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"EU as a Global Player: Geopolitical Position of the EU in the New Global Order"

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Dunja Duić

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FOREWORD

"EU as a Global Player: Geopolitical Position of the EU in the New Global Order" 11-12th June 2026 in Osijek

An editorial

2026 was the year in which ECLIC, the international comparative law conference of the Faculty of Law of Josip Juraj Strossmayer University of Osijek, celebrated its tenth anniversary. This year, once again, **nearly one hundred legal scholars** and social science researchers gathered to discuss issues of EU law, comparative legal scholarship, and related questions of legal policy. Under the key concepts of "global player" and "global order", the conference attracted researchers presenting topics that examined EU law, the Union's internal and external relations, and its geopolitical role through a global lens.

In his keynote lecture, **Darren Harvey** from the United Kingdom, speaking on "Beyond Constraint: The Enabling Dimension of the Rule of Law in EU External Action", demonstrated that the rule of law is not merely a constraint, but also an organising principle of EU action and of the Union's capacity to act. His lecture provided an excellent starting point and theoretical framework for the subsequent presentations dealing with EU external action, limits of competence, strategic autonomy, and geopolitics. **Cristian Mihes** from Romania, in his keynote lecture entitled "Investigating Environmental Crimes Using AI and Big Data Technology: The Romanian Experience", introduced AI-based solutions used in the investigation of environmental crimes, thereby setting the tone for the conference's shared reflection on criminal justice. **Karlo Ressler**, Croatian Member of the European Parliament, then opened the discourse on EU law, administrative law, and financial law with his lecture "Croatia and Europe at a Crossroads – Strategic Priorities and Dilemmas of the New Multiannual Financial Framework".

The question of the **EU's geopolitical role** is increasingly also a question of jurisdiction. The European Union is building and operating a legal order that seeks to act as a decisive actor not only within the territory of the EU, but also in its external relations, that is, beyond the territorial borders of the Member States. Jurisdiction may therefore appear to be a legal-technical issue, yet in the external context it ultimately also has a marked "sovereignty" component. The possible existence

of an "EU sovereignty" can be identified precisely in relation to the Union's global position and its relationship with external partners. The studies included in the volume show that this global position is shaped by policy priorities, institutional ambitions, and concrete geopolitical challenges, often in an acute manner.

This **jurisdictional challenge** also appears sharply in the topic of our joint presentation with Giola Cami. "Extraterritorial Jurisdiction and Electronic Evidence: A Normative Assessment of New Direct Cooperation Mechanisms with Service Providers" is connected to two of the above thematic channels: it deals with extraterritorial criminal jurisdiction, electronic evidence, direct cooperation with service providers, and the limits imposed by sovereignty. Evidence usable in criminal proceedings may be generated in one state, stored in another, and controlled by a service provider operating in a third state. This clearly demonstrates that the classical concept of territoriality can no longer, by itself, adequately address digital criminal justice. Indeed, in the fight against modern crime, "extraterritoriality" has become a structural feature. In this context, the EU, acting as a global player, also shapes jurisdictional frameworks itself: it determines the extent to which national authorities conducting criminal proceedings may "reach beyond" the borders of the Member States. The model that emerges is therefore best understood as one of limited extraterritorial jurisdiction, in which investigative effectiveness must be reconciled with the requirements of sovereignty, fundamental rights, and the rule of law.

ECLIC creates a **valuable professional meeting point** precisely for the discussion of such complex questions: a forum that promotes dialogue between disciplines and provides space for the multifaceted analysis of the current challenges of European law. The thematic diversity of the studies included in the volume clearly demonstrates the intellectual strength and growing professional significance of the ECLIC community. The organisers, editors, and authors of the conference deserve recognition for creating and maintaining a scholarly space that connects Europe's different legal traditions, research perspectives, and institutional experiences.

The ten-year history of the ECLIC conference series clearly reflects **the changing legal and political self-understanding of the European Union**. In the early years, the conference themes focused primarily on the internal functioning of EU law, procedural specificities, adaptation to membership, and the legal and economic relations between the Union and its Member States. This period placed the classical questions of European integration at the centre of attention: how the EU legal order functions, how national legal systems adapt to it, and under what institutional, procedural, and economic conditions integration can become a coherent legal reality. In the following years, the conference themes increasingly reflected

the crises and transformations that tested the functioning of the European Union both internally and externally. The search for lessons from the past and solutions for the future, followed by post-pandemic reconstruction, resilience, the digital and green transitions, and the protection of democracy and the rule of law, all indicated that the study of EU law could no longer be confined to the traditional frameworks of the internal market or institutional operation. During this period, the themes of ECLIC made visible both the adaptability, the normative force, and the vulnerability of European integration.

The trajectory of the conference series ultimately led to the question of a secure, strong, and globally capable Europe. The themes of 2025 and 2026 clearly show that the legal order of the European Union should be understood not only as an internal regulatory system, but also as a normative space of geopolitical significance. The ten-year history of ECLIC thus reveals a gradual shift: from the internal procedural and membership-related questions of EU law, through crisis management, resilience, and the protection of the rule of law, towards the examination of the EU's global role. In this sense, ECLIC does not merely follow the development of European law, but also sensitively records its most important turning points. The significance of the conference series lies precisely in its ability to transform the changing problems of European integration into a coherent scholarly narrative. On the basis of its ten years of themes**, the history of ECLIC itself can be seen as an imprint of the history of the European legal order**: a path leading from technical legal questions to strategic, constitutional, and geopolitical dilemmas. This trajectory makes the conference particularly well suited to reflecting on the future of the European Union not through isolated policy problems, but in the interconnection of the rule of law, sovereignty, security, sustainability, and global responsibility.

The figures of the 2026 ECLIC conference in themselves clearly **illustrate the professional weight and international embeddedness of the event**. The 59 presentations, 95 different authors, 40 papers accepted for publication, and participants from nine countries — Croatia, Hungary, Slovakia, Poland, North Macedonia, Bulgaria, Albania, Tunisia, and Romania — show that ECLIC has become a stable, regionally significant scholarly forum with a broader European and international horizon. The presence of the PhD session is particularly important, as it not only supports the involvement of young researchers, but also serves as a guarantee of the scholarly renewal and future continuity of the conference series. Looking back over the ten-year history of ECLIC, the 393 published papers and the participation of 326 authors demonstrate that ECLIC is not an occasional conference, but a lasting scholarly community and publication workshop. These

figures indicate the conference's continuous growth, organisational stability, and ability to organise professional dialogue year after year around relevant, current, and Europeanly significant legal questions.

Prof. Dr. h.c. Karsai Krisztina (Oradea)
University of Szeged

Chapter 1

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Review article

HISTORICAL AND ADMINISTRATIVE-LEGAL ASPECTS IN THE FIELD OF URBAN FORESTRY IN THE CONTEXT OF EUROPEAN GREEN POLICIES

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ABSTRACT

This paper analyzes the transformation of legal norms for urban forestry in Croatia from its fragmented 19th-century legal framework to today's holistic legal standards based on EU directives. It tracks the evolution of urban forests from being simply subjects of "regulation of police and community" in the Habsburg legal system to being integral components of the EU's "green infrastructure" paradigm in the environmental acquis. This paper applied historical legal research methodology to show how the Habsburg monarchy influenced Croatian forest law through legislation; and how those legislative developments in turn have had lasting effects on Croatian law. Additionally, a dogmatic legal analysis was performed to analyze the most recent national laws enacted regarding the topic. A comparative methodology has been used to compare the legislative developments in Croatia with that of the EU as detailed in strategic documents including the EU Biodiversity Strategy for 2030, the New EU Forest Strategy for 2030, and the European Green Deal. At the regional level of the European Union, the potential of urban and suburban areas has been highlighted by the European Union Forest Action Plan (EUFAP) since 2007–2011. The New EU Forest Strategy for 2030 encourages the expansion of forest and tree cover specifically in urban areas, supporting these initiatives through the Biodiversity Strategy and the European Green Deal. The discourse centered on the concept of normative fragmentation identified in the field of urban forestry. The law at the time defined street trees as city property or objects of "administrative policing" (primarily for maintaining public order and ensuring sustainable timber) and there were no new issues created due to the intersection of forestry with land use planning and environmental law. The authors argue that the EU policy goals of achieving climate neutrality and creating resilient cities will require a shift in the way that forests are perceived from being "economic resources" to providing "multiple functions as multifunctional ecosystem services". In addition to describing this contrast, the authors portray the difference in legal conservatism in Croatia versus the rapidly changing needs of EU law that requires a comprehensive legal approach to managing urban green space for mitigating the "heat island" effect and the loss of biodiversity. An analysis of the current legal regulations and other legal sources reveals inconsistencies, ambiguities, and legal gaps in the regulation of issues related to urban forestry, which are governed through various legal sources (regulating forests, nature and environmental protection, roads, municipal services, decisions on communal order, spatial planning, strategic documents, and others). Furthermore, problems arise regarding the competences of different public authorities and the scope of their powers. The study concludes that despite a strong legal tradition of sustainability, the Croatian case is stymied by a lack of coherence in urban greening.

***Keywords**: Croatian forest law, EU environmental law, Green infrastructure, Normative fragmentation, Urban forestry*

1. INTRODUCTORY CONSIDERATIONS

The normative frameworks that governed urban and peri-urban forest areas between 1852 and 1945 did not emerge in an institutional vacuum; rather, they established the conceptual foundations upon which all subsequent legislative solutions would be built. The analysis of the Habsburg and interwar normative systems demonstrates that the urban forest did not exist as a recognised legal category during that period: forest legislation treated forests exclusively as economic

and ecological-protective objects, while municipal legislation regulated parks and tree-lined avenues as components of communal property, without any coordination between these two regulatory tracks. This conceptual separation, between the forest as an object of forest law and greenery as an object of municipal law, was overcome neither by the unification of legislation in the Kingdom of Yugoslavia in 1929, nor by the subsequent changes of state-legal framework up to 1945. It is precisely this structural lacuna, established and institutionalised during the period under examination, that constitutes the starting point for understanding the manner in which socialist legislation would subsequently regulate urban green spaces, not as an integrated system, but as a set of functionally separate categories inherited from earlier legal orders.

Urban green spaces which under modern legislation include parks, tree-lined avenues and forest parks, were regulated in the socialist period to which this research refers as public goods in general use.[1] As such, they were subject to a special administrative-legal regime, the purpose of which was to ensure their accessibility to all citizens and their protection in the public interest. Their function was therefore primarily social and communal rather than ecological in the contemporary sense. In this regard, the maintenance of green spaces was part of the public services system, often under the jurisdiction of local communities and utility companies. The laws on utility services from that period serve as the basis for defining the processes of maintenance and management of urban green spaces, which were also considered necessary during the socialist period for the daily lives of the urban population.

Spatial and urban planning also played an important role in the process of planning urban greenery, through which the use of urban areas was determined, including green zones, buffer zones and recreational spaces. Although the term "urban forestry" was not used in urban planning activities of that period, planning documents already recognised the need for the integration of vegetation into the urban space in order to improve living conditions. However, this approach was primarily oriented towards the functional arrangement of space and the development of settlements, and only secondarily towards environmental protection. Based on the analysis of legislative texts and available literature, it can be argued that urban forestry in the Yugoslav legal system was not recognised as a separate legal category, but existed in an implicit form through the system of management of public goods, utility services and spatial planning. This research does not attempt to anachronistically find the concept of "urban forestry" in the normative articu-

[1] Borzan, Ž., *Prilog diskusiji o urbanom šumarstvu i vrednovanju općekorisnih funkcija šume (A Contribution to the Discussion on Urban Forestry and Evaluation of the General Forest Benefits)*, Glasnik za šumske pokuse, Spec. Issue 4, 1993, p. 11.

lation of legal sources, but rather to investigate why it did not exist and whether its functions were nonetheless performed within the fragmented but functionally effective legal order of socialist Yugoslavia.

The legal regulation of urban forestry and green space management in the Republic of Croatia represents a complex system of regulations that has developed over time. These areas were regulated in several different laws and by-laws, which is still the case today, but more precisely and more developed. The legal sources we cite primarily relate to the current legislative framework and legal regulation, which indicates reform developments in this area in relation to historical development. One of the primary legal challenges is the dispersion of relevant provisions through various laws and by-laws. Green space management touches on regulations in the areas of spatial planning, construction, environmental and nature protection, municipal management, and roads. Newer regulations (2024-2026) bring significant innovations and increase the focus on green infrastructure, biodiversity conservation in urban ecosystems, and resilience to climate change. In modern urban planning and spatial management, green urban areas represent a key component of sustainable development, environmental protection, and the quality of life of citizens. However, there are limitations and challenges in the legal approach to managing these areas.

The obligation to plan and develop green infrastructure in urban areas is emphasized, with the aim of preserving existing and increasing new green areas and creating green cities. Additional impact was achieved due to alignment with modern European and global trends in urban planning and environmental protection. The need to implement public policies aimed at preserving biodiversity and increasing natural capital, spatial resources, in order to reduce environmental risks and increase resilience to climate change is emphasized. The above is presented and analysed in the Croatian legal system, with a call on European reflections on this issue, provided in numerous strategic documents, guidelines, directives and green policies in this area.

For the purposes of this paper the two key terms must be distinguished, since the *forest* and the *urban forest* rest on different criteria and serve different objectives. In the conventional sense a forest is defined through quantitative and land-use criteria: the Food and Agriculture Organization treats it as land of more than half a hectare bearing trees over five metres tall with a canopy cover above ten per cent, expressly excluding land under urban use[2] and Croatian law adopts a comparable conception, defining a forest as land continuously covered by forest trees on an

[2] FAO, *Global Forest Resources Assessment 2020 – Terms and Definitions*, Forest Resources Assessment Working Paper 188, FAO, Rome, 2018, p. 4.

area of 0.1 hectare or more, on which forest products are produced and the general-benefit functions of forests are realised, while expressly excluding from that notion tree-lined avenues and parks in settlements, botanical gardens and arboreta.[3] The forest is thus conceived, in both frameworks, as a productive and protective natural resource of an essentially rural character. The *urban forest*, by contrast, is defined by its location and social function within the built environment; in international usage it denotes the tree-dominated component of urban green space, managed through *urban forestry* — the integrated, interdisciplinary, participatory and strategic planning and management of forest and tree resources in and around cities.[4] Croatian law, moreover, gives the urban forest an express statutory definition: forests and forest land planned by spatial plans within or adjacent to the construction area of a settlement and significantly affecting the quality of life of its inhabitants; forests intended to create the conditions needed for the rest and recreation of visitors; and forests within the scope of campsites, golf courses and other sports and recreational areas.[5] The decisive difference therefore lies in their objectives: whereas the conventional forest is valued chiefly for timber production and its protective functions, the urban forest is valued, and regulated, for the ecosystem services it provides to the urban population — recreation, public health, climate regulation, air purification and biodiversity — and so functions as an element of urban *green infrastructure* rather than as a timber resource.

2. THE HABSBURG LEGAL FRAMEWORK AND URBAN FORESTRY IN THE KINGDOM OF CROATIA AND SLAVONIA (1852–1918)

The regulation of forest areas in the Kingdom of Croatia and Slavonia during the Habsburg period did not proceed through a single legislative instrument, but through three functionally separate normative tracks that overlapped spatially in the urban and suburban area, yet were not mutually coordinated nor did they share a common concept of urban forestry as a subject of legal regulation. The identification and analysis of these three tracks is a fundamental prerequisite for understanding the institutional genesis of the normative fragmentation whose continuity is traced through all the subsequent legal orders analysed in this work.

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3 Forest Act, Official Gazette No. 68/2018, 115/2018, 98/2019, 32/2020, 145/2020, 101/2023, 36/2024, Art. 5.

4 FAO, *Urban and Peri-urban Forestry (Sustainable Forest Management Toolbox*), FAO, Rome, Available at: [https://www.fao.org/sustainable-forest-management-toolbox/modules/urban-and-peri-urban-forestry/en], Accessed 2 June 2026.

5 Forest Act, Official Gazette No. 68/2018, 115/2018, 98/2019, 32/2020, 145/2020, 101/2023, 36/2024, Art. 22, para. 10.

The first track, the general forest law track, was based on the Imperial Forest Patent of 3 December 1852 (Kaiserliches Patent über die Regelung des Forstwesens, RGBl. Nr. 250/1852), which was the only general forest law instrument applicable throughout the territory of Croatia and Slavonia. The Kingdom of Croatia and Slavonia did not adopt its own comprehensive law on forests throughout the Habsburg period. Forest supervision was systematically grounded in the Patent of 1852, which remained formally and substantively the foundational norm of forest management until the dissolution of Austria-Hungary. This fact is in itself analytically indicative: the absence of an autonomous legislative intervention in forest law confirms the passive transfer of the Austrian normative model without adaptation to local, and particularly urban, contexts.

The second track, the special track for collective ownership and public supervision, was based on three legislative acts of the Croatian Parliament of 1894: the Law on the Regulation of Forestry-Technical Service with the Political Administration of 22 January 1894, the Law on the Regulation of Professional Administration and Forest Management in Forests under Special Public Supervision of 26 March 1894, and the Law of 25 April 1894 on the Regulation of Land Communities.[6] These acts governed a special category of forests under public supervision and collective ownership of institutions that had arisen from the demilitarisation of the Military Frontier and agrarian reform, a significant part of which was located in the immediate vicinity of urban settlements.[7]

The third track, the municipal law track, was based on the Laws on the Organisation of Urban Municipalities of 1881 and 1895, and on the Building Code of 1895, which regulated urban green spaces, parks, tree-lined avenues and ornamental plantings, as objects of municipal property or administrative policing, entirely beyond the reach of both forest law instruments.[8] The intersection of these

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6 Law on the Regulation of Forestry-Technical Service with the Political Administration in the Kingdom of Croatia and Slavonia of 22 January 1894 (Sbornik zakonah i naredabah valjanih za Kraljevinu Hrvatsku i Slavoniju od godine 1894., No. 5); Law on the Regulation of Professional Administration and Forest Management in Forests under Special Public Supervision of 26 March 1894 (Sbornik zakonah, 1894, Part IX, No. 29); Law of 25 April 1894 on the Regulation of Land Communities (Sbornik zakonah, 1894, No. 36); Medvedović, D., *Povijest pravnog uređenja zaštite šuma na području Hrvatske*, in: Barbić, J. (ed.), *Pravna zaštita šuma*, HAZU, Zagreb, 2015, p. 80.

7 Piškorić, O.; Vukelić, J., *Pregled povijesti hrvatskih šuma i šumarstva*, in: Rauš, Đ. (ed.), *Šume u Hrvatskoj*, Grafički zavod Hrvatske, Zagreb, 1992, p. 275.

8 Law on the Organisation of Urban Municipalities (1881), Sbornik zakonah i naredabah valjanih za Kraljevine Hrvatsku i Slavoniju, 1881, Part III, No. 3, pp. 95–119; Law on the Organisation of Urban Municipalities (1895), Sbornik zakonah, 1895, Part IX, No. 34, pp. 220–228; Čepulo, D., *Položaj i ustroj hrvatskih gradova prema Zakonu o uređenju gradskih općina iz 1881.*, Hrvatska javna uprava, Vol. 2, No. 1, 2000, pp. 83–120; Ostajmer, B., *Brod i Zakon o uređenju gradskih općina iz 1895.*, Scrinia Slavonica, Vol. 9, No. 1, 2009, pp. 257–274. The Croatian-Slavonian-Dalmatian Provincial Gov-

three tracks in the urban and suburban space, without a coordination mechanism and without a common definition of the urban forest as a functional legal category, constitutes the structural foundation of the normative fragmentation whose continuity is identified as the central legal-historical thesis of this work.

a) The General Forest Law Framework and Its Application to Urban and Peri-Urban Forests

The Imperial Forest Patent of 1852 entered into force in the Banal territory by imperial patent of 24 June 1857 and was applied from 1 January 1858.[9] In the Military Frontier part, it entered into force on 7 February 1860, modified to a certain extent.[10] The Law contained 77 paragraphs divided into seven sections.[11] Its fundamental purpose was, as Medvedović precisely formulates it, "the preservation of the forest fund, and only then the securing of the rights of owners and the enabling of economic exploitation of forests."[12]

According to § 1 of the Law, forests were classified according to ownership into: state (erarian, cameral) forests, directly managed by state authorities; municipal forests, which are the property of the urban or rural municipality; and private forests, managed by individuals, institutions, foundations, monasteries and religious orders.[13] This tripartite classification had direct implications for urban forestry:

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ernment (Zemaljska vlada), acting through its Department of Internal Affairs within the scope of its autonomous competence, issued several building codes for towns and their surroundings, namely: (1) Building Code I — for rural areas; (2) Building Code II — for towns listed in par. 2 of the Law of 26 June 1895 (See: Towns of the second category (par. 2 of the Law of 26 June 1895): Senj, Bakar, Sisak, Karlovac, Petrinja, Koprivnica, Bjelovar, Križevci, Požega, Brod, Mitrovica, Karlovci, and Petrovaradin); (3) Building Code III — for towns listed in par. 1 of the Law of 26 June 1895, with the exception of the City of Zagreb, that is, for the towns of Osijek, Varaždin, and Zemun (See: Sbornik zakona i naredaba valjanih za kraljevine Hrvatsku i Slavoniju od godine 1900., Part VII, No. 63; Part IX, No. 73. For the text of the building codes with amendments and supplements, see: Smrekar, M., *Priručnik za političku upravnu službu u Kraljevinah Hrvatskoj i Slavoniji [Handbook for Political-Administrative Service in the Kingdoms of Croatia and Slavonia]*, Vol. III, I. Granitz, Zagreb, 1902, pp. 488–548). The building code for the capital city of Zagreb had been issued by the Imperial and Royal Lieutenancy (Carsko i kraljevsko Namjesništvo) in 1857 (See: Zemaljsko-vladni list za kraljevinu Hrvatsku i kraljevinu Slavoniju od godine 1857., Section Two, Part II, No.

9 Piškorić, O., *Pogled u prošlost šumarstva Hrvatske*, Šumarski list, Vol. 105, No. 7–8, 1986, p. 366. The text of the Patent is available in: Reichsgesetzblatt Nr. 250/1852, ALEX platform (alex.onb.ac.at).

10 Piškorić, O., *op. cit.* note 9, p. 366; Čavlović, J., *Osnove uređivanja šuma*, Šumarski fakultet Sveučilišta u Zagrebu, Zagreb, 2013, pp. 31–43. The Law was replaced in Austria itself only in 1975.

11 Živaković-Kerže, Z., *Šuma/drvo – iskorištena ili neiskorištena mogućnost*, in: Župan, D.; Skenderović, R. (eds.), *Slavonske šume kroz povijest*, Hrvatski institut za povijest, Slavonski Brod, 2018, p. 264.

12 Medvedović, D., *op. cit.*, note 6, p. 72.

13 Borošić, A.; Goglia, A., *Zakoni i naredbe tičući se šumske uprave i šumskoga gospodarenja*, L. Hartman, Zagreb, 1900, p. 5; Medvedović, D., *op. cit.*, Borošić, A.; Goglia, A., *Zakoni i naredbe tičući se šumske*

urban and rural municipalities were explicitly recognised as a special category of forest owners whose forests were subject to special supervisory obligations by the Regional Government — but exclusively as an economic object, not as urban ecological infrastructure.

Para. 2 prohibited the reduction of forest land and its conversion to another purpose without special authorisation from a higher instance.[14] For the granting of authorisation with respect to municipal and private forests, the owners of adjacent land were to be heard and the public interest taken into account.[15] This provision had direct applicable force for suburban forest areas exposed to the pressure of urban expansion. Para. 4 prohibited the devastation of forests, and forest owners could be penalized in the same manner as those who had arbitrarily converted forest land.[16] Para. 5 prohibited acting in a forest in a manner that would expose the neighboring forest to "the peril of damage from wind."[17]

Particularly analytically significant is § 9, which concerns forests encumbered with forest easements: such forests had to be continuously maintained in an appropriate manner and a special felling regime was prescribed for them.[18] Para. 10 restricted forest grazing of livestock in parts of the forest designated for replanting.[19] Para. 19 gave state authorities the power to place a forest "under prohibition" for the purpose of protection against landslides, rock falls and similar dangers to persons and property, which was functionally applicable to suburban forests of a protective character.[20]

The Regional Government had jurisdiction only over municipal forests, and supervision over these forests was entrusted to the Forestry Directorate in Zagreb, together with the Senior Forestry Office in Vinkovci and the Royal Forestry Office in Otočac.[21] According to data from relevant literature, forests accounted for 43% of the entire productive area of Croatia and Slavonia, with only 10,000 km² of for-

uprave i šumskoga gospodarenja, L. Hartman, Zagreb, 1900, p. 5; Medvedović, D., *op. cit.* Borošić, A.; Goglia, A., *Zakoni i naredbe tičući se šumske uprave i šumskoga gospodarenja*, L. Hartman, Zagreb, 1900, p. 5; Medvedović, D., *op. cit.* note 12 Borošić, A.; Goglia, A., *Zakoni i naredbe tičući se šumske uprave i šumskoga gospodarenja*, L. Hartman, Zagreb, 1900, p. 5; Medvedović, D., *op. cit.*, note 6, p. 72.

14 Borošić, A.; Goglia, A., *op. cit.* note 13, p. 6.

15 *Ibid.*, p. 6.

16 Borošić, A.; Goglia, A., *op. cit.* note 13, p. 14.

17 Borošić, A.; Goglia, A., *op. cit.* note 13, p. 16.

18 Borošić, A.; Goglia, A., *op. cit.* note 13, p. 34.

19 Borošić, A.; Goglia, A., *op. cit.* note 13, p. 34.

20 Borošić, A.; Goglia, A., *op. cit.* note 13, p. 57.

21 Živaković-Kerže, Z., *op. cit.* note 11, p. 264.

est in Banal Croatia belonging to the state, while all the rest was in the ownership of magnates, corporations and local municipalities.[22]

At the end of the 19th century, specifically in 1894, the Parliament of the Kingdom of Croatia and Slavonia proclaimed three legislative acts.[23] Unlike the Patent of 1852, which was an imperial regulation extended to Croatia and Slavonia, these three laws were autonomous acts of the Croatian Parliament the only more comprehensive legislative intervention in forest law that Croatia and Slavonia independently undertook in the Habsburg period.

On the basis of Law on the Regulation of Forestry-Technical Service with the Political Administration of 22 January 1894, a special forestry section was established in the Department of Internal Affairs of the Regional Government. The Law regulated supervision over all forests in the territory of Croatia and Slavonia, except state forests. Forestry experts were authorized to implement the laws, promote forest cultivation and conduct professional management.[24]

The Law on the Regulation of Professional Administration and Forest Management in Forests under Special Public Supervision of 26 March 1894 governed professional administration and management in the forests of property communes, land communities, urban and other forest owners, where their forests were encumbered with easements.[25] Urban forests were explicitly included, but again only to the extent that they were encumbered with easements, and without any special category of urban forest.

b) Laws on Municipal Boroughs and the Building Code

The third regulatory track - the municipal law track - was based on the Laws on the Organisation of Urban Municipalities of 1881 and 1895, and on the Building Code of 1895.[26] Both laws of 1881 and 1895 are relevant to the issue of urban forestry not through direct provisions concerning forests or green areas, but through provisions governing the municipal sphere of competence. The Acts distinguished between the natural sphere of competence (the municipality's own affairs) and the

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22 Kolar-Dimitrijević, M., *Kratak osvrt na povijest šuma Hrvatske i Slavonije od 1850. godine do Prvoga svjetskog rata*, Ekonomska i ekohistorija, Vol. 4, No. 1, 2008, p. 73.

23 See note 6.

24 Smrekar, M., *Priručnik za političku upravnu službu u Kraljevinah Hrvatskoj i Slavoniji*, Book II, I. Granitz, Zagreb, 1900, pp. 775–786; Borošić, A.; Goglia, A., *op. cit.,* note 13, pp. 162–185.

25 Law on the Regulation of Professional Administration and Forest Management in Forests under Special Public Supervision of 26 March 1894, cited in note 6.

26 See note 8.

delegated sphere of competence (affairs entrusted to the municipality by the state). The management of municipal property, including forests, parks and plantations in municipal ownership, fell within the natural sphere of competence. These regulations governed urban green spaces - parks, tree-lined avenues and ornamental plantings, as objects of municipal property or administrative policing, entirely beyond the reach of both forest law instruments (par. 57-60). The municipal law track was institutionally narrowest in scope: it applied exclusively to areas in municipal ownership. All other green areas, ecclesiastical, military, in the ownership of property communes or land communities, were entirely outside its reach.

The absence of the terms "park," "tree-lined avenue" and "urban garden" from the entire forestry legislation of the Habsburg period is not an oversight or a gap, it is an empirical finding that confirms that parks and tree-lined avenues were conceptually invisible to forest law, while forests were invisible to municipal law. Nowhere in the entire normative corpus of 1852–1918 is there a provision that would treat them as parts of a single functional system of urban greenery. Viewed systematically, the three identified regulatory tracks constitute horizontal normative fragmentation, that is the Patent of 1852 was concerned with ecological stability and the prevention of clearing; the laws of 1894 with the sustainable economic yield of collective ownership institutions; the municipal law track with the aesthetic appearance of public urban space. None of these objectives was an urban-ecological objective in the modern sense.

3. THE INTERWAR PERIOD (1918–1945)

3.1. The Constitutional Framework and Legal Particularism of the Kingdom of Serbs, Croats and Slovenes / The Kingdom of Yugoslavia

With the dissolution of the Austro-Hungarian Monarchy in 1918, a complex normative problem arose. In the Kingdom of SHS there existed six legal areas,[27] which resulted in the application of a multitude of laws and legal provisions that were far from uniform. For the Croatian-Slavonian legal area, the provisions of three laws from 1894 continued to apply, while the Austrian Law on Forests of 1852 applied to the Dalmatian area.[28]

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[27] Kosnica, I.; Protega, M., *Politička prava u Kraljevini Srba, Hrvata i Slovenaca: razvoj temeljnih obilježja*, Pravni vjesnik, Vol. 35, No. 1, 2019, p. 146.

[28] Medvedović, D., *op. cit.,* note 6, p. 80. In the Croatian-Slavonian area, the provisions of the Law of 26 March 1894 on professional management and forest management in forests under special public supervision in Croatia and Slavonia applied; as well as the Law of 22 January 1894 and the Law of 1907 on penal provisions. In the Dalmatian area, the Austrian Forest Law of 1852 applied.

According to the Law of 1929, forests are divided into state and non-state forests (§ 1).[29] State forests are those that have become state property on any legal basis. Non-state forests include the forests of self-governing bodies, property communes and land communities, as well as all private forests (§§ 2–4). This two-part classification replaced the Habsburg tripartite structure, but in practice retained the same fundamental logic: urban forests owned by municipal bodies fell into the category of non-state forests without any special category for the urban context.

Paras. 6–7 prohibited the clearing and devastation of forests without special authorisation from the state authority, which would not grant such authorisation if it were contrary to the public interest, with "the protection of climatic and hygienic interests and the economic needs of a region, public safety, etc." cited as examples of the public interest.[30] The formulation "climatic and hygienic interests" is the only one in the entire Law that could functionally encompass urban-ecological arguments, but without a special category of urban forestry.

The Law defines a new and analytically interesting category of protective forests, distinguishing between permanently protective and temporarily protective forests (par. 16). The Law of 1929 brought centralism and the unification of forest management, but did not introduce any provision that would treat urban forests or urban greenery as a special legal category distinct from rural or commercial forestry. The conceptual gap identified in the Habsburg framework was not filled, it was merely transferred into a new, more centralised legislative mould.

In parallel with forestry legislation, the municipal legislation of the interwar period continued to regulate urban green spaces through the municipal law track, inherited from the Habsburg framework. The Law on Urban Municipalities of 1934 confirmed municipal jurisdiction over parks and tree-lined avenues as parts of municipal property, but without any coordination with forestry regulations (par. 89).[31] The key institutional consequence was that urban gardeners and municipal technicians remained the only professional actors responsible for urban greenery, while forestry experts remained exclusively competent for forests outside the urban cadastral area.

For urban forestry, the Banovina introduced nothing new: not a single regulation or act of the Department of Forestry introduced special categories for urban or

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29 § 1 of the Law on Forests, Official Gazette of the Kingdom of Yugoslavia, No. 307/1929, 301/1930.

30 Balen, J.; Sagadin, S., *Zakon o šumama sa tumačem, uredbama i pravilnicima*, Zagreb, 1930, §§ 6–7; Medvedović, D., *op. cit.*, note 6, p. 83.

31 The Law on Urban Municipalities of 1934, Official Gazette of the Kingdom of Yugoslavia, No. 169/1934.

suburban forests, nor was any coordination established with the department responsible for urban municipalities. The institutional divide between the forestry and municipal tracks remained untouched. The entirety of the interwar period is characterised by a fact that divide between forest law and municipal law remains unaltered.

4. NORMATIVE REGULATION OF URBAN GREEN SPACES IN THE SOCIALIST PERIOD

The republican diversity of legislation and decentralisation in the self-management phase means that there is no single set of sources that applied to all of Yugoslavia, but rather legal regulations can be classified into two categories: those that were valid at the federal level and those that were valid at the republican level.[32] However, the purpose of researching earlier legislation in this part of the research is not exhausted by the exemplary citation of legal regulations, but focuses on the analysis of normative patterns that are practically present despite the absence of a unified normative articulation of the concept of urban forestry.[33]

a) Constitutional regulations and Forestry legislation on urban forested areas

Urban forestry as a separate normative category was not recognised in constitutional documents from earlier systems; however, the indirect regulation of certain matters such as the legal regime over forests, as well as the question of the initial ecologisation and the right of man to a healthy environment, undoubtedly contributed to their articulation in later constitutional documents, particularly in

[32] More about the model of decentralization in socialist systems: Ostojić, M., *Yugoslav Self-Management as a Model of Participatory Municipal Governance? Local Communities in Belgrade in the 1980s*, in: Fiket, I.; Markov, Č.; Ilić, V.; Pudar Draško, G., (eds.), *Participatory Democratic Innovations in Southeast Europe*, Routledge, 2024, pp. 176- 178.

[33] The primary material consists of normative acts systematize according to level and subject area. The first group includes constitutional acts regulating ownership over forests and the first provisions on the right to a healthy environment. In the observed period, the following documents are relevant: Constitution of the Federal People's Republic of Yugoslavia, Official Gazette of the Federal People's Republic of Yugoslavia, No. 10, 1 February 1946, pp. 74–94; Constitution of the Socialist Federal Republic of Yugoslavia, Official Gazette of the Socialist Federal Republic of Yugoslavia, No. 14, 10 April 1963, pp. 261–292; Constitution of the Socialist Federal Republic of Yugoslavia, Official Gazette of the Socialist Federal Republic of Yugoslavia, No. 9, 21 February 1974, pp. 210–263. On forestry legislation: General Law on Forests, Official Gazette of the Federal People's Republic of Yugoslavia, No. 106/1947. More on this: Peleš, T., *Prelaz na plansku privredu (Osvrt na zakonske propise)*, Šumarski list, Vol. 71, No. 1–2, 1947, pp. 2–6. On the history of forestry legislation: Krpan, P. B. A., *Iz povijesti šumarstva*, available at:
[https://www.sumari.hr/250/mat/14309c.pdf], Accessed 25 March 2026.

provisions on environmental protection, urban planning and urban forestry. The first Constitutional Act, the Constitution of the FPRY of 1946, addresses these matters in Articles 11–12, and 14–16.[34] The legal category was similarly regulated in the Constitution of the SFRY of 1963, where attention was paid to forests and, in this context, to urban forest parks, which were defined as goods of general interest, thereby creating a framework for their protection in urban planning, given that the social community regulates the use of space in the general interest.[35] A further step in defining problems that can indirectly be linked to urban forestry is represented by the provisions of the Constitution of the SFRY of 1974, which regulate the right to a healthy human environment and thereby lay more secure foundations for the development of environmental legislation.[36]

The General Law on Forests of 1947 regulated certain matters such as forest management, the development of the forest fund, as well as the exploitation and renewal of forests, regardless of the ownership regime to which the forests actually belonged. Special regulation of forest parks and urban forests in the context of modern articulations was not present in the content of the regulations. Urban green spaces were not included in the content regulated by this regulation, but would later be mentioned within the framework of urban planning regulations.[37]

Somewhat later, recognising the need to address issues in the context of forest management at the federal level, the Basic Law on Forests was adopted in 1963.[38] Forests were divided according to their purpose in the content of this regulation. The provisions in which one could find regulations that indirectly related to the concept of urban forests in the modern sense were only those that defined the purpose of forests. Forests could, according to their purpose, be commercial, protective and forests with a special purpose. While protective forests served primarily as protection of land, water flows, erosion areas, settlements, economic and other

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34 Constitution of the Federal People's Republic of Yugoslavia, Art. 11: "Land, forests, mines, waters and other natural wealth of general national significance are under the special protection of the state." Art. 16: "The state takes care of public health…" The status of forests was similarly defined in Arts. 12 and 13 of the Constitution of the Socialist Federal Republic of Yugoslavia of 1963 on the protection of natural resources.

35 See Arts. 192–193 of the Constitution of the Socialist Federal Republic of Yugoslavia of 1963.

36 See Arts. 84–87 of the Constitution of the Socialist Federal Republic of Yugoslavia of 1974.

37 The Law defined in Art. 14 that certain forests could have a special purpose and accordingly be temporarily or permanently protected. Art. 14 of the General Law on Forests: "For the purpose of protecting economic, health and other interests or the interests of individuals, certain forests or their parts may be declared permanently protective or temporarily protective forests." Temporarily protective forests in the context of Art. 16 of the same regulation were those that protected objects outside their habitat.

38 Komar, S., *Novi zakon o šumama*, Šumarski list, Vol. 85, No. 5–6, 1961, p. 169; Basic Law on Forests, Official Gazette of the Federal People's Republic of Yugoslavia, No. 16/1961; Law on Forests, Official Gazette No. 1/1962.

buildings and other property, forests with a special purpose were substantively defined in the same article of the regulation.[39] The Croatian Socialist Republic Parliament adopted a new Law on Forests in April 1977.[40] For the first time, the law in Article 2 defined the general beneficial functions of forests, listing the role of forests: "…in influencing the climate; in the protection and improvement of the human environment; in the creation of oxygen and purification of the atmosphere; in influencing the beauty of the landscape, in creating favourable conditions for treatment, recovery, rest and recreation." The content of this provision is crucial for creating a link between forestry and urban planning, given that forests are mentioned in the context of significant functions important for urban planning of cities. Protective in terms of planning urban infrastructure, climatic in terms of urban climate mitigation and ensuring favourable climatic conditions, environmental in terms of ensuring a healthy environment and the integration of nature into the city, and social in the context of providing forests for rest, recreation and treatment, which are close to the concept of forest parks and recreational forests even in today's legislation.[41] Forests in the context of this regulation are no longer merely a natural resource, but part of the space that urban planning must take into account when planning and constructing cities.

From the foregoing, it follows that forests in the socialist period were regulated by a special legislative regime. Although they could be in different forms of ownership, all forests were declared goods of general interest and placed under state protection. However, despite the recognition of the general beneficial functions of forests, including health protection and recreation, they remained defined within the forestry system and regulated by separate legislation.

In comparison with the later forestry legislation that much more extensively regulated the special purpose of forests such as recreation or aesthetics, in the content of the earlier SFRY laws preceding 1980 the function of forests was predominantly economic and the regulations were largely exhausted in regulating management while neglecting other forest functions. The later Law on Forests that came into force in 1977 explicitly excluded urban parks from forest legislation, and from

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[39] See Art. 3 of Law on Forests, Official Gazette No. 84/1949, 23/1956. Art. 5 of the Law on Forests of 1977. Forests with a special purpose are: 1. forests and parts of forests registered as objects for the production of forest seed; 2. forests that represent special rarities or beauties or are of special scientific or historical significance (national parks, reserves, etc.); 3. forests intended for scientific research, teaching, military needs of the Yugoslav People's Army and other needs of general national defense and needs established by special regulations; 4. forests intended for recreation.

[40] Law on Forests of the Socialist Republic of Croatia, Official Gazette No. 20/1977.

[41] More on the role and functions of urban forestry in urban environment: Dramalija, D., Obilježen dan urbanog šumastva u Hrvatskoj, Šumarski list, 11- 12, XLIX, 2025, p. 584, [https://www.sumari.hr/sumlist/202511.pdf?utm_source=chatgpt.com,] Accessed 25 March 2026.

that moment the regulation of urban green spaces is contained mainly in urban planning and municipal regulations.[42]

b) Urban green areas in urban planning and municipal regulations

The Basic Regulation on the General Urban Plan is the first post-war regulation by which an obligation of planned urban management was sought to be introduced, wherein "…green spaces, parks and buffer zones are integrated into the settlement structure as functional elements of health, recreation and spatial organisation, though without an explicit ecological or forestry concept."[43] The Regulation introduces the general urban plan (GUP), which represented, as Tandarić argues, a new planning instrument that remained in use through all future socialist and post-socialist planning legislation.[44] First and foremost, the Regulation defined the competence of the city administration in the context of drafting and adopting urban plans, subject to prior approval by the Ministry of Municipal Affairs.[45]

At the level of the republics, efforts were subsequently made to develop urban planning legislation, while cities/municipalities were required to prepare and adopt spatial plans in order to normatively regulate urban planning matters. Therefore, from the 1950s, as Simmie argues, each Yugoslav republic had its own legislative framework for planning.[46]

The Law on Spatial Planning and the Use of Construction Land of 1973 devoted one fifth of its articles, as Tandarić et al. argue, to the protection and improvement of the human environment.[47] However, many other environmental aspects such as

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42 Art. 4 of the Law on Forests, Official Gazette No. 20/1977.

43 Basic Regulation on the General Urban Plan, Official Gazette of the Federal People's Republic of Yugoslavia, No. 78/1949, pp. 1093–1094.

44 Tandarić, N.; Watkins, C.; Ives, C. D., *Urban Planning in Croatia During the Socialist Regime*, Croatian Geographical Bulletin, Vol. 81, No. 2, 2019, p. 15.

45 In 1955, key regulations were adopted introducing the communal system. General Law on the Organisation of Municipalities and Districts, Official Gazette of the Federal People's Republic of Yugoslavia, No. 26/1955. On the role of municipalities: Simmie, J. M., *Self-management and town planning in Yugoslavia*, The Town Planning Review, Vol. 60, No. 3, 1989, p. 272. On decentralisation: Pusić, E., *Hrvatska središnja državna uprava i usporedni upravni sustavi*, Školska knjiga, Zagreb, p. 172; Lozina, D.; Jagnjić, J., *Razvoj lokalne samouprave u Republici Hrvatskoj*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 58, No. 2, 2021, p. 567.

46 During the 1970s, several different types of land use plans were prepared, including: long-term 'social plans' dealing with infrastructure and demography; long-term 'spatial plans' for republics and groups of municipalities; long-term and medium-term 'urban plans' for urban areas; short-term 'location plans' for specific development projects; and 'urban order plans' for more rural settlements. Simmie, J. M., *op. cit.*, note 45, p. 276.

47 Tandarić *et al.*, *op. cit.*, note 44, p. 31.

the protection of natural resources and the use and maintenance of public spaces and private gardens were to be regulated by spatial urban plans. The Law considered urban green spaces to be important for protection from air pollution and noise pollution, and they had to be taken into account when arranging spatial plans and for the natural ventilation of cities.[48] The Law further stipulated that an urban planning project must contain a conceptual design of green, recreational, sports and other open spaces.[49] This indicated the planning, i.e. design, of urban greenery in parallel with buildings, transport and other infrastructure. Thus, urban greenery undeniably became an institutionalised element of urban planning. Somewhat later, the Law on Spatial Planning and the Arrangement of Space of 1980 devoted particular attention to urban greenery in the context of approaching this issue from the perspective of utility services. Specifically, alongside the regulation of roads, the energy system, water supply and lighting, urban greenery was also viewed as part of the utility system, no longer merely as a natural resource, but also as a technical category.[50] A detailed analysis of the provisions referring to the regulation of urban green spaces in the aforementioned legal regulation indicates the absence of comprehensive and developed regulation of urban forestry, while certain provisions relate to this issue exclusively indirectly and without the necessary normative precision.

General urban plans of the 1970s define green spaces as an integral part of the spatial structure of settlements and functionally determine them as spaces for rest, recreation and improvement of living conditions for the population. A systematic organisation through a continuous system of greenery is also introduced, including parks, forest parks and protective greenery.[51] Urban greenery thus becomes a clearly defined category of urban planning, separate from forests which remain under the jurisdiction of forestry legislation. The Urban Plan of Zagreb is used as a case study within the SR of Croatia, while the inclusion of other urban plans from socialist states is foregone, as the selected example sufficiently illustrates the relevant normative and planning patterns for the purposes of this research.

Thus, the Urban Planning Programme of the City of Zagreb of 1965 envisaged several categories of green spaces that were to be represented in the arrangement of

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48 Art. 70 of the Law on Spatial Planning and the Use of Construction Land; Tandarić *et al.*, *op. cit.*, note 44, p. 31.

49 Art. 28 of the Law on Spatial Planning and the Use of Construction Land.

50 Art. 63 of the Law on Spatial Planning and the Arrangement of Space, Official Gazette No. 54/1980, 16/1986, 18/1989, 47/1989.

51 The 1971 General Urban Plan of Zagreb was not directly available, so some of its provisions were analyzed through relevant secondary literature, which confirms the establishment of a systematically organized and continuous system of urban greenery, including parks, park forests, and protective greenery. See more: Bencetić, L.; Jurić, Z., *Urbanistički program grada Zagreba iz 1965.: nastanak, planirano i realizirano*, Časopis za suvremenu povijest, Vol. 53, No. 3, 2021, pp. 1240–1241.

the city: public urban greenery, greenery of a protective type, and forests and buffer zones.[52] The Urban Plan envisaged that: "…from the southern slopes of Medvednica, wedge-like belts of greenery would continuously run through the urban fabric and industrial zones and connect with existing green spaces in the city."[53] Somewhat later, the General Urban Plan of Zagreb of 1971 defines green spaces as a system of interconnected spaces that ensure the ecological balance and spatial organisation of the city, including public parks, forest parks, protective greenery and forest-recreational complexes.[54] The Plan also introduces quantitative standards for the proportion of green spaces (55–60%), whereby urban greenery becomes a clearly defined and standardised category of urban planning.[55]

The same regulation envisaged three different categories of urban green spaces. Public green spaces included parks of larger residential units, botanical and zoological gardens, amusement parks and public gardens, as well as wooded parks and meadows. There were also green spaces of limited use near schools and kindergartens, community halls and other public buildings. Finally, greenery with special functions included buffer zones around industrial and transport zones, blue spaces, protective green spaces and cemetery greenery.[56] This general plan, according to Zrnić, promoted the concept of the active role of greenery in urban recreation, health, biodiversity and economic balance.[57] A further step in the regulation of urban greenery is brought about by the General Urban Plan of Zagreb of 1986. During the adoption of the Plan, the earlier concept of 1971 was criticised, according to which green spaces were not treated as "designed spaces" but as remnants of land between residential buildings.[58] This plan protected wooded parks, groups of trees, groups of greenery, and in some places even individual trees. By this plan, spaces were divided into two fundamental categories: those designated for construction and those not designated for construction. The second category included greenery with various purposes: parks, forests, landscape and protective greenery, sports and recreational spaces, and cemeteries.[59] While the earlier urban

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52 *Ibid.*

53 *Ibid.*, p. 1240.

54 *Ibid*.

55 *Ibid*.

56 Furthermore, every residential settlement had to provide a park space of at least five square metres per inhabitant at a planned distance from the residential zone, intended for short stays and relaxation. Gulin Zrnić, V., *Green space in socialist and post-socialist Zagreb*, in: Clark, P.; Niemi, M.; Nolin, C. (eds.), *Green Landscapes in the European City 1750–2010*, Routledge, 2017, p. 109.

57 *Ibid.,* p. 110; Franković, E., *Urbanističko planiranje Zagreba od 1945. do 1985.*, Radovi Instituta za povijest umjetnosti, Vol. 9, 1985, pp. 85–87.

58 Gulin Zrnić, V., *op. cit.*, note 56, p. 111.

59 *Ibid.*

plan sought to protect existing greenery and increase it within the urban space, the later document divided all urban areas typologically into built and unbuilt surfaces, thereby completely paradigmatically changing the concept of urban planning.[60]

Municipal regulations also contained provisions on the protection and maintenance of urban greenery, but as will be shown below, these provisions were fragmentary, more oriented towards maintaining municipal order with individual provisions of a repressive nature — in case of violations of municipal order. In accordance with the analysis of individual provisions, urban forestry in this context was nonetheless not regulated as a normatively and legally separate category. The Law on Utility Services of 1978 defined the arrangement and maintenance of parks, green spaces and children's playgrounds as a separate utility service, thereby formally incorporating greenery into the system of management of city, i.e. municipal, affairs.[61] Nevertheless, the limited scope of the approach of the time can be noted, as urban forestry was not recognised as a separate area, but remained reduced to a segment of municipal maintenance without an expressed planning and ecological dimension.

The Forestry Act was enacted in 1983 and remained in force during the SFRY period. It was published with corrections in Official Gazette No. 5/84, and was subsequently amended and supplemented in No. 32/87, 47/89 and 41/90. The consolidated text was established on 4 December 1990. This legislation regulated the classification of forests into commercial forests, protective forests, and forests with a special purpose. Item 4 expressly provided for "*forests intended for rest and recreation*". This represents the first legal basis relevant to urban and peri-urban forestry in Croatian legislation.[62]

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60 *Ibid.*, p. 113.

61 Law on Utility Services, Official Gazette No. 15/1979, Art. 2, Item 9.

62 Forest Act, Official Gazette, No. 54/1983, 32/1987, 47/1989, 41/1990. See Art. 5, item 4. In the absence of available municipal orders from the socialist period, the paper uses the later normative example of the Municipal Order of Osijek exclusively for illustrative purposes, in order to indicate continuity in the approach to defining and managing public green spaces. In comparison with communal order decisions from the later period, an identical approach can be noted where it is clear that green spaces in today's regulations are considered a heterogeneous set of elements managed at the local level and in accordance with communal practice, most often expressed in decisions of the competent management bodies. Decision on Municipal Order, Official Gazette of the City of Osijek, Year IV, No. 5, Art. 2; Arts. 70–82. The mentioned municipal order is used exclusively as an illustrative example of the normative approach to defining and managing public green spaces in the post-socialist period, and does not necessarily represent a representative model. See later: Decision on Municipal Order, Official Gazette of the City of Osijek, No. 10, 10 July 2023, Art. 3, 101–111.

5. ADMINISTRATIVE-LEGAL ISSUES OF THE LEGAL REGULATION OF URBAN FORESTRY IN THE REPUBLIC OF CROATIA

5.1. Brief historical overview of the legal framework for urban forestry from 1991 to 2018

Disintegration of SFRY in 1991/1992. led to radical changes not only in the political and legal context, but also in the area of the normative framework when it comes to urban forestry. These changes were mainly manifested in the transformation of the normative framework and the adoption of own regulations that regulated forestry, spatial planning, nature protection and later environmental protection. However, except in the context of the property-legal regime, institutional structure and competence of relevant bodies at the local level, there has been almost no substantial transformation of legal regulations. In the following, an attempt will be made to briefly reconstruct the legal framework that regulated urban green areas after the dissolution of the SFRY, but without citing all the legal regulations as examples, which would exceed the scope of the work. Attention will be paid exclusively to those that indicate the real purpose and practical application of the basic determinants of the concept of urban forestry.

Significant changes and reorganization of forestry and forest management occurred in 1990.[63] The transition of social forests to state forests was carried out. This was the basis for the establishment of a public enterprise for the management of state-owned forests and forest land - Croatian Forests - in 1991.[64] The most important law for this area since independence is the consolidated text of the Forest Act, adopted on December 4, 1990.[65] Art. 4 of the Forest Act contains a definition of forest and forest land. It is important to note that it explicitly excludes "*separate groups of forest trees up to 10 ares in area, forest nurseries, windbreaks, belts, tree-lined avenues or parks in populated areas*" from the concept of forest. This legally excludes a large part of urban green infrastructure from the regime of this law. Within the aforementioned legal framework, due to different purposes, economic, protective and special-purpose forests were distinguished.[66]Art. 5 para. 4 p. 4 of the Forest Act explicitly states that special-purpose forests are also "*forests intended for rest and recreation*". The aforementioned forest types were declared by the municipal assembly, at the proposal of interested legal entities or on its own initiative. This is

63 Official Gazette, No. 52/1990. With numerous changes Official Gazette, No. 5/1991, 9/1991, 61/1991, 26/1993, 76/1993, 29/1994, 76/1999.

64 Art. 18 of the Forest Act from 1990.

65 Official Gazette No. 52/1990 (hereinafter: FA from 1990).

66 Art. 5 para. 1 of the FA from 1990.

the first legal basis relevant to urban and suburban forestry in Croatian legislation. Also worth mentioning is the first Nature Protection Act (hereinafter: NPA), after independence, from 1994.[67] It introduces the forest park as a category of protected area based on nature protection regulations. Art. 8 of that Act defines a park forest as "*a natural or planted forest, of greater landscape value, intended for rest and recreation*." Interventions in it were only permitted for maintenance or renovation.

In the period from 2000 to 2005 the Forest Act underwent several amendments and supplements.[68] The 2001 amendments were important, primarily, in the context of setting legal conditions for the transformation of a public company into a commercial company and establishing sustainable management in changed social, economic and political circumstances. This legal framework brought significant innovations in terms of harmonization with European standards, the introduction of sustainable management, the separation of responsibilities, and the definition of the rights and obligations of state bodies, the company responsible for forest management (Croatian Forests Ltd.) and private forest owners. After a long period, the (new) Forest Act was adopted in 2005,[69] with numerous amendments (from 2006 to 2014).[70] The legislator created a comprehensive and highly protective normative framework with the Forest Act of 2005, taking into account European forestry standards and a high level of regulation of forest conservation has been achieved. The previously highlighted definitions of terms were significantly expanded, in accordance with the amendments from 2014. Special purpose forests have a strictly defined role that excludes primary commercial exploitation. In addition to economic and protective forests, the category of "special purpose forests" includes, among other things, forests intended for scientific research, teaching, defence needs, and other needs determined by special regulations. They were declared by the decision of the competent ministry, while the management of forests in specially protected areas (including park-forests) was carried out on the basis of forest management plans. The management of special-purpose forests is subject to

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67 Official Gazette, No. 30/1994, with changes Official Gazette, No. 72/1994. See also Art. 3 para 1. of the Act. It states, among other things, that the forest park is a part of nature of interest to the Republic of Croatia and enjoys its special protection. The declaration of a forest park is carried out by the County Assembly or the City Assembly of the City of Zagreb with the prior consent of the Ministry (Art. 13. of the Act).

68 Official Gazette No. 8/2000, 13/2002, 100/2004, 160/2004.

69 Official Gazette, No. 140/2005.

70 Official Gazette, No. 82/2006, 129/2008, 80/2010, 124/2010, 25/2012, 68/2012, 148/2013, 94/2014. In 2010, the legislator, among other things, deleted the provisions on the Forestry Advisory Service, and transferred its tasks and powers to Croatian Forests. See Medvedović, D. *op. cit.*, note 6, p. 107.

special planning regimes.[71] Stricter measures for the conservation, protection and use of forests are introduced, it prescribes the preparation of forest management plans, and it emphasizes the importance of management while respecting the principles of sustainable development and the preservation of biological diversity.

The 2013 NPA, [72] replaced the previous law from 2005. [73] The difference in the definition of a forest park between the 2005 and 2013 NPAs is that 2005 places emphasis on "*landscape value*" (Art. 17), while 2013 places emphasis on "*biodiversity and/or landscape value*" (Art. 119). The purpose of a forest park remains the same. It is only noticeable that the 2005 ZZP allows "only those interventions and actions whose purpose is its maintenance or development", while 2013 allows those that "do not impair the characteristics for which it was declared". In 2013, a forest park was defined as one of nine national categories of protected areas (of local significance). [74]

The 2014 legislative framework significantly detailed the forestry planning system, which was based on hierarchically set strategic documents. The key instrument for operational implementation were forest management plans, which represented the basic documents of the spatial and biological organization of forests. Very strict rules have been established regarding the maintenance and enhancement of biological and landscape diversity, which all managers (including those in park forests) must adhere to. An Advisory Service has been introduced and they allocate forests and/or forest land owned by the Republic of Croatia from the forest management area. Based on the presented analysis, it is clear that in the period from 2005 to 2014, the Republic of Croatia built a complex, layered and very restrictive legislative framework for special-purpose forests. This framework was based on the absolute priority of preserving biological and landscape diversity and protecting the ecosystem in relation to commercial and economic exploitation of timber. The declaration of special-purpose forests entailed the mandatory development of specific forest management plans and protection programs, the denial of the possibility of establishing easements for commercial and tourist activities, and strict supervision by the state inspection. Special attention in the legal solutions was devoted to the co-decision-making of several departments (forestry and nature protection), which contributed to ensuring the legal and institutional integrity of the

71 See also Belaj, V. *Posebno stvarnopravno uređenje za šume i šumska zemljišta*, u: Gavella N. (ed.), *Stvarno pravo-posebna pravna uređenja*, Narodne novine, Zagreb, 2011, pp. 162-166.

72 Official Gazette, No. 80/2013. Amended (2018 to 2023).

73 Official Gazette, No. 70/2005.

74 Art. 111. of the NPA from 2013.

forest ecosystem. All interventions in such an area are strictly limited to biological restoration, sanitary protection and maintenance of general beneficial functions.

Urban forests represent an extremely important segment of spatial planning and quality of life in populated areas. Their regulation has undergone significant changes, culminating in legislative solutions adopted by 2018.The term "urban forestry" and "urban forest" as a legal term in Croatian legislation first appears in Forest Act from 2018.[75] Urban forests are recognized as special purpose forests whose primary role is to improve the quality of life in urban areas by providing space for rest and recreation. The legislator explicitly prescribes what is not considered a forest, which is crucial for distinguishing urban forests from communal green spaces. Urban forests have emerged as a specific legal category that requires an interdisciplinary approach, since they are at the intersection of the interests of forest conservation, the needs of urban development, municipal planning and environmental protection. Before that, the legislation did not know the term, but certain elements (park forests, forests with special purposes for rest and recreation, forests around settlements) were legally regulated by other instruments. The review of the legal system indicates the evolutionary path and major changes in this area, with a special emphasis on 1991, marked by transition, the establishment of a new ownership legal system, and the period of harmonization of legislation with EU regulations. It focuses on different reflections on the importance of green urban areas in order to preserve biodiversity, protect the environment and nature, and to better appreciate their role in achieving the aforementioned. From the presentation of normative development, it is also observed that one of the most important legal challenges is the dispersion of relevant provisions through various legal and by-laws, given that the management of green areas touches on regulations from several administrative areas and includes the responsibility of several administrative bodies.

5.2. Legal regulation of urban forests and green infrastructure in the Republic of Croatia form 2018

The legal regulation of urban forestry and green space management in the Republic of Croatia (hereinafter: the RC) represents a complex system of regulations that has developed over time. Before these comprehensive changes, these areas were regulated in several different laws and bylaws, which unfortunately is still the case today, but more precisely and more developed. The subject analysis encompasses a complex legal framework that extends across regulations in the fields of forestry, nature protection, spatial planning and municipal management. Urban for-

[75] Official Gazette No. 68/2018. Urban forestry is being introduced as a specific branch.

ests, which represent a specific category at the intersection of urban development and natural resource protection, require a systematic interpretation of relevant legal provisions. The legal sources we cite primarily relate to the current legislative framework and legal regulation, which indicates significant reform developments in this area compared to the historical development. An additional impact was achieved due to harmonisation with modern European and global trends in urban planning and environmental protection.

The National Development Strategy of the RC until 2030[76] points to the issue of the impact of climate change on the environment and sustainable use of resources, but also to growing urbanization and the importance of preserving the quality of life. Within the development direction entitled "Green and Digital Transition", in the context of the area presented and analysed in this paper, we highlight the ecological and energy transition for climate neutrality (protection of natural resources and the fight against climate change). It emphasizes the need to implement public policies aimed at preserving biodiversity and increasing natural capital, spatial resources, in order to reduce environmental risks and increase resistance to climate change. The importance of green infrastructure development in urban areas and the creation of green cities is also observed.

Urban forestry, as a specific segment of forestry, is gaining increasing importance in the context of sustainable development and urban planning. Newer regulations, especially those that entered into force in 2024 and 2026, bring significant innovations and increase the focus on green infrastructure, biodiversity conservation in urban ecosystems, and resilience to climate change. The obligation to plan green infrastructure in urban areas is emphasized, with the aim of preserving existing and increasing new green areas. The introduction of the concept of "urban forests" as a special purpose and the detailed regulation of the process of their declaration and management, as well as the obligation to plan green infrastructure in spatial plans, represent a modern approach that is the result of the evolution of legislation from 1990 to the present.

The preservation of nature and human environment are an integral part of constitutional values.[77] Every person has the right to live in a clean and healthy environment,[78] but also to take care of the protection and improvement of nature

[76] National Development Strategy of the Republic of Croatia until 2030, Official Gazette No. 13/2021.

[77] See Art. 3 of the Constitution of the Republic of Croatia, Official Gazette No. 55/1990, 135/1997, 8/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010, 05/2014 (hereinafter: Constitution).

[78] Art. 70 pairs. 1 of the Constitution stipulates the obligation of the state to ensure conditions for a healthy environment, not an explicit right to a healthy environment. In more detail see Staničić, F.,

and the environment.[79] Forests, flora and fauna and parts of nature are legally designated as goods of interest to the RC and enjoy its special, special protection.[80] Therefore, the basic law should be mentioned first when we talk about forests and the legal regulation of urban forestry in the RC. Urban forests and urban forestry were first introduced and defined by the Forest Act of 2018.[81] According to Art. 22 para 5 of the Forest Act, urban forests fall under special purpose forests and are defined as forests and forest lands determined by spatial plans within or adjacent to the construction area of the settlement.[82] Declaring urban forests as special purpose forests is a key step in their protection and management. Art. 33 para 4 of the Forest Act stipulates that the Ministry of Agriculture, Forestry and Fisheries[83] declares urban forests at the request of interested bodies.[84] Additionally, Art. 34 of the Forest Act allows the proclamation of an urban forest within the scope of campsites, golf courses and other sports and recreational areas at the request of interested bodies, in accordance with spatial plans. In both cases, administrative-judicial protection against the decision on proclamation is achieved through a lawsuit before the competent administrative court. Forest and forest land owned by the RC are primarily managed by the public forest owner, Croatian Forests Ltd. However, urban forests owned by the RC, except for specific exceptions, may be managed by a legal entity based on a government decision.[85] This exception allows for more flexible management of urban forests at the local level, subject to legally prescribed conditions.

Within the general-purpose functions of forests, we highlight those that are closely related to the area of urban forests and green spaces, as will be shown in the

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Croatia: Constitutional Protection of the Right to a Healthy Life – Do We Need More in Order to Safeguard the Environment and Future Generations?, in: Szilágyi, János E. (ed.), Constitutional Protection of the Environment and Future Generations Legislation and Practice in Certain Central European Countries, CEA publishing, Miskolc-Budapest, 2022, pp. 127-160. Changes in the constitutional interpretation of the right to a healthy life and environment after the Constitutional Court's decision from 2023 see more Ofak, L., *The Right to a Healthy Environment in the Light of the New Case Law of the Croatian Constitutional Court*, Journal of Agricultural and Environmental Law, Vol. 20, No. 38, 2025, pp. 354-355, 360-361.

79 Article 70 of the Constitution.

80 Art. 52 pairs. 1 of the Constitution. See also Art. 2 para 1 of the Forest Act, Official Gazette No. 68/2018, 115/2018, 98/2019, 32/2020, 145/2020, 101/2023, 36/2024 (hereinafter: FA).

81 Official Gazette No. 68/2018.

82 Art. 22 para. 10 of the FA.

83 See Art. 16 of the Act on the Organization and Scope of Work of State Administration Bodies, Official Gazette No. 85/2020, 21/2023, 57/2024.

84 They apply to state administration bodies, local self-government units and legal entities founded by the RC, with the prior opinion of the public forest owner, when it comes to forests and forest land owned by the RC.

85 Art. 16 para. 3 of the FA.

European perspective in the following paper. These are, first of all, those functions that relate to the importance and impact of forests on the climate and mitigation of the consequences of climate change, protection and improvement of the human environment, recreational and health functions, oxygen production and carbon sinks, and the impact on the water regime and biodiversity.[86] A modern legal approach must also take into account the fact that green urban areas are no longer just an aesthetic element, but a necessary infrastructure for adapting to climate change. Legal regulations sometimes lag behind the need to integrate nature-based solutions into the urban matrix. There is a need to redefine the legal status of "green infrastructure" so that it receives the same level of legal protection and priority. The current situation indicates that the concept of "green infrastructure" is not treated as a single, priority legal category. Its protection is implemented in a fragmented manner through various institutes of spatial planning, construction, municipal management, environmental and nature protection. Such a fragmented approach leads to legal uncertainty, arbitrary interpretations in the procedures for adopting spatial plans and, ultimately, to the degradation and conversion of green areas for commercial purposes. Therefore, it is necessary to systematically redefine this legal institute. The current legislative framework recognizes the importance of green infrastructure, but does not provide it with adequate operational protection. Consider adopting an Urban Forestry and Green Infrastructure Act to regulate all necessary issues in one place and reduce or avoid fragmentation in a series of different laws regulating this area.

The performance of communal activities, urban and spatial planning and development, as well as the protection and improvement of the environment, belongs to the self-governing scope of local self-government units (big cities also and some of them to counties).[87] The Act on Communal Economy[88] (hereinafter: ACE) provides a framework for the maintenance of public areas, including green elements within urban spaces. It clearly defines public green areas as part of the communal infrastructure and prescribes their maintenance as a communal activity. According to Art. 22 para. 1 p. 4 of the ACE, the maintenance of public green areas[89] is expressly stated as one of the communal activities that ensure the maintenance of communal infrastructure. This provision emphasizes the importance of green areas for the functioning of the settlement and classifies their maintenance in the

86 Art. 4 para. 1 of the FA.

87 See Art. 129. and para. 1 of the Constitution and Art. 19-20 of the Act on local and regional self-government, Official Gazette No. 33/2001, 60/2001, 106/2003, 129/2005, 109/2007, 125/2008, 36/2009, 150/2011, 144/2012, 19/2013, 137/2015, 123/2017, 98/2019, 144/2020.

88 Official Gazette No. 68/2018, 110/2018, 32/2020, 145/2024 (hereinafter: ACE).

89 Art. 23 paragraph 4. of the ACE defines the concept of public green areas.

domain of communal services. Art. 59 pairs. 1 point 5. of the ACE (located in the part related to communal infrastructure), explicitly states "public green areas" as an integral part of communal infrastructure. This classification is crucial because it determines the legal status of these areas and implies that they are of public interest and that they are managed in the manner prescribed for communal infrastructure.

The establishment and maintenance of communal order is also prescribed through the decision on municipal order, which is passed by the representative body of the local self-government unit. Pursuant to Art. 104 paragraph 1 of the ACE, the decision prescribes, among other things, the manner of arrangement and use, maintenance of cleanliness and preservation of public areas. Although "maintenance of green areas" is not explicitly stated in this context, the arrangement of settlements and the use of public areas necessarily includes the care of greenery, which is elaborated in more detail through local regulations adopted on the basis of this provision. According to the decisions on the communal order, public green areas, which are organized in accordance with spatial plans, landscape and horticultural planning projects, and others, also belong to the areas of public use. Decision making on mandatory planting of certain types of trees on these areas is determined and what is considered maintenance of public green areas is prescribed. It also prescribes what is prohibited for the purpose of protecting these areas. First of all, there are the competent administrative bodies of cities and counties responsible for the affairs of the municipal economy. The management of the tree maintenance system is being organized. It should be noted that the maintenance of green areas is also determined through decisions on the performance of communal services by local government units.[90]

Urban forests and forest lands are an integral part of spatial planning. The development of green spaces in urban areas is closely related to the concept of urban forestry, but encompasses a wider range of public and private green spaces. Recent regulations from 2025, which entered into force on 1 January 2026, in particular the Spatial Planning Act (hereinafter: PPA)[91] and the Energy Efficiency in Buildings Act (hereinafter: AEEB),[92] place a strong emphasis on the development of green infrastructure and the preservation of existing green spaces.

Some of the numerous prescribed spatial planning objectives relate to the quality development of urban and rural settlements and green infrastructure, as well

[90] For example, see Decision on municipal order, Official Gazette of the City of Osijek No. 10 from 10 July 2023, Decision on performing communal activities, Official Gazette of the City of Osijek No. 8 from 6 July 2023.

[91] Physical Planning Act, Official Gazette No. 155/2025 (hereinafter: PPA).

[92] Act on Energy Efficiency in Buildings, Official Gazette No. 155/2025 (hereinafter: AEEB).

as the rational use of natural resources, nature conservation and environmental protection, spatial sustainability and strengthening of resilience. They also place emphasis on the protection, preservation and development of space as a limited natural resource of national interest, all in accordance with environmental principles and principles. The development of green infrastructure is encouraged while respecting the urban and natural landscape. The principle of spatial conservation and nature restoration[93] emphasizes that the space of the RC, as a non-renewable resource, must be protected from all inappropriate human activities that devastate spatial, landscape, cultural and natural values. Space must be planned with such planning solutions that ensure that urban ecosystems do not lose urban green areas and cover cities with tree crowns, and that ensure an increase in the area of urban ecosystems throughout the RC. Planning solutions ensure the preservation and recovery of biodiversity, the restoration and strengthening of ecosystem resilience, and the strengthening of spatial resilience to the impacts of climate change.

The PPA touches on urban greenery, but from the aspect of planning and protection. Urban forests and green areas are an integral part of spatial plans, with clear restrictions on construction and an emphasis on preservation. It introduces the concept of green infrastructure in urban areas.[94] It determines that for urban entities in spatial plans, it is necessary to plan green infrastructure in urban areas, in accordance with the Program for the Development of Green Infrastructure in Urban Areas. It emphasizes the importance of preserving and protecting existing public and protective green and absorbent areas, from new construction or conversion. This is a key protective provision that ensures the survival and continuity of urban greenery. Also, these provisions of the PPA provide a framework for planning and protecting urban greenery, complementing the provisions of the ACE on maintenance. However, in order to further protect green urban infrastructure, perhaps future legislative amendments should consider about Art. 47 para. 2 of the PPA. The current formulation according to which existing green areas "need to be preserved to the maximum extent" should be replaced with a strict legal norm that prohibits conversion, except in exceptional cases of determining the prevailing public interest in accordance with a special law, with the obligation to ensure replacement green infrastructure of equal or greater area and ecological value within the same urban entity. This may prevent local governments from easily changing the purpose of green areas for commercial purposes.

93 Art. 12 of the PPA.

94 Art. 47 of the PPA.

Finally, it is worth mentioning the Roads Act (hereinafter: RA).[95] It defines road maintenance obligations, but with special exemptions for green areas within settlements. It is important to distinguish public roads from unclassified roads in the context of green area maintenance. The general provisions on public road maintenance do not specify the maintenance of green areas as part of the regular maintenance of public roads within settlements. The key provisions related to the maintenance of green areas within the settlement are found in Art. 27 of the RA. This provision is of utmost importance because it clearly transfers responsibility for the maintenance of green areas, tree lines, and independent ornamental shrubs within settlements from public road managers to other entities, most often local government units through utility services. Article 100 of the RA defines parts of an unclassified road and expressly includes "green areas" as part of the road structure and the associated land. This provision clearly implies that green areas are an integral part of unclassified roads. The local government unit is directly responsible for the maintenance of green areas that are part of unclassified roads. There is a clear demarcation of responsibility, in such a way that public road managers (e.g. Croatian Roads Ltd., Croatian Motorways Ltd.) do not maintain green areas, tree-lined streets and independent ornamental shrubs within settlements. Their primary responsibility is to ensure traffic safety, which includes the removal of vegetation that endangers visibility on the road. Consistency in the legislation confirms the established practice that the maintenance of urban greenery in populated areas is not the primary obligation of public road managers. Ultimately, the responsibility for the maintenance of urban greenery primarily lies with local government units, either directly as part of municipal infrastructure or as part of unclassified roads.

In conclusion, the normative analysis of the presented administrative-legal issues in the field of urban forestry, taking into account the obligations of entities in maintaining urban greenery, encompasses complex legal relations arising from the management of urban forests and green areas. It encompasses a wide range of responsibilities, primarily focused on maintaining safety, protecting property and properly performing utility services. A certain fragmentation is observed (certain legal gaps, ambiguities and inconsistencies), which is manifested in a wide range of different legal sources relating to forests, green areas, municipal economy, roads, nature and environmental protection, spatial planning and urban planning, and others. Consider adopting the Law on Urban Forestry and Green Infrastructure in order to prescribe all necessary issues in one place and reduce or avoid fragmentation in a series of different laws regulating this area.

[95] Roads Act, Official Gazette No. 84/2011, 18/2013, 22/2013, 54/2013, 148/2013, 92/2014, 110/2019, 144/2021, 114/2022, 114/2022, 4/2023, 133/2023, 156/2025.

6. EUROPEAN GREEN VIEWS ON URBAN ISSUES - THE IMPACT OF CLIMATE CHANGE ON URBAN GREENING AND URBAN FORESTRY FOR THE PURPOSE OF CONSERVING AND PROTECTING BIODIVERSITY

The achievement of a high level[96] of protection and the objectives of sustainable development,[97] the protection and improvement of the quality of the environment, human health are promoted by setting requirements for environmental protection through implementing policies, activities and measures to be taken for this purpose.[98] The EU expresses its climate ambition and intention to invest, through its role, in finding measures and solutions and setting environmental standards related to the conservation of biodiversity, the fight against climate change and the mitigation of its consequences. It has particularly emphasized this through its accession to the UN Convention on Biological Diversity from 1992[99] and the Paris Agreement from 2015.[100] Likewise, the European Green Deal (hereinafter: EGD)[101] from 2019, stands out as one of the key political European initiatives aimed at the green transition. It expresses concern for forests and forest ecosystems due to increasing pollution and destruction, precisely under the increasing pressures of climate change and human activities. In addition to the numerous areas of action highlighted through the EGD, in which sustainable development policies at the EU level should be directed, we particularly focus here on the protection and restoration of ecosystems and biological biodiversity, which include forest ecosystems, urban forests, green spaces. It is being considered in the direc-

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96 The fundamental principles of environmental protection issues at the EU level are based on the shared competence of the EU and the Member States See Art. 4 para 2 of the Treaty on the Functioning of the EU, 2016/C 202/1, available at: [https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=OJ:C:2016:202:TOC], Accessed 2 April 2026.

97 Environmental protection is one of the important and priority areas at the EU level, and therefore proclaimed through Art. 37 of the EU Charter of Fundamental Rights, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT&from=EN], Accessed 2 April 2026.

98 Art. 191-193 of the Treaty on the Functioning of the EU.

99 Council Decision of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity (93/626/EEC) [1993] OJ L 309, available at: [https://eur-lex.europa.eu/eli/dec/1993/626/oj], Accessed 2 April 2026.

100 Council Decision of 5 October 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change (2016/1841) [2016] OJ L 282, Available at: [https://eur-lex.europa.eu/eli/dec/2016/1841/oj], Accessed 2 April 2026, [https://www.consilium.europa.eu/hr/policies/paris-agreement-climate/], Accessed 2 April 2026.

101 COM (2019) 640 final, Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019DC0640], Accessed 2 April 2026 (hereinafter: EGD).

tion of qualitative and quantitative improvement of European forest areas through sustainable and reforestation, all with the aim of strengthening and increasing resilience and the bio economy. The EGD announces the adoption of an EU Forest Strategy based on the EU Biodiversity Strategy, through which a strategic framework for the further development, conservation, and improvement of forest ecosystems would be set and elaborated. Urban forests and green infrastructure are becoming a key part of European regulation, primarily through the EGD and the EU Biodiversity Strategy to 2030. Within the EGD activities, which relate to the preservation and restoration of ecosystems and biodiversity, the adoption of a Regulation on land use, forestry and agriculture is proposed, as one of the numerous climate policy objectives by 2030 and the achievement of the EGD. The increasingly frequent negative effects and consequences of climate change have required stronger action at the EU level, so in response to the above-mentioned worrying situation, with the aim of achieving climate neutrality, the European Climate Law was adopted in 2021.[102] Despite numerous initiatives, measures, directives, strategies, regulatory frameworks, the European Environment Agency, in its 2025 environmental reporting,[103] expresses concern about the state of the environment and biodiversity.

One of the areas that is often highlighted and that is particularly threatened by the negative consequences of climate change is forests and urban forests. Therefore, changes in the way they are managed (integrated, coordinated and sustainable management) and the strengthening of green infrastructures are considered necessary, all with the aim of preserving and protecting biodiversity, protecting the environment and the health of people, plants and animals. Green areas and urban forests in city and urban centres are particularly "vulnerable" and susceptible to the influence of various factors, such as increasingly frequent weather conditions, heat waves and extreme heat, floods, air pollution, noise, and others. They have demonstrated their social and environmental function even during the pandemic. These are areas that, due to their specificities and characteristics, but also the role and functionality, contribute to numerous benefits, and above all, to improving the quality of life, preserving biodiversity, protecting the environment and nature, and sustainability in general.

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[102] Regulation 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), [2021] OJ L 243, Available at: [https://eur-lex.europa.eu/eli/reg/2021/1119/oj?eliuri=eli%3Areg%3A2021%3A1119%3Aoj&locale=en], Accessed 2 April 2026.

[103] See more: [https://www.eea.europa.eu/en/europe-environment-2025/thematic-briefings/biodiversity-and-ecosystems/state-of-europes-biodiversity], Accessed 3 April 2026.

In the following, we point out the problems of urban areas in the context of the impact of climate change on urban greening and urban forestry, which the EU continuously points out and invests efforts to try to contribute to their preservation and protection through appropriate mechanisms. The EU is persistent in finding ways to protect, restore and improve the quality of European forests and the expansion of green areas, in order to increase their resistance to greater and stronger environmental impacts caused by climate change. EU policy goals to achieve climate neutrality and create resilient cities require a change in the way forests are perceived, from "economic resources" to providing "multiple functions as multifunctional ecosystem services". Treaty on the Functioning of The EU does not contain provisions on common forestry policies, but rather elaborates them through strategic documents and sectoral policies, leaving the competence and responsibility for forests and forest ecosystems (specific to each country) to the member states, respecting the principle of subsidiarity. Forest protection falls under EU legal principles relating to environmental protection.

The last decade has been marked by efforts by international organizations to achieve a political consensus in encouraging the afforestation of urban areas. Advocating sustainable urban forestry, efforts have been directed towards the formulation of minimum legal standards for urban forestry regulation. Appropriate green and urban policies, planning and management systems, and legal and strategic frameworks can guide relevant stakeholders in creating the basis for the successful establishment, protection, and restoration of urban forests. As urbanization continues to increase and the pressures and problems caused by urbanization become more frequent and obvious, the challenges of sustainable development are increasingly concentrated in urban areas. The unsustainability of urban growth is increasingly putting in the focus of the competent state and local authorities, but also the public, the need for sustainable urban models of green infrastructures, capable of responding to the numerous complex challenges of their management. A comprehensive legal approach to the management of urban green areas is required to mitigate the "heat island" effect and biodiversity loss. "Urban forests affect the regulation of the microclimate of city districts, reduce air pollution, filter floating particles, mitigate wind blows, soil erosion, reduce the negative effects of rainwater and reduce the noise level in cities."[104] Therefore, it is important to see what

[104] Posavec, S.; Tikvić, I., et al., *Strategic goals of urban forest management in the city of Zagreb*, New forestry mechanization: Journal of forest engineering theory and practice, Vol. 41, No. 1, 2020, pp . 37. See also EU Biodiversity Strategy for 2030 (2.2.8. Greening urban and peri-urban areas), Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0380], Accessed 10 April 2026.

contribution and role urban forests and green areas can have in achieving the goals of sustainable development.

The potential of urban and sub-urban areas was pointed out through the European Union Forest Action Plan (hereinafter: EUFAP) (2007-2011)[105] back in 2006.[106] The plan provided a coherent framework and was intended to serve as a coordination instrument for initiatives at EU level with the forest policies of the Member States. It proposed 18 key actions aimed at promoting sustainable forest management and the EU forest sector. The EUFAP highlights how (with good and well-designed management, new requirements are imposed on the bodies that manage them) urban forests can significantly contribute to environmental sustainability, economic profitability and convenience, and the improvement of the quality of life in urban areas.

In response to the call of the European Parliament, and in view of the increasing loss of biodiversity (five main drivers of biodiversity loss) and how to prevent it, the European Commission presented the EU Biodiversity in May 2020. Strategy for 2030 (hereinafter: Biodiversity Strategy) with the slogan " Bringing nature back into our lives ".[107] As one of the key components of the EGD, its implementation in line with other relevant previously highlighted European strategic documents was emphasized. The Biodiversity Strategy is a long-term and ambitious plan with concrete measures, commitments and activities for the protection, restoration and recovery of biodiversity, nature and ecosystems. Among the many objectives of the Biodiversity Strategy, we particularly highlight the area covering urban nature and biodiversity[108] Given its exceptional importance, it strives to increase the number of forest areas, afforestation and tree planting to support biodiversity and restore ecosystems. The intention is to encourage greening and afforestation trends in order to try to stop the loss of green urban ecosystems. For this purpose,

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105 Available at:
[https://eur-lex.europa.eu/legal-content/BG/TXT/?uri=LEGISSUM:l24277&frontOfficeSuffix=%2F], Accessed 3 April 2026 .

106 Communication from the Commission to the Council and the European Parliament on an EU Forest Action, COM/2006/0302 final, Available at:
[https://eur-lex.europa.eu/legal-content/BG/TXT/?uri=celex%3A52006DC0302], Accessed 3 April 2026.

107 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Biodiversity Strategy for 2030 Bringing nature back into our lives, COM/2020/380 final, Available at:
[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0380], Accessed 10 April 2026, (hereinafter: Biodiversity Strategy).

108 Available at:
[https://environment.ec.europa.eu/topics/nature-and-biodiversity_en], Accessed 10 April 2026.

a European Platform for Urban Greening has been planned, which should facilitate the planting of urban trees.[109] Also, one of the strategic measures refers to the planning of planting 3 billion trees by 2030. Under the subtitle 2.2.8. Greening urban and peri-urban areas of the Strategy, issues related to the exploitation of green urban and suburban areas and their additional greening (creation of accessible and biodiverse urban forests) are covered. The advantages and benefits of such green urban spaces (green islands, roofs, gardens) are highlighted. The "greening of European cities and increasing biological biodiversity" is proposed,[110] as well as the promotion of green infrastructure for their systematic integration into urban and spatial planning.[111] The "value of environmentally sustainable urban planning and infrastructure design" is recognized.[112] Furthermore, it warns against reducing the use of chemical pesticides, fertilizers or their complete abolition in green areas, reducing the mowing of urban green areas and all other current methods and practices that threaten or damage biodiversity . Likewise, European cities with at least 20,000 inhabitants are invited to develop Urban Greening Plans. All proposed measures and activities should enable and support increasing urban greening.

Some of the key European initiatives when it comes to forests focus on issues such as promoting sustainable forest management, greater forest protection and the role of forests in mitigating climate change, as well as increasing biodiversity. On 14 July 2021, the European Commission presented the New EU Forest Strategy for 2030.[113] The aforementioned strategy is one of a series of initiatives to reduce greenhouse gas emissions by at least 55% by 2030. It is believed that precisely forests can contribute to this as carbon sinks that can reduce and largely eliminate uncertainties and negativity caused by climate change. It also builds on the EU Biodiversity Strategy until 2030,[114] adopted in October 2020. The strategic framework for EU forests highlights the importance and role of forests for human and animal health and contribution to a healthy environment. From the conclusions

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109 Available at: [https://platformurbangreening.eu/], Accessed 10 April 2026.

110 EGD, *op. cit.*, note 101, p. 13.

111 See more on [https://forest.eea.europa.eu/resources/research-corner/research-highlights/urban-forestry-multi-functional-greening-in-the-city], Accessed 10 April 2026.

112 Available at: [https://climate-adapt.eea.europa.eu/hr/metadata/publications/urban-forests-a-global-perspective], Accessed 10 April 2026.

113 COM/2021/572 final, Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0572], Accessed 5 April 2026.

114 Available at: [https://commission.europa.eu/documents_en,], [https://ec.europa.eu/commission/presscorner/api/files/attachment/865560/factsheet-EU-biodiversity-strategy_en.pdf], Accessed 5 April 2026.

of the Council on the New EU Strategy for Forests,[115] the importance that forest wealth can have as one of the modalities of assistance in "the transition to a green, climate-neutral and competitive circular bio economy and the necessity to achieve a balance between the environmental, social and economic aspects of sustainable forest management" is highlighted.[116] The strategy aims to create more resilient, healthier and more biodiverse forests and forest systems/areas that can achieve multifunctional potential: socio-economic, ecological, economic functions. It is also important to highlight the need to establish legally binding instruments for ecosystem restoration. Among the numerous objectives and measures related to forests and forest lands set out in the strategic framework, the expansion of forest and tree coverage in urban areas, i.e. the greening of urban areas, is encouraged. It is concluded that forest ecosystems are additionally affected and threatened by climate change. Sustainable afforestation and forest restoration represent effective ways to achieve a healthy environment, the resilience of these systems and a circular bio economy, all in accordance with environmental principles.

The strategy recognizes urban forests as important multifunctional spaces for urban challenges. Greening and tree planting [117] in urban areas (urban and suburban squares, parks, urban gardens, buildings, playgrounds, etc.) is encouraged in order to create urban biodiversity and respect ecological principles and standards. It is emphasized that "afforestation is one of the most effective measures for mitigating climate change and disaster risk in the forest sector."[118] Likewise, urban forests are important because of their direct impact on the well-being and health of citizens and adaptation to climate change by enabling "cooling cities" by mitigating the effects of the "urban heat island". They ensure disaster resilience, while providing natural flood control, air purification and noise reduction. They have an aesthetic, recreational and educational function. By strengthening the diversity of ecosystems, greater resilience to the increasingly severe consequences of climate change is sought, and thus the reduction of potential natural disasters and catastrophes is sought. This particularly highlights planting in urban areas. The principle of "the right tree in the right place" is promoted, highlighting the importance of planting

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115 Council conclusions on the New EU Forest Strategy to 2030, 5 November 2021, Brussels, Available at:
[https://data.consilium.europa.eu/doc/document/ST-13537-2021-INIT/hr/pdf], Accessed 5 April 2026.

116 Available at:
[https://www.consilium.europa.eu/hr/press/press-releases/2021/11/15/council-adopts-conclusions-on-the-new-eu-forest-strategy-for-2030/], Accessed 10 April 2026.

117 Monitoring will without ensured through the European Forest Information System (FISE). See more: [https://forest.eea.europa.eu/], Accessed 10 April 2026.

118 *Ibid*.

trees to cool cities, purify the air and provide habitat for birds and pollinators, while respecting ecological principles and local conditions. The guideline is that the 3-30-300 rule, which refers to: 3 trees from each home, 30% tree cover in the neighbourhood and access to a park within 300 metres, should be followed. The aim is for the aforementioned rule, which can serve as a benchmark for urban forestry infrastructure, to be a guideline in future European green policies. It seeks to ensure that there is no loss of urban green spaces and tree canopy by 2030. Cities with more than 20,000 inhabitants are encouraged to develop innovative Urban Nature Plans (Urban Greening Plans).[119] The aim of the plans is to create biodiverse and accessible urban forests, gardens, parks, green oases, instructive green paths, tree rows, in order to stop the deterioration of urban ecosystems.

Finally, we refer to the EU Nature Restoration Regulation,[120] which is significant for this topic, which further promotes and encourages the area of urban forestry. This Regulation was adopted in June 2024 with the aim of "restoring degraded ecosystems and restoring nature across Europe, on farmland and seas, in forests and in urban environments".[121] It is aimed at restoring various types of ecosystems, including urban ecosystems,[122] which make up 22% of the EU's surface area. It also, as through the previously mentioned EU legal sources, but in more detail and specifically elaborates and highlights the benefits (control of flood risks, heat islands, recreation, cooling, water and air purification, slowing down water runoff, improving health and many others) urban green areas, green cover and urban ecosystems as important habitats for biodiversity and the need to increase them. Member States are obliged to take measures to avoid the loss or reduction of urban green areas and trees by 2030,[123] but also to ensure a trend of increasing green areas in the following years. Some of the numerous restoration measures related to urban areas include increasing the coverage of cities with tree crowns in urban ecosystems and green areas with ecological features. This Regulation particularly highlights areas of sustainable urban and peri-urban forestry and green structures,

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119 See more Urban Nature Plans-Guidance for cities to help prepare an urban nature plan, European Commission: Directorate-General for Environment, Publications Office of the European Union, 2024, available at:
[https://data.europa.eu/doi/10.2779/353044], Accessed 12 April 2026.

120 Regulation (EU) 2024/1991 of the European Parliament and of the Council of 24 June 2024 on nature restoration and amending Regulation (EU) 2022/869 [2024] OJ L, 2024/1991, Available at:
[https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32024R1991], Accessed 12 April 2026 (hereinafter: Regulation on Nature).

121 Available at:
[https://www.europarl.europa.eu/ftu/pdf/hr/FTU_2.4.3.pdf], Accessed 12 April 2026.

122 What makes urban ecosystems see Art. 14 para 4 point a) and b) of the Regulation on Nature.

123 See Art. 8 para 1 of the Regulation on Nature.

which are exposed to the challenges of selecting the conditions for planting certain tree species in these areas. Furthermore, Member States should develop national restoration plans[124] and identify areas of urban ecosystems referred to in Article 8 and create maps of these areas.[125] In conclusion, urban forestry is directed towards the provision of ecosystem services. It is recognized as a key factor contributing to the achievement of multifunctional benefits and the provision of ecosystem services. Urban areas, urban forests, green infrastructures, are increasingly perceived as "potential nature-based solutions that can address some of the current challenges facing cities, while providing diverse services for human well-being and biodiversity, improving the livelihoods and resilience of cities."[126] A transformational shift in thinking about their environmental, cultural and socio-economic purpose and potential is evident.

7. CONCLUSION

The legal-historical analysis presented in this paper leads us to the conclusion that the absence of a uniform legal framework for urban forestry in Croatian legislation cannot be explained solely by the specific disadvantages of the legislative system of some period, but is a consequence of the continued application of the structural principle of fragmentation of normative regulation of urban forestry law from the Habsburg era to the present.

In the several times of Habsburg rule (1852 to 1918), the regulation of forests was based on three parallel, but mutually separate systems. The first system was based on the general forest law system created by the Imperial Forest Patent of 1852. The second of the three 1894 laws passed by the Croatian Parliament determined the joint ownership and supervision of the public domain. Legal municipal law also covered the maintenance of urban green spaces and tree-lined streets. None of them mentioned urban or peri-urban forests as a formally recognized category with specific legal status serving environmental, recreational or public health purposes. In contrast, the Patent of 1852 mainly focused on the conservation of goods produced in forests and preventing illegal deforestation, while the 1894 law specifically addressed the over-exploitation of economic yield generated through common property institutions. Since the municipal regulations mainly concerned the aesthetics of public spaces, the combination of these regulatory tracks especial-

[124] Art. 14-19 of the Regulation on Nature. See also, available at: [https://biodiversity.europa.eu/europes-biodiversity/nature-restoration/reference-portal-for-nature-restoration-regulation], Accessed 12 April 2026.

[125] Art. 14. para 4 of the Regulation on Nature.

[126] Borelli, S.; Conigliaro, M.; Di Cagno, F., *Urban forests : a global perspective,* FAO, Rome, 2023, p. 120, available at: [https://forestknowledge.eu/hr/resources/urban-forests-a-global-perspective-1], Accessed 15 April 2026.

ly in cities generated meaningful regulatory gaps at the intersections since there was no coordination mechanism.

The interwar period (1918-1945) did not eliminate the fragmentation. On the contrary, the unification into the Kingdom of Serbs, Croats and Slovenes brought a higher degree of legal pluralism. The Law on Forests of 1929 was arguably the most ambitious legislative action taken in this period, but lacked the necessary conceptual clarity. The lines between state and non-state forests continued the rationale of the Habsburg regulations. The only mention that came close to regulating urban ecology was the protection of "climatic and hygienic interests" in paragraphs 6-7. It remained a marginal reference, without institutional implications, while by this time there already existed five parallel legal regimes for the same urban green spaces, without a unified definition or coordination framework. Following governments, the Banovina of Croatia and the Independent State of Croatia, retained the same fragmented structure, but did not introduce any new regulations on urban forestry.

The path dependence becomes evident when comparing the Habsburg legal order with the Kingdom of Yugoslavia's legal system and the systems of three other subsequent states. The normative layer was developed by Habsburg law which was inherited by the Law of the Kingdom of Yugoslavia and continued to subsequent states. The conceptual architecture of forest and parks departments was largely unchanged. Forests were still seen as economic and ecological assets, while parks remained municipal amenities with unclear legal boundaries.

It is important to note that, even today, contemporary Croatian forest law and spatial planning law are under a regime that does not provide for a dedicated statutory definition or integrated management regime for urban forests. The historical origin of this gap might provide a more coherent understanding of policy and legislation and the calls for modern urban green infrastructure and climate change adaptation delivered by the ecosystem services offered by our urban forests. As laid out as early as 1852, nothing has changed.

By analysing the previously presented normative framework that was valid in the territory of Yugoslavia after 1945, an attempt was made to determine the relevance and application of the concept of urban green spaces as well as urban forestry with special reference to the legislative practice of the SR Croatia. The analysis of the relevant provisions showed that the concept of urban forestry was never explicitly recognized in the content of legal regulations. However, it cannot be ignored that the basic functions of urban forestry were nevertheless recognized within the fragmented provisions and their application in the systems of public goods management, forestry legislation, urban planning and regulation of communal services.

The constitutional regulations from 1946, 1963 and 1974, defining forests as goods of general national interest under state protection, created the basis for the later normative articulation of the law on urban forestry and environmental protection. Forestry legislation throughout the socialist period was predominantly oriented towards the economic exploitation and management of forest resources. However, in contrast, urban green spaces, including parks and forest parks, were mostly excluded from the scope of forestry law. This was regulated by the Forestry Act of 1977, which expressly removed city parks from the forestry legislative regime. From that moment on, the regulation of urban green areas is recognized within the framework of regulations on urban planning and municipal legislation.

Urban regulations starting with the Basic Regulation on the General Urban Plan from 1949 gradually institutionalized the issue of urban green areas. This is particularly recognized in the subsequent regulations, the Law on Spatial Planning and Use of Building Land from 1973 and the Law on Spatial Planning and Spatial Planning from 1980. These lists formally included urban greenery in the context of spatial planning and regulated it as a component of the communal system. The general urban plans of Zagreb for 1971 and 1986, which are illustratively listed in the content of the research, most concretely illustrate this claim. The most formal regulatory framework is recognized in the 1978 Law on Municipal Services, where the maintenance of urban green spaces was regulated as a separate municipal activity.

The post-Yugoslav successor states, including Croatia, after the collapse of the SFRY inherited this fragmented but functionally coherent legal area and formed new national legal systems dealing with forests, spatial planning and environmental protection within the framework of separate regulations. Understanding the socialist legal heritage is therefore a necessary prerequisite for a full appreciation of contemporary legislation on urban forestry in the post-Yugoslav legal space.

The normative analysis of the current legal framework in the field of urban forestry shows a certain fragmentation, which is manifested in a wide range of different legal sources related to forests, green areas, communal economy, roads, nature and environmental protection, spatial planning and urban planning, and others. One of the primary legal challenges is the dispersion of relevant provisions across various legal and subordinate legislation. There are certain limitations and challenges in the legal approach to managing these areas. Likewise, the analysis of this stated administrative-legal issue in the field of urban forestry, taking into account the obligations of entities in maintaining urban greenery, encompasses complex legal relationships arising from the management of urban forests and green areas. It encompasses a wide range of responsibilities, primarily focused on maintaining

safety, protecting property and properly performing communal activities. Accordingly, the necessity of a systematic reform of the legal approach to managing green urban areas is proposed. The adoption of the Urban Forestry and Green Infrastructure Act is proposed in order to prescribe all necessary issues in one place and reduce or avoid fragmentation in a number of different laws regulating this area. Furthermore, strengthening inspection supervision and introducing stricter sanctions for unauthorized conversion or destruction of green zones. Integrating the principles of green infrastructure into all levels of spatial planning while ensuring legal mechanisms for their permanent protection. Given that urban forestry is described exclusively as a management activity, and urban forests are defined by spatial criteria, consider supplementing the definition with a functional criterion (multifunctional ecosystem service) as an alternative or complementary criterion to the spatial one.

Although there are differences in (legal) approaches to urban forestry between Member States, a transformational shift is noticeable under the influence of European aspirations in thinking about their environmental, cultural and socio-economic purpose and potential. An additional impact has been achieved due to alignment with modern European and global trends in urban planning and environmental protection, which is also visible in the new regulations in Croatia (2024-2026). The specificities of forest ecosystems within a particular country require individual, but integrated management approaches. The importance of urban forests and green infrastructure as multifunctional spaces is perceived, and the need for changes in national legal frameworks is focused on increasing the green cover in urban ecosystems and green areas with ecological characteristics. A comprehensive legal approach to the management of urban green spaces is required to mitigate the "heat island" effect and biodiversity loss. Although many of the provisions are of recent date, they represent the culmination of legislative developments that began earlier, with the aim of establishing a sustainable and resilient urban environment. Continuous development and alignment with European standards ensure that urban forests and green spaces in Croatia will continue to be given exceptional importance in the future.

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Review article

SAFEGUARDING ELECTORAL RIGHTS IN THE EUROPEAN UNION: BETWEEN THE EU'S NORMATIVE AUTHORITY AND NATIONAL JUDICIAL REVIEW*

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ABSTRACT

The right to vote and to stand for election constitutes one of the fundamental elements of the rule of law and a key mechanism of democratic legitimation of public authority. Within the European Union, this principle acquires particular significance, as the democratic legitimacy of the European Union is indirectly derived from democratic processes taking place in its Member States. The European Union cannot function as a credible global promoter of democracy and the rule of law if it is unable to ensure that the democratic origin of power in Member States is effectively protected.

What is the role of the European Union in safeguarding electoral rights in the context of increasing geopolitical confrontation? What role do the Member States play in this regard? What regulatory strategies in this area can be identified in European Union legislation and in the exercise of its conferred competences? The aim of this paper is to analyse and seek answers to these questions, since on 12 November 2025 the European Commission and the High Representative of the union for foreign affairs and security policy published a Joint Communication entitled "European Democracy Shield: Empowering Strong and Resilient Democracies". This initiative envisages the adoption of measures to be implemented by 2027, one of its key areas being the strengthening of free and fair elections. As indicated in the document, elections within the European Union are subject to undue or undesirable influences. The question therefore remains whether the European Union, through its legal framework, is capable of ef-

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fectively addressing such influences while simultaneously respecting Member States' sovereignty in electoral matters.

Using the Slovak Republic as a case study, the paper also examines judicial review of elections considering the current challenges faced by the European Union in the exercise and protection of electoral rights. Effective and independent judicial review of elections does not merely represent an instrument of internal control over the legality of electoral processes but also forms a fundamental condition for the credibility of democratic governance and for the continuous promotion of the principles of democracy and the rule of law across the European Union. The European Union can promote these principles globally only to the extent that they are guaranteed and effectively enforced at the national level. Through an analysis of the Slovak approach, this contribution examines the process of interaction between European Union legislation and the national law of a Member State considering new initiatives in EU legislation.

***Keywords**: Democracy, Electoral rights, Judicial review*

1. INTRODUCTION

In a democratic state governed by the rule of law, power derives from the citizens, who exercise it either directly or through elected representatives. Free and fair elections, together with the right to vote, constitute a fundamental instrument for the formation of key public authorities entrusted with the exercise of that power. The mandate conferred by the sovereign (the people) should not merely represent the objective of elections, but above all a binding commitment. However, if effective mechanisms ensuring the realization of the fundamental principles of free and fair elections are absent already in the very process of constituting public authority, democracy itself may face a serious challenge. The European Union (hereinafter "EU") cannot function as a credible global promoter of democracy and the rule of law, if it fails to ensure effective protection of the democratic origin of power within Member States. Although the European Union has undergone significant and ongoing development in electoral law, the primary guarantors of the legality and legitimacy of elections should remain with the Member States and their respective legal orders. This paper outlines the efforts of the EU to strengthen free and fair elections, presents the initiative associated with the European Democracy Shield, and, using the legal framework of the Slovak Republic as an example, addresses the issue of judicial review of the constitutionality and legality of elections to the European Parliament. Finally, it examines the extent to which these European initiatives may interfere with the sovereignty of Member States in matters of electoral law and assessing the potential risks of the instruments they are intended to be applied.

2. THE EVOLUTION OF EU LAW ON ELECTORAL RIGHTS: FROM THE CURRENT FRAMEWORK TO NEW LEGISLATIVE INITIATIVES

Pursuant to Article 2 of the consolidated version of the Treaty on European Union[1] (hereinafter "TEU"), "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." Article 10 TEU further provides that "The functioning of the Union shall be founded on representative democracy." A central feature of representative democracy is the right to vote and the right to stand as a candidate. Electoral rights constitute the fundamental basis of participation in the broader sense, with such participation culminating in the actual exercise of the vote.[2] At the level of the EU, citizens are directly represented in the European Parliament (hereinafter "EP").

The legal basis for electoral rights at the level of the EU is firmly enshrined in primary law. Article 20(2)(b) of the consolidated version of the Treaty on the Functioning of the European Union (hereinafter "TFEU") guarantees Union citizens the right to vote and to stand as candidates in elections to the EP, as well as in municipal elections in the Member State of residence, under the same conditions as nationals of that State. Article 22(1) and (2) TFEU further elaborates this framework by providing that every citizen of the Union residing in a Member State of which they are not a national shall have the right to vote and to stand as a candidate in municipal elections in the Member State, as well as in elections to the EP in the Member State of residence, under the same conditions as nationals of that State. These rights are also enshrined in the Charter of Fundamental Rights of the European Union[3] (hereinafter "Charter"), in Articles 39 and 40. Article 39(2) of the Charter lays down the principles governing elections to the EP, including universality, direct suffrage, free elections, and the secret ballot. At EU level, the regulation of electoral rights thus primarily concerns the electoral rights of Union citizens in relation to elections to the EP, as well as the guarantees associated with those rights in relation to municipal elections within the Member States. The distinction between these two categories, from the perspective of EU institutional involvement, lies principally in the fact that, whereas municipal

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1 Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union [2016] OJ C 202/1.

2 Krunková, A., *Volebné právo ako prostriedok participácie v kontexte Charty základných práv Európskej únie,* in: Orosz, L.; Majerčák, T. (eds.), Aktuálne problémy volebného práva a volebného súdnictva v Slovenskej republike – II. ústavné dni. Zborník príspevkov z medzinárodnej vedeckej konferencie. Košice 25 septembra 2013, UPJŠ, Košice, 2014, p. 225.

3 Charter of Fundamental Rights of the European Union [2016] OJ C 202/2.

elections - due to their diversity across Member States - remain primarily within national competence, elections to the EP directly concern one of the Union's principal institutions. In this context, a higher degree of EU involvement may be observed, stemming from Article 223 TFEU, which requires the EP (for the election of its Members) to draw up a proposal for a uniform electoral procedure or for a procedure in accordance with principles common to all Member States.

The process of constituting the EP has undergone significant development over time. The Assembly, as the precursor to the EP under the Treaty establishing the European Coal and Steel Community of 1951, was entrusted under Article 21(3) with drawing up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States. This objective of establishing a uniform electoral procedure was subsequently incorporated into Article 138(3) of the 1957 Treaty establishing the European Economic Community. During the 1970s, endeavours were aimed at achieving convergence among the electoral processes of the respective Member States and defining shared principles.[4] Following substantial developments reflecting the gradual formation of more stable political cooperation extending beyond the economic and industrial spheres across Europe, a key milestone was reached in 1976 with the adoption of the instrument annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976, namely the Act concerning the election of the members of the European Parliament by direct universal suffrage (hereinafter "Act")[5]. Based on this Act, the first direct elections to the EP were held in 1979.[6] The Act has since been amended on several occasions, most notably in 2002[7] and again in 2018[8]. However, it does not establish a single uniform electoral system across the Member States but rather

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4 Molek, P.; Šimíček, V., *Soudní přezkum voleb,* Linde Praha, a.s., Praha, 2006, p. 68.

5 Decision of the representatives of the Member States meeting in the council relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage, 76/787/ECSC, EEC, Euratom, [1976] OJ L 278/1.

6 Angelovičová, A., *Právna úprava volieb do Európskeho parlamentu – (doterajší vývoj, aktuálny stav, hodnotenie).,* in: Orosz, L.; Majerčák, T. (eds.), Volebné zákonodarstvo v Slovenskej republike (doterajší vývoj, aktuálny stav, príčiny a dôsledky). Zborník vedeckých prác z medzinárodnej vedeckej konferencie. Košice 26.-27 jún 2014, UPJŠ, Košice, 2014, p. 296.

7 Council Decision of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom [2002] OJ L 283/1.

8 Council decision (EU, Euratom) 2018/994 of 13 July 2018 amending the Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 [2018] OJ L 178/1. Although this decision was adopted as early as 2018, certain of its provisions have not yet entered into force due to the ongoing process of ratification by all Member States.

envisages the approximation of electoral principles in accordance with Article 223 TFEU. [9]

On 3 May 2022, the EP adopted a legislative resolution on the proposal for a Council Regulation on the election of the members of the European Parliament by direct universal suffrage, repealing Council Decision (76/787/ECSC, EEC, Euratom) and the Act concerning the election of the members of the European Parliament by direct universal suffrage annexed to that Decision (2020/2220(INL) — 2022/0902(APP)). The annex to this resolution contains a draft Proposal for a Council regulation on the election of the Members of the European Parliament by direct universal suffrage (hereinafter the "legislative resolution").

The legislative resolution in question is regarded as a significant step in the ongoing debate on enhancing the transparency and democratic accountability of the EP. It is important to emphasise that it constitutes a proposal within the legislative process under Article 223 TFEU and does not as such establish binding electoral rules. Among its key elements is the proposal for the introduction of a Union-wide electoral constituency, which is intended to strengthen the transnational dimension of European elections.[10] European political parties, European associations of voters, and other European electoral entities should be enabled to participate more visibly in European elections campaigns and to submit candidate lists across the Union, thereby enhancing their recognition among voters, including on ballot papers and in campaign materials and publications.[11] This development reflects broader effort to strengthen the role of European political parties and associations, of which citizens of the Member States are often insufficiently informed. The introduction of transnational electoral lists constitutes an explicit objective of the proposal and remains one of its most controversial and widely discussed elements, for example because of concerns regarding the creation of different categories of MEPs, the weakening of the link between representatives and their electorate, and the potential empowerment of populist.[12] Other parts of the legislative resolution

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9 In the context of EU-level legal regulation of electoral rights, reference may also be made to Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals [1993] OJ L 329/34.

10 Point 2 of European Parliament legislative resolution of 3 May 2022 on the proposal for a Council Regulation on the election of the members of the European Parliament by direct universal suffrage, repealing Council Decision (76/787/ECSC, EEC, Euratom) and the Act concerning the election of the members of the European Parliament by direct universal suffrage annexed to that Decision (2020/2220(INL) — 2022/0902(APP)) [2022] OJ C 465/171 (Legislative resolution).

11 Draft Article 15 of Anex to the Legislative resolution.

12 Polzin, M., *Transnational Lists, Diversity and Quota Regulation: The European Parliament's proposal for a New Electoral Law*, EU Law Live, Weekend Edition, Nº123, 2022, p. 4; see also Costa, O., *Can the*

concern the possible harmonisation of certain aspects of electoral participation. The recommended minimum voting age is 16 years (without prejudice to constitutional provisions of Member States establishing a minimum voting age of 18 or 17 years), while the minimum age for eligibility as a candidate should be set at 18 years.[13] In order to promote participation in elections to the EP, the proposal encourages Member States to make available postal voting, advance in-person voting, or proxy voting.[14] Further measures include proposed limits concerning of electoral thresholds, which should not exceed 5%[15], as well as the coordination of deadlines for the submission of candidate lists and the compilation of electoral registers prior to European elections[16], and the timing of electoral campaign (which may begin no earlier than eight weeks before election day)[17] and equalisation of the length of the electoral silence period.[18]

In comparison with the current legal framework in the form of the Act, the proposed changes are considerable. The Act primarily contains a set of minimum common principles which are implemented by Member States in accordance with their respective national rules; therefore, despite the specific nature of elections to the EP, which are of a supranational character, from a procedural perspective (from the national point of view) they may be characterised as national electoral processes producing a European-level outcome. However, regarding EP elections, national regulations (comprising the judicial review of elections) must be subject to a consistent interpretation in compliance with Union law.[19] The legislative resolution seeks to further Europeanise electoral procedures and to enhance their coherence across Member States. This proposal is currently pending and is subject to the special legislative procedure under Article 223 TFEU. Pursuant to this provision, it requires unanimous approval by the Council, the consent of the EP (by a majority of its members), and approval by the Member States in accordance with their respective constitutional requirements to enter into force. The proposal has not yet reached a consensus, and its progress has remained limited in recent years. The lack of agreement may be linked to concerns regarding certain proposed mea-

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Conference on the Future of Europe unlock the EU elections reform? Reflections on transnational lists and the lead-candidate system, European Law Journal, Vol. 26, Issue 5-6, 2021, p. 468.

13 Draft Article 4 and 5 of Anex to the Legislative resolution.

14 Draft Article 8 of Anex to the Legislative resolution.

15 Draft Article 13 of Anex to the Legislative resolution.

16 Draft Article 9 and 11 of Anex to the Legislative resolution.

17 Draft Article 17 of Anex to the Legislative resolution.

18 Draft Article 17 of Anex to the Legislative resolution.

19 Molek, P., *Politická práva,* Wolters Kluwer, Praha, 2014, p. 437.

sures, including transnational candidate lists,[20] the establishment of a Union-wide constituency, and the harmonisation of rules concerning the age of eligibility for both active and passive suffrage. The proposal itself indicates that the age thresholds for active and passive suffrage differ across Member States[21], which reflects the diversity of national constitutional traditions. While general principles governing elections are broadly common across all types of election, the procedures may differ depending on the national, social, or cultural traditions of individual Member States, particularly in relation to national electoral systems. Such differences may reflect the sovereignty of the Member States. It cannot therefore be excluded that the proposed legislation may be perceived as affecting national competences in the field of electoral law. A further aspect concerns the practical and technical feasibility of implementing the proposed regulation, should it be adopted. However, as noted above, any reform of EU electoral law must rest on a broad consensus among the Member States; absent such consensus, even well-intentioned amendments and reforms intended to strengthen the European character of elections will not have significant impact.[22] Although the legislative resolution has not yet resulted in a political agreement among the Member States, several legal acts have been adopted at EU level that partially address electoral rights, as well as the enhancement of electoral transparency and political competition.[23]

3. EUROPEAN DEMOCRACY SHIELD

Particular attention was drawn in 12 November 2025 to the initiative entitled "European Democracy Shield: Empowering Strong and Resilient Democracies" (hereinafter "EDS"), published by the European Commission and the High Rep-

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20 Fox, B., EU countries to reject Spitzenkandidaten and pan-EU election lists, 2022, Available at: [https://www.euractiv.com/news/eu-countries-to-reject-spitzenkandidaten-and-pan-eu-election-lists/?utm_source=chatgpt.com], Accessed 4 April 2026.

21 Point 23 of The Legislative resolution.

22 Mateo, F. P., *European Parliament and representation of the Union's citizens: What can be expected from electoral law from a democratic standpoint?,* European Law Journal, Vol. 28, Issue 1-3: Shall we say the words? Essays on the EU federal democracy, 2023, p. 69. As pointed out in the contribution, the legislative resolution was passed in the European Parliament by a very narrow majority, which may be taken as indicating a reduced potential in the subsequent legislative process.

23 For example, Regulation (EU) 2024/900 of The European Parliament and of The Council of 13 March 2024 on the transparency and targeting of political advertising [2024] OJ L 2024/900; Commission Recommendation (EU) 2023/2829 of 12 December 2023 on inclusive and resilient electoral processes in the Union and enhancing the European nature and efficient conduct of the elections to the European Parliament; Council Directive (EU) 2025/1788 of 24 June 2025 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in elections to the European Parliament for Union citizens residing in a Member State of which they are not nationals [2025] OJ L 2025/1788.

resentative of the Union for Foreign Affairs and Security Policy. In the introductory sections, the EDS emphasises the general need to strengthen democracy in a context of increasing geopolitical confrontation, international and regional conflicts, as well as technological transformation, all of which exert both internal and external pressure on democratic systems. The EDS identifies three areas which, according to the document, require more substantial at Union level intervention to effectively address these challenges:

- enhancing situational awareness and strengthening response capacities to safeguard the integrity of the information space,
- strengthening democratic institutions, free and fair elections, and free and independent media,
- enhancing societal resilience and citizen engagement.

The adopted document envisages, with a view to supporting cooperation and coordination in addressing the above-mentioned areas, the establishment of a dedicated body - the European Democracy Resilience Centre (hereinafter the "Centre") - whose activities are intended to enhance awareness and strengthen democratic resilience.

As indicated by the priorities of the EDS, one of the areas to which it pays particular attention is the strengthening of free and fair elections, which is addressed in point 2.3 of the document. The EDS identifies cyberattacks and cyber threats as a major challenge to ensuring free and fair elections. The strengthening of protection against these threats is currently supported by the Network and Information Security Directive[24] and the Cyber Resilience Act[25], which establish a Union cybersecurity framework ensuring that critical sectors and digital products are, by design, secure, resilient, and coordinated across the Union. In relation to undesirable political advertising, the EDS specifically responds through Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising, as an instrument establishing common EU standards (hereinafter "Regulation on Political Advertising"). Based on information exchanges within the European Cooperation Network on Elections, the Commission plans to develop a repository of common references and standards for electoral processes and intends to cooperate with Member States on the development of specific guidance on the fair, transparent, and account-

[24] Directive (EU) 2022/2555 Of the European Parliament and Of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union [2022] OJ L 333/80.

[25] Regulation (EU) 2024/2847 Of the European Parliament and Of the Council of 23 October 2024 on horizontal cybersecurity requirements for products with digital elements [2024] OJ L 2847/1.

able use of artificial intelligence in electoral processes.[26] To address election-related threats, the Code of Practice on Disinformation (originally introduced in 2018) and the Digital Services Act (hereinafter "DSA") [27], which constitutes a set of rules on digital services, also play an important complementary role. The EU also aims to improve transparency and accountability in political financing, including campaign funding, and to address issues of common concern such as anonymous donations and cryptocurrencies, which may be used to finance activities in a non-transparent and difficult-to-trace manner. Finally, an objective set by the EDS in strengthening electoral rights is the adoption of a recommendation on security in politics, aimed at ensuring the safety of political candidates and elected representatives.[28] In view of the increasing role of influencers in electoral campaigning, the Commission, in connection with the EU legal centre for influencers, aims to support the creation of a voluntary network of influencers in order to raise awareness of relevant EU rules, namely the Regulation on Political Advertising, the DSA, and the Artificial Intelligence Act[29], including their obligations when participating in political campaigns.

Using the example of the 2024 and 2025 elections in Moldova, the EDS illustrated forms of interference in electoral campaigns in the form of hybrid threats, including cyberattacks, fake bomb threats, foreign information manipulation, foreign interference, and disinformation, with reference to the European Digital Media Observatory hub report[30], as well as the amplification of content artifi-

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26 Page 12 of Joint Communication to the European Parliament, the Council, the European economic and Social Committee and the Committee of the Regions, European Democracy Shield: Empowering Strong and Resilient Democracies, Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52025JC0791#footnote58], Accessed 4 April 2026.

27 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance) [2022] OJ L 277/1 (DSA).

28 Page 14 of Joint Communication to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions, European Democracy Shield: Empowering Strong and Resilient Democracies, Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52025JC0791#footnote58], Accessed 4 April 2026.

29 Regulation (EU) 2024/1689 Of The European Parliament And Of The Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJ L 2024/1689.

30 EDMO hub report, Available at: [https://brodhub.eu/en/republic-of-moldova/report-the-observation-mission-of-the-2025-parliamentary-elections-in-the-republic-of-moldova/ n of the 2025 Parliamentary Elections in the Republic of Moldova – BROD], Accessed 10 April 2026.

cially generated in support of certain candidates or parties, the extensive use of AI-generated content, fake social media pages, and vote-buying.[31] The conclusion reached by the EDS in relation to the situation in Moldova was that, with the support of the EU and other partners, Moldova strengthened its cybersecurity and internal security, the integrity of its judiciary, the capacity of investigative authorities to detect illicit financial flows, including through cryptocurrencies. This experience demonstrated that the most significant vulnerabilities occurred in the online environment. [32]

In summary, the EDS outlined the following measures regarding to strengthen free and fair elections:

- support for enhanced cooperation with Member States within the European Cooperation Network on Elections, with the aim of strengthening electoral integrity and preparedness,
- development of guidance on the use of AI in electoral processes,
- update of the electoral toolbox in accordance with the DSA,
- support for the establishment of a voluntary EU network of influencers,
- support for joint work with Member States in transparency and integrity of political financing,
- development of a Commission Recommendation and a dedicated best practice guide on the security of political candidates and elected representatives,
- strengthening cooperation with international election observers to enhance capacities for monitoring disinformation on social media during election observation activities outside the EU.[33]

Although the stated objectives appear ambitious and reflect the EU's efforts to strengthen free and fair elections, certain concerns cannot be overlooked. In elec-

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31 See reports by FACT - European Digital Media Observatory hub covering MD, Available at. [https://fact-hub.eu/moldova/] and BROD - European Digital Media Observatory hub covering RO and BU, Available at: [https://brodhub.eu/en/republic-of-moldova/], Accessed 10 April 2026.

32 Page 15-16 of Joint Communication to the European Parliament, the Council, the European economic and Social Committee and the Committee of the Regions, European Democracy Shield: Empowering Strong and Resilient Democracies, Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52025JC0791#footnote58], Accessed 4 April 2026.

33 Page 16 of Joint Communication to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions, European Democracy Shield: Empowering Strong and Resilient Democracies, Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52025JC0791#footnote58], Accessed 4 April 2026.

toral matters, the EDS places particular emphasis on the "fight" against disinformation and undesirable political advertising; however, the question remains as to where the boundary lies between disinformation and freedom of expression. The EDS envisages monitoring the information space and mapping information manipulation, yet these concepts are, from a substantive perspective, relatively vague. The DSA, on which the EDS also relies in pursuing its objectives, has faced criticism regarding potential impacts on freedom of expression[34] and do not provide a conceptually sufficient definition of disinformation.[35] The definition of illegal content[36] itself raises concerns, as it may provide a basis for the excessive moderation of digital content that may be controversial or contentious, yet does not necessarily qualify as illegal.[37] Initiatives such as the EDS may certainly be regarded as a positive signal towards strengthening democracy in the EU; however, the protection of democracy requires a consistent commitment to democratic values, which include free and fair elections, but also freedom of speech, political pluralism, plurality of political opinions and parties. This commitment must be understood not only at EU level, but at the level of the Member States. At the same time, the EU should primarily make use of the instruments that have already been adopted and evaluate their practical outcomes. The EDS itself refers to several EU legal acts, such as the Regulation on political advertising, the DSA, the Artificial Intelligence Act, and the European Media Freedom Act, among others.[38] The growing volume of EU legislation may ultimately become counterproductive and create legal and interpretative uncertainty not only for Member States.

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34 On its platform, ADF International addresses issues related to the DSA, criticising in particular the vagueness of key concepts and the risk of censorship and threats to freedom of expression, Available at. [https://adfinternational.org/article/digital-services-act-unpacked], Accessed 10 April 2026.

35 Repiščáková, D., *Removal of illegal content online - conflicts between Slovak and EU legislation?,* STUDIA IURIDICA Cassoviensia, Vol. 13, Special Issue, 2025, p. 144.

36 DSA, Article 3 (h) 'illegal content' means any information that, in itself or in relation to an activity, including the sale of products or the provision of services, is not in compliance with Union law or the law of any Member State which is in compliance with Union law, irrespective of the precise subject matter or nature of that law.

37 Treščáková, D., F*reedom of expression on the internet vs. Digital services act: chosen aspects*¸ in: Duić, D.; Petrašević, T. (eds.), Strong and Secure Europe: Legal and Economic Aspects, EU and Comparative Law Issues and Challenges Series (ECLIC), Issue 9, 2025, p. 141.

38 Reference is also made, for example, to Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union [2022] OJ L 333/80. Regulation (EU) 2024/2847 of the European Parliament and of the Council of 23 October 2024 on horizontal cybersecurity requirements for products with digital elements [2024] OJ L 2847/1. 15. Regulation (EU) 2025/38 of the European Parliament and of the Council of 19 December 2024 laying down measures to strengthen solidarity and capacities in the Union to detect, prepare for and respond to cyber threats and incidents [2022] OJ L 2025/38.

4. CURRENT LEGISLATION AND CASE LAW OF THE SLOVAK REPUBLIC

Efforts by the EU to strengthen free and fair elections as one of the key instruments of a properly functioning democracy can be achieved only to the extent that Member States are willing to adopt effective domestic measures, as well as to ensure their effective implementation within national legal systems. The constitutional basis of electoral law in the Slovak Republic (hereinafter "SR") is enshrined directly in the Constitution of the Slovak Republic No. 460/1992 Coll., as amended (hereinafter "Constitution"). The constitutional concept of elections is grounded in the principle of popular sovereignty expressed in Article 2(1) of the Constitution as follows: "State power originates from citizens, who exercise it through their elected representatives or directly."[39] The right of citizens to participate in the governance of public affairs is set out in Article 30(1) of the Constitution, which provides that: "Citizens have the right to participate in the administration of public affairs either directly or through the free election of their representatives. Foreign nationals with permanent residence in the territory of the SR have the right to vote and to be elected to municipal self-government bodies and to the bodies of higher territorial units."[40] Pursuant to Article 30(3), suffrage is universal, equal and direct, and is exercised by secret ballot. The Constitution does not provide a comprehensive regulation of the electoral process; instead, it is supplemented by means of blanket constitutional provisions.[41] The primary role in this regard is played by Act No. 180/2014 Coll. on the Conditions for the Exercise of the Right to Vote (hereinafter "Election Act")[42] and Act No. 181/2014 Coll. on Election Campaign and on Amendments and Supplements to Act No. 85/2005 Coll. on Political Parties and Political Movements, as amended (hereinafter "Act on Election Campaign"). Prior to the adoption of the current Election Act, the legal regulation of elections to the EP in the SR was governed by a separate Act No. 331/2003 Coll. on Elections to the European Parliament. The new legal framework in the form of the Election Act and the Act on Election Campaign was, at the time of its adoption, assessed by some constitutional lawyers as a missed opportunity, lacking more substantial

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39 Article 2(1) of the Constitution of the Slovak Republic No. 460/1992 Coll.

40 Article 30(1) of the Constitution of the Slovak Republic No. 460/1992 Coll.

41 A reference to the legal regulation of the electoral process is found, inter alia, in Article 30(3) of the Constitution of the Slovak Republic No. 460/1992 Coll.

42 Annex 2 to the Election Act sets out a list of transposed legally binding acts of the European Union, including the following: Council Directive 93/109/EC of 6December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals [1993] OJ L 329/34 and Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals [1994] OJ L 368/38.

reforms and failing to reflect modern developments.[43] Although it has since undergone several amendments, there remain areas in which, it appears that it does not provide fully effective regulatory mechanisms. For example, the Act on Election Campaign explicitly provides that certain measures concerning the publication of information during the election campaign (for instance 48 hours before election day) do not apply to broadcasting via the internet.[44] In this context, however, what is meant is radio and television broadcasting transmitted via the internet.[45] But in general this approach does not reflect fully coherent regulatory measures and creates a certain gap in the regulation of online electoral campaigning. Another example can be found in the Constitutional Court's case-law concerning the application of the electoral moratorium to the dissemination of posts via social media platforms, inter alia in decisions PL. ÚS 25/2015 and PL. ÚS 53/2018. The Court held that social networks - specifically Facebook within this context - do not qualify as channels for regular public information. As such, they fall outside the ambit of mass media, thereby exempting them from the statutory prohibition under Section 30(11) of the Election Act (now Section 14(1) of the Electoral Campaign Act). However, given the ever-growing influence of social media on electoral campaigns, such interpretation may no longer suffice. The internet itself is inherently problematic, given that search engines alone possess the capacity to manipulate information and distort electoral outcomes to the benefit of a particular political viewpoint.[46]

In the legal order of the SR, the mechanism of objective and independent review of the constitutionality and legality of elections is entrusted to different bodies depending on whether the review concerns the preparatory phase of elections (in which electoral registers are compiled, candidate lists are registered, etc.) or the post-electoral phase (i.e., the phase following the conclusion of elections and the announcement of their results). With regard to elections to the EP, the Supreme Administrative Court decides in proceedings concerning the registration of candidate lists for elections to the EP[47] (the preparatory, registration phase of the elec-

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43 Orosz, L., *Nové volebné zákony na Slovensku – kvalitatívny skok, evolučný krok, či premárnená šanca*, in: Orosz, L.; Majerčák, T. (ed.), Aktuálne problémy volebného práva – nové volebné zákony, UPJŠ, Košice, 2015, p. 31.

44 Reference may be made to Section 12(6) or Section 14(2) of Act No. 181/2014 Coll. on Election Campaign and on Amendments and Supplements to Act No. 85/2005 Coll. on Political Parties and Political Movements, as amended.

45 Domin, M. *Volebné právo a volebné systémy*, 2. vydanie, Wolters Kluwer, Bratislava, 2021, p. 370.

46 Adamov Kráľová, V.; Fogašová, F., *Volebná kampaň v online priestore: medzi reguláciou a anarchiou,* in: Orosz, L; Makaturová, M. (eds.), Právna regulácia volebnej kampane a jej uplatňovanie vo volebnej praxi v Slovenskej republike a vo vybraných štátoch Rady Európy. Zborník príspevkov z vedeckej konferencie. Veľká Tŕňa 15. – 16. mája 2025, UPJŠ, Košice, 2025, p. 52.

47 Section 11(b) of Act No. 162/2015 Coll., the Administrative Judicial Code.

tions), while the Constitutional Court of the Slovak Republic (hereinafter "Constitutional Court") decides on the legality and constitutionality of elections to the EP in the form of *ex post* electoral review.[48] In this section, attention will be paid to the *ex post* review of elections to the EP.

References to elections to the EP are nevertheless embedded in the Constitution in Article 77(1), which defines the incompatibility of the office of a Member of the EP and a Member of the National Council of the Slovak Republic, as well as in the Article 129(2) of the Constitution, which entrusts the review of the constitutionality and legality of elections to the EP to the Constitutional Court.[49] The procedural framework for judicial review of elections to the EP is laid down in the part regulating the Procedure in electoral matters ("electoral justice") in the Chapter Ten of Part Five of Act No. 314/2018 Coll. on the Constitutional Court of the Slovak Republic and on Amendments and Supplements to Certain Acts (hereinafter "ACC"). This constitutes a unified procedural framework for proceedings concerning the constitutionality and legality of elections to the office of President of the SR, elections to the National Council of the SR, as well as elections to the EP.

According to Section 156 of the ACC, the purpose of electoral proceedings is to remedy potential unconstitutionality or unlawfulness of the challenged elections, thereby ensuring the free competition of political forces. The essence of constitutional review lies in the protection of fundamental rights guaranteed under Article 30 of the Constitution, namely the right to vote and the right to be elected. The legality of elections is understood, in particular, as their conduct in accordance with all applicable statutory electoral legislation, where, according to the established case law of the Constitutional Court, there must be a causal link between such a breach and its consequences for the rights of the persons concerned, which ultimately amounts to a violation of electoral rights and their underlying principles.[50] The jurisdiction of the Constitutional Court to decide on the constitutionality and legality of elections to the EP was conferred on it by Constitutional Act No. 323/2004 Coll. upon the accession of the SR to the EU. Standing to file a motion is granted to a political party or political movement, or their coalition, which has submitted a valid candidate list under special legislation.[51] Beyond the general requirements, an electoral complaint must contain the specific particulars prescribed by Section 158 of the ACC. The statutory time limit for filing an

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48 Article 129(2) of the Constitution of the Slovak Republic No. 460/1992 Coll.

49 Domin, M., *Volebné právo a volebné systémy*, Wolters Kluwer, Bratislava, 2017, p. 274.

50 Macejková, I.; Bárány, E.; Baricová, J.; Fiačan, I.; Holländer, P.; Svák, J. and col., *Zákon o ústavnom súde Slovenskej republiky. Komentár,* 1. edition, C. H. Beck, Bratislava, 2020, p. 1166.

51 Section 157(2) of Act No. 314/2018 Coll. on the Constitutional Court of the Slovak Republic and on Amendments and Supplements to Certain Acts.

electoral complaint is ten days, commencing from the announcement of the election results.[52] Failure to comply with this time limit results in the rejection of the complaint. Compliance with the statutory time limit is also of significance in relation to the submission of evidence, as the Constitutional Court will not consider evidence submitted after the expiry of that time limit.[53] The ACC also provides the Constitutional Court with a 90-day time limit to decide on the complaint, running from the date of its delivery. The law prescribes several types of decisions. The Constitutional Court may (1) declare the elections invalid, (2) annul the contested election results, (3) annul the decision of the electoral commission and declare elected the candidate who was duly elected, or (4) dismiss the motion.[54] The judgment of the Constitutional Court becomes final and enforceable on the day it is delivered to the National Council of the SR.[55]

Broadly speaking, it may be contended that the development of case law is evolutionary in nature, and the doctrinal assessment of specific questions is inevitably subject to ongoing shift.[56] Electoral jurisprudence is characterised by a certain periodicity, given the periodic nature of elections themselves. In the case of elections to the EP, this period is five years. The first elections to the EP in the Slovak Republic were held following the accession of the Slovak Republic to the European Union in 2004, and since then they have been held on four further occasions (in 2009, 2014, 2019 and most recently in 2024). The decision-making activity of the Constitutional Court in matters concerning the constitutionality and legality of elections to the European Parliament is relatively limited and case-specific. There are not many decisions that directly concern elections to the EP. For example, in the 2019 the Constitutional Court dealt with proceedings PL. ÚS 15/2019[57] and PL. ÚS 21/2019[58], both applications were dismissed. In proceedings concerning alleged unconstitutionality or unlawfulness of elections to the EP, certain key decisions of the Constitutional Court may be applied *mutatis*

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52 Section 159 of Act No. 314/2018 Coll. on the Constitutional Court of the Slovak Republic and on Amendments and Supplements to Certain Acts.

53 Orosz, L.; Svák, J. and col., *Ústava Slovenskej republiky. Komentár. Zväzok II.,* Wolters Kluwer SR s.r.o., Bratislava, 2022, p. 490.

54 Section 163(1) of Act No. 314/2018 Coll. on the Constitutional Court of the Slovak Republic and on Amendments and Supplements to Certain Acts.

55 Section 163(3) of Act No. 314/2018 Coll. on the Constitutional Court of the Slovak Republic and on Amendments and Supplements to Certain Acts.

56 Macejková, I.; Babják, M.; Mihaľov, J.; Mozešová, Z., *Volebné sťažnosti v rozhodovacej činnosti Ústavného súdu Slovenskej republiky,* Vydavateľstvo EUROUNION, spol. s r.o., 2016, p. 17.

57 Decision of the Constitutional Court of the Slovak Republic, file no. PL. ÚS 15/2019, of 26 June 2019 - application was dismissed to the failure to obtain the required majority within the Plenum.

58 Decision of the Constitutional Court of the Slovak Republic, file no. PL. ÚS 21/2019, of 29 April 2020 - application was dismissed on the grounds that it was lodged out of time.

mutandis. For instance, in decision PL. ÚS 10/2020, the Constitutional Court, emphasised the importance of the electorate's decision as the sovereign, which may be altered only in exceptional circumstances: "only where a breach of law occurs in a manner affecting the free competition of political forces in a democratic society … the exercise of this power requires a gross or serious breach, or repeated breaches, of laws governing the preparation and conduct of elections. Not every breach of electoral law necessarily leads to the invalidity of elections. … The decision of the electorate as sovereign may therefore be altered by the Constitutional Court only in exceptional cases where defects in the electoral process have caused, or could demonstrably have caused, that voters would have decided differently and that a different candidate (i.e., a political party, political movement, or their coalition) would have been elected…"[59] Not every finding of unconstitutionality or illegality occurring during an election will lead to judicial interference with the election results; within the SR, the review of the constitutionality of elections does not apply the doctrine of absolute electoral defects, as these possess merely a relative character contingent upon other factors.[60] The line of case law reflects approach of the Constitutional Court towards electoral outcomes, grounded in the principle of popular sovereignty, therefore judicial intervention is conceived as strictly exceptional and limited. As a result, the Constitutional Court's established practice has not, to date, led to the annulment of the results of elections to the EP.

Based on the legal regulation of constitutional review of elections to the EP under the ACC, it may be concluded that, this review does not differ substantially from the process of reviewing elections to the National Council of the SR. In contrast to elections to the EP, in the case of elections to the National Council of the SR the Constitutional Court exercises full jurisdiction over the entire electoral process and provides comprehensive and, in principle, final review. In the case of EP elections, given their supranational nature, the Constitutional Court's review constitutes only a partial, nationally confined judicial review. A further question arises as to what possible impact, the adoption of a legislative resolution[61] or the introduction of additional instruments associated with the application of the EDS in practice would have on this process. It follows from the annex to the legislative resolution containing the draft Regulation on the direct and universal elections

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59 Paragraphs 38 and 39 of the Decision of the Constitutional Court of the Slovak Republic, file no. PL. ÚS 10/2020, of 29 April 2020.

60 Domin, M. *Volebné právo a volebné systémy,* 2. edition, Wolters Kluwer, Bratislava, 2021, p. 397.

61 European Parliament legislative resolution of 3 May 2022 on the proposal for a Council Regulation on the election of the members of the European Parliament by direct universal suffrage, repealing Council Decision (76/787/ECSC, EEC, Euratom) and the Act concerning the election of the members of the European Parliament by direct universal suffrage annexed to that Decision (2020/2220(INL) — 2022/0902(APP)) [2022] OJ C 465/171.

of Members of the EP that each voter would have two votes: one for the election of Members of the EP in national constituencies, and one for the election in a constituency covering the entire Union. Members of the EP would be elected as representatives of EU citizens under a system of proportional representation, both in national constituencies and in a Union-wide constituency (from a transnational candidate list).[62] In this context, it is reasonable to assume that the jurisdiction of the Constitutional Court (and thus the national competence of Member States) in judicial review of elections could be further limited or modified by the adoption of the proposed measure. At the same time, however, it is necessary to consider which authority at EU level would potentially assume such functions and how such a mechanism might operate in practice.

5. CONCLUSION

The system governing electoral law at EU level exhibits a dynamic and evolving tendency, responding to social, geopolitical, and technological developments. The legislative framework and the proposed instrument, which introduce changes to electoral legislation, appear to contribute to a gradual transformation of the understanding of elections to the EP. They move from a structure based on the concept of separate electoral constituencies of Member States towards a model that extends into Member States' competences not only in the "preparatory" stage of elections, but also in key areas defining a common electoral constituency, active and passive electoral rights, the formation of candidate lists, and related matters. It is plausible that, if such a proposal were to pass the legislative process (although this has not yet occurred), it would necessitate corresponding adjustments to the domestic legal frameworks of Member States. It cannot be excluded that the proposed changes would ultimately affect even the level of judicial review of elections at the national level.

As regards the EDS in the context of strengthening free and fair elections, several problematic aspects have already been outlined in Chapter 2 of this article. The initiative may be viewed as a continuation of the EU's broader and coordinated efforts aimed at strengthening democracy. However, references to enhancing democratic governance must ultimately be accompanied by concrete measures and clearly defined objectives. The EU already possesses several instruments capable of facilitating a coordinated approach to democratic resilience across the Member

[62] Draft Article 12 of the European Parliament legislative resolution of 3 May 2022 on the proposal for a Council Regulation on the election of the members of the European Parliament by direct universal suffrage, repealing Council Decision (76/787/ECSC, EEC, Euratom) and the Act concerning the election of the members of the European Parliament by direct universal suffrage annexed to that Decision (2020/2220(INL) — 2022/0902(APP)) [2022] OJ C 465/171.

States. Nevertheless, the use of such instruments requires careful coordination, particularly considering the principles of Member State sovereignty and national responsibility for democratic governance. Importantly, when the EDS refers to the strengthening of free and fair elections, it does not limit its scope to elections to the EP. Rather, it encompasses all electoral processes, including those falling within the exclusive competence of the Member States. In this respect, concerns may arise regarding measures that could potentially extend beyond the scope of powers conferred upon the EU under the Treaties.

Particularly contentious is the issue of identifying and addressing harmful content, including disinformation and other forms of online manipulation. In this area, measures aimed at combating harmful content may create tensions with the protection of freedom of expression. Although the EDS advocates broader public participation in democratic processes, some of the mechanisms envisaged for strengthening democracy may be perceived as reflecting an increased level of coordination at the Union level, particularly in relation to matters such as political campaign financing, the detection and countering of disinformation, and related regulatory initiatives. A separate issue concerns cooperation with social media influencers. Such cooperation may indeed represent an effective means of engaging younger generations in democratic processes. At the same time, it carries the risk of exerting influence that may not necessarily correspond with the intended democratic objectives.

Another challenge associated with the EDS lies in the relative vagueness of certain proposals. Several of the envisaged initiatives remain insufficiently specified, making it difficult to determine their precise implications for electoral processes. This is particularly evident in the EDS's references to the use of artificial intelligence in the political activities. The EU envisages cooperation with Member States and relevant stakeholders in the development of specific guidance on the fair, transparent, human-centred, and accountable use of artificial intelligence in electoral processes. Yet the practical meaning and operational implications of concepts such as "fair" and "human-centred" remain uncertain in the electoral context. If the use of AI tools and other digital technologies directly within electoral processes is contemplated, particular caution is required. Such technologies must be assessed against the fundamental principles of electoral law, including, most notably, the principles of free elections and the secrecy of the ballot. The legislative resolution, in draft Article 8, proposes that Member States provide additional voting options, for example voting via electronic and internet-based systems, which may easily come into conflict with the principle of secrecy of the ballot, as well as with the issue of subsequent judicial review of elections, where the assessment of legality will require a specific type of scrutiny.

Emerging challenges associated with increasingly sophisticated methods of electoral influence require Member States not only to adapt the administration of elections themselves, but also to adjust the mechanisms through which the constitutionality and legality of elections are reviewed. These developments may significantly complicate both the identification of actors seeking to influence electoral processes and the assessment of the actual impact of such activities on electoral outcomes. As follows from the case law of the Constitutional Court, not every instance of unconstitutionality or illegality occurring during the electoral process justifies judicial intervention in election results. The invalidation of an election or the election of a candidate may result only from such serious violations of electoral law as call into question the election results themselves and reasonably give rise to doubts as to whether the elections and their outcome genuinely reflect the will of the electorate.[63] In this regard, particularly problematic are forms of influence that are difficult to detect, operate within the online environment, and may manipulate voters through prohibited means. It therefore remains to be seen to what extent the initiatives associated with the EDS will effectively address these challenges and what consequences their implementation may have for the jurisdiction and constitutional responsibilities of the Member States in the field of electoral governance.

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[63] Orosz, L.; Svák, J. and col., *Ústava Slovenskej republiky. Komentár. Zväzok II.,* Wolters Kluwer SR s.r.o., Bratislava, 2022, p. 491

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Review article

FROM EU POLICY TO LOCAL PRACTICE: IMPLEMENTING GREEN PUBLIC PROCUREMENT IN CROATIA

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ABSTRACT

Green public procurement (GPP) has emerged as one of the key instruments through which the European Union seeks to achieve its environmental, climate, and sustainability objectives. By leveraging the purchasing power of the public sector, EU policy aims to stimulate markets for environmentally preferable goods, services, and works, while simultaneously contributing to broader strategic goals such as climate neutrality, circular economy, and resource efficiency. The paper therefore explores the extent to which European framework and policy objectives on green public procurement are reflected in the Croatian legal framework and implemented in procurement practice. The analysis is conducted using a combination of doctrinal legal research, qualitative examination of strategic and policy documents, and empirical data gathered through structured interview with local public authority.

The first part of the paper examines the European legal framework governing green public procurement, in which Directive 2014/24/EU operates as the overarching legal instrument establishing the horizontal legal basis for integration of environmental considerations into public

procurement procedures, complemented by sector – specific legislation. The second part of the paper analyses the Croatian legal framework and the extent to which European standards on green procurement have been transposed into national law and supported by strategic policy documents. Although the application of green procurement criteria is not mandatory for local government units, the authors sought to examine the underlying reasons for their limited implementation. Consequently, the final part of the paper presents findings on implementation at the local level, highlighting key challenges such as limited administrative and financial capacity, insufficient constraints, and legal uncertainty. The paper concludes with recommendations for strengthening the effectiveness of GPP in Croatia.

***Keywords**: Croatian legal framework, Directive 2014/24/EU, European Green Deal, Green public procurement, Most economically advantageous tender (MEAT), Recommendations*

1. INTRODUCTION

Green public procurement (GPP) has, over the past two decades, evolved from a policy aspiration into a central instrument of the European Union's regulatory strategy for achieving environmental and climate objectives. By mobilising the significant purchasing power of the public sector, the EU seeks not only to promote the uptake of environmentally sustainable goods, services, and works, but also to reshape market behaviour in line with broader goals of climate neutrality, resource efficiency, and the transition to a circular economy.[1]

Despite this strategic repositioning, the legal nature of GPP within the EU remains characterised by a certain degree of ambiguity. While Directive 2014/24/EU establishes the overarching legal framework for public procurement and enables the integration of environmental considerations (most notably through the criterion of the most economically advantageous tender – MEAT), the application of green criteria largely retains a facultative character. This tension between voluntary implementation and emerging expectations of mandatory integration reflects a broader structural challenge within EU public procurement law: the need to reconcile traditional economic objectives, such as competition and cost-efficiency, with increasingly prominent strategic and sustainability-driven goals.[2]

At the same time, the progressive development of sector-specific regulations and strategic policy instruments, such as the European Green Deal and the Circular Economy Action Plan, indicates a clear shift towards strengthening the role of public procurement as a tool of environmental governance. However, the fragmentation

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1 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Public procurement for a better environment,* COM/2008/0400 final.

2 Kuitert, L., *Public Values in Procurement, in: Public Procurement, Theory, Practices and Tools*, in: Grandia, J.; Volker, L. (eds.), Palgrave Macmillan, 2023, p. 28.

of the normative framework, combined with the absence of a uniform definition and the uneven application of green criteria across Member States, continues to raise questions regarding legal certainty, coherence, and effective implementation.[3] These challenges become particularly evident at the national level, where Member States are responsible for transposing EU directives and operationalising policy objectives within their domestic legal systems. In the Republic of Croatia, the formal alignment of the public procurement framework with EU law, primarily through the Public Procurement Act, provides a solid normative basis for the integration of environmental considerations. Nevertheless, the extent to which these legal provisions translate into consistent and effective practice remains subject to significant limitations. Empirical data indicate a persistent gap between the ambitious objectives set out in strategic documents and their actual implementation, suggesting that the existence of a formal legal framework does not, in itself, guarantee substantive outcomes. [4]

Against this background, this paper examines the relationship between the European legal and policy framework on green public procurement and its transposition and implementation within the Croatian legal system. It seeks to determine whether the existing normative and strategic framework is capable of delivering the environmental objectives it formally endorses, or whether structural deficiencies undermine its effectiveness in practice. To this end, the analysis is structured in three parts. The first part outlines the European legal framework governing green public procurement, with particular emphasis on Directive 2014/24/EU and the evolving body of sector-specific legislation. The second part examines the Croatian normative and strategic framework, assessing the degree of alignment with EU requirements and the coherence of domestic regulatory instruments. Given that the application of green criteria is discretionary for local government units, the question arises as to whether this voluntary nature is the sole factor underlying their infrequent adoption, or if more profound underlying causes exist. Therefore, the third part presents the results of empirical research on the implementation of GPP at the local level, identifying key practical barriers and proposing measures for strengthening both the legal and institutional framework. By combining doctrinal legal analysis with empirical insights, the paper aims to contribute to the broader discussion on the transformation of public procurement from a predomi-

[3] Ozcelik, N.; Rey-García, M.; Mato-Santiso, V., *Enablers and barriers to European Green Deal implementation: A systematic review and framework proposal,* Sustainable Production and Consumption, Vol. 61, 2025, p. 167.

[4] An analysis of the available Statistical Annual Reports issued by the Ministry of Economy in Croatia indicates a modest increase in the application of green criteria in public procurement procedures. However, these figures still fall short of the levels envisaged by strategic documents, as well as by national legislation and the European Union (Statistical reports available at: [https://www.javnanabava.hr/statistika-javne-nabave/statisticka-godisnja-izvjesca].).

nantly economic mechanism into a strategic regulatory tool capable of supporting the EU's environmental and sustainability agenda.

2. EUROPEAN REGULATION OF GREEN PUBLIC PROCUREMENT

The European framework for GPP comprises a set of policies, guidelines, and criteria developed by the European Commission to assist public authorities in purchasing goods, services, and works with a reduced environmental impact. In this context, the framework includes public procurement directives that enable the inclusion of environmental criteria, life-cycle costing, and eco-labels. On the other hand, regulations may also be considered that set specific rules and criteria, defining standards for sustainability and climate change. In addition to the above, the European Green Deal and the Circular Economy Action Plan constitute an important framework as strategic documents.[5]

The abstract of this paper highlights the key directive that represents the foundation for the application of green public procurement. This is Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC. It establishes rules on procurement procedures conducted by contracting authorities regarding public procurement contracts and design contests whose estimated value is not less than the thresholds set in Article 4 of the same Directive, and it enables the inclusion of environmental criteria through the "most economically advantageous tender (MEAT)."[6] According to the Directive, procurement means "the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose."[7] Another important directive is Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport, and postal services sectors and repealing Directive 2004/17/EC. It enables the use of environmental and innovation criteria.[8]

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5 European Commission, Communication from the Commission to the European Parliament, The European Council, The Council, The European Economic and Social Committee and the Committee of the Regions, *The European Green Deal,* COM/2019/640 final.

6 The threshold amounts are established in Article 4 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94 (Public Procurement Directive).

7 *Ibid.*

8 See Directive 2014/25/EU of the European Parliament and the Council of 6 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L 94/243.

At the European Union (hereinafter: EU) level, the application of green criteria in public procurement procedures is still classified as voluntary. However, although a large part of the method and scope of their implementation remains within the domain of the discretionary judgment of individual Member States, it can be argued that a certain general obligation for their application exists, at least to a limited extent. It is considered that green public procurement has the potential to contribute to environmental improvement and the expansion of green technologies.[9]

Specifically, within the framework of general principles contained in Directive 2014/24/EU, which act as horizontal principles in all public procurement procedures within the EU, it is prescribed that Member States shall take appropriate measures to ensure that, in the performance of public contracts, economic operators comply with applicable obligations in the fields of environmental, social, and labor law established by Union law, national law, collective agreements, or by the international environmental, social, and labor law provisions listed in Annex X.[10] In light of the above, although there is no explicit obligation to implement green public procurement, it can be concluded that there is a certain level of obligatoriness arising from the application of the stated principle, especially in the contract performance phase. In other words, Member States are imposed with an obligation to integrate relevant environmental, social, and labor law standards, but by referring to a broader regulatory framework that regulates the field of environmental protection in detail in the context of the implementation of green criteria relevant to this paper.

Despite this, the European Commission, in its recent reports, points to numerous ambiguities regarding the implementation of the provision in question. It is particularly emphasized that this specific provision, during more than a decade of its practical application, has generated the largest number of open questions in practice by Member States and contracting authorities.[11] An additional complexity is the issue of the distribution of responsibility for the implementation of this provision. Namely, although the norm formally obligates Member States to take appropriate measures, national transposition regulations often transfer this responsibility to contracting authorities, who then frequently delegate it to other competent bodies. Consequently, in practice, ambiguities arise regarding who is specifically responsible for ensuring its effective implementation, which ultimately may limit its actual impact. In this context, Altaee points out how procurement

9 Aldenius, M.; Khan, J., *Strategic Use of Green Public Procurement in the Bus Sector: Challenges and Opportunities*, Journal of Cleaner Production, Vol. 164, 2017, p. 250.

10 Art. 18(2) of the Directive 2014/24/EU.

11 European Commission, *Commission Staff Working Document Evaluation of Directive 2014/23/EU on Concessions, Directive 2014/24/EU on Public Procurement and Directive 2014/25/EU on Utilities.*

experts indicate the increasing complexity of the system, arising from the expansion of sectoral legislation. Such legislation introduces additional environmental requirements that contracting authorities must apply alongside the existing framework of the 2014 Directives. The fragmentation of the normative framework, along with the absence of clear mechanisms for hierarchy and coherence, can lead to the overloading of entities responsible for implementing public procurement and consequently diminish the effectiveness of the policies themselves.[12]

Furthermore, a certain tension is observed between the existence of a general principle and the varying levels of its implementation among Member States.[13] Such differences call into question the level of coherence of the system, as well as the effectiveness of the efforts made by the European Commission in providing guidelines for the practical application of green criteria. It should also be noted that the provision in question is often referred to in literature and practice by the term "social horizontal clause." However, such a terminological designation can be misleading, as its content does not exclusively encompass socially responsible aspects but explicitly includes requirements related to environmental protection. Despite the existence of the mentioned general sustainable principle, there are no additional normative provisions that would unequivocally point to the mandatory nature of the application of green criteria in public procurement procedures within the EU. Consequently, in legal theory and practice, the position has been taken that their application is essentially facultative in nature, with Member States deciding on the scope and method of application.

At the European level, the problem of a potential conflict between different public procurement objectives is also highlighted. On one hand, the emphasis is on ensuring market efficiency and respecting economic principles, while on the other hand, contracting authorities are expected to implement sustainable, i.e., strategic criteria. Consequently, contracting authorities find themselves in a situation where they need to achieve ambitious public policy goals while simultaneously operating within a strictly defined regulatory framework and often without sufficiently clear operational guidelines for the implementation of such goals.[14] An additional challenge is the lack of a clear definition of green public procurement at the EU level, which has led to significant regulatory differences among Member States, both in terms of the conceptual definition itself and in the method of implementing green criteria.[15] Although Directive 2014/24/EU was conceived as a directive of

12 *Ibid.,* p. 59.

13 *Ibid.,* p. 37.

14 *Ibid.,* pp. 35 – 36.

15 *Ibid.*

minimum harmonization, i.e., as a general framework that leaves room for Member States to adapt to a greater extent, such an approach has resulted in significant divergences in practice. While some Member States apply green criteria in a very high share of the total value of public procurement, others are still in the initial stages of their implementation. These variations are, therefore, a product of the optional nature of the strategic role of public procurement.

The development of the strategic dimension of public procurement at the EU level can be monitored more intensively since 2008, while in the previous period, public procurement was primarily focused on achieving economic goals. As a result of New Public Management measures and the market orientation of public administration, such values were reflected in public procurement, which primarily mirrored the satisfaction of a sufficient level of market competition and the principle of non-discrimination.[16] One of the key documents towards the strategic development of public procurement is the 2008 European Commission Communication titled Public Procurement for a Better Environment, which proposes a definition of green public procurement and lays the foundations for the development of common criteria at the EU level.[17] It encouraged the inclusion of environmental criteria in public procurement procedures and set a goal that 50% of procedures by 2010 should be "green." Since the goal was not legally binding, its implementation was limited. Only certain Member States reached a higher level of green criteria application, while the majority remained significantly below the set threshold.[18] After 2008, the European Commission developed a series of voluntary criteria for priority sectors, such as IT equipment, food, transport, and construction, which it updated regularly. These criteria served as guidelines for procurers, with the possibility of their adaptation to national and local circumstances. During this period, the EU focused on providing education, guidance, and technical support, while many Member States adopted national action plans and strategies. However, such a voluntary approach did not ensure uniform and broad application, as measures often related only to specific sectors or procurement categories.[19] Simultaneously, binding measures were introduced in certain areas, especially regarding energy ef-

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16 Böttge, I.; Kumpar Zidanič, H.; Tzamalikou, A., *From Green Vision to Legal Obligation: The Case for Making Green Public Procurement Mandatory,* Croatian Yearbook of European Law and Policy, Vol. 19, No. 1, 2023, p. 252.

17 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *op. cit.,* note 1, Accessed on 18 April 2026.

18 Renda, A. *et al., The Uptake of Green Public Procurement in the EU27, Study*, Brussels: Centre for European Policy Studies and College of Europe, 2012, p. 23.

19 Mähönen, M. *et al., Public Procurement for Climate Neutrality: A Transformative Policy Instrument?* D4.2: 4i-TRACTION case study report, Berlin, University of Eastern Finland & Ecologic Institute, 2023, p. 15.

ficiency and the procurement of low-emission vehicles[20], thereby setting specific standards in those sectors. However, the general public procurement system still did not contain a horizontal obligation to apply green criteria.

The European Green Deal, which was highlighted at the very beginning of this chapter and established in the Commission Communication of 11 December 2019, is a European strategy for sustainable growth and aims to transform the Union into a fair and prosperous society with a modern, competitive, climate-neutral, and circular economy and a non-toxic environment. The Plan sets the goal of ensuring that the Union becomes the first climate-neutral continent by 2050 and recognizes the benefits of investing in the Union's competitive sustainability by building a fairer, greener, and more digital Europe.[21] In this context, the European Green Deal opened space for redefining the role of public procurement as a key instrument for achieving environmental and economic goals. Public procurement began to be increasingly viewed as a strategic tool for encouraging sustainable market practices, which was also emphasized by the strategic documents that preceded the European Green Deal.[22] Despite these ambitious announcements, the implementation of the Green Deal in the field of green public procurement has proven to be partial and uneven. The Commission continued to develop voluntary criteria, even in priority sectors such as IT equipment, although the view that such an approach is not effective enough increasingly prevailed among decision-makers. In certain sectors, binding measures were not introduced or were significantly weakened, while existing instruments were rarely combined in a way that would allow for their full effectiveness. The complexity of the regulatory framework and different approaches among sectors contribute to legal uncertainty and uneven application among Member States in the context of green public procurement,[23] and the aforementioned also points to the fact that the transition from a voluntary to a mandatory model is not a linear process.

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20 Thus, for instance, Article 1 of Directive (EU) 2019/1161 of the European Parliament and of the Council of 20 June 2019 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles stipulates that "Member States shall ensure that contracting authorities and contracting entities, when procuring certain road transport vehicles, take into account lifetime energy and environmental impacts, including energy consumption and emissions of CO2 and of certain pollutants, with a view to promoting and stimulating the market for clean and energy-efficient vehicles and improving the contribution of the transport sector to the environment, climate and energy policies of the Union.".

21 Regulation (EU) 2024/1735 of the European Parliament and of the Council of 13 June 2024 on establishing a framework of measures for strengthening Europe's net-zero technology manufacturing ecosystem and amending Regulation (EU) 2018/1724, [2024] OJ L, 28 June 2024, Art. 1.

22 Commission Communication 2017 and Action Plan for Circular Economy 2020 are emphasizing the need to introduce mandatory criteria and targets for green public procurement.

23 European Parliament, *Report on public procurement* (2024/2103(INI)), A10-0147/2025, July 18, 2025, point 13.

To achieve environmental protection goals, including the fight against climate change and the transition to a circular economy, it is necessary, without disproportionately increasing bureaucracy and costs for economic operators, especially small and medium-sized enterprises ("SMEs"), to establish new obligations in the field of environmental protection and lay the foundations for the development and application of assessment methods for calculating the environmental sustainability of construction products. Calculations should cover the product's life cycle using methods established by standardization.[24]

European Union legislation is now developing in a direction where green public procurement (GPP) becomes mandatory in an increasing number of sectors, with the focus shifting from merely prescribing "how to buy" to defining "what to buy," or more precisely "what not to buy," expanding the way in which contracting authorities should understand the broader costs of their procurements.[25]

The European framework for green public procurement represents a strategic framework regarding the implementation of environmental protection policy at the European Union level. The overview of directives and regulations and the analysis of the most important fundamental directive from 2014 indicate that the entirety of public procurement is transforming from an economic into a strategic regulatory tool. Differences in the level of implementation among Member States show that there is substantial fragmentation in practice and that work must be done on ensuring the harmonization of the GPP application model. The development of strategic documents such as the European Green Deal and circular economy policies confirm a clear direction towards the increasingly strong integration of environmental requirements into all phases of public procurement. Questions regarding legal certainty, implementation, and the distribution of responsibility between the EU and national procurers remain open. It is crucial to focus on the question of "what to procure" at both the European and national levels.

3. CROATIAN NORMATIVE AND STRATEGIC FRAMEWORK OF GREEN PUBLIC PROCUREMENT

In the Republic of Croatia, the legal framework for public procurement is established by the Public Procurement Act (Official Gazette No. 114/2022), which, to a large extent, transposes and implements the provisions of Directive 2014/24/

[24] Regulation (EU) 2024/3110 of the European Parliament and of the Council of 27 November 2024 laying down harmonised rules for the marketing of construction products and repealing Regulation (EU) No 305/2011, [2024] OJ, 18 December 2024, Art. 7.

[25] Andhov, M.; Yukins, C. R., *A Transatlantic Analysis of EU and U.S. Strategies in 'Green Procurement'*, The Government Contractor, Vol. 66, 2024, p. 4.

EU. This ensures a high level of alignment of national legislation with the EU acquis, at least in a formal, i.e. normative sense. The Act functions as a *lex generalis* in the field of procurement and introduces the criterion of the most economically advantageous tender, which enables the inclusion of environmental and socially responsible aspects in the tender evaluation process.[26] This creates room for the application of green public procurement. The field of green public procurement is further specified through sectoral legislation regulating particular areas, such as the Act on the Promotion of Clean Vehicles in Road Transport (Official Gazette No. 52/2021)[27] and the Energy Efficiency Act (Official Gazette No. 155/2025).[28]

The role of public procurement in achieving broader social and environmental progress has been recognised in a number of strategic documents of the Republic of Croatia. However, until 2015, there was no comprehensive document that systematically and exclusively addressed the potential of green public procurement as a distinct public policy instrument. The first significant step in this direction was the adoption of the National Action Plan for Green Public Procurement for the period 2015–2017, with a projection to 2020. Although elements of sustainable procurement had been present in earlier strategic documents, such as the Third National Energy Efficiency Action Plan, which identifies green public procurement as one of the measures, it was only with this document that a framework for the integration of environmental criteria into public procurement procedures was established. The development of the Action Plan was conditioned by obligations arising from the legal and political framework of the European Union, with the aim of ensuring the systematic introduction of green criteria into procurement processes across Member States. The central objective of the Plan was defined quantitatively, namely to achieve that by 2020, half of all public procurement procedures in the Republic of Croatia would be conducted using environmental

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26 Article 284(1) of the Public Procurement Act, Official Gazette, No. 120/16, 114/22.

27 Article 1 of the Act on the Promotion of Clean Vehicles in Road Transport, Official Gazette, No. 52/2021, establishes an obligation for contracting authorities and contracting entities that, in the public procurement of certain road transport vehicles, for the purpose of promoting and stimulating the market for clean and energy-efficient vehicles and increasing the contribution of the transport sector to Union policies relating to environmental protection, climate and energy, they take into account energy and environmental impacts over the entire lifetime of the vehicles, including energy consumption, CO_2 emissions and emissions of certain pollutants.

28 Article 24(1)(c) provides that the criteria laid down in the *Energy Efficiency Act* shall apply, for example, where a product or service is covered by EU green public procurement criteria or by available equivalent national criteria. With regard to the energy efficiency of products or services, contracting authorities and contracting entities shall make efforts to procure only those products and services that meet at least the technical specifications defined at the "basic" level of the relevant EU green public procurement criteria or equivalent national criteria, including, inter alia, data centres, server rooms and cloud services, road lighting and traffic signalling, as well as computers, displays, tablets and smartphones *(*Official Gazette, No. 155/25).

criteria.[29] In order to operationalise this objective, the Plan envisaged the selection of priority categories of goods and services with the greatest potential for the rapid and straightforward implementation of green criteria. In doing so, factors such as environmental impact, the potential for reducing greenhouse gas emissions, contributions to energy efficiency, and the relative share of specific product categories in overall public procurement at the national level were taken into account.[30] Based on these criteria and the practices of other Member States, printing and copying paper, office and IT equipment, and motor vehicles were identified as priority categories. In addition to its normative dimension, the Action Plan also aimed to raise awareness of the importance of green public procurement among stakeholders involved in procurement procedures, which resulted in the introduction of various educational activities and training programmes. Nevertheless, it should be emphasised that the setting of a 50% target was highly ambitious, particularly in the context of the legal framework at the time, in which the application of green criteria was not mandatory but merely recommended.

An analysis of available data indicates that the target has not been achieved even after 2020. It is estimated that the share of contracts concluded with the application of green criteria amounted to 12.96 % in 2023[31], while in 2024 this share increased to 16.3 %.[32] Such results confirm the existence of a significant gap between the normatively defined objectives and their actual implementation in practice, in the sense that the target set by the 2015 National Action Plan has not been achieved even after more than a decade. Although recent data show a certain increase in the share of contracts concluded using green criteria, this share still significantly

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29 Ministry of Environmental Protection and Nature, *National Action Plan for Green Public Procurement for the Period 2015–2017*, with a Projection to 2020, p. 15.

30 *Ibid.*, p. 12.

31 According to the *Statistical Report on Public Procurement in the Republic of Croatia for 2023*, Ministry of Economy, Directorate for Public Procurement Policy, the number of public procurement contracts concluded in 2023 amounted to 30,972, while the number of contracts that included green criteria amounted to 4,015; the stated figure was therefore obtained by calculating the ratio of green contracts to the total number of public procurement contracts. However, it should be noted that this statistical figure on contracts incorporating green criteria includes both public and sectoral contracting authorities, i.e. it does not refer exclusively to public bodies [*Statistical Report on Public Procurement in the Republic of Croatia for 2023*, pp. 12, 59, Available at: [https://www.javnanabava.hr/userdocsimages/userfiles/file/Statisti%C4%8Dka%20izvje%C5%A1%C4%87a/Godi%C5%A1nja/Statisticko_izvjesce_JN_2023.pdf], Accessed 01 April 2026.

32 The figure was obtained by dividing the number of green contracts in 2024 (a total of 5,643) by the total number of public procurement contracts concluded (34,606), while the statistical data in question were calculated by aggregating figures from both the old and the new Electronic Public Procurement Classifieds (EOJN) Available at: [*Statistical Report on Public Procurement in the Republic of Croatia for 2024*, pp. 12–13, 54, Available at: [https://www.javnanabava.hr/files/Datoteke/Statisti%C4%8Dko%20izvje%C5%A1%C4%87e%202024.pdf], Accessed 01 April 2026.

deviates from the initially set target of 50% and from the statistical data of other Member States. Furthermore, it should be noted that the reliability of the available data may be questionable. Namely, records on the application of green criteria are largely based on self-assessments by officials involved in public procurement procedures, without systematic *ex post* verification of the actual fulfilment and applicability of those criteria. Such an approach creates room for discrepancies between formally reported and actually applied green criteria in practice and may lead to an overestimation of the actual level of their implementation.

An additional issue arises from the manner in which the obligation to apply green public procurement is regulated. In 2021, the Government of the Republic of Croatia required the Central State Office for Central Public Procurement to include green criteria in the procedures it conducts, but subject to the condition that such application is in line with technical suitability, the financial capacities of users, broader sustainability considerations, and a sufficient level of market competition.[33] Such a normative solution left room for discretionary assessment, which in practice led to a limited application of green criteria. The possibility of omitting green measures on financial or technical grounds created space for their systematic avoidance, whereby the exception largely became the rule, resulting in a situation contrary to the original objective pursued by introducing the obligation to implement green criteria in the procurement procedures of the Central State Office.

Certain shortcomings of the Croatian system have also been highlighted by OECD, particularly in the context of Croatia's accession process to the organisation. As a candidate country, Croatia is required to align its legislation and policies with OECD standards. As early as 2002, the OECD Council adopted the Recommendation on Improving the Environmental Performance of Public Procurement (OECD/LEGAL/0311) in order to encourage states to implement and promote environmental aspects within procurement procedures. The Recommendation essentially aims at the development of green public procurement policy by encouraging the adoption of concrete measures, the introduction of financial and budgetary instruments, the provision of training for public officials, and the establishment of systems for identifying products and services that contribute to the objectives of green public procurement. An important component of these recommendations is the phase of measuring and monitoring progress, as well as the evaluation and assessment of green public procurement policies.[34] It is precisely in the context of monitoring the implementation of green measures that the Repub-

[33] Article 1(1) of the Decision on Green Public Procurement in Central Public Procurement Procedures, Official Gazette, No. 49/2021.

[34] OECD, Recommendation of the Council on Improving the Environmental Performance of Public Procurement, OECD/LEGAL/0311.

lic of Croatia demonstrates certain shortcomings, particularly with regard to the definition of clear objectives, indicators, and reporting and monitoring systems, which points to the need for further institutional and normative adjustments.[35]

In response to the identified shortcomings, at the end of 2024 the Ministry of Environmental Protection and Green Transition adopted a new Decision on the Implementation of Green Public Procurement, which has been applicable since 1 January 2025. This Decision introduces an obligation to apply green criteria for all central government bodies in pre-defined product categories, whereby for each category minimum percentages of sustainable elements are precisely determined, the fulfilment of which is deemed to satisfy the obligation.[36] While the application of green criteria is mandatory for certain categories of products, central government bodies are also encouraged to implement such criteria for other products, thereby creating a recommendation for the remaining categories. The Decision further provides for an obligation to prepare annual reports on the implementation of green public procurement, which are to be publicly available. The monitoring system is organised in such a way that individual central government bodies carry out internal control through the preparation of annual reports, while the competent Ministry of Environmental Protection assumes a coordinating role, relying on data from the Electronic Public Procurement Classifieds (EOJN) and the results of oversight conducted by other central government bodies.[37] In this way, the aim is to ensure the actual and measurable implementation of green public procurement policy through enhanced control and alignment of practical implementation, as opposed to previous arrangements which did not fully ensure effective oversight. It remains to be seen what results the Decision has produced in practice during its first year of application, given that contracting authorities were required to submit their annual statistical reports by 31 March 2025.

The question of the actual scope of this Decision also remains open, particularly since central government bodies account for a relatively small share of the overall number of public procurement contracts. Given that the Republic of Croatia transitioned to a new Electronic Public Procurement Classifieds system during 2024,

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35 Ilijazović, B., *Decision of the Government of the Republic of Croatia on the Implementation of Green Public Procurement*, Available at: [https://zastitaokolisa.dashofer.hr/33/odluka-vlade-republike-hrvatske-o-provedbi-zelene-javne-nabave-uniqueidRCViWTptZHLLWF5_cabpuljBzEfkEIEKAg_rzFJ8D5c/32/trazi/], Accessed 27 March 2026.

36 Article 6 of the Decision on the Implementation of Green Public Procurement, Official Gazette, No. 137/2024-2260.

37 Article 10 regarding Article 11 of the Decision on the Implementation of Green Public Procurement, Official Gazette, No. 137/2024-2260.

the statistical report for that year distinguishes between two reporting categories in certain segments. Accordingly, under the previous EOJN system, central government bodies accounted for approximately 5.46%, whereas under the new EOJN this share is somewhat higher, amounting to 16.78%.[38] In view of the relatively low proportion of central government bodies compared to other contracting authorities, the actual impact of the Decision will depend on the broader uptake of green criteria at other levels of government, as well as on their application by other major public and subsequently sectoral contracting entities.[39]

The broader strategic framework is further defined by the Integrated National Energy and Climate Plan for the period 2021–2030, adopted in 2019, which envisaged increasing the share of green public procurement to 75% of all procedures by 2030. The Plan also explicitly stated that innovative low-carbon products and services would be favoured, thereby encouraging their market uptake.[40] Although such a provision may have positive environmental implications, its formulation could potentially have adverse effects on competition and, if implemented inappropriately, could even result in a breach of the applicable legal framework.[41] Notably, in March 2025 the Government of the Republic of Croatia adopted a revised version of the Plan, which introduced significant changes in the area of green public procurement. The revised Plan no longer includes a projection expressed as a specific percentage share of green public procurement, as had been the case in the previous Plan, likely reflecting the assessment that achieving such a target proved challenging in light of existing indicators. Furthermore, the revised Plan omits the controversial provision on the direct favouring of such products and services in procurement procedures. While the Plan emphasises the importance of setting targets and deadlines to further promote green public procurement, it does not concretise those objectives or timelines.[42] It is also important to note that the revised Plan elaborates on the Decision of the Government of the Republic of Croatia on Green Public Procurement in Central Public Procurement Procedures (Official Gazette No. 49/2021),

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38 Ministry of Economy, Directorate for Public Procurement Policy, Statistical Report on Public Procurement in the Republic of Croatia for 2024, pp. 11–13.

39 According to the Statistical Report, public contracting authorities concluded 30,559 contracts in 2024, whereas sectoral contracting entities concluded only 4,047.

40 Ministry of Environmental Protection and Energy, *Integrated National Energy and Climate Plan of the Republic of Croatia for the Period 2021–2030*, p. 144.

41 For example, Directive 2014/24/EU, in Article 42(2), provides that technical specifications must afford equal access to the procurement procedure to economic operators and must not have the effect of creating unjustified obstacles to competition in public procurement, which implies that such "favouring" must not be implemented in the preparation of the procurement documentation.

42 Ministry of Environmental Protection and Energy, *Revised Integrated National Energy and Climate Plan of the Republic of Croatia for the Period 2021–2030,* pp. 225 – 227.

which obliged the Central State Office for Central Public Procurement to apply green criteria, even though that Decision was no longer in force at the time of the Plan's adoption (March 2025). Namely, it had been replaced by the Decision on the Implementation of Green Public Procurement, which makes the application of green criteria mandatory for procurement procedures conducted by all central government bodies, yet this is not mentioned at all in the revised Integrated National Energy and Climate Plan, despite being in force at the relevant time.

In addition to the aforementioned regulations, it is also necessary to mention the Decision adopting the Waste Management Plan of the Republic of Croatia for the period 2023–2028 (Official Gazette No. 84/2023), as well as the Low-Carbon Development Strategy of the Republic of Croatia until 2030, with a view to 2050 (Official Gazette No. 63/2021), both of which rely, to a significant extent, on green public procurement as a means of achieving their stated objectives.[43]

4. KEY CHALLENGES IN THE IMPLEMENTATION OF GREEN PUBLIC PROCUREMENT IN CROATIA

One of the fundamental challenges in the implementation of green public procurement stems from the entrenched approach that favours the lowest price as the primary award criterion. Lower-priced tenders are preferred due to immediate cost savings, and, in the EU context, the European Commission identifies this as a major obstacle to the participation of small and medium-sized enterprises (SMEs) in procurement procedures that emphasise sustainability elements. SMEs themselves highlight the prioritisation of the lowest price as a key barrier to the implementation of sustainable procurement, alongside legal uncertainties within the existing regulatory framework.[44] More generally, the Commission, in its reports, indicates that the share of public procurement contracts awarded solely on the basis of the lowest price has been increasing over the reference period from 2011 to 2021.[45] At the same time, the costs of procurement procedures should not be understood narrowly and solely in terms of initial financial expenditure, but should

[43] For example, the Low-Carbon Development Strategy of the Republic of Croatia until 2030, with a View to 2050, Official Gazette No. 63/2021, in Section 12, which addresses the low-carbon economy and behavioural patterns, identifies, inter alia, green public procurement as one of the six areas for the development of sustainable consumption and production programmes, thereby contributing to the implementation of the Low-Carbon Strategy.

[44] European Commission, *Commission Staff Working Document Evaluation of Directive 2014/23/EU on Concessions, Directive 2014/24/EU on Public Procurement and Directive 2014/25/EU on Utilities*, SWD [2025] 333 final, p. 93.

[45] *Ibid.*, p. 33, regarding ECA (2023) Special report 28/2023, p. 30.

also encompass those arising as longer-term outcomes of a given procurement.[46] Certain studies have shown that products incorporating green measures are often comparable in price to conventional products, with only a small proportion being genuinely more expensive.[47]

In order to raise awareness of the importance of implementing green criteria in public procurement, it is necessary to insist on and continuously promote high-quality and adequate training programmes for officials involved in procurement procedures. The effective implementation of green criteria does not depend solely on the normative framework, but to a large extent on the level of knowledge, competences and awareness of those responsible for applying that framework in practice. The need to strengthen educational capacities has been recognised in numerous strategic documents at both the EU and national levels. For example, the Integrated National Energy and Climate Plan for the period 2021–2030 identifies the implementation of information and training activities on green public procurement as a key planned measure.[48] In Croatia, a green public procurement portal has been established and is maintained by the Ministry of Environmental Protection and Green Transition, providing access to a range of educational materials. These include handbooks, guidelines, video tutorials and practical tools that explain in an accessible manner how to incorporate green criteria into different stages of procurement procedures.[49] This approach largely builds on the practice of the European Commission, which has for years been developing a comprehensive set of tools to support green public procurement, such as the Green Public Procurement Toolkit[50], as well as technical instruments such as the EU Ecolabel[51] and Life-Cycle Costing (LCC) tools.[52]

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46 Manta, O. *et al., Public procurement, a tool for achieving the goals of sustainable development*, Amfiteatru Economic Journal, The Bucharest University of Economic Studies, Bucharest, 2022, Vol. 24, Issue 61, p. 864.

47 Andhov, M. *et al., Sustainability Through Public Procurement: The Way Forward – Reform Proposals*, University of Oslo, Faculty of Law Legal Studies, Research Paper Series No. 2020-09, 2020, pp. 6 – 7.

48 Ministry of Environmental Protection and Energy, *Revised Integrated National…op. cit.,* note 17, p. 226.

49 Ministry of Environmental Protection and Green Transition, *Training Materials,* Available at: [https://zelenanabava.hr/trening-materijali/], Accessed 01 April 2026.

50 European Commssion, *Green Public Procurement Toolkit*, Available at: [https://green-forum.ec.europa.eu/green-business/green-public-procurement/gpp-training-toolkit_en], Accessed 01 April 2026.

51 European Commission, *EU Ecolabel, The official European Union voluntary label for environmental excellence*, Available at: [https://environment.ec.europa.eu/topics/circular-economy-topics/eu-ecolabel_en], Accessed 01 April 2026.

52 European Commission, *Life-cycle costing, Life-Cycle Costing (LCC) is being applied by an increasing number of public authorities across the EU and in a range of sectors*, Available at: [https://green-forum.ec.europa.eu/green-business/green-public-procurement/life-cycle-costing_en], Accessed 01 April 2026.

Accordingly, even where the legislative framework, together with accompanying guidelines, strategic documents and soft law instruments, may be adequately designed, potential problems arise in the practical implementation of such a framework if it is not supported by adequately trained officials.[53] A lack of knowledge regarding the potential effects of green criteria often leads to the continued reliance on traditional practices that are perceived as safe and familiar to all stakeholders. Green public procurement in the Republic of Croatia undoubtedly requires further professionalisation, and one of the ways to achieve this is through the introduction of a competency framework for officials, which would assess their performance based on objective criteria and monitor their progress.[54] Such a framework would also be applicable to employees in the public procurement sector, thereby providing additional motivation for the implementation of green measures in procurement procedures. By developing concrete mechanisms for monitoring such implementation, officials would consequently become more interested in further training in this field. A step in this direction is the recent introduction of the European competency framework for public procurement professionals, ProcurCompEU, into the Croatian system, which identifies training in sustainable public procurement as a distinct category of competences. Within this framework, the required skills are specified according to different stages of training, enabling their practical evaluation.[55] The handbook provides certain recommendations on how to implement such training and which thematic areas should be covered; however, many experts argue that officials should also be motivated and persistent in implementing sustainable procurement.[56] As a result, future practices could include the introduction of reward mechanisms based on objectively measurable results.

A challenge that is certainly not limited to the national context concerns the existence of difficulties in the implementation of green criteria, which often results in uneven application when comparing Member States.[57] However, the implementation of green criteria encounters the greatest challenges at the lowest territorial levels, specifically in procurement procedures conducted by local and subsequent-

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53 Drmić Kunić, A., *Profesionalizacija zelene javne nabave kao podrška javnim tijelima za njezinu provedbu*, Informator, 2024, p. 4.

54 Zoretić, G., *Određivanje kompetencija službenika u javnoj upravi – pregled Republike Hrvatske i odabranih zemalja EU,* FIP – Financije i pravo, Vol. 6, No. 1, 2018, p. 58.

55 Ministry of Economy, Handbook for the Assessment and Development of Competences in the Field of Public Procurement, pp. 22 – 25, Available at: [chromeextension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.javnanabava.hr/userdocsimages/Priru%C4%8Dnik.pdf], Accessed 28 March 2026.

56 Andhov, M. *et al, op. cit.,* note 22, pp. 15 – 16.

57 European Commission, Commission Staff…, *op. cit.,* note 19, pp. 36 – 37.

ly regional self-government units.[58] Namely, the increasingly extensive normative framework, which, in addition to the core Directive 2014/24/EU, encompasses numerous sectoral and horizontal rules, further complicates navigation within an already complex system. Such regulatory fragmentation, coupled with the absence of a clear hierarchy of rules, may result in an excessive administrative burden for entities responsible for conducting procurement procedures. These challenges are particularly pronounced at the lowest territorial levels, in procedures carried out by local and regional self-government units, where administrative capacities are often limited.[59] Although, as of 2025, an obligation to apply green measures has been introduced in public procurement procedures conducted by central government bodies in the Republic of Croatia, the relevant Decision also contains a provision encouraging contracting authorities, particularly local and regional self-government units, to implement green public procurement.[60] Taking into account the complex territorial organisation of the Republic of Croatia, as well as the large number of subnational units, it is evident that achieving tangible effects of green public procurement will require a stronger emphasis on its implementation precisely at these lower levels.

Specifically, the Republic of Croatia faces the challenge of a large number of local and regional self-government units, with an administrative structure comprising 555 local self-government units (428 municipalities and 127 cities), in addition to 20 regional self-government units and the City of Zagreb, which has a special status as both a city and a county.[61] Such a complex and highly fragmented structure indicates the significant presence of territorial units as contracting authorities, which frequently rely on the public procurement system for the acquisition of goods, services and works necessary for their day-to-day functioning.[62] In addition, a particularly pressing issue is the limited fiscal capacity of local and regional

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58 Cheng, W. *et. al., Green Public Procurement, Missing Concepts and Future Trends – A Critical Review*, Journal of Cleaner Production, Vol. 176, No. 1, 2017, p. 781.

59 European Commission, Commission Staff…, *op. cit.,* note 19, p. 59.

60 Article 4 of the *Decision on Green Public Procurement in Central Public Procurement Procedures*, Official Gazette, No. 49/2021.

61 Ministry of Justice, Public Administration and Digital Transformation, *List of Counties, Cities and Municipalities*, Available at: [https://mpudt.gov.hr/gradjani-21417/iz-djelokruga/lokalna-i-podrucna-regionalna-samouprava-24398/popis-zupanija-gradova-i-opcina-24402/24402], Accessed 01 April 2026

62 According to the Report, local and regional self-government bodies accounted for 32% of contracting authorities in the total number of published contracts in 2023. In 2024, under the previous EOJN system, they accounted for 16.66%, whereas under the new EOJN system local authorities accounted for 12.41% and regional authorities for 7.85%, Statistical Report on Public Procurement in the Republic of Croatia for 2024, pp. 11–13.

self-government units[63], which often depend on state funding for the implementation of their programmes, institutions or activities within their competence.[64] Given that certain local and regional units in the Republic of Croatia at times lack sufficient budgetary resources to cover even salaries and other basic expenditures, it is difficult to expect that they will allocate additional financial resources in public procurement procedures in order to select, most often, initially more expensive procurement objects that meet specific green criteria, i.e. that have a positive environmental impact. Consequently, the application of green criteria, which are often perceived as financially more demanding, remains limited.

Beyond the fundamental challenges of limited administrative and fiscal capacity, the implementation of GPP by local and regional self-government units has remained largely unexamined in Croatian academic literature. While the authors intend to undertake a broader study at the level of large local government units, this paper presents a preliminary, exploratory analysis based on a single local authority. This pilot case study has proven useful in identifying key trends and refining research questions for subsequent, more comprehensive inquiry. The following sections examine the findings of this initial analysis in order to highlight practical approaches to the application of green criteria and to formulate preliminary recommendations for strengthening the existing framework.

4.1. Analysis of Green Public Procurement Implementation at the Local Level: A Case Study of the City of Rijeka

As the most significant challenges regarding the implementation of Green Public Procurement (GPP) arise at the level of local self-government units, the authors sought to identify the underlying reasons and systemic barriers to the integration of environmental criteria within public procurement procedures. To this end, the analysis is based on a case study of a single local authority, the City of Rijeka. The research instrument administered to the City is structured into four thematic sections, designed to analyze the strategic planning of GPP, its operational implementation, the identification of structural barriers to the inclusion of green criteria in tendering procedures, and prospective adaptations.

The implementation of GPP within the City of Rijeka is a strategically oriented process currently situated at a fundamental level of application. This assessment is

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63 See *Decision on the Classification of Local and Regional Self-Government Units According to the Level of Development*, Official Gazette, No. 3/2024-60.

64 Blažević, R.; Dobrić Jambrović; D., Menger, M., *Lokalna samouprava*, Sveučilište u Rijeci, Pravni fakultet, 2021, pp. 99 – 100.

predicated on the fact that environmental criteria are consistently integrated into the procurement of standardized goods and services, whereas, for more complex and specific subject matters of procurement, the application of green measures remains in a nascent stage or lacks systematic execution. The normative foundation of these processes is secured through vertical alignment with key strategic instruments, most notably the City Development Plan 2021–2027, the Sustainable Energy and Climate Action Plan (SECAP), and the Energy Efficiency Action Plan for the 2025–2027 period. By incorporating the 'Green Purchasing City' concept into local development policies, a progressive increase in the share of GPP is anticipated relative to the total public procurement of the contracting authority and its budget users, commencing with the municipal administration, followed by educational institutions, and subsequently extending to other public entities.

In addition to the positive externalities regarding the promotion of local products, these measures facilitate the reduction of CO2 emissions associated with logistics and warehousing. Such an approach explicitly defines the teleological objectives of public procurement, reflected in the attainment of energy efficiency, waste minimization, the enhancement of renewable energy shares, and climate change adaptation. Consequently, public procurement is undergoing a transformation from a mere fiscal instrument into a robust environmental policy tool dedicated to the long-term public interest and the sustainable development of the local community.

However, at present, the practical operationalization of GPP in the City of Rijeka faces significant barriers arising from the necessity to balance environmental standards with the principle of fiscal responsibility. Given the obligation for rational management of public funds with the "due diligence of a prudent administrator", the market price of environmentally friendly products and services is frequently perceived as prohibitive. This necessitates a systematic assessment of the economic benefits of such procurement in comparison to conventional solutions. This challenge is further exacerbated by a partial deficit in the specific professional competencies of municipal civil servants. While specialists within the Public Procurement Department are proficient in the procedural aspects, there is a need for additional training of officials in the respective administrative departments who, as end-users, define the project tasks and technical specifications. Absent precisely established criteria in the initial stages, the instrument of green public procurement cannot achieve its full potential.

Simultaneously, the market structure constitutes a substantial constraint, particularly regarding the participation of small and medium-sized enterprises (SMEs). Procedures for obtaining eco-certificates are often protracted and financially tax-

ing, which deters many economic operators from certification, thereby narrowing the pool of potential bidders and undermining the principle of competition. Notwithstanding these obstacles, practical implementation demonstrates a broad spectrum of application, such as the procurement of eco-friendly cleaning agents, printing equipment of the highest energy efficiency class, eco-packaging for certain goods, and eco-consumables. Furthermore, it encompasses the restoration of greenery, tree rows, and city parks as climate change adaptation measures, the acquisition of a biological wastewater treatment plant for a cultural facility, the construction of solar power plants on schools and kindergartens, the procurement of electricity with a minimum renewable energy share of 50%, the acquisition of hybrid and electric official motor vehicles, the requirement of the highest Euro standards for vehicles used in contract execution, and the utilization of eco-materials for cleaning maritime pollution.

An analysis of the data for 2025 indicates that GPP, although present in a smaller number of procedures, is highly significant in terms of value, accounting for 21.40% of the total planned public procurement value. However, systematic monitoring and further development are hindered by the inadequate infrastructure of the Electronic Public Procurement Classifieds (EOJN RH), which currently does not allow for efficient searching or statistical reporting on green contracts. Also, the simple procurement registry lacks the functionality to input data identifying a procedure as GPP. In addition to investing in the improvement of the EOJN RH infrastructure, City officials emphasize that future progress crucially depends on the education of civil servants based on the best practices of countries such as the Netherlands, Denmark, or Sweden, which have established GPP as a standard. Alongside institutional support, it is essential to provide measures to stimulate the local economy, primarily through subsidies for obtaining certifications, to ensure that SMEs can timely adapt to forthcoming green requirements and ensure the long-term sustainability of public expenditure.[65]

4.2. Recommendations for Enhancing the Legal and Institutional Framework of Green Public Procurement in Croatia

The analysis of the Croatian normative and strategic framework demonstrates that, despite a relatively high degree of formal alignment with the EU acquis, the practical implementation of GPP remains limited and fragmented. Enhancing the GPP system necessitates a comprehensive approach that transcends mere formal harmonization with European directives, moving instead toward a profound nor-

[65] The questionnaire responses were submitted on 8 April 2026, following the receipt of the formal consent for research participation from the Mayor of the City of Rijeka.

mative, administrative, and market transformation. Consequently, the authors' primary recommendation concerns the further precise elaboration of the legislative framework to gradually phase out the prevailing practice of voluntariness in favor of clear and measurable mandatory requirements. Existing discretionary powers, which allow contracting authorities to circumvent environmental criteria under the guise of financial unsuitability, must be redefined while ensuring coherence across various levels of strategic planning. This implies, for instance, the alignment of national energy and climate plans with concrete governmental implementation decisions, alongside the establishment of realistic yet ambitious quantitative targets extending to all levels of government, including local self-government units which currently exhibit the most pronounced deficit in the implementation of green criteria.

A further element of system improvement pertains to a shift in the bid evaluation paradigm, necessitating a decisive move away from the lowest price criterion toward the systematic application of the life-cycle costing (LCC) methodology. Only by fully internalizing environmental externalities and operating costs throughout a product's entire life cycle can the principle of "best value for money" be realized. To operationalize this, intensive professionalization of administrative staff is essential. The authors propose a diversification of educational processes to encompass not only procurement procedure specialists but primarily officials in line departments who define project tasks. As key barriers emerge precisely at this stage, strengthening competencies for drafting precise and non-discriminatory green technical specifications constitutes a *conditio sine qua non* for their successful implementation. Furthermore, the introduction of objective mechanisms for monitoring staff progress is proposed, which could further stimulate professionalization processes and ultimately mitigate the fear of legal uncertainty in the oversight of public procurement procedures.

In this respect, comparative practices from other EU Member States may provide useful guidance for the Croatian system, particularly regarding local and regional self – government units. Relevant example is the Dutch Sustainable Public Procurement Criteria Tool (MVI criteria tool) which enables contracting authorities to select and download pre-formulated environmental criteria for specific categories of procurement.[66] Such an instrument does not replace the discretion of contracting authorities, but it significantly reduces legal uncertainty and administrative burden by providing practical, standardised and verifiable criteria that may be incorporated into tender documentation. A comparable tool adapted to the

[66] Government of the Netherlands, *About MVI tool*, Available at: [https://www.mvicriteria.nl/en/about-webtool], Accessed 30 May 2026.

Croatian legal framework could be especially useful for smaller local units lacking specialised administrative capacity. In addition, the Croatian system could draw inspiration from the Irish "apply or explain" model, which represents an intermediate solution between a purely voluntary approach and a fully mandatory regime. Under such an approach, contracting authorities would be expected to include green criteria where relevant criteria exist and where their application is appropriate and proportionate, while any omission would have to be justified through the reporting system.[67] For Croatian local and regional self-government units, this model could provide a realistic transitional mechanism. It would preserve a degree of flexibility in cases of limited market availability or disproportionate costs, while at the same time preventing the systematic avoidance of green criteria on general financial or technical grounds.

The third recommendation is directed toward the upgrading of the digital infrastructure, which currently does not correspond to the requirements for searching GPP records or for systematic oversight and reporting on procedures. The transformation of the EOJN RH into an analytical tool enabling the automatic recognition of green parameters and real-time contract monitoring would ensure the necessary transparency and eliminate the unreliability of data based on self-assessment. Such digital verification, accompanied by systematic ex-post audits, would create a database essential for future *de lege ferenda* proposals and more efficient management of public expenditure.

Finally, the sustainability of the system inevitably depends on market inclusiveness, which requires a continuous and proactive role of the state in supporting SMEs. Although support mechanisms and certification vouchers exist in Croatia, the cumulative costs of obtaining recognized eco-labels, encompassing not only direct fees to certification bodies but also substantial indirect expenses for engaging external experts, laboratory testing, and complex adaptations of production processes, continue to represent an excessive financial and administrative burden.[68] To prevent the progressive narrowing of market competition and the risk of creating oligopolistic structures dominated exclusively by large economic operators, it is recommended to redefine existing subsidy models by introducing

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[67] Government of Ireland, Department od Public Expenditure Infastructure Public Service Reform and Digitalisation, Circular 17/2025, *Updated Green Public Procurement Instructions for Public Sector Bodies*, Accessed 30 May 2026.

[68] Currently, the maximum aid intensity is up to 75% of eligible costs for micro and small enterprises, and 55% of eligible costs for medium-sized enterprises. EU Funds, *Publication of the Call for Proposals: "Support for Enterprises for Product Certification and Implementation of Management Systems",* Available at:
[https://eufondovi.gov.hr/objava-poziva-za-dostavu-projektnih-prijedloga-potpora-poduzecima-za-certifikaciju-proizvoda-i-uvodenje-sustava-upravljanja-referentni-broj-pk-1-3-04/], Accessed 07 April 2026.

more robust and accessible targeted support with a higher intensity of coverage for total adaptation costs.

5. CONCLUSION

The analysis presented in this paper demonstrates that, despite a high level of formal alignment with the EU acquis, the implementation of GPP in Croatia remains limited, uneven and structurally constrained. While the existing legislative framework provides a sufficient legal basis for the integration of environmental considerations, its practical effectiveness is weakened by the predominance of discretionary provisions, fragmented strategic planning and insufficiently developed monitoring mechanisms. These findings reflect, to a significant extent, broader challenges inherent in the EU system of public procurement. Although the Union increasingly promotes the strategic use of procurement as a tool of environmental governance, the largely facultative nature of green criteria under Directive 2014/24/EU, combined with the growing complexity of sector-specific regulation, continues to generate legal uncertainty and uneven implementation across Member States. The Croatian case thus illustrates a more general structural tension within EU public procurement law: the gap between ambitious policy objectives and the limited enforceability of those objectives in practice

At the national level, recent regulatory developments, particularly the introduction of mandatory green criteria for central government bodies, represent an important step towards strengthening the binding dimension of GPP. However, their overall impact remains constrained by the limited share of centralised procurement and by the absence of comparable obligations at the local and regional levels, where the majority of procurement activity takes place. The case study of the City of Rijeka further confirms that the most significant obstacles to effective implementation arise precisely at this level. Limited administrative and fiscal capacities, insufficient professional training, market constraints and persistent reliance on the most economically advantageous tender continue to restrict the systematic application of green criteria in practice. At the same time, the case study illustrates that, even within such constraints, local authorities can play a meaningful role in advancing GPP through strategic planning and gradual institutional adaptation.

In light of these findings, the paper suggests that future progress in the field of GPP will depend less on the formal expansion of strategic commitments and more on the development of enforceable, coherent and operationally feasible mechanisms. This includes the gradual transition from voluntary to mandatory application of green criteria, the strengthening of administrative capacities at all levels of government, the improvement of monitoring and data systems, and the creation

of a more supportive market environment, particularly for SMEs. Ultimately, the transformation of public procurement into an effective instrument of environmental policy requires not only regulatory alignment, but also a shift in institutional practices and governance approaches. Without such a shift, GPP risks remaining a formally recognised objective within EU and national frameworks, without achieving its intended transformative impact in practice.

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Review article

FROM MARKETING CLAIMS TO UNFAIR COMMERCIAL PRACTICES: REGULATING GREENWASHING IN EU LAW*

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ABSTRACT

The regulation of unfair competition within EU law is both extensive and fragmented, being dispersed across a range of secondary legislative instruments, predominantly Directives. This regulatory framework is inherently multi-layered, as it integrates provisions aimed at consumer protection alongside rules designed to safeguard the interests of traders. The increasing prominence of sustainability, closely linked to the expansion of green marketing practices, has intensified efforts by traders to portray goods and services as environmentally sustainable. In practice, however, such claims frequently operate at the margins of truthfulness and objective verifiability. Product labelling and commercial statements often contain information capable of creating misleading impressions regarding the characteristics, quality, or environmental impact of the goods or services concerned. Consequently, consumers may engage in economic transactions under the influence of deceptive or misleading claims and information overload, driven by the belief that their purchasing decisions contribute to environmental protection and sustainability objectives. Current legal framework is intended to be supplement by Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and improved information (hereinafter "Directive 2024/825"). Similarly, the draft GCD Directive is also relevant within the defined area. The primary objective of this article is to analyse Directive 2024/825 and to identify its key normative elements, with particular emphasis on the newly introduced obligations imposed on affected entities, primarily traders, and the corresponding rights conferred upon consumers. The partial objective of this paper is to analyse the European legal framework

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and the national legal framework governing the defined area, with a focus on the specific rights and obligations of traders.

***Keywords**: Consumer protection, Greenwashing, GCD Regulation, Unfair competition, 2024/825 Directive*

1. INTRODUCTION & METHODOLOGY

The term greenwashing is currently appearing with increasing frequency in academic literature and is drawing closer attention not only from the general public but also from experts. In this regard, we would like to emphasize that it is important to distinguish between the concepts of green marketing and greenwashing, since not all green marketing is greenwashing, but usually, all greenwashing is part of green marketing. We are currently witnessing growing trends on the part of national legislators,[1] as well as European lawmakers regarding environmental protection and stricter legal regulation of related aspects. This is evidenced by a number of initiatives, particularly at the European Union level, aimed at environmental protection in a broad sense.[2] In the light of sustainability and in relation to the business environment, the CSRD[3] resonates, which, according to *Odobaša* and *Marošević*, "regulates the future framework and rules of mandatory, regular and public non-financial reporting of European and non-European companies operating in a more comprehensive and thorough manner than previous European regulations were introduced on the European market."[4]

When it comes to the greenwashing, two legal acts play key role - the proposal of Directive on substantiation and communication of explicit environmental claims (Green Claims Directive)[5] as well as the Directive 2024/825, which regulates cer-

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1 Duić, D.; Ćemalović, U., *The Environmental Legal Framework Governing the Relations Between the EU and Serbia as a Candidate Country*, in: Wessel, R. A. *et al.* (eds.) *EU External Relations Law and Sustainability: The EU, Third States and International Organizations*, TMC Asser Press, The Hague, 2025, pp. 457–477.

2 Probably the best-known document in this regard is the so-called Green Deal, which is widely discussed by both the general public and experts, with particular attention paid to the impact of this regulation on individuals as well as on businesses. *See* Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the Framework for Achieving Climate Neutrality and amending Regulations [2021] OJ L243/1.

3 Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards Corporate Sustainability Reporting [2022] OJ L322/15.

4 Odobaša, R.; Marošević, K., *Expected Contributions of the European Corporate Sustainability Reporting Directive (CSRD) to the Sustainable Development of the European Union*, in: Duić, D.; Petrašević, T. (eds.), EU and Comparative Law Issues and Challenges Series (ECLIC), Vol. 7, 2023, pp. 596–598, at p. 594.

5 Proposal for a Directive of the European Parliament and of the Council on Substantiation and Communication of Explicit Environmental Claims (Green Claims Directive), COM(2023) 166 final.

tain aspects of consumer protection in light of green transition.[6] Similarly, emphasis is placed on compliance with the obligations of entities that place packaging or non-packaging products on the market, and these obligations arise from this position.[7] In this article, however, we will focus on a narrower scope of issues that go beyond environmental protection, specifically addressing selected aspects of commercial law related to unfair competition and consumer protection law. Each Member State is required to adopt and publish the measures necessary to comply with Directive 2024/825 by March 27, 2026, and those measures will apply from September 27, 2026.

The methodological approach of this paper can be divided into three levels. The first is a descriptive-analytical method focused on the regulatory framework for unfair competition and consumer protection under EU law and national law. The second level is an analysis of the concept of greenwashing and analysis of specific provisions of the new component of the legislative framework, namely Directive 2024/825, and its impact on Directives 2005/29/EC and Directive 2011/83/EU, with a summary of the obligations arising for traders from Directive 2024/825. The third level involves an examination of the proposed GCD Directive focusing on the fundamental obligations of traders arising from the proposed legislation. The main objective of this paper is primarily to analyse Directive 2024/825, including an analysis of the European legal framework and the national legal framework regulating the defined area with regard to the specific rights and obligations of traders. In summary, the methodology of this paper is based on a normative analysis of existing and applicable legislation (including Directive 2024/825), supplemented by an empirical review of the scholarly literature and relevant case law, with the aim of comparing the transition from general regulation to a specific prohibition of greenwashing practices.

2. UNFAIR COMMERCIAL PRACTICES IN GENERAL

2.1. Regulation on EU Level

At the EU level, the regulation of unfair competition is conceptually organized primarily through directives. From the perspective of its protective purpose, it can be divided into regulations governing B2C (business-to-consumer) and B2B

[6] Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as Regards Empowering Consumers for the Green Transition through Better Protection against Unfair Practices and through Better Information [2024] OJ L2024/825.

[7] For example, under Slovak national law, this area is regulated by Act No. 79/2015 Coll., the Waste Management Act.

(business-to-business) relationships. From the perspective of the objective of EU law on unfair competition, this legislation is primarily aimed at consumer protection. This is evidenced by the purpose and scope of Council Directive 93/13/EEC on unfair terms in consumer contracts[8] and Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (Unfair Commercial Practices Directive)[9] regulating unfair practices in both online and offline environment.

Directive 93/13/EEC regulates unfair terms in contracts concluded between a seller or supplier and a consumer; its annex contains the terms referred to in Article 3(3), which include an indicative and non-exhaustive list of contractual terms that may be considered unfair. Directive 2005/29/EC regulates unfair commercial practices that harm the economic interests of consumers and is known (not only) for the non-exhaustive list set out in Annex 1, which defines commercial practices that are considered unfair in all circumstances, also known as the *black list*.

The third key directive in the area of consumer protection is Directive 2011/83/EU,[10] which regulates certain aspects of consumer information in the case of contracts other than distance contracts or off-premises contracts. However, this directive does not specifically target unfair commercial practices, but forms part of the consumer protection legal framework within the context of EU law. All three of the aforementioned directives were updated by Directive 2019/2161,[11] which aims to modernize consumer regulation. An exception to the general observation that the regulation of unfair competition is aimed at consumer protection is the regulation focusing on the area of misleading advertising, specifically Directive 2006/114/EC of the European Parliament and of the Council on misleading and comparative advertising, which states in Article 1 that its purpose is to protect

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8 Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts [1993] OJ L95/29.

9 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') [2005] OJ L149/22.

10 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64.

11 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU as regards the Better Enforcement and Modernisation of Union Consumer Protection Rules [2019] OJ L328/7.

traders against misleading advertising and its unfair consequences and to establish the conditions under which comparative advertising is permitted.

2.2. Slovak National Regulation of Unfair Competition

Under Slovak national law, the legal framework governing unfair competition is set forth in Act No. 513/1991 Coll., the Commercial Code. This framework is based on the general and permanent applicability of a general clause and includes a list of eight additional specific factual basis: misleading advertising, misleading labeling of goods and services, creating a likelihood of confusion, free-riding on reputation, bribery, disparagement, breach of trade secrets, and endangering health and the environment. According to *Vozár* the general and permanent validity of the general clause means that if there is no specific factual basis for a certain action that meets the characteristics of a general general clause, or if a certain action does not meet the characteristics of one of the specific factual bases listed in Sections 45 to 52, it will be considered unfair competition and will be assessed according to Section 44, paragraph 1.[12] However, the aforementioned specific factual basis of unfair competition constitute only a non-exhaustive list of unfair competitive conduct, and for their application, they must satisfy the conditions of the general clause - the conduct must occur in the context of competition, be contrary to fair competition practices, and be capable of causing harm to other competitors or consumers. If a specific provision does not meet the criteria of the general clause, it cannot be granted the protection provided by the Commercial Code.

The Commercial Code also regulates procedural remedies in cases of unfair competition, although the scope of authority to assert such claims is limited in the context of consumer protection. Claims arising from unfair competition may be asserted only by a legal entity authorized to defend the interests of consumers, but exclusively to the extent of ceasing the conduct and remedying the defective situation, and only in selected factual circumstances, specifically in cases of violation of the general clause, misleading advertising, misleading labeling of goods and services, creating a risk of confusion, and endangering health and the environment (i.e., excluding free-riding on reputation, bribery, disparagement, and breach of trade secrets). When assessing whether the three conditions of the general clause- which must be met cumulatively- are satisfied, the defendant's position in the competitive market will be key, while legal entities defending consumer interests are entitled to assert claims *ex lege*. From a review of court case law regarding the assertion of private-law claims based on violations of unfair competition provi-

[12] Vozár, J., in: Ovečková, O. *et al.* (eds.), *Commercial Code. Large Commentary. Part 1 (§ 1 to § 260)*, 2nd ed., Wolters Kluwer SR s.r.o., Bratislava, 2022, p. 340.

sion, it can be concluded that legal entities authorized to defend the interests of consumers or competitors do not make frequent use of this option.

Given the focus of this paper, the most relevant specific form of unfair competition is the endangerment of health and the environment. This provision defines such conduct as actions by which a competitor distorts the conditions of competition by engaging in production, markets products, or performs services that endanger the interests of health or environmental protection safeguarded by law, in order to gain an advantage for themselves or another party at the expense of other competitors or consumers. This provision essentially addresses situations where a business saves funds that it would otherwise have spent on complying with public law obligations arising primarily from specific legal regulations regulating a broad range of areas, including, for example, waste management, occupational health and safety, and other related fields. Protection against practices falling within the scope of greenwashing is also regulated at the national level by Act No. 108/2024 Coll. on Consumer Protection, which to a significant extent reflects the European regulatory framework outlined in the preceding subchapter, as the relevant legal acts have been implemented into its provisions.

3. GREENWASHING – CONCEPT

Greenwashing presents a legal challenge at the intersection of consumer protection law, unfair competition law, and environmental protection law. It can be said that this is a practice in which a business creates a misleading impression regarding the environmental characteristics of a product, service, or its own business activities, where this impression is not supported by objective, verifiable, and truthful information. As noted by *Netto* et al., the term greenwashing was first used in 1986, by an environmentalist Jay Westervelt. He published an essay on the hospitality industry about their practices to promote towel reuse.[13] At the same time, *Netto* et al. distinguishes between two forms of greenwashing: so-called claim greenwashing and executional greenwashing.[14] Claim greenwashing uses textual arguments that explicitly or implicitly refer to the ecological benefits of a product or service to create a misleading environmental claim.[15] Executional greenwashing is described as a new form of greenwashing and this strategy of greenwashing does not use any type of claim that was described before, but it suggests natureevoking ele-

[13] De Freitas Netto, S. V. *et al.*, *Concepts and Forms of Greenwashing: A Systematic Review*, Environmental Sciences Europe, Vol. 32, Issue 19, 2020, p. 6.

[14] *Ibid.,* p. 7-10.

[15] *Ibid.*, p. 7.

ments such as images using colors (e.g., green, blue) or sounds (e.g., sea, birds).[16] Backgrounds representing natural landscapes (e.g., mountains, forests, oceans) or pictures of endangered animal species (e.g., pandas, dolphins) or renewable sources of energy (e.g., wind, waterfalls) are examples of executional nature-evoking elements. These nature-evoking elements, intentionally or not, may induce false perceptions of the brand's greenness.[17]

From a legal perspective, greenwashing is most appropriately classified under the category of misleading commercial practices, and its significance is growing as a result of increasing consumer demand for sustainable products and services. As we also mention in the introduction of this article, it is also necessary to clearly distinguish green marketing from greenwashing and not to confuse these categories. Similarly, it is possible to distinguish the application of greenwashing in various sectors of the business environment, most prominently appearing especially in apparel industry[18] and cosmetics industry.[19] Researchers, however, also address this topic with regard to its impact on stakeholders, concluding that misleading claims regarding environmental practices inflict harm on stakeholders.[20] In light of greenwashing, *Bogojević* argues that "for green claims about products (and services) to achieve their intended market impact, a rigorously enforced system of verification and accountability is needed. Sustaining a market where green claims empower consumers to make informed choices as part of facilitating the ecological transition requires market regulation."[21]

In the digital environment, greenwashing takes on particular significance in connection with various sophisticated forms of online advertising. Digital platforms enable the rapid dissemination of environmental claims, often through personalized advertising or influencer marketing. In this context, one can also point to the relevant

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16 *Ibid.*, p. 10 reffering to Parguel, B.; Benoit-Moreau, F.; Russell, C., *Can Evoking Nature in Advertising Mislead Consumers? The Power of 'Executional Greenwashing'*, International Journal of Advertising, Vol. 34, Issue 1, 2015, pp. 107–134.

17 De Freitas Netto, S. V. *et al.*, *op. cit.*, note 13, p. 10 reffering to Parguel B, Benoit-Moreau F, Russell C., *Can evoking nature in advertising mislead consumers? The power of 'executional greenwashing'*, International Journal of Advertising, Vol. 34, Issue 1, pp. 107–134.

18 Adamkiewicz, J. *et al.*, *Greenwashing and Sustainable Fashion Industry*, Current Opinion in Green and Sustainable Chemistry, Vol. 38, 2022.

19 Kaur, H.; Subburayan, B., *A Comprehensive Evaluation of Assessment Tools for Detecting Corporate Greenwashing Practices in the Beauty and Cosmetics Industry*, Shanlax International Journal of Arts, Science and Humanities, Vol. 11, Special Issue 3, 2024.

20 Santos, C.; Coelho, A.; Marques, A., *A Systematic Literature Review on Greenwashing and its Relationship to Stakeholders: State of Art and Future Research Agenda*, Management Review Quarterly, Vol. 74, Issue 3, 2024, pp. 1397–1421.

21 Bogojević, S., *Regulating Greenwashing: Where Market Rules Meet Climate Action*, Journal of Environmental Law, Vol. 37, Issue 2, 2025, pp. 169–174.

provisions of the DSA, which, while not explicitly regulating greenwashing, establishes a framework for advertising transparency, the identification of advertisers, and a ban on certain manipulative practices, e.g., dark patterns (Art. 26 of DSA). These tools can also indirectly contribute to curbing greenwashing by increasing informational transparency and enabling more effective oversight of online content. According to *Wolters* and *Borgesius* "category of online marketing also falls outside the scope of the DSA's advertising definition: influencer marketing."[22] They further states that "in the words of Goanta and Ranchordás, 'modern influencer marketing is a digital form of word-of-mouth ('WOM') advertising.'" As an example, they point out to that "brand could pay a popular video blogger (an influencer) to mention the brand in YouTube videos. In such a case, the brand does not pay the platform for the advertising, and the marketing falls outside the DSA's advertising definition." [23] We agree with this statement, however, if a situation arises where a company pays a digital platform for advertising (for example, showing signs of greenwashing), the provisions of the DSA will apply to such a legal relationship.

Greenwashing that goes beyond the scope of permitted advertising could even constitute illegal content, as the definition of illegal content in Article 3(1)(h) means any information which, in itself or by reference to an activity, including the sale of goods or the provision of services, does not comply with the law of the Union or of a Member State, regardless of the precise subject matter or nature of that law. As *Treščáková* states "content regulation on digital platforms by DSA can result in the removal of legitimate content, which can lead to censorship."[24] Mentioned situation could be also a mean of reducing competition in the context of greenwashing when advertising is repeatedly reported. In this context, the DSA introduces new mechanisms for moderating illegal content, including out-of-court methods for settling disputes between the platform and its end or commercial users, which *Hučková* analyzes in the light of Article 20 of the DSA, and states that AI and its tools occupy a relatively strong position in content moderation on digital platforms since not every decision to remove content is directly controlled by humans.[25]

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22 Wolters, P.; Borgesius, F. Z., *The EU Digital Services Act: What Does It Mean for Online Advertising and Adtech?*, International Journal of Law and Information Technology, Vol. 33, 2025, eaaf004, p. 7 reffering to Goanta, C.; Ranchordás, S., The Regulation of Social Media Influencers: An Introduction, in: The Regulation of Social Media Influencers, Edward Elgar Publishing, Cheltenham, 2020, pp. 1–22.

23 Wolters; Borgesius, p. 8.

24 Trescakova, D., *Freedom of Expression on the Internet vs. Digital Services Act: Chosen Aspects*, in: Duić, D.; Petrašević, T. (eds.) EU and Comparative Law Issues and Challenges Series (ECLIC), Vol. 9, 2025, p. 136.

25 Huckova, R., *Automated Decision-Making and the Role of Artificial Intelligence in Resolving Disputes over Illegal Content on Digital Platforms*, in: Duić, D.; Petrašević, T. (eds.) EU and Comparative Law Issues and Challenges Series (ECLIC), Vol. 9, 2025, p. 488.

3.1. On the applicability of existing legal framework

Under European Union law, Directive 2005/29/EC on unfair commercial practices has thus far served as the primary legal framework for assessing greenwashing; this directive harmonizes consumer protection rules regarding commercial practices employed by businesses toward consumers. Greenwashing may constitute misleading conduct under Article 6 of Directive 2005/29/EC if it contains false information or, in any way, including the overall presentation, misleads or is likely to mislead the average consumer, thereby causing or likely to cause the consumer to take a transactional decision that he would not have taken otherwise. Similarly, this may constitute a misleading omission under Article 7 of Directive 2005/29/EC if the trader fails to provide essential information about the product's environmental characteristics that the consumer needs to make an informed decision.

Particularly problematic are general and vague claims such as "eco," "green," or "sustainable" if they are not supported by specific and verifiable data or verifiable through actual testing, which is necessary for such a claim. From a comparative perspective, we could consider similar claims through the case decided by the Court of Justice of the EU known as Deutsches Weintor, in which the court addressed the question of whether wine may be labeled as "easily digestible," as this constitutes a health claim.[26] The Court of Justice of the European Union ultimately concluded that the claim "easily digestible" can be classified as a health claim.[27]

The European Commission's guidelines, in particular the updated Guidance on the interpretation and application of Directive 2005/29/EC, serve as an important interpretive tool for the application of Directive 2005/29/EC,[28] which explicitly identify environmental claims as an area with an increased risk of misleading practices. The Commission's guidelines use the term "environmentally misleading advertising." In the context of business-to-consumer relations, this may relate to all forms of business practices by businesses toward consumers concerning the environmental characteristics of products. Depending on the circumstances, this may include all types of statements, information, symbols, logos, graphics, and labels, as well as their interaction with colors on packaging, labeling, advertising in all media (including websites), and their use by any organization that qualifies as a "trader" and engages in commercial practices directed at consumers. The Commission emphasizes that environmental claims must be accurate, clear, unambiguous,

[26] Case C-544/10, *Deutsches Weintor* [2012] ECLI: ECLI:EU:C:2012:526.

[27] Case C-544/10, Deutsches Weintor [2012] ECLI: ECLI:EU:C:2012:526, para. 39-41.

[28] Commission Notice – Guidance on the Interpretation and Application of Directive 2005/29/EC of the European Parliament and of the Council concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market [2021] OJ C526/1, p. 72.

and evidence-based, with the burden of proof regarding their truthfulness resting on the business operator. These requirements are further specified in the food, energy, and textile sectors, where greenwashing occurs particularly frequently.[29] Although Directive 2005/29/EC undoubtedly constitutes a relevant regulatory framework, we agree with the statement by *MaCLennan* "that the way these latter provisions have been applied by national courts is highly fact-specific, depending on a court's view on what would have an impact on an average consumer's decision, and as a result, very variable."[30]

At the national level, greenwashing is punishable under consumer protection laws or advertising laws. Supervisory authorities, such as the Slovak Trade Inspection, may impose sanctions for misleading environmental claims, while the self-regulatory framework for advertising and codes of ethics, overseen by the Advertising Council under national conditions, also play a significant role.

4. DIRECTIVE 2024/825

In the previous sections of this paper, we described the regulatory framework through which greenwashing practices have been subject to sanctions to date. It cannot therefore be said that this area is unregulated, as existing legal instruments have been capable of addressing even new, sophisticated commercial practices containing deceptive or misleading environmental claims. Currently, however, at the EU level, there are two legal acts that directly target practices falling under the umbrella of greenwashing. The first is the proposal of GCD Directive, which is not yet an applicable legal act, and the second is Directive 2024/825, which we will address in this section of the article. In the literature, Directive 2024/825 is referred to as "key tool in combating greenwashing, requiring precise, verifiable environmental claims, shifting the burden of proof to businesses, and enhancing transparency."[31]

The framework of Directive 2024/825 is based on the amendment of Directive 2005/29/EC (Article 1) and the amendment of Directive 2011/83/EC (Article 2). Furthermore (Article 3), the Directive regulates reporting to the Commission and review, and subsequently (Article 4), the conditions for transposing the relevant

[29] Commission Notice – Guidance on the Interpretation and Application of Directive 2005/29/EC of the European Parliament and of the Council concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market [2021] OJ C526/1, p. 72.

[30] Maclennan, J.; De Catelle, W., *The Revision of EU Greenwashing Laws: A New Framework of Analysis*, Business and Human Rights Journal, Vol. 10, Issues 2–3, 2025, p. 457, referring to Willem H. van. Boom, *Unfair Commercial Practices*, in: Twigg-Flesner, C. (ed.), Research Handbook on EU Consumer and Contract Law, Cheltenham: Edward Elgar 2016, pp. 388–405.

[31] Vozár, J.; Zlocha, Ľ., *Directive (EU) 2024/825 as a Tool to Eliminate Greenwashing?*, in: Treščáková, D.; Hučková, R. (eds.), *Law-Commerce-Economy XIV.*, ŠafárikPress, 2025, p. 236.

provisions of the Directive into the national legal systems of the Member States. The 2024/825 Directive "aims to promote sustainable consumption patterns by prohibiting practices that prevent consumers from making informed green choices and by ensuring better information provision on durability and reparability of products at point of purchase."[32] The text of the Directive does not explicitly define its scope in the introductory articles, as is standard for regulations of this type, but its scope can be inferred from the amendments it introduces to the other two specific Directives. Since the GCD Directive revises Directive 2005/29/EC and Directive 2011/83/EU, its scope must be derived from the scope of those two directives. According to Article 3 of Directive 2005/29/EC, the Directive applies to unfair commercial practices by traders toward consumers. Directive 2011/83/EU also stipulates in Article 3 that it applies to any contract concluded between a trader and a consumer under the conditions and to the extent set out in its provisions. In light of the above, it can therefore be concluded that the provisions of Directive 2024/825 will apply to B2C relationships, excluding B2B relationships.

4.1. Amendments to the Directive 2005/29/ES

Directive 2005/29/EC aims to protect consumers from unfair commercial practices that harm their economic interests. It introduced (in Article 2) definitions of the terms "consumer," "trader," "product," "business-to-consumer commercial practices," "significant disruption of economic conduct," "code of conduct," "code owner," "professional diligence," "invitation to purchase," "undue influence," and "regulated profession." This article is expanded to include additional definitions, specifically the definition of the term "goods," as defined in Article 2(5) of Directive 2019/771.

Furthermore, Article 2 of Directive 2005/29/EC is amended to include definitions of environmental claims, general environmental claims, sustainability labels, certification schemes, recognized excellent environmental characteristics, durability, software updates, consumables, and functionality. Under Article 6 of Directive 2005/29/EC, the definition of the main characteristics of a product is amended such that the original wording is replaced by a new one. The new definition of the main characteristics of a product significantly reflects environmental claims, as the main characteristics of a product will also include environmental or social characteristics, circularity aspects such as durability, reparability, or recyclability, as well as the results and key indicators of tests or inspections performed on the product.

[32] Keirsbilck, B., *Empowering Consumers for the Green Transition: Overview of Directive (EU) 2024/825*, Journal of European Consumer and Market Law, Vol. 13, Issue 5, 2024, p. 205.

Article 6(2) of Directive 2005/29/EC addresses the misleading nature of commercial practices, and points (d) and (e) are to be added to that provision. Point (d) provides that a commercial practice shall be regarded as misleading if it makes environmental claims regarding future environmental characteristics without clear, objective, publicly available, and verifiable commitments set out in a detailed and realistic implementation plan that includes measurable and time-bound targets and other relevant elements necessary to support its implementation, such as resource allocation, and which is regularly verified by an independent third-party expert whose findings are made available to consumers. Conduct under point (d) shall also be considered misleading if it promotes benefits to consumers that are irrelevant and do not result from any characteristic of the product or the business.

The latest amendment to Directive 2005/29/EC is incorporated into Article 7, which will stipulate that where a trader provides a service involving the comparison of products and provides the consumer with information on the environmental or social characteristics or on the circularity aspects of the products, such as durability, repairability, or recyclability, or on the suppliers of those products, information on the comparison method, the products being compared, and the suppliers of those products, as well as on the measures in place to ensure that the information is kept up to date, shall be considered material information. Last but not least, the individual changes will also be reflected in an amendment to Annex I.

4.2. Amendments to the Directive 2011/83/EU

Similar to Directive 2005/29/EC, Directive 2011/83/EU is amended by adding definitions such as "commercial durability guarantee," "durability," "manufacturer," "repairability score," and "software update" (Article 2 of Directive 2011/83/EU). Article 5 replaces the definition of the reminder of the existence of the statutory guarantee of conformity of goods and its main elements, including its minimum duration of two years. The normative text further includes an obligation for a manufacturer who offers a consumer a lifetime commercial warranty at no additional cost, covering the entire product, with a duration of more than two years, to make this information available to the trader and to further make available information that such a warranty applies to the product in question, along with its duration and a reminder of the existence of the statutory guarantee of conformity, in a clear manner using a harmonized label.

Article 5 also includes an obligation to remind consumers of the existence of the statutory guarantee of conformity for digital content and digital services, the existence and conditions of after-sales service and commercial warranties for goods with digital elements, for digital content, and for digital services, in cases where

the manufacturer or provider makes the information available to the trader, information on the minimum period, expressed either as a time period or by reference to a date, during which the manufacturer or provider provides software updates. At the same time, Article 5 is supplemented with an obligation for the trader, where applicable, to provide information on the repairability rating of the goods.

With regard to Article 6, which lays down the information requirements for contracts concluded at a distance or off-premises, the trader is required to provide, prior to the conclusion of the contract, clear information on payment, delivery- including, where applicable, environmentally friendly delivery options -performance, delivery timeframes, and, where applicable, complaint-handling policies. Compared to the original wording of the relevant provision, an obligation has been added to specify more environmentally friendly delivery methods where available. Directive 2011/83/EU is also amended to require the trader to clearly highlight the existence of the statutory warranty for goods and its main elements, including a minimum duration of two years, as set out in Directive 2019/771, using a harmonized notice. Another amendment to Directive 2011/83/EU concerns the trader's notification obligations toward the consumer, relating both to warranties for goods at no additional cost and to a point-based assessment of the goods' repairability. If a contract between a merchant and a consumer is concluded at a distance using electronic means and imposes an obligation on the consumer to pay, the consumer must be provided with information regarding the main characteristics of the goods or services to the extent appropriate to the medium and the goods or services, the total price of the goods or services, including taxes, information on the warranty period without additional costs, information regarding the duration of the contract, or, in the case of a contract for an indefinite period or a contract that is automatically renewed, the conditions for terminating the contract and information regarding the minimum duration of the consumer's obligations arising from the contract.

Directive 2011/83/EU introduces the category of so-called harmonized notice and so-called harmonized label, which aims to ensure that consumers are well-informed and can easily understand their rights throughout the Union. The harmonized notice is to be used to provide information in contracts that are not concluded at a distance or on business premises, and the trader must provide the consumer, in a clear and comprehensible manner, with information regarding the existence of a statutory guarantee of conformity of the goods, or, where applicable, information on the existence and conditions of after-sales service and commercial guarantees, and the existence of a statutory guarantee of conformity of the goods with the contract (Article 5(1)(e) and Article 6(1)(l)). The harmonized labeling is intended to ensure that, in the case of contracts not concluded at a distance or on business premises, the trader provides the consumer, in a clear and comprehen-

sible manner, with information regarding a lifetime commercial warranty at no additional cost that covers the entire product, with a duration of more than two years, and if the manufacturer offers the consumer a commercial lifetime warranty at no additional cost, covering the entire product, with a duration of more than two years, and makes this information available to the trader, information that such a guarantee applies to the goods in question, its duration, and a reminder of the existence of the statutory guarantee of conformity, in a clear manner using harmonized labeling (Article 5(1)(ea) and Article 6(1)(la)).

4.3. Obligations Resulting for Businesses

The regulation in the form of Directive 2024/825 could be described as the first significant step toward explicitly imposing obligations on businesses regarding environmental claims. We view the nature of regulation on two conceptual levels. The first involves the redefinition or definition of selected terms that can be considered essential to the issue under examination. The second category of regulation involves defining the specific obligations of businesses in relation to consumers. We also view these obligations in such a way that, even though their primary impact is directed toward consumer protection, their overall impact on the business environment within which transactions take place cannot be denied.

Under Regulation 2024/825, businesses are required to refrain from making general environmental claims unless they are supported by recognized and verifiable evidence, for example claims without clear, objective, publicly available and verifiable commitments set out in a detailed and realistic implementation plan, which includes measurable and time-bound objectives and other relevant elements necessary to support its implementation, such as resource allocation, and which is regularly verified by an independent third-party expert whose findings are made available to consumers. The Directive also prohibits creating a misleading impression regarding the extent of a product's environmental benefits, as well as the use of uncertified environmental labels. Environmental claims must be formulated clearly, precisely, and comprehensibly, and their use is classified as a commercial practice that is considered unfair *per se* if the aforementioned conditions are not met. In this regard, it is also important to note the expansion of the annex 1 of the Directive 2005/29/EC, which has been supplemented with fairly specific case studies regulating potentially harmful practices in the area of greenwashing.

5. GCD DIRECTIVE - FEW REMARKS

In connection with Directive (EU) 2024/825, the proposal for the Green Claims Directive (GCD) represents a qualitative shift in the regulation of greenwashing.

Accoring to *Jung* and *Dowse* "the proposed directive establishes an ex-ante control of information, i. e., a control before commercial use of the environmental claim in B2C relationships to achieve these goals."[33] Under this proposal, traders would be required to ensure that any environmental claim is substantiated by scientifically recognised evidence, based in particular on a life-cycle assessment of the product, while demonstrating not only the existence of an environmental benefit but also its significance and relevance in the context of the overall impact of the product or service.

Among the key obligations imposed on traders are the substantiation of explicit environmental claims (Article 3 GCD proposal), the substantiation of comparative environmental claims (Article 4), the communication of explicit environmental claims (Article 5), the communication of comparative environmental claims (Article 6), the regulation of environmental labels (Article 7), requirements for environmental labelling schemes (Article 8), the review of the substantiation of explicit environmental claims (Article 9), and the verification and certification of the substantiation and communication of environmental claims as well as environmental labelling schemes (Article 10).

Similarly to Directive 2024/825, the proposal introduces definitions and, in some cases, redefinitions of key concepts (such as environmental claim, explicit environmental claim, and a trader's commercial practices vis-à-vis consumers), while also referring to the definitions set out in 2025/29/EC, particularly with regard to the notions of trader, consumer, and product. At the same time, it establishes a requirement for independent third-party verification of environmental claims prior to their use in commercial communication, thereby aiming to prevent their arbitrary and unsubstantiated use. The proposal further emphasises transparency, requiring traders to clearly explain the content of the claim, the methodology used, and any comparisons with other products, while also specifically regulating the use of environmental labels and comparative claims. The Green Claims Directive thus constitutes a comprehensive regulatory framework aimed at ensuring a high level of credibility of environmental claims and significantly limiting their misleading or inaccurate use in practice.

6. CONCLUSION

Greenwashing is a rapidly evolving phenomenon that requires a comprehensive, multi-level regulatory approach. The existing legal framework of the European

[33] Jung, S.; Dowse, M., *Key Aspects of the Green Claims Directive Proposal*, Journal of European Consumer and Market Law, Vol. 13, Issue 1, 2024, pp. 11–23, at p. 13.

Union, consisting primarily of directives on unfair competition and consumer protection, has provided basic tools for addressing practices that fall under the category of greenwashing. Initially, their applicability had to be inferred rather implicitly, which was subsequently clarified by non-binding legal acts of the European Union (Guidance on the interpretation and application of Directive 2005/29/EC). Given the specific nature of greenwashing and the importance of environmental protection issues, which must be considered alongside with a high level of consumer protection under EU law, the proposal of GCD was created and is currently still in the legislative process. It is not only the growing sophistication of these practices that highlights the need to refine its final wording. In contrast, Directive 2024/825 is now (almost) fully applicable and provides a significant portion of the regulation addressing the phenomenon of greenwashing. These additions to the current legislative framework appropriately address specific challenges in practical application. Explicit and targeted legislation in the form of Directive 2024/825 and, in the form of (and currently still forming) Green Claims Directive, aims to strengthen legal certainty and consumer protection, as well as to create fairer competitive conditions in a market where environmental claims play an increasingly significant role.

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LIST OF NATIONAL REGULATIONS, ACT AND COURT DECISIONS

1. Act No. 79/2015 Coll., the Waste Management Act

Chapter 2

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Review article

CRIMINAL LIABILITY FOR HARM CAUSED BY ARTIFICIAL INTELLIGENCE SYSTEMS: CROATIAN LEGAL REFORM AND THE EU LAW CONTEXT

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ABSTRACT

The rapid deployment of artificial intelligence (AI) systems across the European Union (EU) raises profound legal challenges, particularly regarding liability for damage caused by autonomous or semi-autonomous systems. While AI promises significant economic and societal benefits, its increasing autonomy disrupts traditional legal concepts of fault, causation, and responsibility. This tension is clearly illustrated by recent national debates, such as in Croatia, where proposals have emerged to introduce criminal liability for harm caused by AI systems, resulting in new criminal offence introduced in 2025, despite unresolved questions concerning the identification of the responsible legal subject. At the EU level, policymakers have sought to address these challenges through a comprehensive regulatory framework, most notably the Artificial Intelligence Act (AI Act) and the proposed reforms of civil liability rules for defective products and emerging digital technologies. These instruments aim to balance innovation with legal certainty, risk management, and the protection of fundamental rights. However, they

predominantly focus on ex ante risk regulation and civil liability mechanisms, leaving unresolved issues regarding criminal liability and the attribution of responsibility in cases involving complex AI-driven decision-making processes.

This paper examines the evolving EU approach to liability for AI-caused damage and assesses its implications for legal certainty within member states. The research focuses on three core questions: (1) how EU law conceptualizes responsibility and accountability for AI-related harm; (2) how national legal systems, using Croatia as a case study, attempt to transpose or supplement EU norms through criminal and civil law instruments; and (3) whether existing regulatory models adequately address the practical and normative challenges posed by autonomous AI systems.

Methodologically, the paper employs doctrinal legal analysis of EU legislation and policy documents, comparative examination of national legal approaches, and critical review of relevant academic literature. Where available, emerging judicial reasoning and analogies from existing case law on technological risk and product liability are also considered.

The paper argues that current regulatory developments reveal a fragmented approach to AI liability that risks undermining legal certainty and uniform application of EU law. It concludes by proposing normative guidelines for a more coherent EU-wide framework that clarifies the attribution of responsibility, enhances harmonization across member states, and strengthens the EU's role as a global standard-setter in AI governance.

***Keywords**: AI-caused harm, Artificial intelligence, Criminal liability, EU law, Legal certainty*

1. INTRODUCTION

The accelerated development and increasingly widespread deployment of AI over the past decade have profoundly transformed social, economic, and legal relations. Autonomous and semi-autonomous systems are now used, for example, in transport, healthcare, financial services, industry, and public administration, where their decisions may have direct and significant consequences for individuals' lives, health, and property.

The increasing use of machine learning systems and advanced algorithms means that certain decisions are no longer made exclusively by human actors, but emerge from complex technical processes whose outcomes may be difficult to predict. This unpredictability may give rise to risks for fundamental rights and human dignity.[1]

At the EU level, the adoption of the AI Act[2] has established a comprehensive regulatory framework based on a risk-based approach. Criminal liability for harm or

[1] Roksandić, S.; Protrka, N.; Engelhart, M., *Trustworthy Artificial Intelligence and its use by Law Enforcement Authorities: where do we stand?*, IEEE, 45th Jubilee International Convention on Information, Communication and Electronic Technology (MIPRO), 2022, p. 1400.

[2] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU)

risk caused by AI is not harmonised at the EU level and remains within the competence of the Member States. This is a consequence of the absence of EU competence in criminal law harmonisation within the EU legal order, under which national legal systems retain responsibility for defining the conditions of criminal liability.

Criminal law traditionally rests on the concepts of individual culpability, unlawfulness, and personal responsibility. It presupposes human conduct and a mental element on the part of the perpetrator in relation to the offence (intent or negligence), on the basis of which blame may be attributed. The criminal liability of legal persons is grounded in acts or omissions, as well as in failures of supervision by responsible persons.[3]

In the context of AI, these concepts are confronted with significant challenges. Where an autonomous system causes harm or creates a risk, the question arises as to whom, and under what conditions, criminal responsibility should be attributed: the programmer, the manufacturer, the distributor, the operator, or the end user?[4]

Complex causal chains and the technical opacity of algorithms ("black box" systems) complicate both the establishment of causation and the assessment of the mental element. This paper proceeds from the premise that existing criminal law doctrines can be applied to such situations, but require careful and restrictive interpretation. At the same time, the application of these doctrines must respect the fundamental limits of criminal law, particularly the principle of legality and the prohibition of objective liability.

No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 [2024] OJ L2024/1689 (Artificial Intelligence Act) (Text with EEA relevance).

3 Pursuant to Art. 3 para. 2 of the Act on the Liability of Legal Persons for Criminal Offences (Croatia), Official Gazette No. 151/03, 110/07, 45/11, 143/12, 114/22, 114/23, a legal person shall be punished for a criminal offence committed by a responsible person where, by such offence, a duty of the legal person is violated or the legal person has obtained or was intended to obtain a benefit for itself or for another. See in: Dragičević Prtenjača, M.; Roksandić, S., *Criminal Law and Criminal Compliance in Croatia*, in: Papathanasiou, K. (ed.), Corporate Criminal Law and Criminal Compliance, Vienna, 2023, pp. 137–164. Under the aforementioned conditions, a legal person shall be punished for a criminal offence committed by a responsible person entrusted with the performance of tasks within the scope of the legal person's activities, where the offence was committed as a result of a failure of supervision or control by a responsible person managing the affairs of the legal person. Under the same conditions, a legal person shall be punished for criminal offences prescribed by the Criminal Code and by other statutes providing for criminal offences.

4 Roksandić Vidlička, S.; Liepiņa, E.; Ostapchuk, S., *Bioethical and Legal Challenges of Artificial Intelligence and Human Dignity*, in: Jovanović, M.; Virady, Tibor (eds.), Human Rights in 21st Century, Netherlands, 2020, pp. 269–288.

In such a normative context, the Croatian legislator amended the Criminal Code in 2025, introducing a statutory definition of an "AI system" and a new criminal offence of endangering life and property through the use of an AI system.[5] The new criminal offence (Article 215a of the Criminal Code/11) encompasses persons involved in the development, testing, validation, placing on the market, supervision, management, or use of AI systems, or otherwise involved, where, through their conduct, a danger is created to life, bodily integrity, or property of a large scale, with aggravated forms provided for in cases of serious bodily injury or death, or large-scale property damage.[6]

However, such an innovation raises a number of questions. To what extent is the definition of an AI system aligned with European law? Are the constituent elements of the criminal offence formulated with sufficient precision to satisfy the principle of legality, in particular the requirement of *nullum crimen sine lege certa*? A particularly sensitive issue concerns the degree of guilt, especially the distinction between intent and negligence and the risk of expanding liability towards objective responsibility. In this context, it is necessary to clarify whether negligence relates to the conduct itself or only to the resulting consequence, and how Croatian law positions this distinction in comparative perspective.

In light of the foregoing, this paper pursues a threefold objective. This paper argues that AI-related criminal liability does not require new categories of guilt, but a restrictive reinterpretation of existing doctrines, particularly negligence and organisational fault.

First, to provide a systematic analysis of the new criminal offence and the definitions related to AI in Croatian criminal law, including an examination of issues of causation, objective imputation, guilt, and the liability of legal persons. Second, to assess the Croatian solution from a comparative perspective in light of EU law, taking into account the broader EU regulatory framework and its interaction with national criminal law. Third, to identify legal uncertainties and challenges concerning the attribution of responsibility, as well as the distinction between criminal and civil liability in this field.

The analysis is guided by the following research questions: (1) whether the statutory definition of AI ensures sufficient clarity and alignment with the European framework; (2) whether the constituent elements of the new criminal offence sat-

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5 Art. 87 para. 33 and art. 215.a of the Criminal Code (Croatia), Official Gazette No. 144/2012, 125/2011, 56/2015, 61/2015, 101/2017, 118/2018, 126/2019, 84/2021, 114/2022, 114/2023, 36/2024, 136/2025.

6 Criminal Code (Croatia), Art. 87 para. 27.

isfy the requirements of legality, foreseeability, and precision; (3) how classical doctrines of criminal law, in particular causation and negligence, can be applied in the context of autonomous systems; and (4) how the relationship between criminal and civil liability should be understood in this field. In doing so, the paper positions itself against approaches that advocate the creation of new categories of criminal liability for AI, arguing instead for doctrinal continuity combined with interpretative adjustment.

Methodologically, the paper is based on a doctrinal analysis of positive law, a structured comparative legal analysis, and a critical review of the relevant literature. The paper argues that, while the Croatian reform represents an important step towards addressing AI-related risks, its application requires a restrictive interpretation of statutory elements and a clearer doctrinal distinction between different forms of fault in order to preserve the principles of legality and personal guilt.

2. THE REGULATORY EU FRAMEWORK

2.1. Constitutional Context and Regulatory Purpose of the AI Act

The subsequent sections of the paper analyse criminal and civil liability for AI, with the EU regulatory framework providing the key background to recent reforms and legal debates. This section provides a structured overview of the AI Act, its regulatory logic, and its relationship to national systems of liability. For the purposes of this paper, the relevance of the EU framework lies primarily in its impact on national legal systems, particularly in shaping regulatory obligations that may be relevant for the assessment of criminal liability.[7]

The AI Act constitutes the first comprehensive European regulatory framework that approaches AI through a risk-based framework. It categorises AI systems into four levels of risk – "unacceptable risk (prohibited)"[8], "high risk (regulated)"[9], "limited risk (transparency)"[10], and "minimal/no risk (unregulated)" – and lays down corresponding obligations for providers and operators of such systems.

From the recitals of the AI Act it follows that the existing EU legal framework is not sufficient to address the specific risks generated by AI systems, which necessitated the establishment of a uniform horizontal regulatory framework. The

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7 Kritikos, M., *Artificial Intelligence ante portas: Legal & ethical reflections*, 2019, Available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/634427/EPRS_BRI(2019)634427_EN.pdf], Accessed 26 March 2026.

8 Art. 5 of the AI Act.

9 Art. 6-27 of the AI Act.

10 Art. 50 of the AI Act.

Regulation is therefore conceived as a response to regulatory gaps, in particular with the aim of ensuring a high level of protection of fundamental rights, safety, and health.

2.2. Preventive regulatory model and limits of EU competence

In this regard, AI systems presenting an unacceptable risk (e.g. manipulation, social scoring, profiling for the purpose of predicting criminal behaviour) are explicitly prohibited. High-risk AI systems may be placed on the market only subject to strict safety and oversight mechanisms, while transparency and supervision are expressly prescribed for general-purpose AI models, including requirements to inform users when they are interacting with AI.[11]

The AI Act builds upon existing product safety mechanisms, extending them to address AI as a horizontal technology across multiple sectors.[12] Its primary function is preventive (*ex ante*), while liability remains governed by separate instruments and national law. This structural separation between *ex ante* regulation and *ex post* liability contributes to legal fragmentation, particularly in areas where technological complexity challenges traditional doctrines of attribution.

2.3. Civil Liability Developments at the EU Level

Although the AI Act defines risks, the approach to liability at the EU level remains uneven. Two principal directions can be identified in the field of civil liability: the proposed AI Liability Directive and the reformed regime of liability for defective products.

In 2022, the European Commission proposed the Artificial Intelligence Liability Directive (AILD) with the aim of modernising the rules on liability for damage caused by AI systems. Under this initiative, the AILD would introduce a rebuttable presumption of causation in order to alleviate the burden of proof for victims seeking to establish damage caused by an AI system.[13]

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11 Art. 51-56 of the AI Act. In the context of explainability and transparency, see in: High Level Expert Group on Artificial intelligence set up by the European Commission, *Ethics Guidelines for Trustworthy AI*, 2019, Available at: [https://www.aepd.es/sites/default/files/2019-12/aiethics-guidelines.pdf], Accessed 26 March 2026.

12 Lewis, D. *et al.*, *Mapping the Regulatory Learning Space for the EU AI Act*, arXiv,2025, Available at: [https://arxiv.org/html/2503.05787v2], Accessed 10 January 2026.

13 European Parliament, *Artificial Intelligence Liability Directive*, 2025, Available at: [https://arxiv.org/html/2503.05787v2], Accessed 11 January 2026.

Its withdrawal in 2025 reflects the practical and political difficulties of harmonising civil liability within the EU legal order.[14] The withdrawal also illustrates the limits of consensus among Member States in balancing innovation, competitiveness, and the protection of injured parties.

In addition to the directive specifically dedicated to AI, under the Revised Product Liability Directive the concept of "product" has been expanded to include software and AI systems[15], thereby extending the EU legal framework for liability for defective products to encompass digital and software-intensive technologies that are increasingly present on the market. This reformed system of civil liability reflects the growing importance of software and AI within complex value chains, while maintaining that liability is attributed to the relevant economic operators involved in their development and deployment.

In this way, civil liability is broadened to encompass autonomous digital systems, while remaining distinct in its function and doctrinal foundations from criminal liability. However, questions remain as to whether the concept of "defectiveness" can fully capture damage resulting from the autonomous behaviour of learning systems.

2.4. Case Law and Indirect Relevance for Criminal Liability

To date, there are no judgments of the Court of Justice of the European Union (CJEU) that directly address criminal liability in relation to AI. This reflects the limited competence of the EU in criminal law matters. Nevertheless, there are cases concerning digital technologies and liability in EU law more generally, in which the CJEU has addressed liability in the context of digital services and data processing, albeit not on the basis of the AI Act.

The Court has held that operators of online platforms and search engines may incur liability where their role goes beyond that of a neutral intermediary and involves a degree of control over content or data processing.[16] Although these decisions were not adopted on the basis of the AI Act, they establish an interpretative

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[14] Euronews, *EU Tech Commissioner defends scrapping of AI Liability rules*, 2025, Available at: [https://arxiv.org/html/2503.05787v2], Accessed 12 January 2026.

[15] P. 3 and 6 of the Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC [2024] OJ L, 2024/2853 (Text with EEA relevance).

[16] Case C-492/23 – Russmedia Digital SRL and Inform Media Press SRL [2025] ECLI:EU:C:2025:935, pp. 106 and 126. Case C-131/12 Google Spain SL and Mario Costeja González [2014] 2012/C 165/18, pp. 33 and 38.

framework that may influence the understanding of liability in technologically complex environments.[17]

Several conclusions follow from the foregoing. First, the European regulatory approach to AI is primarily preventive and risk-based. Second, the AI Act does not harmonise liability, but operates alongside civil law instruments and national legal systems. Third, there is a recognised need to adapt certain legal doctrines, particularly with regard to evidence and standards of fault, in order to address the specific challenges posed by AI systems. EU law therefore does not directly regulate criminal liability, but may influence its interpretation indirectly through general principles such as legal certainty and proportionality.

2.5. Synthesis: multi-level liability framework

The European model of AI regulation is primarily based on prevention and risk management, while issues of liability are addressed through a combination of civil law instruments and national legal systems. From a criminal law perspective, this creates a structural gap: regulatory obligations are harmonised at the EU level, while the attribution of criminal responsibility remains fragmented and dependent on national legal doctrines. In this context, the Croatian reform represents an attempt to address risks that are otherwise regulated at the EU level primarily through preventive mechanisms.

3. CRIMINAL LAW REGULATION OF ARTIFICIAL INTELLIGENCE IN CROATIA

Through the amendments to the Criminal Code of 2025[18] the Croatian legislator has, for the first time, expressly introduced criminal law regulation of AI. This intervention represents a specific legislative response to risks associated with technologically complex and adaptive systems, rather than a departure from existing criminal law structures.

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[17] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391. See also in: Wagner, G., *Liability Rules for the Digital Age – Aiming for the Brussels Effect*, Journal of European Tort Law, Vol. 13, Issue 3, 2023, p. 191. See also in: Rodríguez de Las Heras Ballel, T., *Mapping Generative AI rules and liability scenarios in the AI Act, and in the proposed EU liability rules for AI liability*, Cambridge Forum on AI: Law and Governance, Vol. 1, Issue e5, 2025, p. 2. See also in: Ebers, M. *et al.*, *The European Commission's Proposal for an Artificial Intelligence Act—A Critical Assessment by Members of the Robotics and AI Law Society (RAILS)*, J, Vol. 4, Issue 4, 2021, p. 601. See also in: Novelli, C. *et al.*, *Generative AI in EU law: Liability, privacy, intellectual property, and cybersecurity*, Computer Law & Security Review, Vol. 55, 106066, 2024, p. 1. See also in: Tran, H. C., *Unbounded Harms, Bounded Law: Liability in the Age of Borderless AI*, J, arXiv preprint arXiv:2601.12646, 2026, p. 1.

[18] Amendments to the Criminal Code (Croatia), Official Gazette No. 136/2025.

This legislative reform encompasses two fundamental elements: (1) the introduction of a statutory definition of an "AI system" into the Criminal Code/11[19] and (2) the introduction of a new criminal offence of endangering life and property through the use of an AI system.[20] The legislator has thus combined a technologically neutral definition with a specific incrimination. While this approach ensures flexibility, it also requires a restrictive interpretation in order to comply with the principle of legality.

The definition of an AI system in the Croatian Criminal Code is substantively aligned with the definition set out in the AI Act, under which 'AI system' means a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments.[21]

By adopting a functional and technologically neutral definition, the legislator has ensured compatibility with European law and alignment with the broader regulatory framework. However, from a criminal law perspective, the key issue is the precision of the provision set out in Article 215a of the Criminal Code.

The Croatian criminal law intervention must be understood in the context of the EU regulatory framework, which is primarily preventive and does not regulate criminal liability, and focuses on risk classification, obligations of providers and users, and systems of oversight. This legislative intervention differs from classical forms of technological regulation in that AI is not treated merely as an instrument, but as a source of risk arising from its design, deployment, and use.

Such an approach raises the question of the limits of criminal law in regulating AI systems whose full effects may only become apparent *ex post*. In this respect, criminal law must avoid extending liability beyond the boundaries of personal culpability, as doing so would risk transforming fault-based responsibility into de facto objective liability.

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19 Amendments to the Criminal Code (Croatia), Art. 87 para. 33 of the Criminal Code (Croatia).

20 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 [2024] OJ L2024/1689 (Artificial Intelligence Act) (Text with EEA relevance).

21 Compare Art. 3 para. 1 of the AI Act with Art. 87 para. 33 of the Criminal Code (Croatia).

From a systematic perspective, the new criminal offence is placed among offences against public safety of persons and property. The legislator thus treats AI as a source of technological risk.

Unlike classical sources of danger, AI does not possess inherent physical hazardousness; the relevant risk arises from human decisions in its design, configuration, and use. At the same time, their adaptive and complex behaviour justifies specific regulatory attention.

From a doctrinal perspective, this constitutes an endangerment offence. The basic form of the offence is completed already by the creation of a concrete danger to protected legal goods (life or bodily integrity of persons, or property of a larger scale), while serious bodily injury or death, as well as large-scale property damage, are provided for as aggravated forms. This confirms the preventive character of the offence. However, extending punishability to the stage of concrete endangerment requires a restrictive interpretation, ensuring that only real and individualised risks fall within the scope of criminal liability.

The principle of *ultima ratio* requires that criminal law be applied only where other branches of law are insufficient to protect fundamental legal goods. Accordingly, broadly formulated elements of the offence, such as "or otherwise", must be interpreted restrictively in line with the principle of legality.[22]

The *actus reus* of the criminal offence of endangering life and property through the use of an AI system encompasses the development, testing, validation, placing on the market, supervision, management, and use of AI systems, or otherwise the use of an AI system. Such a broad formulation covers the entire life cycle of the technology. This indicates that responsibility may extend beyond the end user to other actors involved in the life cycle of the system.

In this context, it is also necessary to consider the relationship between this offence and other criminal offences. Where, in addition to endangerment, actual harm occurs (e.g. bodily injury or death), issues of concurrence arise. In principle, the rules on concurrence require an assessment of whether the conduct constitutes a single offence with aggravated consequences or multiple offences in real concurrence. This depends on the specific circumstances of the case and the structure of the statutory provisions.

Such breadth requires a clear distinction between regulatory non-compliance, professional error, and criminally relevant conduct. The objective element of this

[22] Art. 1 of the Criminal Code (Croatia). Novoselec, P. (ed.), *Posebni dio kaznenog prava*, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2007, pp. 505-524. See also in: Vuletić, I., *Corporate Criminal Liability: An Overview of the Croatian Model after 20 Years of Practice*, Laws, Vol. 12, Issue 2, 2023, Article 27, pp. 2-5.

criminal offence consists in creating a danger to the life or bodily integrity of persons, or to property of a larger scale. In this respect, it is crucial to emphasise the distinction between abstract and concrete danger.

For the application of Article 215a, the danger must be concrete and individualised, rather than merely hypothetical. Croatian case law requires that courts establish the individual responsibility of the accused and the existence of a concrete danger, ensuring that liability is not attributed in abstract terms.[23]

In the AI context, this requires an assessment of whether a specific configuration or use of the system created a foreseeable and preventable risk. As regards causation, it exists where the conduct of the perpetrator, according to the rules of experience and the laws of nature, was capable of bringing about the resulting consequence, and where that consequence is not the result of extraordinary and unforeseeable circumstances. In the context of AI systems, the notion of unforeseeable circumstances is particularly relevant, given the potential for complex and adaptive behaviour. A mechanical attribution of all system errors to developers or operators would disregard the complexity of such systems.

However, the application of these criteria is particularly complex in technologically sophisticated environments. These difficulties may be illustrated by the example of an autonomous vehicle that fails to recognise a pedestrian due to limitations in training data and specific environmental conditions, resulting in serious bodily injury.

In such a case, the key legal question is whether a specific actor breached a duty of care in a manner that created a foreseeable and preventable risk. For example, liability may arise if the developer failed to address known limitations of the system, or if the operator deployed the system in conditions for which it was not intended. Conversely, where the system operates within expected parameters and the outcome is not foreseeable, criminal liability should be excluded.

In such circumstances, multiple potential addressees of the norm come into consideration, including the vehicle manufacturer, the developer of the AI system, the entity responsible for maintenance and updates, as well as the user or operator.[24]

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[23] Judgement of the Supreme Court of the Republic of Croatia No. I Kž 438/2018-11 of 21 October 2020. Judgement of the Supreme Court of the Republic of Croatia No. I Kž 561/2020-9 of 15 April 2021. Dragičević Prtenjača, M.; Roksandić, S., *op. cit.,* note 3, pp. 137–164. See also in: Law on the Liability of Legal Persons for Criminal Offences (Croatia).

[24] Gless, S.; Silverman, E.; Weigend, T., *If Robots Cause Harm, Who Is to Blame? Self-Driving Cars and Criminal Liability*, New Criminal Law Review, Vol. 19, Issue 3, 2016, p. 412. See also in: Roksandić Vidlička, S.; Liepiņa, E.; Ostapchuk, S., *op. cit.,* note 4, pp. 270–272.

However, the mere occurrence of harm is not sufficient to establish criminal liability; it must be shown that a concrete and individualised danger is linked to a breach of a duty of care by a specific person.[25]

Where the system operates within its intended parameters and the outcome is objectively unforeseeable, negligence may be excluded. Conversely, disregard of known limitations or failures of supervision and control may constitute a breach of the duty of care. In such cases, liability may arise for both individuals and legal persons, where the offence results from failures in supervision or control.[26]

By contrast, different hypothetical constellations may lead to different attributions of liability. For instance, if a developer knowingly deploys an AI system despite documented deficiencies in its training data, liability may arise at the development stage.

If an operator uses a system in conditions explicitly excluded by its design specifications, liability may arise at the level of use. Finally, where a company systematically fails to implement adequate monitoring and compliance mechanisms, liability may arise on the basis of organisational fault.

The diffusion of decision-making characteristic of AI systems complicates the attribution of individual responsibility, particularly in complex organisational structures involving multiple actors. This makes the requirement of individualisation of liability particularly important, as criminal responsibility cannot be inferred from systemic failure alone without identifying a concrete breach of duty by a specific actor. Criminal liability must nevertheless remain individualised and linked to a concrete contribution and a breach of duty in relation to a foreseeable risk, in accordance with the principle of legality and the requirement of foreseeability of criminal liability.[27]

In Croatian criminal law, it is necessary to distinguish clearly between intent and negligence. Intent presupposes awareness and acceptance of the prohibited consequence, whereas negligence is characterised by a lack of such acceptance, even where the consequence was foreseeable.

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25 Novokmet, A.; Roksandić, S.; Vidaković I., *Tehnološki potaknute promjene u kaznenom postupku: održavanje ravnoteže učinkovitosti kaznenog postupka i prava na obranu*, in: Modernizacija prava, Knjiga 82., Regulacija umjetne inteligencije u Europskoj uniji: Tehnološki izazovi i etička pitanja, pp. 63-98.

26 Marchant, G. E.; Lindor, R. A., *The Coming Collision Between Autonomous Vehicles and the Liability System*, Santa Clara Law Review, Vol. 52, Issue 4, 2012, p. 1321. Art. 3 p. 2 of Law on the Liability of Legal Persons for Criminal Offences (Croatia).

27 Art. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, E.T.S. No. 5, 213 U.N.T.S. 222. Art. 49 of the Charter of Fundamental Rights of the European Union. *Kokkinakis v Greece* (1993) 52 ECHR 20. *Cantoni v France* (1996) 35 ECHR 121.

In this respect, the concept of negligence may differ from certain comparative approaches in which awareness of risk combined with acceptance may be classified as intent. Negligence exists where the perpetrator was obliged and able to foresee the possibility of the harmful consequence but failed to exercise due care.

In comparative criminal law, particularly in systems recognising *dolus eventualis*, awareness of a risk combined with acceptance of its occurrence may qualify as intent rather than negligence. However, Croatian law maintains a stricter distinction, requiring acceptance of the consequence for intent, whereas mere awareness without acceptance remains within the scope of negligence. In this respect, it is important to clarify that negligence in Croatian criminal law may relate both to the conduct and to the resulting consequence; however, in the analysed offence, it is primarily linked to the failure to prevent a foreseeable and avoidable consequence, rather than to the mere performance of the act itself.

The analysed offence is primarily structured as a negligent offence. Intentional commission would require that the perpetrator was aware that their conduct would create a concrete danger and accepted such an outcome, which, in the context of AI systems, is expected to be exceptional.

Accordingly, the doctrinal construction of the offence must be understood as centred on negligence, particularly in relation to the resulting danger. From a doctrinal perspective, intentional commission of this offence is not excluded, but would require a situation in which the perpetrator is aware that their conduct creates a concrete danger and nevertheless accepts such an outcome, which in practice will occur only in exceptional circumstances.

While civil liability primarily serves a reparative function, criminal liability is based on the attribution of personal guilt. Although both may rely on the concept of negligence, their content is not identical. Criminal negligence requires a higher degree of fault and is subject to stricter standards of proof, reflecting the punitive nature of criminal law.[28]

This implies that omissions may constitute a relevant form of conduct under Croatian criminal law. In particular, failures to implement adequate supervision, monitoring, or risk management measures may give rise to liability where a legal duty to act exists. Since approaches to omission differ across legal systems, it is important to emphasise that Croatian law recognises omission as a basis of criminal liability where a specific duty of care is established.

[28] Art. 41 of the Criminal Code (Croatia).

Under Croatian criminal law, such duties may arise from statutory provisions, contractual obligations, or the assumption of responsibility within organisational structures. In the context of AI systems, this is particularly relevant for actors responsible for supervision, monitoring, and risk management throughout the lifecycle of the system.

The relevance of fundamental rights must be interpreted cautiously, as their horizontal effect remains debated.[29] In this context, their relevance in criminal law does not stem from direct horizontal applicability, but rather from their interpretative function in shaping the content of legal duties and standards of care, particularly where regulatory obligations under EU law inform the assessment of unlawfulness. The principle of proportionality requires that penalties correspond to the gravity of the offence and the degree of guilt.[30]

Even where AI is involved, criminal liability remains attached to natural or legal persons.[31] The Croatian reform represents an important step in addressing AI-related risks, but its effectiveness depends on a restrictive and doctrinally consistent interpretation of its elements, particularly with regard to negligence, omission, and the requirement of individualised criminal liability.[32]

4. COMPARATIVE AND NORMATIVE ANALYSIS

A comparative analysis of criminal law regulation of AI in the Member States of the EU reveals significant normative diversity, while confirming a shared conceptual core: the preservation of the anthropocentric structure of criminal law. Accordingly, notwithstanding technological innovations and the increasing au-

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29 Art. 1, 7 and 8 of the Charter of Fundamental Rights of the European Union. Moch, E., *Autonomous Systems (AI) and Criminal Imputability: Challenges for Modern Law*, International Journal of Research and Review, Vol. 12, Issue 10, 2025, p. 290.

30 Art. 49 para. 3 of the Charter of Fundamental Rights of the European Union.

31 Berdica, J.; Herceg Pakšić, B., *Umjetna inteligencija i odabrani aspekti kaznenoga prava. O nekim izazovima za suvremenu pravnu kulturu*, Filozofska istraživanja, Vol. 42, Issue 1, 2022, p. 101. Mrčela, M.; Vuletić, I., *Novo kazneno djelo – dovođenje u opasnost života i imovine sustavom umjetne inteligencije*, Državno odvjetništvo otvara razgovor: DOOR, Vol. 1, Issue 1, 2025, p. 229.

32 Vuletić, I.; Novokmet, A.; Tomičić, Z., *Izazovi posebnog dijela kaznenog prava zbog razvoja umjetne inteligencije uz poseban osvrt na hrvatsko kazneno pravo*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 47, Issue 1, 2024, p. 27. As regards the amendments in the regulation of criminal offences against the environment, in particular in accordance with the requirements of the Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC [2024] OJ L, 2024/1203. See further in: Roksandić, S.; Engelhart, M., *Environmental Corruption: Fighting Two Evils through International Criminal Law Alongside Introducing a Special Protocol to UNCAC and UNTOC*, International Criminal Law Review, Vol. 25, Issue 2-3, 2025, pp. 247-270.

tonomy of algorithmic systems, only natural and legal persons – not AI systems – can be bearers of criminal liability.

The Croatian reform of 2025 introduced a specific criminal offence of endangering life and property through the use of an AI system, thereby representing a relatively innovative step in the European context. In doing so, the Croatian legislator has partially moved beyond the dominant model of relying exclusively on general criminal law doctrines and has normatively recognised the specificity of technologically generated risks.

Most EU Member States, by contrast, continue to rely on general criminal law doctrines without introducing AI-specific offences. For the purposes of comparison, the analysis focuses on the criminal liability of natural persons and, where relevant, the liability of legal persons based on organisational fault.

4.1. Models Based on General Criminal Law (Germany, France)

Germany has not introduced a specific criminal offence relating to AI; rather, liability is assessed under general offences such as negligent homicide and negligent bodily injury.[33] The German model is grounded in a strict doctrine of personal guilt, emphasising individual responsibility and rejecting any form of automated attribution of liability to a technological system.

AI is treated as a technical instrument, with liability depending on human intent or negligence. The system is analogous to a machine or vehicle and does not constitute a bearer of conduct in criminal law.

Nor does the French legal system contain an explicit provision criminalising AI-specific risks. Liability arises under general provisions relating to safety obligations of producers and distributors.

French law attributes liability to natural and legal persons, including for omissions, without recognising AI as a subject of liability.[34] Thus, causation may stem from software, but guilt is attributed to human or organisational failure.

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[33] Art. 222 and 229 of the Criminal Code (Germany), in the version published on 13 November 1998 (Official Gazette I, p. 3322), as last amended by Article 2 (2) of the Act of 7 November 2024 (Official Gazette 2024 I No. 351).

[34] Art. 121-1 and 222-19 of the Criminal Code (France), in the version published on 29 July 1994 (Official Gazette No. 175), as last amended of the Act of 9 July 2025 (Official Gazette No. 622). See also in: Cartier M. E., *Kaznenopravna odgovornost pravnih osoba u francuskom pravu,* Hrvatski ljetopis za kazneno pravo i praksu, Vol. 12, Issue 2, 2005, pp. 279-293.

4.2. Organisational Liability Models (Italy, Spain)

Italy has followed an opposite path, initially proceeding with implementing national regulation. On 17 September 2025, the Italian Parliament approved the first national law on artificial intelligence, thereby making Italy the first country in the European Union to adopt domestic legislation governing the use of AI.[35]

Italy has a system of criminal liability of legal persons based on organisational fault.[36] Liability arises where effective compliance and risk-management systems are lacking. In the AI context, this includes failures in risk assessment, oversight, and internal controls.[37]

The criminal law reform of 2025 in Spain introduced a compliance-based approach where liability may be excluded if effective prevention mechanisms are in place.[38] This links criminal liability to organisational failure rather than technological risk alone.

4.3. Technologically Neutral Approaches (Netherlands, Austria)

Dutch law recognises criminal liability of legal persons (Article 51), but in practice liability is often attributed to natural persons within the organisation, in line with general criminal law principles. The Netherlands does not provide for AI-specific offences but applies existing offences, such as unlawful interference with data, to technologically mediated conduct.[39] This reflects a technologically neutral approach, allowing existing norms to be applied to AI systems.

In the AI context, liability may arise from failures to address known risks or from deficiencies in supervision. This approach enables adaptation to new technologies without introducing specific AI-related offences.

The Austrian model allows for the sanctioning of legal persons where a criminal offence is the result of failures in supervision or organisation.[40] In the AI sector, this may include inadequate validation of systems or the disregard of safety warn-

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35 Law No. 132/2025 - AI Law (Italy), in the version published on 23 September 2025 (Official Gazette No. 223) entered into force 10 October 2025.

36 Art. 1 and 222-19 of the Legislative Decree (Italy), in the version published on 8 June 2001 (Official Gazette No. 231).

37 Law No. 132/2025 - AI Law (Italy), *op. cit.,* note 13.

38 Art. 31 of the Criminal Code (Spain), Official Gazette No. 10/1995.

39 Art. 350a para. 1 of the Criminal Code (Netherlands), in the version published on 1 April 1881 (Official Gazette No. 35), as last amended of the Act of 19 April 2005 (Official Gazette No. 211).

40 Art. 3 of the Corporate Liability Act (Austria), Official Gazette I No. 151/2005.

ings. In this way, liability is focused on control mechanisms rather than on the autonomy of the technology itself.

4.4. Comparative Synthesis

Across all analysed systems, a common element is the preservation of the principle of personal guilt. No State recognises AI as a subject of criminal law. Accordingly, the anthropocentric character of criminal law remains an unquestioned doctrinal constant of the European legal space.

Accordingly, criminal liability may extend to: the programmer, the manufacturer, the user, or the responsible person within a legal entity, depending on their specific contribution and breach of duty in the concrete case. From a comparative perspective, the Croatian model goes a step further, as it explicitly criminalises the use of an AI system in hazardous circumstances, thereby normatively recognising the specificity of technological risk.

Such a normative formulation potentially broadens the scope of criminal law intervention even before concrete harm occurs. This distinguishes the Croatian model from more conservative approaches and raises concerns regarding the potential expansion of criminal liability into areas traditionally governed by regulatory or civil law mechanisms. This approach also risks over-criminalisation if not interpreted restrictively.

4.5. EU Multi-Level Framework

At the EU level, the regulatory framework is shaped by the AI Act, which is preventive in nature (*ex ante*), while the civil liability regime has been modernised through the Revised Product Liability Directive. Criminal liability remains a national domain, but must be consistent with the Charter of Fundamental Rights of the European Union. This creates a multi-layered system of liability, in which national criminal law norms are integrated into the broader European regulatory context.

In this respect, three liability regimes function complementarily: administrative fines (regulatory level), compensation for damage (civil law level), and imprisonment or pecuniary sanctions (criminal law level). The overlap of these regimes requires careful interpretation to avoid double punishment (ne bis in idem). The boundaries between these regimes become particularly sensitive in cases involving high-risk AI systems.

National criminal law norms must be proportionate, precise, and foreseeable. The principle of legality (*nullum crimen sine lege*) requires a clear and determinate defi-

nition of prohibited conduct, particularly in technologically complex areas such as AI. Criminal law intervention must be justified by a real and serious risk to protected legal interests (life, bodily integrity, or property of significant value). Otherwise, there would be a risk of overly broad interpretation and potential undermining of legal certainty.

Different national models may give rise to varying standards of criminal liability, regulatory forum shopping, understood as the possibility for economic actors to structure their activities in jurisdictions with more favourable liability standards, and legal uncertainty for multinational technology companies. In this context, the CJEU may play an important role, as its interpretation of the principles of proportionality, legal certainty, and ne bis in idem could indirectly influence the shaping of criminal law standards in the field of AI. Case law at the EU level may thus act as a factor of gradual harmonisation without the formal unification of criminal law.

4.6. Key Challenges

Such a comparative analysis shows that the Croatian reform represents a normatively bold, yet doctrinally sensitive, step forward. Most EU Member States continue to rely on general criminal law doctrines and established models of liability for legal persons.

Key challenges, however, remain: the precise attribution of responsibility within complex technological chains; establishing causation in self-learning systems; distinguishing negligence from permissible technological risk; preserving the principle of personal guilt; and preventing disguised objective liability. Addressing these challenges requires an interdisciplinary approach, particularly the integration of legal and technical expertise.

4.7. Doctrinal implications

It may be said that the European legal space is currently in a phase of experimental normative adaptation. Future development will likely move towards a gradual convergence of standards, but without a complete unification of criminal law, which remains strongly anchored in national legal traditions.

In this way, AI becomes a test of the resilience of fundamental criminal law principles: personal guilt, proportionality, legality, and subsidiarity. The preservation of these principles in the digital age will determine the long-term legitimacy of criminal law intervention in the field of AI.

The regulation of AI in criminal law raises fundamental questions concerning conduct, causation, and guilt in technologically complex environments. In other words, it is a challenge that affects the very doctrinal structure of criminal law, rather than merely its application to new technological phenomena.

Traditional criminal law theory proceeds from the presumption of conscious and volitional human action as the fundamental unit of criminal law analysis, in which human awareness and control over behaviour constitute a key element in the attribution of guilt. Autonomous systems, however, introduce complex, statistically conditioned decision-making processes that are not always transparent or predictable, relying on probabilistic models and the processing of large volumes of data. For this reason, the establishment of effective supervision is of indisputable importance.

This is particularly evident in the case of machine learning systems, which over time modify their behavioural patterns based on new data, thereby diverging further from their initial programming. In such situations, the question arises whether the classical standard of foreseeability of harmful consequences can be applied without adjustment, or whether more nuanced criteria for assessing negligence must be developed that take into account the technological complexity and dynamism of the system.

This also raises the question of whether the boundaries of permissible risk should be redefined in the context of experimental and innovative technologies. In particular, it invites reconsideration of how foreseeability should be assessed in environments characterised by probabilistic and data-driven decision-making.

The limited transparency of complex AI systems may complicate the assessment of subjective elements of criminal liability. This problem is not merely technical, but has direct implications for establishing the subjective elements of a criminal offence.

This increases the importance of documentation, testing, and transparency as indirect indicators of due care. In the future, procedural rules of evidence may become as important as substantive norms, given that the success of criminal prosecution will largely depend on the ability to reconstruct technical processes and decision-making within algorithmic systems.[41]

4.8. Final Synthesis

From a comparative perspective, it can be observed that EU Member States balance differently between the promotion of innovation and repressive intervention,

[41] Novokmet, A.; Roksandić, S.; Vidaković I., *op. cit.*, note 37.

depending on their respective legal traditions and regulatory philosophies. States that rely more heavily on existing criminal law doctrines implicitly prioritise stability and legal certainty, considering that the technological neutrality of norms allows their application to new forms of risk without the need for specific incriminations.

On the other hand, the Croatian model demonstrates a greater willingness to normatively anticipate risks and to explicitly recognise AI as a source of specific hazards. Such anticipatory criminalisation has a preventive potential, as it sends a clear signal regarding the boundaries of permissible conduct, but it simultaneously carries the risk of overreaching into the domain of permissible technological experimentation and innovation.

The boundary between justified risk and criminally relevant negligence thus becomes extremely sensitive, and its delineation requires careful evaluation of social benefit and potential harm. The attribution of liability remains particularly complex in multi-layered technological chains involving developers, data providers, system integrators, and end users, each exercising different levels of control and knowledge.

The criminal law system, which traditionally requires a clearly identifiable person and precisely established subjective liability, must adapt to the analysis of collective and organisational failures without abandoning the fundamental principles of personal responsibility. It is precisely here that the concept of organisational negligence comes into play, developing through the practice of liability of legal persons and enabling the sanctioning of structural weaknesses in risk management. In this way, the focus shifts from individual error to systemic deficiencies in supervision, control, and corporate security.

At the European level, an additional dimension is the need to align criminal law standards with fundamental rights, in particular the right to a fair trial and the principle of proportionality, which act as a corrective on any repressive intervention. Any criminal norm relating to AI must be formulated with sufficient precision so that its addressees can foresee which conduct is prohibited and what consequences may follow in the event of a violation. Otherwise, there would be a breach of the principle of legality and legal certainty, potentially giving rise to constitutional and European law challenges.

Technological complexity must not serve as an excuse for normative indeterminacy, as this would undermine the legitimising basis of criminal law. Clarity and foreseeability of norms form the foundation of trust in the criminal justice system.

In the long term, it can be expected that specific standards of due care in the AI sector will gradually emerge, developing through case law and regulatory guid-

ance. In fields such as traffic or medical law, where specific standards of professional diligence have evolved, comparable criteria may develop in the AI domain that take into account the level of system autonomy, the foreseeability of risks, the quality of training data, and the availability of safety measures.

These standards would not necessarily require a new category of guilt, but would clarify the content of the existing concept of negligence in the digital context and enable a more consistent application of the law. In this way, they would ensure a balance between flexibility and legal certainty.

The regulation of AI in criminal law reflects the broader challenge of adapting legal systems to technological change while preserving fundamental principles. Criminal law, as the strictest form of social control, must intervene cautiously and subsidiarily, bearing in mind that punishment is a measure of last resort for the protection of fundamental values.

At the same time, criminal law must address serious risks to life, bodily integrity, and property, particularly where they result from systemic failures or breaches of safety standards. This requires a careful balance between innovation and the protection of fundamental values. It is within this balance that it will be determined whether the criminal law systems of EU Member States can preserve their anthropocentric structure while effectively responding to the challenges of autonomous technologies and ensuring the long-term legitimacy of criminal law intervention in the digital age.

5. CONCLUSION

An analysis of the European and Croatian normative frameworks shows that legal regulation of AI is developing along two complementary, yet still insufficiently integrated, trajectories. At the EU level, the adoption of the AI Act established a sophisticated preventive, risk-based regulatory model. This model is primarily aimed at ex ante risk management, transparency, conformity assessment, and administrative supervision. In parallel, the reform of liability for defective products through the Revised Product Liability Directive[42] expanded the concept of "product" to include software and AI systems, thereby adapting the civil liability framework to the digital environment.

[42] Directive (EU) 2024/2853, *op. cit.*, note 17. Entered into force on 9 December 2024, replacing the nearly 40-year-old regulation from 1985. EU Member States have until 9 December 2026 to transpose it into their national legislation.

This has created a multi-layered system where administrative and market regulation are strongly harmonised, while criminal liability remains fragmented. Such asymmetry generates risks to legal certainty, particularly in cross-border situations and involving multinational technology actors.

This asymmetry is a structural consequence of the constitutional allocation of competences within the European Union, under which criminal law remains primarily within the jurisdiction of Member States. It should therefore not be understood as a regulatory deficiency, but as an inherent feature of the EU legal order.

The Croatian reform of the Criminal Code in 2025 represents a significant step, as it explicitly criminalises the endangerment of life and property through the use of AI systems for the first time. By introducing a statutory definition of an AI system, drawn from the European regulatory framework, formal alignment with EU law has been ensured. At the same time, the new criminal offence is placed among offences against public safety (Chapter XXI of the Criminal Code/11), thereby normatively recognising AI as a specific source of technological risk.

At the same time, it must be emphasised that the primary responsibility for defining the scope and limits of criminal liability lies with the legislator. Without sufficiently precise legislative guidance, there is a risk that courts may be required to resolve fundamental normative questions through interpretation, potentially undermining the principle of legality. Courts play a crucial role in interpreting and applying criminal law norms, but the determination of offences and sanctions must be clearly established through legislation in accordance with the principles of legality and proportionality.

The key findings of this study are as follows. First, the European regulatory model, based on prevention and risk management, does not fully resolve the question of *ex post* liability, particularly in the criminal law context. Second, the Croatian legislator has sought to fill this gap through anticipatory criminalisation, but such an approach requires extremely restrictive and precise interpretation in order to preserve the principles of legality and personal guilt. Third, comparative analysis shows that most Member States continue to apply general criminal law doctrines without specific AI-related incriminations, relying on the individualisation of guilt of programmers, manufacturers, operators, or responsible persons within legal entities.

In all the models analysed, the anthropocentric structure of criminal law is preserved: AI cannot be a bearer of criminal liability. Normative attribution remains attached to a human being or a legal person, while the AI system is regarded as an instrument, a source of risk, or a technical intermediary. In this way, the continu-

ity of fundamental criminal law principles is maintained despite the technological transformation of society.

A particular challenge identified in this paper concerns establishing causation and the subjective element of guilt in the context of complex, self-learning, and partially opaque systems. The "black box" problem, the dynamic adaptability of models, and multi-layered technological chains complicate the precise individualisation of responsibility. In this regard, procedural issues (standards of evidence, expert assessments, access to technical documentation) become as important as the substantive construction of the criminal offence.

Firstly, it shows that the question of liability for AI is not merely technical or regulatory, but raises fundamental questions concerning the concepts of criminal law: conduct, causation, guilt (intent and negligence), and permissible risk. AI tests the resilience of the classical theory of conscious and volitional human action, as it introduces statistically conditioned and autonomous decision-making processes that are not always fully predictable or controllable.

Secondly, the study confirms that it is not necessary to abandon existing criminal law categories in order to address the challenges posed by AI. This conclusion follows from the comparative analysis, which demonstrates that multiple legal systems successfully address AI-related risks through the application of general doctrines of negligence and organisational fault, without introducing fundamentally new categories of criminal liability.

Rather than creating a "new" type of guilt or attributing legal personality to algorithms, it is possible to adapt existing doctrines, particularly negligence and organisational fault, to the technological context. In this way, the continuity of legal tradition is maintained, and normative radicalism that could destabilise the criminal law system is avoided.

Thirdly, the analysis of the Croatian reform highlights both the advantages and risks of anticipatory criminalisation. The advantage lies in the fact that the use of AI systems in hazardous circumstances is subject to criminal law control. This strengthens the preventive function of the law and public confidence in the safe application of new technologies. The risk, however, lies in the potential for overly broad interpretation and disguised objective liability, particularly if standards of due care are not defined with precision.

Fourthly, the study emphasises the need for a clear distinction between criminal and civil liability. The civil law regime has a primarily reparative function, whereas criminal law protects fundamental social values and operates as ultima ratio. Any

erosion of this distinction would lead to an approximation to objective liability, which would be contrary to the principles of proportionality and personal guilt guaranteed within the European legal space.

Fifthly, the comparative overview shows that EU Member States are currently in a phase of normative experimentation. The Croatian model represents one of the first attempts at explicit AI-related incrimination, whereas other states prefer a technologically neutral approach.

This diversity can serve as an impetus for the development of best practices, but it simultaneously creates a risk of fragmentation and regulatory "forum shopping." This may occur where economic actors choose to develop, deploy, or structure AI-related activities in jurisdictions with less stringent standards of criminal liability, thereby potentially undermining the uniform level of protection across the internal market.

In this way, the study supports the thesis that the future development of criminal liability for AI will not move toward complete unification, but rather toward a gradual convergence of standards through case law, doctrine, and mutual learning between legal systems. Based on the analysis conducted, several guidelines can be formulated for the further development of criminal law regulation of AI, both at the national and European levels. Any criminal norm relating to AI must be formulated clearly and predictably. Definitions drawn from regulatory law must be interpreted restrictively in the criminal law context, with the consistent application of the principle *in dubio pro reo*.

In complex technological chains, it is essential to precisely establish the personal contribution of an individual or organisational failure within a legal person. Criminal liability must not be based solely on the fact that an AI system caused harm, but rather on a demonstrable failure in its design, supervision, or use.

In practice, these criteria will need to be concretised through case law, particularly with regard to the level of system autonomy, the foreseeability of risks, the quality of training data, and the availability of safety mechanisms. In this way, the content of negligence in the digital context would be clarified.

The effective application of criminal law in this field depends on the development of specialised expert evidence, as well as on the capacity of courts to assess complex technical processes, particularly in cross-border cases. This includes, in particular, the development of forensic methodologies for analysing algorithmic decision-making, access to technical documentation and training data, and the establishment of interdisciplinary expert bodies capable of bridging legal and tech-

nical knowledge. Without adequate evidentiary tools, the criminal law norm will remain purely declaratory.

Administrative sanctions, civil compensation, and criminal liability must be coordinated to avoid double punishment and the violation of the principle of *ne bis in idem*. A clear hierarchy of interventions will strengthen legal certainty.

Criminal law intervention must remain reserved for serious and concrete violations of fundamental interests - life, bodily integrity, and property of significant value. Innovative technological development must not be unjustifiably constrained by fear of criminal sanctions, but neither should it be exempt from liability in cases of conscious or gross disregard of safety standards.

Ultimately, AI does not require the abandonment of the fundamental principles of criminal law, but rather their careful and thoughtful adaptation to new circumstances. The future of criminal law regulation of AI will depend on the ability of the legal system to preserve its normative core while responding to technological complexity.

It is in this balance between continuity and adaptation that the long-term legitimacy of criminal law intervention in the digital age lies. The legitimacy of criminal law in the age of artificial intelligence will depend not on its expansion, but on its ability to adapt without abandoning its fundamental principles. Only such a balanced approach can ensure both effective protection of fundamental values and the preservation of legal certainty in an increasingly autonomous technological environment.

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5. Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, E.T.S. No. 5, 213 U.N.T.S. 222
6. Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 [2024] OJ L2024/1689 (Artificial Intelligence Act) (Text with EEA relevance)

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5. Criminal Code (Germany), in the version published on 13 November 1998 (Official Gazette I, p. 3322), as last amended by Article 2 (2) of the Act of 7 November 2024 (Official Gazette 2024 I No. 351)
6. Criminal Code (Netherlands), in the version published on 1 April 1881 (Official Gazette No. 35), as last amended of the Act of 19 April 2005 (Official Gazette No. 211)
7. Criminal Code (Spain), Official Gazette No. 10/1995
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Original scientific paper

EXTRATERRITORIAL JURISDICTION AND ELECTRONIC EVIDENCE: A NORMATIVE ASSESSMENT OF NEW DIRECT COOPERATION MECHANISMS WITH SERVICE PROVIDERS

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ABSTRACT

Transnational criminality and deterritorialized data challenges traditional territorial borders, as electronic communications, cloud storage, and platform-based services enable evidence to be created in one State, stored in another, and controlled by service providers in a third. While criminal justice traditionally grounds enforcement jurisdiction to territorial sovereignty, communications and information technology advances, a significant share of criminal proceedings now depends on data that is fluid - transnational, and de-linked from a stable geographic location.

As a result, extraterritoriality in criminal procedure can no longer be regarded as exceptional but instead constitutes a structural feature of criminal justice. Investigative powers involving coercive measures - such as data searches, seizures, production and preservation orders, are increasingly exercised in transnational contexts, thereby exposing public authorities and private actors alike to overlap and potentially concurring public functions.

This new reality has been addressed through the adoption of new cooperation instruments, which challenge the traditional territorial constraints of procedural powers. This study employs a normative assessment of extraterritoriality through a two-tiered analytical framework. The first part examines extraterritorial jurisdiction in criminal law enshrined in the current legal doctrine debate concerning sovereignty, extended scope of jurisdictions, and inherent nature of electronic

evidence. The second part assesses how extraterritoriality is configured within two selected frameworks, concurrent to each other: (a)Council of Europe's Budapest Convention on Cybercrime, and its Second Protocol; and (b) European Union's Regulation for the European Production Orders and European Preservation Orders. While both institute investigative powers across territorial borders, they are asymmetric with regard to the powers extended to third parties.

We argue that these cooperation mechanisms reflect a model of limited extraterritorial jurisdiction, where the need for efficient investigative powers is weighed against the normative constraints embedded in territorial sovereignty.

Keywords: *Deterritorialized data, Extraterritoriality, Investigative powers, Sovereignty*

1. INTRODUCTION

We have a problem. Proliferation of communication technologies has impacted institutional functioning, particularly within the field of criminal justice. On a yearly basis trillions of security incidents on networks and daily millions of attacks against computers risk security[1], criminal investigations necessitate cross-border electronic evidence gathering. Yet, associated procedural powers sit uneasy with the classical principle of territoriality, embedded within the sovereignty constraints of international law.

Not only cybercrimes, but as well "conventional" offences now yield digital data stored or controlled across borders through decentralized network infrastructures. As a result, domestic criminal investigations collocate transnational borders, where access to evidence may depend less on the territorial nexus, rather more on the architecture of data storage and service provision. For instance, in 2024 Council of the European Union (hereinafter EU) confirmed that 50% of criminal investigations in the Union are conditioned by data located in another jurisdiction.[2]

This context has exposed a structural tension between traditional principles of criminal jurisdiction and deterritorialized data.[3] Territoriality has traditionally served as founding principle of enforcement jurisdiction, constraining the exercise of coercive powers domestically. Yet digital data does not conform to stable territorial assumptions. Data may be fragmented, constantly flowing across jurisdictions, stored in multiple locations, and/or accessed remotely irrespective of physical lo-

1 Cybercrime Convention Committee (T-CY), *Criminal Justice Access to Electronic Evidence in the Cloud: Recommendations for Consideration by the T-CY – Final Report of the T-CY Cloud Evidence Group T-CY(2016)5*, 16 September 2016, p. 6.

2 Council of the European Union, Better Access to E-Evidence to Fight Crime, Available at: [https://www.consilium.europa.eu/en/policies/e-evidence/], Accessed 6 May 2026.

3 Daskal, J., The Un-Territoriality of Data, Yale Law Journal, Vol. 125, 2015, p. 326; Berman, P. S., *Legal Jurisdiction and the Deterritorialization of Data*, Vanderbilt Law Review, Vol. 71, No. 7, 2018, p. 973.

cation.[4] As a result, the connection between data location and sovereign authority has become ambiguous. The territorial limitations are embodied in the challenges facing mutual legal assistance (hereinafter MLA), mainly burdensome and lengthy procedures of electronic evidence collection.[5]

To remedy this procedural gridlock, legislators have developed new cooperation mechanisms, bypassing the role of public authorities in validating orders, and institutionalizing direct cooperation with private service providers. The new criminal procedural formula bends the principle of territoriality within the enforcement jurisdiction, raising important legal questions on sovereignty, the permissibility of unilateral cross-border investigative powers, and the relationship between enforcement jurisdiction and territoriality in cyberspace. The logic behind the adjusted mechanisms is to remedy the procedural inefficiencies of traditional cooperation mechanisms by circumventing the "control" function of public authorities. Unorthodox or not, the new mechanism' existence is conditioned by a functional recalibration of territoriality within enforcement jurisdiction.

The current scholarship has examined the deterritorialized nature of electronic data and the emergence of new cooperation mechanism. However, in a comparative landscape less attention has been devoted to whether these mechanisms do fundamentally reconfigure territorial limits of enforcement jurisdiction or instead reinterpret territoriality within international law.

Against this background, this article assesses whether the newly introduced direct cooperation mechanisms redefine the territorial limits of enforcement jurisdiction or, instead constitute a controlled recalibration of territoriality conforming to state sovereignty. We posit that neither the Council of Europe - comprising the Budapest Convention on Cybercrime (hereinafter: Budapest Convention)[6] and its Second Additional Protocol to the Convention on Cybercrime on Enhanced Co-operation and Disclosure of Electronic Evidence (hereinafter: Second Protocol)[7] - nor the EU framework consisting of the EU Regulation on the European Production Orders (hereinafter EPOC) and European Preservation Orders

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4 Daskal, *op. cit.*, note 3, p. 366.

5 The estimated efficient timeframe for obtaining evidence would be approximately ten days, compared with the several months often required under traditional MLA procedures. See European Commission, *E-Evidence – Cross-Border Access to Electronic Evidence*, Available at: [https://commission.europa.eu/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/e-evidence-cross-border-access-electronic-evidence_en], Accessed 6 May 2026.

6 Council of Europe, *Convention on Cybercrime*, adopted 23 November 2001, entered into force 1 July 2004, ETS No. 185, art. 1.

7 Council of Europe, *Second Additional Protocol to the Convention on Cybercrime on Enhanced Co-operation and Disclosure of Electronic Evidence*, adopted 12 May 2022, ETS No. 224.

(hereinafter EPOC-PR)[8] abandon territoriality. Rather, both construct models of limited extraterritoriality in which procedural powers are extended only as far as they remain constrained by procedural safeguards protecting sovereignty and fundamental rights.

By developing this concept of limited extraterritoriality and comparatively assessing how it is operationalized within the two legal frameworks, the article contributes to the broader doctrinal debate on the future of enforcement jurisdiction in criminal procedure.

2. METHODOLOGY

This study employs a normative legal assessment of literature and regulations. The first layer of the analysis focuses on the identification of the current state of art of academic discourse, as we review the relevant academic and institutional publications on the subject matter. The doctrinal legal assessment is further strengthened by examining a dual layer of legal norms governed in Council of Europe (hereinafter CoE) and EU frameworks pertaining procedural powers for the access to electronic evidence, and their relationship with principle of territoriality. The study will inherently constitute components of comparative analysis, where compliance and consistence of rules with the territoriality principle is investigated.

3. THE QUESTION ON EXTRATERRITORIALITY

3.1. The limits of sovereignty in international law

Within the framework of public international law, state sovereignty is linked to two fundamental principles - territoriality and non-interference. Each represents, respectively, the positive and negative dimensions of state authority exercise.

Territoriality, as the predominant principle in criminal jurisdiction[9], constitutes a fundamental constraint within public international law. State jurisdiction is

[8] Regulation (EU) 2023/1543 of the European Parliament and of the Council on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings [2023] OJ L191/118.

[9] The contemporary understanding of sovereignty is bound to the Peace of Westphalia (1648), regarded as foundational to the development of the modern nation-state system. Earlier theoretical reflections on sovereignty can be identified in the work of Jean Bodin, *Six Livres de la République* (1576), where he conceptualizes supreme authority as residing in a political entity capable of maintaining order and terminating conflict. See Bodin, J., *Six Livres de la République*, 1576; Bennoune, K., *Sovereignty vs Suffering? Re-examining Sovereignty and Human Rights through the Lens of Iraq*, European Journal of International Law, Vol. 13, Issue 1, 2002, pp. 243–262.

broadly understood as the power and authority exercised over subjects within its borders. In this sense, territoriality has long served as the primary basis of criminal jurisdiction, enabling states to enact, adjudicate and enforce their criminal laws within their own territory.[10] Fundamentally, international law and the principles governing state jurisdiction are rooted in sovereignty.[11] Read together with the logic of *realpolitik* in the international affairs,[12] the principle serves as a pillar legitimating the exercise of criminal jurisdiction within a state's territorial boundaries.[13]

The principle of non-interference, as established in the *Nicaragua* jurisprudence, has been defined as "the right of every sovereign State to conduct its affairs without outside interference".[14] Though corollary to sovereignty, the principle is uncertain[15], and yet to be assessed on its implications in the increasing digitalized exchange of data.[16] Coercion, as a condition for establishing unlawful intervention, is regarded as interference in the internal affairs of a state. Whereas the notion of *domaine réservé* has been conceptualized in spatial terms, linked to the physical territory of the State, acts of interference would qualify for intrusions such as trespassing or the use of force against a state's territory or troops.[17]

While sovereignty has been regarded as particularly exclusive to criminal justice[18], or as conferring the most extensive form of jurisdiction in international law[19], it has not been upheld in the doctrine as *absolute* for the exercise of state authority.[20] On the contrary, in the doctrinal debate addressing the tensions between

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10 Liivoja, R., *The Criminal Jurisdiction of States, Foundations,* Journal for Extreme Legal Positivism, Vol. 7, 2010, p. 29.

11 Klabbers, J., *Clinching the Concept of Sovereignty: Wimbledon Redux*, Austrian Review of International and European Law, Vol. 3, 1998, p. 346.

12 Cryer, R., *International Criminal Law vs State Sovereignty: Another Round?*, European Journal of International Law, Vol. 16, No. 5, 2006, p. 980.

13 Westlake, J., *International Law*, Cambridge University Press, Cambridge, 1904; Beale, J. H., *The Jurisdiction of a Sovereign State,* Harvard Law Review, Vol. 36, 2023, p. 241.

14 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, para. 202.

15 Tsagourias, N., Electoral Cyber Interference, Self-Determination and the Principle of Non-Intervention in Cyberspace, in: Broeders, D.; van den Berg, B. (eds.), Governing Cyberspace: Behavior, Power and Diplomacy, Rowman & Littlefield International, London, 2020, p. 45.

16 Shurson, J., *Investigative Jurisdiction: The Evolving Limits of Extraterritoriality in Transnational Digital Investigations,* International and Comparative Law Quarterly, Vol. 74, 2025, p. 681.

17 Moulin, T., *Reviving the Principle of Non-Intervention in Cyberspace: The Path Forward*, Journal of Conflict & Security Law, Vol. 00, No. 0, 2020, pp. 426–430.

18 Perkins, R. M., *The Territorial Principle in Criminal Law*, UC Law Journal, Vol. 22, No. 5, 1971, p. 1163.

19 Dixon, M., *Textbook on International Law*, 6th ed., Oxford University Press, Oxford, 2007, p. 154.

20 Bodley, A., *Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the Former Yugoslavia*, *New York University Journal of International Law and Politics*, Vol. 31, 1999, p. 419.

sovereignty and international law, there have been efforts to reconceptualize sovereignty**,** challenging its role as a fundamental ordering mechanism.[21] In doing so, scholarship has moved away from a monolithic approach to state sovereignty, instead defining it as dynamic and flexible[22], and capable of evolving within legal frameworks and international relations.[23]

The question on sovereignty has been examined in the jurisprudence of the Permanent Court of International Justice. The 1927 landmark *Lotus* case[24] confirms that while the principle of territoriality remains a central organizing principle of jurisdiction, it does not preclude the lawful exercise of extraterritorial powers; rather, international law permits the exercise of extraterritorial jurisdiction in the absence of a prohibitive rule. [25] However, it was the earlier *Wimbledon* case[26] that first elaborated the limits of sovereignty in the context of treaty obligations. The court held that where states adhere to binding international obligations, their sovereign status is not forfeited; rather, the exercise of sovereignty will be restricted within the constraints arising from international law.

As digitalization continues to levitate human interaction in the digital space, the question about sovereignty limitations persists. It raises the issue of whether access to electronic data, especially when directed at foreign-based service providers, constitutes prohibited interference. We argue that even where investigative measures avoid physical intrusion, they may still implicate sovereignty if they bypass or accelerate procedures that would otherwise engage a state's authority. At the same time, the implications for the principle of non-intervention in cases of transnational data access, although relevant, may not amount to the same level of intrusion as classic territorial violations. Rather, they may be understood as a functional limit triggered when procedural powers implicate a state's control within its sovereign domain.

3.2. The Electronic Evidence Inquiry

There is not a commonly established international definition *per se* of electronic evidence[27], as different legal regimes have approached it diversely. Notwithstand-

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21 Klabbers, *op. cit.*, note 11, p. 346; Slaughter, A.-M., *International Law in a World of Liberal States*, European Journal of International Law, Vol. 6, No. 3, 1995, p. 503.

22 Kelsen, H., *Sovereignty and International Law*, Georgetown Law Journal, Vol. 48, No. 4, 1960.

23 Cryer, *op. cit.*, note 9.

24 *The Case of the S.S. Lotus (France v Turkey)* (1927) PCIJ Rep Series A No. 10, p. 10.

25 *Ibid.*, p. 45.

26 *The S.S. Wimbledon (UK v Germany)* (1923) PCIJ Rep Series A No. 1.

27 Across the literature and jurisprudential discourse, various terms have been employed to describe the data at issue, most notably electronic evidence, digital evidence, and computer data. While these con-

ing, a prevalent legislative approach across jurisdictions has been to distinguish electronic evidence from traditional forms of evidence[28], as a minimum threshold for a common international agreed classification. In literature it has been regarded as information of probative value, any electronic information made on a computer[29], any data stored or transmitted using a computer[30], or mean of proof in legal proceedings.[31] In the Budapest Convection, it has been provided with the adoption of computer data as "any representation of facts, information or concepts in a form suitable for processing in a computer system, including a program suitable to cause a computer system to perform a function". The Budapest Convention rather than offering a bold definition, adopts a functional and technology-oriented approach grounded in the notion of "computer data." Read in conjunction with the Explanatory Report, the definition aligns with ISO concept of data, referring to information as processable by computer systems, noting its inherently digital nature.[32] However, the Budapest Convention refrains from a narrow understanding of computer data as constrained to the hardware component only. Instead, it adopts a holistic view: as data processed and exchanged across interconnected systems and networks, thus inherently incorporating internet as a component in the classification of electronic data.[33]

In acknowledgement of the diversity of legal regimes governing electronic evidence, CoE has further provided with a set of guiding principles, complimentary to the notion of electronic evidence: authenticity (preservation of integrity), audit trail (traceability of handling), compliance with law (procedural legality), confidentiality (protection of sensitive data), and admissibility (technical reliability for judicial use).[34] Though not legally binding, these principles are relevant. Especially, the authenticity of such data can be compromised due to its inherent

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cepts may differ in their technical scope, for the purposes of this study they are treated as functionally equivalent, referring to electronic evidence as developed within the legal frameworks subject to this study.

28 Schafer, B.; Mason, S., *The Characteristics of Electronic Evidence*, in: Mason, S. (ed.), Electronic Evidence, 2017.

29 Lange, M. C. S.; Nimsger, K. M., *Electronic Evidence and Discovery: What Every Lawyer Should Know Now*, American Bar Association, 2009, p. 72.

30 Casey, E., *Digital Evidence and Computer Crime*, 3rd ed., Academic Press, 2011, p. 7.

31 Mason, S.; Seng, D. (eds.), *Electronic Evidence and Electronic Signatures*, 5th ed., Institute of Advanced Legal Studies for the SAS Humanities Digital Library, 2021, p. 1.

32 Council of Europe, *Explanatory Report to the Convention on Cybercrime*, ETS No. 185, 2001, para. 25.

33 *Ibid.*, paras. 23–24.

34 Council of Europe, Directorate General of Human Rights and Rule of Law, *Electronic Evidence Guide: A Basic Guide for the Management and Procedures of a Digital Forensics Laboratory*, 2017.

volatile[35], ephemeral nature[36], as it remains subject to constant change due to the characteristics of the underlying data infrastructure.[37] Volatility is defined as the evidence's defining characteristic[38], being constantly prone to alteration, loss, or inaccessibility. Furthermore, as data is processed, transferred, and stored in numerous infrastructures, its location may change fluidly, with a measurable impact on legal integrity and evidentiary reliability. Can investigative powers – strongly limited within conventional principles – serve well to access data which constantly flows across multiple territories?

Such fluidity of data reflects data' deterritorialized nature[39], where the traditional correlation between jurisdiction and geographic boundaries configures a broken formula, perhaps? Sovereignty, then, may need to be reflective of such reality: as a legal construct intertwined with investigative powers which extend the principles of territoriality and non-interference.[40]

3.3. The Tripartite Structure of Territorial Jurisdiction

Within international law, territoriality is conventionally structured around a tripartite jurisdictional construct: prescriptive, judicial, and enforcement jurisdiction.[41] At the prescriptive level, States enjoy a broader discretion in extending the reach of their legislative authority beyond national borders.[42] Particularly where

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35 Casey, *op. cit.*, note 30; Mason, S.; Seng, D., *The Foundations of Evidence in Electronic Form*, in: Mason, S.; Seng, D. (eds.), Electronic Evidence, University of London Press, 2017, p. 48.

36 Currie, R. J., *Cross-Border Evidence Gathering in Transnational Criminal Investigation: Is the Microsoft Ireland Case the 'Next Frontier'?*, Canadian Yearbook of International Law, Vol. 54, 2016, p. 18.

37 Franssen, V.; Tosza, S., *Introduction: Gathering Electronic Evidence and Cooperation with Service Providers in the Digital Era – A Jigsaw Puzzle of Technological and Legal Challenges*, in: Franssen, V.; Tosza, S. (eds.), *The Cambridge Handbook of Digital Evidence in Criminal Investigations*, Cambridge University Press, 2022.

38 Erbežnik, A., *Impact of Digital Evidence Gathering on the Criminal Justice System: A Broader Perspective*, in: Franssen, V.; Tosza, S. (eds.), The Cambridge Handbook of Digital Evidence in Criminal Investigations, Cambridge University Press, 2022, p. 20; Lasagni, G., *Admissibility of Digital Evidence*, in: Franssen, V.; Tosza, S. (eds.), The Cambridge Handbook of Digital Evidence in Criminal Investigations, Cambridge University Press, 2022, p. 128; Cami, G., *Legal Standards for Cross-Border Access to Electronic Evidence in Criminal Procedure: An Albanian Perspective on International Standards*, Studia Iuridica Lublinensia, Vol. 33, No. 5, 2024, p. 19.

39 Daskal, *op. cit.*, note 3.

40 Currie, *op. cit.*, note 36.

41 Liivoja, *op. cit.*, note 10, pp. 25–58; Payer, A., *The Territorial Principle as a Basis for State Criminal Jurisdiction: Particularly with Regard to Cross-Border Offences and Attempts, and to Multiple Parties to an Offence Acting in Different Countries*, International Criminal Law Review, Vol. 23, 2023.

42 Criddle, E. J., *Extraterritoriality's Empire: How Self-Determination Limits Extraterritorial Lawmaking*, *American Journal of International Law*, 2024, p. 609.

a sufficient connecting nexus exists, what constitutes territorial or extraterritorial has become "increasingly a matter of appreciation".[43] In the descriptive law, hence, the distinction is (being) deconstructed.[44] This may be justified, for example, by nationality, protective interests, passive personality, universality, or other accepted bases of jurisdiction.[45]

The territoriality question becomes complex at the procedural or enforcement jurisdiction: whether, and under what conditions, a decision adopted by one State may generate legal effects within the territory of another State? The prevailing principle is that decisions emanating from the exercise of State authority carry binding force exclusively within their territorial boundaries where they stem. Embedded in the principle of sovereignty[46], international law prohibits States from directly exercising coercive powers abroad.[47] Therefore, if a decision or judgment of one state is intended to produce legal effects in another state, we enter in the field of recognition and enforcement of foreign judgments or foreign decisions. Where cooperation takes place between public authorities, at both CoE and EU level, multiple cooperation mechanisms have been established across different legal fields, including private international law, family law, and criminal law. Depending on the legal context concerned, such mechanisms may operate through exequatur procedures, mutual recognition, reciprocity, MLA, or specialized EU instruments.[48]

The next question concerns the legal context where a judicial decision is directed not toward another public authority, but to private actors. This constitutes a novel element in the contemporary cooperation framework. Formal recognition in the traditional sense is no longer required on a case-by-case basis; instead, the regulatory framework itself predetermines the cross-border legal effects of the order, abolishing the need for a separate recognition assessment by the authorities of the State where the service provider is established or where the data is located. The result is a form of controlled extraterritorial effect, operating alongside a reconstructed notion of "European territoriality"[49], where the connecting factor is no

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43 Crawford, J., *Brownlie's Principles of Public International Law*, 9th ed., Oxford University Press, Oxford, 2019.

44 Berman, P. S., *The Globalization of Jurisdiction*, University of Pennsylvania Law Review, Vol. 151, No. 2, 2002.

45 Ryngaert, C., *Jurisdiction in International Law*, 2nd ed., Oxford University Press, Oxford, 2015.

46 Klabbers, *op. cit.*, note 11.

47 Criddle, *op. cit.*, note 42, p. 611.

48 Ronsfeld, P., *Mutual Recognition and Mutual Trust*, in: Ambos, K.; Rackow, P. (eds.), The Cambridge Companion to European Criminal Law, Cambridge University Press, 2023.

49 Marzal, T., *The Territorial Reach of European Union Law: A Private International Law Enquiry into the European Union's Spatial Identity*, *International and Comparative Law Quarterly*, Vol. 73, No. 1, 2024.

longer necessarily the physical location of the data or the company, but the provision of services within EU.

3.4. The (Extra)territorial Jurisdiction

Electronic data is location-independent, in fragments and/or with multiple copies, bound to no specific device or closed network[50], and deployed across different services, providers and/or locations.[51] This context becomes more relevant and central as the ubiquitous use of cloud computing infrastructure[52] allows data to be stored, processed, and managed across geographically dispersed servers, often without a fixed or identifiable physical location. Result? Data is mobile[53] and unpredictable, blurring the distinction between territorial and extraterritorial jurisdiction.[54] With considerable domestic investigations requiring cross-border access to evidence[55], investigative powers face numerous challenges, both from a normative and enforcement perspective with regard to extraterritoriality.[56] The concern arises that, where data is accessed from foreign territories, potential infringements of state sovereignty may occur.[57]

In the debate addressing the "extra mile" of the territorial principle it has been questioned on whether cyberspace ought to be normatively treated as a distinct domain given its borderless and decentralized architecture.[58] Another approach, opposing a *res nullius* take on cyberspace conceptualizes it as *res communis* - a shared international space analogous to outer space, precluding territorial sovereignty.[59] These domains of debate are yet to be matured.

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50 Daskal, *op. cit.*, note 33, p. 366.

51 Council of Europe, *Criminal Justice Access to Data in the Cloud: Challenges*, Cybercrime Convention Committee (T-CY), T-CY (2015)10, 26 May 2015, p. 9.

52 Mell, P.; Grance, T., *The NIST Definition of Cloud Computing*, National Institute of Standards and Technology, Special Publication 800-145, 2011.

53 Daskal, *op. cit.*, note 3, p. 366.

54 Daskal, *op. cit.*, note 3, p. 373.

55 Council of the European Union, *Better Access to E-Evidence to Fight Crime*, Available at: [https://www.consilium.europa.eu/en/policies/e-evidence], Accessed 17 April 2026.

56 Shurson, *op. cit.*, note 16, p. 683.

57 Sieber, U.; Neubert, C.-W., *Transnational Criminal Investigations in Cyberspace: Challenges to National Sovereignty*, in: Lachenmann, F.; Röder, T. J.; Wolfrum, R.; Max Planck Foundation for International Peace and the Rule of Law (eds.), Max Planck Yearbook of United Nations Law, Vol. 20, Brill Nijhoff, 2017.

58 Currie, *op. cit.*, note 36, pp. 17–18; Wu, T., *Cyberspace Sovereignty? The Internet and the International System*, *Harvard Journal of Law & Technology*, Vol. 10, No. 3, 1997; Johnson, D. R.; Post, D., *Law and Borders: The Rise of Law in Cyberspace*, Stanford Law Review, Vol. 48, 1996, pp. 1378–1379.

59 Menthe, D. C., *Jurisdiction in Cyberspace: A Theory of International Spaces*, Michigan Telecommunications and Technology Law Review, Vol. 4, 1998, pp. 86–87.

The prevailing trajectory of the debate anchors cyberspace within the principle of territoriality. A proposal includes the hyper-territoriality model, where states extend or reassert jurisdiction *vis-à-vis* extended interpretations of territorial criteria.[60] It relies on a unilateral act of extended territoriality that may lead to fragmentation. Alternatively, a controlled adoption of a transnational cooperation framework is endorsed, rooted in multi-stakeholder participance and procedural interoperability, swaying from pure territorial criteria, yet not eroding it. The model advocates against strict territorial prerequisites that would render the principle a proxy constraint.[61] Within the spirit, a new bold paradigm is presented – *the fourth investigative jurisdiction-* where the binary territory and nationality are swiped instead by new dual proxies: substantial connection and legitimate interest.[62]

Acknowledging that territoriality principle erodes efficiency of investigative powers governing acquisition of electronic data, the concept of "extended territoriality" allows states to assert enforcement jurisdiction over data that is substantially connected to their territory, even if physically located elsewhere.[63] In essence, the new paradigm builds upon the legal vacuum generated by the "un-territoriality" of data in cyberspace, where it is stored, accessed, and controlled.[64] The adoption of the investigative jurisdiction does not equal the abandonment of the conventional constraints imposed by international law, but rather their recalibration. The model differentiates between direct and indirect enforcement measures, notably through obligations imposed on service providers.

In this study, the concept of limited extraterritoriality is employed as an analytical framework to assess contemporary cross-border procedural powers. It refers to the controlled extension of enforcement jurisdiction beyond territorial borders through legally prescribed procedural mechanisms that remain constrained by safeguards of legality, proportionality, judicial oversight where appropriate, and the protection of fundamental rights. Unlike unrestricted unilateral extraterritorial enforcement, limited extraterritoriality does not replace territoriality as the organizing principle of criminal procedure. Rather, it reflects a recalibration of territoriality in response to the deterritorialized nature of electronic evidence, while

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60 de La Chapelle, B.; Fehlinger, P., *Jurisdiction on the Internet: From Legal Arms Race to Transnational Cooperation*, Global Commission on Internet Governance, Paper Series No. 28, April 2016, p. 12.

61 Svantesson, D. J. B., *A New Jurisprudential Framework for Jurisdiction: Beyond the Harvard Draft*, *AJIL Unbound*, Vol. 109, 2017, p. 70.

62 *Ibid.*; Shurson, *op. cit.*, note 16, p. 676; Ryngaert, C., *Extraterritorial Enforcement Jurisdiction in Cyberspace: Normative Shifts*, *German Law Journal*, Vol. 24, 2023.

63 Coughlan, S.; Currie, R. J.; Kindred, H. M.; Scassa, T., *Law Beyond Borders: Extraterritorial Jurisdiction in an Age of Globalization*, Irwin Law, 2014, pp. 35–36.

64 Daskal, *op. cit.*, note 3.

preserving state sovereignty as the normative boundary governing the exercise of procedural powers.

4. THE QUEST FOR EXTRATERRITORIAL INVESTIGATIVE POWERS: A SHIFT FROM MUTUAL LEGAL ASSISTANCE TO PRODUCTION ORDERS

4.1. The MLA Gridlock: Constraints on Procedural Efficiency

Accessing evidence in a cross-border context and upholding sovereignty principle in criminal law matters has been governed vis-à-vis the instruments of MLA.[65] Under this framework, coercive measures are governed between public authorities, originally designed for territorially bounded evidence, where the location of evidence is identifiable and stable. When faced with electronic evidence, several challenges have hampered the "muscle" of the authorities to wield efficient measures.

Namely, the chain custody of letter rogatory from issuance to evidence acquisition commonly may take up to 10 (ten) months due to the length and complexity of the procedures involved.[66] For volatile data, limitations of the MLA framework become unquestionable, referred to as cumbersome and complex.[67] This legal gridlock is sharpened even more with mass data[68], or the cloud computing context, as T-CY Cloud Evidence Group concluded that the loss of a stable territorial nexus, combined fragmented control structures renders the identification of applicable jurisdiction and lawful access mechanisms increasingly complex.[69]

Similarly, the need for timely procedural powers has been voiced by the European Commission, noting that MLA mechanisms developed several decades ago no longer meet the demands of efficiency.[70] Furthermore, it notes that, as a result, states have resorted to expanding national data acquisition tools through direct

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65 Council of Europe, *European Convention on Mutual Assistance in Criminal Matters*, adopted 20 April 1959, entered into force 12 June 1962, ETS No. 30.

66 European Commission, *Frequently Asked Questions: New EU Rules to Obtain Electronic Evidence*, 17 April 2018, Available at: [https://europa.eu/rapid/press-release_MEMO-18-3345_en.htm], Accessed 23 March 2026.

67 Council of Europe Cybercrime Convention Committee (T-CY), *The Mutual Legal Assistance Provisions of the Budapest Convention on Cybercrime*, 2014, p. 3; Tosza, S., *Mutual Recognition by Private Actors in Criminal Justice? E-Evidence Regulation and Service Providers as the New Guardians of Fundamental Rights*, *Common Market Law Review*, Vol. 61, 2024, p. 150.

68 Ryngaert, *op. cit.*, note 62, p. 540.

69 Council of Europe Cybercrime Committee, *op. cit.*, note 51, pp. 10–14.

70 European Commission, *Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for Electronic Evidence in Criminal Matters*, COM(2018) 225 final, 17 April 2018.

access, raising concerns regarding legal uncertainty, as well as implications for fundamental rights and procedural safeguards.[71]

One form of direct access has been police-to-police cooperation, whereby intelligence is shared to support the commencement of criminal proceedings, although in many jurisdictions such intelligence does not meet the threshold for evidentiary use.[72] Echoing this view, United Nations deemed the traditional means of international cooperation in cybercrimes as not capable for the handling of electronic evidence.[73]

These challenges, coined as "the MLAT problem" in the academic discourse, constitute a set of interconnected challenges, involving different actors within the system.[74] It asserts the limited capacity of traditional MLA mechanisms to obtain electronic evidence efficiently, given delays, procedural complexity, and the mismatch between territorial based cooperation and the transnational nature of data.[75] The solution to the problem has addressed through direct access with service providers, in pursuit of procedural efficiency.

4.2. In(Direct) Cooperation with Service Providers

While legislative measures supporting extended territoriality have been more readily adopted in the prescriptive domain, enforcement jurisdiction remains entrenched in a conservative approach to sovereignty. Yet, with the acceleration of communications and information technology, criminal investigations are faced with a growing impediment to the effective exercise of procedural powers, as data increasingly disregards territorial boundaries. Such procedural impasse no longer is a *hereditas* confined to a handful of jurisdictions, rather a transnational *res communis*, with zero discriminating policy against geography. Addressing this procedural knot, two selective legislative frameworks[76] are adopting cooperation

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71 *Ibid.*

72 Council of Europe Cybercrime Convention Committee (T-CY), *op. cit.*, note 67, p. 7.

73 United Nations Office on Drugs and Crime, *Comprehensive Study on Cybercrime*, Draft, February 2013, p. xi.

74 Kent, G., *Sharing Investigation-Specific Data with Law Enforcement: An International Approach*, Stanford Public Law Working Paper, 14 February 2014, pp. 6–9. The approach was later embraced and further developed by Currie, *op. cit.*, note 34.

75 Currie, *op. cit.*, note 36.

76 While this study is constrained to the analysis of the CoE and EU frameworks, a very important legal instrument in this regard is the CLOUD Act (Clarifying Lawful Overseas Use of Data Act), affecting how countries share data across borders. This U.S. law allows the U.S. and other countries to exchange electronic data for criminal investigations, bypassing the MLA procedure. Though the CLOUD Act mainly affects the U.S. law enforcement, it also influences international agreements and data protec-

mechanisms seeking to remedy traditional instruments embedded in sovereignty protectionist foundations.

4.2.1. Direct Cooperation within a Territoriality Centered Framework

In the early 2000s, the CoE addressed the pressing need for improved international co-operation, and envisaged facilitated MLA in the broadest sense.[77] The Budapest Convention, *per se*, aside from relaxing the dual criminality requirement[78], did not fully crystallize such proclaimed flexibility. MLA was confirmed as *a priori* cooperation framework among parties, whilst encouraging it to be exercised at the widest extent possible for the collection of electronic evidence.[79] Two norms in the Budapest Convention advocate for the case of extraterritoriality with regard to the subscriber data, whilst traffic and content data remain subject to MLA procedures.

Article 18(1)(b) of the Budapest Convention permits the extraterritorial use of production orders by allowing authorities to require service providers offering services within their territory to disclose subscriber information within their possession or control, regardless of the provider's location.[80] This notion of the provider's possession or control was further elaborated in Guidance Note 10. It argues that article 18 (1)(b) may give production orders extraterritorial effect, provided that the service provider offers services within the territory of the requesting Party, irrespective of its physical location.[81]

Possession of data refers to subscriber information in the service provider's physical possession, whereas control refers to remotely stored subscriber information under the service provider's control. In other words, the exercise of such procedural powers is directed at service providers on the basis of territorial reach of their services, rather than their place of establishment. The guidance is not binding and does not create new obligations for the parties.[82] Accordingly, it has been questioned whether this provision constitutes a genuine exercise of extraterritorial jurisdic-

tion rules around the world. See US Department of Justice; European Commission, *EU–US Negotiations on Access to Electronic Evidence*, 2023; US Congress, *Clarifying Lawful Overseas Use of Data Act (CLOUD Act).*

77 Council of Europe, *Explanatory Report to the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems*, ETS No. 189, 28 January 2003, para. 3.

78 Council of Europe, *Convention on Cybercrime*, *op. cit.*, note 6, art. 25(5).

79 Council of Europe, *Convention on Cybercrime*, *op. cit.*, note 6, art. 25(1).

80 Council of Europe, *Convention on Cybercrime*, *op. cit.*, note 6, art. 18(1)(b).

81 Council of Europe Cybercrime Convention Committee (T-CY), *T-CY Guidance Note #10: Production Orders for Subscriber Information (Article 18 Budapest Convention)*, T-CY (2015)16, 1 March 2017, p. 3.

82 *Ibid.*, p. 6.

tion. Alternatively, it may be understood as a legal power operating within existing territorial limits, given that it does not impose any obligation of recognition or enforcement beyond the framework of the MLA.[83] Even if one accepts that the provision reflects an exercise of extended territoriality, the production order may not still amount to a truly extraterritorial practice, given that subjected providers arguably fall into the territorial jurisdiction of the requesting party.[84]

Article 32, by contrast, regulates direct cross-border access to stored computer data that is either (a) publicly available – open source, or (b) has the lawful and voluntary consent of a person who is allowed to share that data.[85] Similarly, Guidance Note #3, adopted to facilitate effective use and implementation of Article 32, frames the provision as an exception to the principle of territoriality, allowing unilateral transborder access only under consensual conditions.[86] The notion of "consent" remains insufficiently defined for the purposes of investigative powers, thereby leaving a potential loophole in the regulatory framework. A critical reading of the Guidance shows that this procedural power does not override MLA as the primary mechanism but rather operates alongside it. Article 32 is therefore not conceptualized as a broad assertion of extraterritorial jurisdiction, instead it is limited to clearly defined situations - publicly available data or access based on lawful and voluntary consent.[87] In doing so, it preserves sovereignty by avoiding any obligation of recognition or enforcement beyond these limited cases. Article 32 therefore serves merely as a pragmatic accommodation to cross-border data realities rather than a doctrinal shift toward extraterritoriality.

In 2014 CoE concluded that the MLA process is timely inefficient, with prolonged procedure up to 24 (twenty-four) months, and many investigations being abandoned.[88] Among the recommendations proposed, included a preliminary proposal for the consideration of an Additional Protocol to the Budapest Convention to include the possibility for direct cooperation.[89] In the consequent year, the Cloud

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83 Hörnle, J., *Internet Jurisdiction: Law and Practice*, Oxford University Press, Oxford, 2021, pp. 115–145.

84 Ryngaert, *op. cit.*, note 62, p. 545.

85 Council of Europe, *Convention on Cybercrime*, *op. cit.*, note 6, art. 32.

86 Council of Europe Cybercrime Convention Committee (T-CY), *T-CY Guidance Note #3: Transborder Access to Data (Article 32)*, T-CY (2013)7 E, 3 December 2014.

87 However, opposing views were also expressed, notably by Boris Vasiliev on behalf of the Russian Federation. See Mallory, J. C. (mod.); Brengelmann, D.; Mohan, C. R.; Vasiliev, B. A., *Sovereignty, International Cooperation and Cyber Security: A Treaty Dialogue*, in: *CYFY 2013: The India Conference on Cyber Security and Cyber Governance*, Observer Research Foundation and FICCI, 2013.

88 Council of Europe Cybercrime Convention Committee (T-CY), *op. cit.*, note 67, p. 123.

89 Council of Europe Cybercrime Convention Committee (T-CY), *op. cit.*, note 67, pp. 37-39.

Evidence Group[90] acknowledged that arisen challenges catalyzed by technological advancement embedded jurisdictional uncertainties[91], even more evident when cloud computing enters the equation.[92] As a result, the Group proposed the adoption of a new protocol aimed at strengthening international cooperation.[93]

The Second Protocol supplements the Budapest Convention by providing direct access to service providers through the introduction of more nuanced procedural powers with extraterritorial implications. Specifically, two of its provisions operationalize the recommendations developed over the years by pursuing procedural efficiency while seeking to address safeguard imbalances arising from advancement of technology.[94]

Article 6 provides the normative basis for direct cooperation with service providers for domain name registration services. This mechanism enables public authorities to request information about domain name registrants across various jurisdictions. However, it should not be regarded as a conventional coercive extraterritorial power. The reason lies paragraph 2 of the provision, which stipulates that disclosure remains contingent upon the permissibility of such actions under the domestic law of the state in which the entity is located.[95] Where cooperation is not forthcoming, the Second Protocol does not provide for unilateral enforcement; instead, it requires that authorities revert to consultation mechanisms or alternative forms of cooperation, thereby constraining the extraterritorial reach of the measure. The provision therefore reflects a hybrid model of cooperation in which direct requests are permitted but remain dependent on voluntary compliance and domestic legal frameworks.

By contrast, Article 7 constitutes a more interventionist framework for extraterritorial procedural powers by allowing authorities to issue binding orders directly to service providers located in another Party for the disclosure of subscriber information. It establishes a form of direct enforcement vis-à-vis private actors,

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90 The Cloud Evidence Group was established in 2014 as a follow-up to earlier work on transborder access to data, mandated to examine criminal justice access to electronic evidence stored in the cloud and across foreign jurisdictions. See Council of Europe Cybercrime Convention Committee (T-CY), *Transborder Access to Data and Jurisdiction: Options for Further Action by the T-CY*, T-CY (2014)16, 3 December 2014, p. 21.

91 Council of Europe Cybercrime Convention Committee (T-CY), *op. cit.*, note 51.

92 Cybercrime Convention Committee (T-CY), *op. cit.*, note 1, pp. 7–9.

93 Council of Europe, *op. cit.*, note 77, paras. 10–11.

94 Traffic data and content data continue to fall exclusively within traditional MLA channels, subject to higher threshold of judicial and inter-state control. See Giola Cami and Krisztina Karsai, 'International Cooperation Mechanisms in Criminal Justice: Human Rights Implications and Sovereignty Constraints in Cross-Border Access to Electronic Evidence' (2025) 2(2) *Balkans Legal, Economic and Social Studies*, p. 93.

95 Council of Europe, *op. cit.*, note 7, art. 6(2).

grounded on a territorial nexus. Nevertheless, this mechanism remains carefully balanced by safeguards intended to preserve state sovereignty, including notification requirements to national authorities [96], and the possibility of consultation.[97] The provision further makes clear that, in the event of refusal to comply or failure to respond within the prescribed time frame, the issuing authority must revert to MLA or other cooperative channels. Thus, while Article 7 aims to improve procedural efficiency and accommodate human rights considerations, its extraterritorial dimension does not replace MLA but operates alongside it.

4.2.2. Direct cooperation in a mutual trust–based framework

Within the EU framework, the European Investigation Order[98] (hereinafter EIO) established the first comprehensive mechanism designed to modernize cross-border evidence gathering. Enshrined in the principle of mutual recognition, it was conceived as a single standardized instrument intended to replace the fragmented MLA framework.[99] The instrument facilitates judicial cooperation through orders circulating directly between competent authorities and thus remains anchored in a territorially based enforcement logic. However, its procedural chain of custody and dependence on executing-state authorities were considered ill-suited to the speed required for obtaining electronic evidence. The legal response to the bottleneck of cross-border data access in criminal proceedings was therefore consolidated through the adoption of the e-evidence package[100], rather than through the amendment of the EIO.[101]

This development constituted an important step toward greater procedural efficiency and marked a paradigm shift in EU criminal procedure: from authority-to-authority cooperation to direct cooperation with third parties.[102]

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96 Council of Europe, *op. cit.*, note 7, art. 7(5)(a).

97 Council of Europe, *op. cit.,* note 7, art. 7(5)(b).

98 Directive 2014/41/EU of the European Parliament and of the Council regarding the European Investigation Order in criminal matters [2014] OJ L130/1.

99 Tosza, S., *All Evidence Is Equal, but Electronic Evidence Is More Equal than Any Other: The Relationship between the European Investigation Order and the European Production Order*, New Journal of European Criminal Law, Vol. 11, No. 2, 2020.

100 Regulation (EU) 2023/1543 of the European Parliament and of the Council on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings [2023] OJ L191/118; Directive (EU) 2023/1544 of the European Parliament and of the Council laying down harmonised rules on the designation of designated establishments and the appointment of legal representatives for the purpose of gathering electronic evidence in criminal proceedings [2023] OJ L191/181.

101 European Commission, *op. cit.*, note 70.

102 Sachoulidou, A., *Cross-Border Access to Electronic Evidence in Criminal Matters: The New EU Legislation and the Consolidation of a Paradigm Shift in the Area of "Judicial" Cooperation*, New Journal of European

Architected within the principle of mutual recognition - as enshrined in Article 82 of the Treaty on the Functioning of the European Union (hereinafter TFEU), the Regulation is more intrusive in nature compared to the CoE framework, as it challenges more fiercely the traditional limits of mutual recognition. This "intrusion" materializes through the vesting of private service providers with public functions[103], thereby institutionalizing binding cooperation between judicial authorities third parties. EPOC and EPOC-PR are empowered to reach directly service providers offering services in the Union, irrespective of the actual location of the data or the provider's infrastructure.[104]

This implies that territorial nexus is conditioned to service providers offering services within the Union, even where the provider itself is established outside the EU or the data is stored abroad. In this regard, the location of the company's headquarters, servers, or storage infrastructure is not determinative.[105] Instead, the Regulation builds jurisdiction around the provider's connection to the Union market through the offering of services within one or more Member States, as provisioned in Recitals 26 and 29.

Service Provider's establishment or legal representative in the Union does not itself create jurisdiction; rather, it serves as a procedural mechanism through which authorities may enforce an EPOC in compliance with Article 7 of the Regulation. Such remedial construct allows EU authorities to address orders to foreign-based service providers catering their services within the Union. In doing so, the Regulation decouples jurisdiction from the physical location of the data, acknowledging that cloud-based services and network infrastructures render territorial nexus impractical.[106] The Regulation, hence, stretches the boundaries of indirect cooperation to a model of quasi-direct enforcement vis-à-vis private actors.

Yet, at the same time, the Regulation does not entirely abandon safeguards linked to sovereignty; instead, it aims to balance procedural efficiency with territorial prerogatives through the notification mechanism, proportionality assessments, grounds for refusal, and fundamental rights protections. Particularly, Article 8(1) conditions the issuance of a production order on traffic and content data[107] with an additional notification obligation to public authority in the jurisdiction, where

Criminal Law, Vol. 15, No. 3, 2024.

103 Tosza, *op. cit.*, note 67, p. 156.

104 Regulation (EU) 2023/1543, *op. cit.*, note 8, recital 21.

105 Regulation (EU) 2023/1543, *op. cit.*, note 8, recital 21.

106 For the elaborated clarification regarding the "offering services" criterion for the establishment of jurisdiction see European Commission, *op. cit.*, note 70.

107 Subscriber data, as stipulated in Article 7, is not constrained by such obligation.

the service provider is located. While the Regulation expands enforcement jurisdiction through direct cooperation with service providers, equally it wards off the framework from amounting to an unrestricted coercive power of unilateral extraterritorial enforcement.

4.3. Proportionality Trade-offs: a Procedural Catch 22

4.3.1. Rethinking Territoriality in Criminal Procedure: Toward a Limited Model of Extended Enforcement Jurisdiction

The growing use of investigative powers to obtain cross-border electronic evidence and persisting concerns about insufficient procedural efficiency[108] compels the recognition that extraterritoriality in criminal procedure can no longer be understood as exceptional, or marginal. The un-territoral nature of data[109], cloud infrastructure and encryption challenge conventional legal frameworks strictly embedded in territoriality. The question is therefore no longer whether procedural powers produce extraterritorial effects, but rather how to develop a normative framework capable of accommodating unorthodox legal solutions without dismantling safeguards rooted in sovereignty.

The newly introduced mechanisms - Budapest Convention and its Second Protocol, and the EU Regulation on EPOC and EPOC-PR seek to address this problem. Neither abandons territoriality but rather recalibrates its scope by accommodating forms of extended territoriality in relation to data. Both mechanisms constitute early efforts to facilitate an incremental shift from strict territorial enforcement toward a new model where enforcement jurisdiction operates through a more flexible form of extended territoriality, subject to procedural safeguards.

Procedural powers pursuant to articles 18(1)(b), 32 of the Budapest Convention and articles 6 and 7 of the Second Protocol institute procedural remedies with a controlled extraterritorial implication. They do not abandon MLA as the foundational cooperation model[110] but rather operate in tandem with it as complementary mechanisms. These investigative measures though seeking to render possible the "widest extent possible" for the less sensitive subscription data, may lack the "coercive" component and rather grounded on goodwill and cooperation.[111] This

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108 United Nations Office on Drugs and Crime, *op. cit.*, note 73.

109 Daskal, *op. cit.*, note 3.

110 Traffic and content data are subject to MLA procedures. Only subscription data collection may be subjected to bypass mechanism.

111 Davies, G.; Kennedy-Mayo, D., *The Promise and Pitfalls of the Second Protocol to the Budapest Convention: Assessing Its Impact on EU and UK Cross-Border Criminal Investigations*, New Journal of European

is due to the lack of a binding obligation for service providers to disclose data, rather the "voluntary disclosure" provision favors providers with a discretionary and less stringent procedural position.

The Second Protocol resorts to MLA procedures as a remedy if the service provider supplies not with the requested data, making the mechanism a quasi-efficient for the purpose it was established. Yet, the core problem of the mechanisms under this framework is the asymmetric data protection safeguards among parties, as criticism has questioned the utilization of given instruments.[112] Since the Second Protocol was opened for signature in 2021, it has, at the time of writing, been ratified by only four Parties out of 52 signatories. Parties' hesitation reflects the concern on adhering to a "mutual trust" framework, where parties differentiate in data protection safeguards, institutional capabilities and uneven democratic standards. The imbalance may lead to fragmented application of procedural powers, whereas its implications may affect fundamental rights and procedural guarantees.

In comparison, the cooperation model introduced in the EU Regulation for EPOC and EPOC-PR employs a relatively liberal choice of extended territoriality. Neither does it discard sovereignty. EPOC and EPOC-PR are enforced through a Regulation[113], a conscious choice aimed at harmonizing the cross-border acquisition of electronic evidence between Member States. A fundamentally different approach[114], potentially employing asymmetrically the principle of mutual recognition[115] and instead rendering the mutual trust principle as rather "absolute".[116] For the intrusive traffic and content data, the Regulation conditions their production

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Criminal Law, Vol. 17, No. 1, 2026.

112 Cami, *op. cit.*, note 38; Access Now, *Comments on the Draft Second Additional Protocol to the Budapest Convention on Cybercrime*, 30 April 2021; European Data Protection Supervisor, *Opinion 1/2022 on the Two Proposals for Council Decisions Authorising Member States to Sign and to Ratify, in the Interest of the European Union, the Second Additional Protocol to the Convention on Cybercrime on Enhanced Co-operation and Disclosure of Electronic Evidence*, 20 January 2022; European Digital Rights (EDRi), *Ratification by EU Member States of the Second Additional Protocol of the Council of Europe Cybercrime Convention*, 30 April 2021.

113 The so far instruments in EU criminal justice enshrined in Article 82 TFEU have been instituted via Directives.

114 Franssen, V., *The European Commission's E-Evidence Proposal: Toward an EU-Wide Obligation for Service Providers to Cooperate with Law Enforcement?*, *European Law Blog*, 12 October 2018, Available at: [https://europeanlawblog.eu/2018/10/12/the-european-commissions-e-evidence-proposal-toward-an-eu-wide-obligation-for-service-providers-to-cooperate-with-law-enforcement], Accessed 9 May 2026.

115 Cami; Karsai, *op. cit.*, note 94.

116 Christakis, T., *From Mutual Trust to the Gordian Knot of Notifications: The EU e-Evidence Regulation and Directive*, in: Franssen, V.; Tosza, S. (eds.), Collecting Digital Evidence, Cambridge University Press, 2025, p. 174.

to additional safeguards, as they may be requested for limited criminal offences,[117] and the Order is to be reviewed by a judge in the issuing state.[118]

Notwithstanding, the model clearly monopolizes the institute of remedy[119] to the issuing state. The structural imbalance has been primarily addressed through the "notification knot", where the "ground for refusal" are expected to protect data and human rights against potential violations of the Charter of Fundamental Rights of the European Union or abusive practices.[120]

The model clearly constructs the procedural relationship as exclusive between the public authorities and service providers, whereas the subjects whose data has been processed remain striped of mechanisms to contest the legality and necessity of measures within the enforcing state.[121] Whether the notification mechanism will be able to leverage its guarantor role without implicating the effectiveness of the direct cooperation instrument will be tested from August 18, 2026 onwards, as the Regulation takes effect. The main concern regards its central role in contributing to the "privatisation" of functions traditionally exercised by public authorities by transferring core compliance responsibilities to service providers.[122] Similarly, jurisprudence will assess whether the model constitutes a balanced[123], and proportional framework.[124]

In both frameworks, private third parties constitute a core component, as they are empowered to serve as guardians of fundamental rights. The question is to what extent are we prepared to vest third parties with public functions and outsource to them the exercise of judgement when assessing the necessity and proportionality[125] of such coercive measures? Heading, potentially, to the gradual privatization of criminal justice.[126]

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117 Regulation (EU) 2023/1543, *op. cit.*, note 8, recital 40. It stipulates that these data may be required for offences that carry at least a three-year maximum custodial sentence.

118 Regulation (EU) 2023/1543, *op. cit.*, note 8, recital 36.

119 Tosza, *op. cit.*, note 99.

120 Christakis, *op. cit.*, note 116, p. 186.

121 Christakis, *op. cit.*, note 116, p. 203.

122 Mitsilegas, V., *The Privatisation of Mutual Trust in Europe's Area of Criminal Justice: The Case of E-Evidence*, Maastricht Journal of European and Comparative Law, Vol. 25, No. 3, 2018.

123 Tosza, *op. cit.*, note 67, pp. 148–153.

124 Juszczak, A.; Sason, E., *The Use of Electronic Evidence in the European Area of Freedom, Security, and Justice: An Introduction to the New EU Package on E-Evidence*, *Eucrim*, No. 2, 2023.

125 Topalnakos, P., *Critical Issues in the New EU Regulation on Electronic Evidence in Criminal Proceedings*, Eucrim, No. 2, 2023, p. 200.

126 Mitsilegas, *op. cit.*, note 122, pp. 264–265.

In striking a balanced model of coercive measures, the legitimacy of newly developed mechanisms cannot be assessed exclusively through the lens of enforcement efficiency. Otherwise, sovereignty will be treated as an obstacle, rather than the foundational organizing principle of international law. Deterritorialization of data, hence, may not be excused as a reason to ground unrestricted unilateral extraterritoriality, but rather approached with legal solutions that are compatible with the principles of territoriality and sovereignty.[127]

The divergences between the two models of direct cooperation reveal that in tackling the cumbersome timeframes associated with the MLA, new regulations need to be robust to facilitate expedited collection of data across jurisdictions. Within the model of the fourth proposed investigative jurisdiction[128], a solution may rest in a limited extraterritoriality model – a flexible legal construct where the matter in question is not constrained as a binary question of legality or illegality, but rather a trade-off discourse to accommodate efficiency conditioned to procedural standards commonly shared among parties. The challenge of this model lies in the selective approach to whether such standards should be harmonized or met at a minimum threshold. Answers may be found in mutual trust-based cooperation, as embedded in EU criminal procedure, where the "free circulation" of decisions[129] facilitates a more effective access to deterritorialized electronic evidence. This framework is a procedural luxury confined within the political and legal context of the EU, where the commonality of standards is a product of harmonization between member states.

Electronic evidence, however, transcends territorial jurisdictions beyond EU without prejudice, and therefore the regulatory responses designed to address it must cater holistic solutions across asymmetric jurisdictions. As in the informal cooperation so far[130], we may need to consider bilateral agreements between states, operating alongside broader multilateral instruments, within an adjusted trust framework. Such cooperation would be largely constrained and sized by sufficient compatibility between legal systems, robust institutional capacities, commonly shared procedural safeguards and stable long-term relations between the jurisdictions. In this respect, the selective and adjusted mutual trust may not be presumed as *a priori* but instead is progressively constructed upon evidenced reliability, reciprocity, and credibility.

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127 Kleijssen, J.; Perri, P., *Cybercrime, Evidence and Territoriality: Issues and Options*, in: Netherlands Yearbook of International Law 2016, Springer, 2017.

128 Ryngaert, *op. cit.*, note 62; Shurson, *op. cit.*, note 16.

129 Karsai, K., *Division of Competences between Member States and the European Union in Criminal Procedural Law*, XXVII FIDE Congress, 2016.

130 United Nations Office on Drugs and Crime, *op. cit.*, note 73.

While instituting a fourth jurisdiction in customary international law is not a foreseeable event[131], the model may be applicable in selective states formalizing the direct mechanisms by means of bilateral agreements extending conventional territoriality constrain. There is not an all-size fit solution, rather a model that may capacitate a proportional solution to the problem. Time bound iterative practices will further support a jurisprudence build up, giving rise to a controlled exercise of enforcement jurisdiction as accommodated in international law.

4.3.2. Policing the dark web: anonymity, encryption, and where extraterritoriality becomes secondary

The discussion on cross-border procedural powers becomes more complex in the context of the dark web. The discussion so far has examined how new legal mechanisms accommodate limited forms of extraterritoriality. The dark web, however, presents a distinct yet complementary dimension of this debate. Rather than raising the question of whether enforcement jurisdiction may legitimately extend across borders, the dark web reveals that, in some cases, the main challenge lies in the practical inability to exercise investigative powers at all. Consequently, this section examines whether the proposed model of limited extraterritoriality remains capable of addressing investigative challenges in environments where anonymity and technological indeterminacy render territorial nexus itself uncertain.

Dark web is defined as a deterritorialized space belonging to no single jurisdiction yet implicating them all. Accounting for a substantial portion of the internet and concealed beneath World Wide Web, dark web is understood as a global network of computers, grounded on user anonymity, cryptographically protected communications, and concealed digital transactions.[132] It is associated as a secretive place operatable by shadowy users accessing hidden services[133], and hotbed to illicit activities from good to hacking services, such as malware and denial-of-service attack (DDoS).[134] Even in cases where investigative authorities are successful in identifying illicit websites, dark web policing is argued to be nearly impossible due to anonymity and encryption.[135]

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131 Shurson, *op. cit.*, note 16.

132 Ghappour, A., *Searching Places Unknown: Law Enforcement Jurisdiction on the Dark Web*, Yale Law Journal, Vol. 127, 2017, p. 1077.

133 Bradbury, D., *Unveiling the Dark Web*, *Network Security*, Vol. 4, 2014, p. 14.

134 Choi, K.-S.; Lee, C. S., *In the Name of Dark Web Justice: A Crime Script Analysis of Hacking Services and the Underground Justice System*, *Journal of Contemporary Criminal Justice*, 2023, p. 2.

135 Davies, G., *Shining a Light on Policing of the Dark Web: An Analysis of UK Investigatory Powers*, Journal of Criminal Law, Vol. 84, No. 5, 2020.

Achilles' heel is nested in the disrupted infrastructure of the dark web, where users access hidden networks through specialized software such as Tor offering anonymous browsing. Tor allows the user to create a virtual untraceable server, which neither the SP that route the traffic, nor law-enforcement agencies, nor the developers of the Tor project are able to track the server's location.[136] Unable to identify the location of a targeted device, authorities may not employ any procedural power as discussed so far to collect evidence.[137] Public authorities have resorted to ad-hoc policing techniques, such as the use of the Open-Source Intelligence, or interrogation of seized data. Despite results, it has been evidenced as inadequate.[138]

While cryptography[139] constitute a major investigative barrier for law enforcement[140], authorities pursue out of need hacking techniques to bypass encryption and access data, otherwise inaccessible as it is cloaked in anonymity and secure communications technologies. In the U.S. the hacking-based techniques are provisioned as "network investigative techniques", pursuant to the amended Federal Rule of Criminal Procedure 41.[141]

In essence, the authorities employ malware software in the target transmuting it into a surveillance device, allowing for access to and extract of data. Yet this leapfrog[142] remedial policing mechanism employed through surveillance procedural power poses a significant jurisdictional risk: because the location of the targeted device is unknown at the moment of deployment[143], such technique may inevitably cross borders, violating sovereignty of foreign jurisdictions where the computer is located. Though normatively the technique is to be engaged within U.S. jurisdiction, it is estimated that 80% of the dark web computers are located abroad, rendering this procedural power an out-of-country mechanism.[144] Despite limited support for the hacking tools employments[145], it has been countered

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136 Moore, D.; Rid, T., '*Cryptopolitik and the Darknet*', 2016, 58(1), Survival 17.

137 Ghappour, *op. cit.*, note 132, p. 1093.

138 Davies, *op. cit.*, note 135.

139 Diffie, W.; Hellman, M. E., *New Directions in Cryptography*, *IEEE Transactions on Information Theory*, Vol. 22, No. 6, 1976.

140 European Parliament, *Legal Frameworks for Hacking by Law Enforcement: Identification, Evaluation and Comparison of Practices*, *op. cit.*, note 120, pp. 18–21.

141 Ghappour, *op. cit.*, note 132, p. 1080.

142 Ghappour, *op. cit.*, note 132, p. 1095.

143 Katyal, N., *Criminal Law in Cyberspace*, *University of Pennsylvania Law Review*, Vol. 149, No. 4, 2001, pp. 1072–1073.

144 Ghappour, *op. cit.*, note 132, p. 1081.

145 Bellovin, S. M.; Blaze, M.; Clark, S.; Landau, S., *Lawful Hacking: Using Existing Vulnerabilities for Wiretapping on the Internet*, *Northwestern Journal of Technology and Intellectual Property*, Vol. 12, No. 1, 2014.

with strong criticism. Google has expressed its concerns about the implications of network investigative techniques, assessing that such policy may corrode nations' sovereignty.[146]

In the UK, the hacking has been defined as "Equipment Interference" based on the Investigatory Powers Act 2016, formalizing the use of hacking techniques within a transparent framework. UK endorses rather a safeguarded coercive tool, tied to requirements for the issuance of an equipment interference warrant, including to be approved by the law enforcement chief and a Judicial Commissioner[147], a British Islands connection should be evidenced[148], and for serious crimes[149].

The EU approach on hacking remains fragmented and dependent on national legal systems. European Parliament Study confirmed that law enforcement agencies the Member States subject to study, have used hacking techniques pursuant to the so-called 'grey area' legal provisions, due to the absence of specific legislative provisions.[150] Some states have domestically authorized forms of "lawful hacking", including the Netherlands, France, and Germany.[151] Europol and the European Cybercrime Centre's role in coordinating multinational dark web investigations is central, employing covert infiltration, digital forensics, and coordinated device exploitation.[152]

The incompatibility of territorially tied procedural powers and anonymity in cyberspace has presented investigative authorities with an enforcement dilemma: they must either refrain from intervention and risk fostering a culture of impunity for cybercriminals[153], or employ intrusive tools.

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146 Ghappour, *op. cit.*, note 132, p. 1082.

147 *Investigatory Powers Act 2016* (UK), s 106(1)(d).

148 *Investigatory Powers Act 2016* (UK), s 107.

149 *Investigatory Powers Act 2016* (UK), s 106(3).

150 European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, *Legal Frameworks for Hacking by Law Enforcement: Identification, Evaluation and Comparison of Practices*, 2017, p. 10.

151 *Ibid.*

152 European Union Agency for Law Enforcement Cooperation (Europol), *Global Cybercrime Crackdown: Over 373 000 Dark Web Sites Shut Down – Authorities from 23 Countries Participate in the Operation*, Europol, 2026, Available at: [https://www.europol.europa.eu/media-press/newsroom/news/global-cybercrime-crackdown-over-373-000-dark-web-sites-shut-down], Accessed 10 May 2026.

153 In the absence of a conventional justice court, the dark web has developed its own Court of Arbitrage to settle disputes and handle grievances, with outcomes ranging from financial compensations to true identity exposure. See Choi; Lee, *op. cit.*, note 134.

The dark web may be perceived as belonging to no single jurisdiction—or, equally, to all jurisdictions. Extraterritoriality becomes secondary here, not because territoriality loses legal relevance, but because the territorial nexus itself becomes technologically indeterminate. The dark web therefore confirms the relevance of the proposed model, yet it simultaneously constitutes its outer limits. The challenge in this domain is no longer whether enforcement jurisdiction may legitimately extend beyond territorial borders; but whether territoriality remains a connecting factor where the location of data, devices, or users cannot be determined.

5. CONCLUSIONS

The growing volume of criminal investigations necessitating cross-border electronic evidence reflects that territoriality may not be sufficient to function as an unweaving organizing principle for enforcement jurisdiction. Electronic data is volatile, fragmented, and detached from stable territorial connections, whereas efficiency in criminal investigations is dependent on time. MLA framework struggles to satisfy timeframes required, often regarded as cumbersome and inefficient. Newly proposed cooperation mechanisms disrupt the conventional authority to authority circulation, vesting service providers with a central role in criminal justice. This model, primarily, has rendered extended procedural jurisdiction a central legal concern.

Notwithstanding the necessity for efficient procedural powers, the solution cannot nest in unrestricted unilateral enforcement. Territorial sovereignty remains central to international law. The challenge therefore lies in designing procedural frameworks capable of recalibrating investigative efficiency with sovereignty-tied safeguards. The mechanisms examined in this study reflect adjusted models to strike that balance. Whereas the CoE framework adopts a territorial conscious approach, architecting MLA as the foundational cooperation model, it introduces limited forms of direct cooperation. The EU model, by contrast, advances a more intrusive model grounded in the mutual trust paradigm. Both frameworks reflect a gradual recalibration of territoriality rather than its abandonment.

Ultimately, the debate on cross-border access to electronic evidence is not about whether extraterritorial procedural effects should exist, but under what conditions they may be exercised legitimately. The emphasis will be on the development of procedural safeguards as the foundational layer of mechanisms that can constrain investigative power within a growing deterritorialized digital environment. This study assesses positively the model of limited extraterritoriality, whereby cross-border investigative powers may be stretched only insofar as they remain constrained by procedural safeguards, and proportionality. This model advances as

a two-pillar solution, with multilateral and bilateral agreements between parties who trust each other.

The legitimacy of such a model, however, cannot be built solely on investigative efficiency. Cross-border access to electronic evidence should remain conditioned upon a coherent set of normative safeguards, including a clear legal basis, judicial oversight where appropriate, proportionality, effective notification mechanisms, meaningful remedies, and the protection of fundamental rights. Such safeguards are equally necessary to make sure that the involvement of private service providers does not result in an excessive transfer of core public functions traditionally exercised by judicial authorities. Only within such procedural constraints can limited extraterritoriality remain compatible with territorial sovereignty and the rule of law.

Investigations in the dark web elevate this debate to new heights, as anonymity, encryption, and concealed infrastructures challenge the normative assumptions discussed. The question of extraterritoriality here is downgraded as secondary compared to the fundamental problem of law enforcement reliance on hacking-based investigative powers.

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Review article

ENDING CHILD SEXUAL ABUSE – INTERNATIONAL STANDARDS, CROATIAN CRIMINAL LEGAL FRAMEWORK AND PREVENTIVE STRATEGIES*

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ABSTRACT

Sexual abuse of children is a pervasive social issue that affects children with different social background, age and family settings, an issue that crosses national boundaries. The global prevalence of child sexual abuse (hereinafter: CSA), coupled with the possibility of identifying shared conclusions regarding the nature and consequences of this profoundly harmful phenomenon, underscores the need for a coordinated agreement on effective strategies and interventions. Considering the above, recent years have seen the adoption of various international instru-

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ments aimed at preventing and combating the sexual abuse of children. Starting with the Convention on the Rights of the Child, followed by the Lanzarote Convention, continuing through EU directives, a comprehensive international normative framework has been established. In recent years, EU has significantly strengthened its normative framework for the suppression of domestic and gender-based violence and outlined effective preventive strategies. Previous research has demonstrated that the obligations arising from convention-based law have served as an important catalyst for Croatian criminal law reforms over the past two decades. An examination of the legislative amendments to the 1997 and 2011 Criminal Code reveals that sexual offences against children underwent a number of separate revisions in terms of legislative drafting. Given the exceptionally intensive normative activity in the field of sexual offences against children, this paper will specifically examine whether the interventions undertaken so far have sufficiently aligned national solutions with international guidelines and whether there is scope for further reform.

***Keywords**: Child sexual abuse, Croatian criminal legal framework, International standards, Sexual exploitation of children, Sexual offences against children, Prevention*

1. SEXUAL ABUSE OF CHILDREN: THE SCALE OF THE ISSUE

Sexual abuse of children is a pervasive and highly complex social issue that has received considerable scholarly attention in recent years. Numerous studies have revealed the general estimates of this negative phenomenon, its various forms, the complex dynamics of victimisation, and the manifestation and severity of its consequences. Extensive research across different fields has advanced our understanding of CSA, shedding new light on the victim-offender relationship and the criminological and victimological contexts. Given the intensity of research, Conte and Sion concluded that knowledge of different aspects of this phenomenon has expanded dramatically over the past four decades.[1] Similarly, Witt and colleagues confirm that there has been noted a significant increase in research into the issue of CSA owing to media reports and intensive public and political debate.[2] Nevertheless, it has become clear that increased scholarly interest in this topic has not led to convergent conclusions. Considering the structural and contextual complexity of the sexual victimisation of children, it is unrealistic to expect research findings to align completely. Although many studies have produced divergent findings, shaped by differing theoretical frameworks on what constitutes CSA,

[1] Conte, J. R.; Simon, J., *Sexual Abuse of Children*, in: Geffner, R.; White, J. W.; Hamberger, L. K.; Rosenbaum, A.; Vaughan-Eden, V.; Vieth, V. I. (eds.), Handbook of Interpersonal Violence and Abuse Across the Lifespan, A Project of the National Partnership to End Interpersonal Violence Across the Lifespan (NPEIV), Springer Nature, Cham, 2022, p. 741.

[2] Witt, A.; Rassenhofer, M.; Allroggen, M.; Brähler, E.; Plener, P. L.; Fegert, J. M., *The Prevalence of Sexual Abuse in Institutions: Results From a Representative Population-Based Sample in Germany*, Sexual Abuse, Vol. 31, No. 6, 2018, p. 644.

research methods, and sample definitions, certain recurring tendencies and shared positions can still be identified.

It is important to note at the outset that, despite public concern and awareness, CSA is a frequent yet underreported occurrence, closely linked to the phenomenon known as the dark figure of crime. In a significant number of cases, no disclosure has ever been made, and the magnitude of the problem is therefore obscured. Most research studies show that children face barriers that prevent them from reporting abuse. For instance, fear, anxiety, embarrassment, a lack of understanding of abuse, insufficient parental support, and the experience of intrafamilial abuse are strongly associated with nondisclosure.[3] As noted in Radford et al., although a child manages to summon the strength to confide in another person about the abuse they have endured, typically a peer, at most 14% of these incidents are subsequently reported to authorities.[4] It seems that a substantial proportion of sexual offences against children remains outside the scope of the criminal justice system, either because they are never detected or because they are excluded from official crime statistics due to low prosecution rates. Even when a case becomes known to the authorities, recent research indicates that only 25% of cases are prosecuted, and approximately half of those prosecutions result in a conviction.[5]

Even though the precise extent of abuse remains unclear, evidence suggests that the exposure of children to sexual victimisation is a global phenomenon. Recent estimates indicate that around 12% of the world's children have experienced some form of sexual abuse.[6] This is consistent with the findings of the World Report on Violence against Children, which confirmed that large numbers of children worldwide are routinely exposed to sexual violence.[7] Published meta-analyses and individual reviews show that the regional prevalence of child sexual victimisation forms a highly complex and uneven pattern. Country-wide surveys report that CSA reaches the highest rates in Africa and South Asia, while the lowest preva-

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3 Wallis, C. R. D.; Woodworth, M. D., *Child Sexual Abuse: An Examination of Individual and Abuse Characteristics That May Impact Delays of Disclosure*, Child Abuse & Neglect, Vol. 107, 2020, [https://doi.org/10.1016/j.chiabu.2020.104604]; Okur, P.; van der Knaap, L. M.; Bogaerts, S., *A Quantitative Study on Gender Differences in Disclosing Child Sexual Abuse and Reasons for Nondisclosure*, Journal of Interpersonal Violence, Vol. 35, No. 23-24, 2017, p. 5256.

4 Radford, L.; Allnock, D.; Hynes, P.; Shorrock, S., *Action to End Child Sexual Abuse and Exploitation: A Review of the Evidence*, UNICEF, New York, 2020, p. 24.

5 Burke, K. C.; Golding, J. M.; Neuschatz, J. S., *Sexual Victimization and Legal-Decision Making*, Ohio State Journal of Criminal Law, Vol. 22, No. 1, 2025, p. 42.

6 Wallis; Woodworth, *op. cit.,* note 3.

7 Pinheiro, P. S., *World Report on Violence against Children, United Nations Secretary-General's Study on Violence against Children*, United Nations, Geneva, 2006, p. 3.

lence is noted in Europe and the United States.[8] Nevertheless, there is broad agreement among researchers and child-protection professionals that this is predominantly a gendered issue. According to various studies and official crime reports, girls are two to three times more likely than boys to experience violations of their sexual integrity.[9] This ratio varies depending on the methodological parameters of the studies, and, for example, the above-mentioned World Report on Violence against Children cites that approximately 150 million girls and 73 million boys were subjected to some form of sexual abuse with force in 2002.[10] More recently, WHO estimates that 120 million girls and young women under the age of 20 have experienced forced sexual contact.[11]

The bulk of recent studies show that most offenders are adult males previously known to the victim through social connections or family ties.[12] It appears that up to 95% CSA is committed by individuals known to the child, and over one-third of these perpetrators are family members.[13] A special relationship between the offender and the child is usually established within an environment that enables the offender's strategic and manipulative behaviour. Katz analysed 29 forensic interviews with children aged 8 to 14 years and highlighted the unique child-offender dynamic in intrafamilial CSA. Children abused by family members described feelings of shock and surprise when confronted with the abuse, despite having previously been subjected to prolonged manipulative tactics, in addition to fear, terror, confusion, and difficulty in understanding their feelings about the abuse.[14] Moreover, sexually victimised children within the family context are exposed to pronounced levels of familial dysfunction, and it is not uncommon for them to experience additional forms of maltreatment, including physical, psychological, or

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8 Radford, L.; Allnock, D.; Hynes, P., *Preventing and Responding to Child Sexual Abuse and Exploitation: Evidence Review*, UNICEF, New York, 2015, p. 6.

9 Radford *et al.*, *ibid.*, p. 18; *Global Status Report on Preventing Violence against Children*, World Health Organization, Geneva, 2020, p. 12; Bücken, C. A.; Mangiulli, I.; Erens, B.; Leistra, A.; Otgaar, H., *International Researchers and Child Protection Service Workers Beliefs about Child Sexual Abuse*, Psychology, Crime & Law, Vol. 31, No. 7, 2025, p. 869.

10 Pinheiro, *op. cit.,* note 7, p. 12.

11 *Global Status Report on Preventing Violence against Children*, *op. cit.,* note 9, p. 14.

12 Radford *et al.*, *op. cit.,* note 4, p. 39; Ross, S., *Parental Advocacy and Child Sexual Abuse in Australian Institutions, 1940-1980*, Law & History, Vol. 11, No. 1, 2025, pp. 25 – 26.

13 Goddard, N.; Wright, C.; Bramwell, R.; Shannon, K. L., *Detecting Child Sexual Abuse in Perpetrators: The Effects of Perpetrator Age and of Training on Observers*, Child Abuse Review, Vol. 34, No. 4, 2025, p. 2; Rittossa, D., *Seksualni delikti na štetu djece*, Hrvatsko udruženje za kaznene znanosti i praksu, Ministarstvo unutarnjih poslova Republike Hrvatske, Zagreb, 2007, p. 292.

14 Katz, C., *Unspoken: Child–Perpetrator Dynamic in the Context of Intrafamilial Child Sexual Abuse*, Journal of Interpersonal Violence, Vol. 37, No. 5-6, 2022, pp. 14 – 17.

combined abusive behaviours.[15] Clarifying the child's situation and experiences is critical for understanding and addressing the potential consequences of exposure to abuse.

The vast majority of studies, confirm the social, emotional, mental, and physical health consequences that victims may experience immediately or throughout their lives. As noted in a recent national survey, CSA is in most cases deeply traumatic, leaving scars on a child's sense of security, self-integrity, and sexual and bodily autonomy.[16] Survivors must navigate a wide range of psychosocial challenges that affect their housing stability, independent living, educational attainment, employment opportunities, and social connections.[17] They also often struggle with various mental health conditions such as depression,[18] post-traumatic stress disorder,[19] eating disorders, and other anxiety disorders,[20] as well as ongoing physical health outcomes.[21] Research to date has consistently shown that CSA is a widespread social and public-health issue affecting children in both low- and high-income countries, and recent estimates indicate that the global economic burden of all forms of violence against children, including sexual violence, could reach 8% of global GDP or roughly 7 trillion US dollars.[22]

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15 Martijn, F. M.; Blagden, N.; Baguley, T.; Leroux, E., J.; Mackay, J.; Seto, M. C., *What about the Family in Intrafamilial Child Sexual Abuse? There is Significantly More Familial Dysfunction in Families with Intrafamilial Child Sexual Abuse Than in Other Families*, Clinical Psychology Review, Vol. 123, 2026, p. 12.

16 Mathews, B.; Finkelhor, D.; Collin-Vézina, D.; Malacova, E.; Thomas, H. J.; Scott, J. G.; Higgins, D. J.; Meinck, F.; Pacella, R.; Erskine, H. E.; Haslam, D. M.; Lawrence, D., *Disclosure and Non-Disclosure of Childhood Sexual Abuse in Australia: Results from a National Survey*, Child Abuse & Neglect, Vol. 160, 2025, p. 2.

17 Latham, R. M.; Newbury, J. B.; Fisher, H. L., *A Systematic Review of Resilience Factors for Psychosocial Outcomes During the Transition to Adulthood Following Childhood Victimisation*, Trauma, Violence, & Abuse, Vol. 24, No. 2, 2023, p. 958.

18 Akinyemi, O.; Ogundare, T.; Fasokun, M.; Ogunyankin, F.; Ugochukwu, N.; Ajisafe, W.; Ikugbayigbe, S.; Eze, O.; Hughes, K.; Michae, M., *The Long-Term Impact of Childhood Sexual Assault on Depression and Self-Reported Mental and Physical Health*, Frontiers in Psychiatry, Vol. 15, 2025, p. 5.

19 Cea, B.; Montes, A.; Trinidad, A.; Arce, R., *Forensic Psychological Harm in Victims of Child Sexual Abuse: A Meta-analytic Review*, The European Journal of Psychology Applied to Legal Context, Vol. 17, No. 2, 2025, p. 115.

20 Carretier, E.; Jourdan, M.; Duchesne, S.; Flouriot, J.; Lachal, J.; Moro, M-R., *Disclosure of Sexual Abuse by Adolescents Treated in a Psychiatry Department*, Encephale, Vol. 51, No. 1, 2025, p. 50.

21 Easton, S. D.; Kong, J.; Renner, L. M.; McKetchnie, S. M., *Long-Term Effects of Child Sexual Abuse on Physical Health: A Mixed-Gender, Population-Based Analysis of Older Adults*, Journal of Interpersonal Violence, 2025, [https://doi.org/10.1177/08862605251339641].

22 *The Violence Prevention Divided - Why Preventing Violence Against Children Makes Economic Sense*, UN Office of the Special Representative on Violence against Children, Geneva, 2022, p. 2.

The global prevalence of CSA, affecting both girls and boys across diverse socioeconomic and cultural contexts, regardless of racial, ethnic, or national identity, together with consistent scientific evidence of its profoundly harmful consequences and other commonly shared characteristics, highlights the need for coordinated and effective strategies at the international level. In recent years, new challenges associated with modern technology and AI have further intensified this need, as these developments have contributed to CSA increasingly transcending national borders.[23] Consequently, the adoption of international and regional instruments has become a logical and necessary step towards harmonising national legal frameworks, strengthening cross-border cooperation, and promoting best practices in the effective suppression and prevention of CSA. However, to the best of the authors' knowledge, existing research on CSA in Croatia is limited and has not examined the extent to which the international obligations undertaken by the state have been complied with, particularly regarding the establishment of a coherent criminal law framework and the adoption of effective preventive measures. Thus, the aim of the present study is to provide an in-depth normative analysis that addresses the identified gap in the literature. It further proposes *de lege ferenda* amendments to the Criminal Code and preventive measures aligned with international standards, and seeks to foster scholarly debate.

2. THE ROLE OF INTERNATIONAL LAW IN SHAPING EFFECTIVE CSA RESPONSES

2.1. Overview of the Key CSA-related Instruments with Regard to the Republic of Croatia

As already emphasised, CSA constitutes an exceptionally complex social phenomenon which manifests in various forms and examines through a wide range of interrelated approaches, each addressing CSA from its own perspective. Growing societal awareness has enabled a deeper understanding of its complexity, prevalence, and transnational nature, thereby creating space for more systematic and decisive actions at all levels, but above all within the international legal framework. Given the scope limitations of this paper, it is not possible to provide a detailed analysis of all existing instruments and the networks of established mechanisms. The examples presented below therefore serve only as an indicative overview of the complexity of this phenomenon, with particular emphasis on the implementation of selected instruments in Croatia, where relevant data are available.

[23] Parti, K.; Szabó, J., *The Legal Challenges of Realistic and AI-Driven Child Sexual Abuse Material: Regulatory and Enforcement Perspectives in Europe*, Laws, Vol. 13, No. 6, 2024, p. 74.

With regard to the protection of children's rights, the most prominent place undoubtedly belongs to the Convention on the Rights of the Child (hereinafter: CRC), adopted in 1989,[24] as the first international legal instrument to refer explicitly and clearly to the issue of CSA in its provisions.[25] It was the first to introduce terms such as sexual abuse, coercion of a child to engage in unlawful sexual activities, child prostitution, child pornography, use of children in pornographic materials and performances.[26] In elaborating on the provisions relating to sexual exploitation and abuse, the Committee on the Rights of the Child (hereinafter: the CRC Committee)[27] has defined such acts as all sexual activities imposed on a child by an adult that are prohibited under criminal law,[28] including: a) inducement or coercion of a child to engage in any unlawful or psychologically harmful sexual activity; b) the use of children in commercial sexual exploitation; c) audio or visual images of CSA, d) child prostitution, sexual slavery, sexual exploitation in travel and tourism and sale of children for sexual purposes, and forced marriage.[29] One of the most significant achievements of the CRC lies in the imposition of obligations on States Parties to adopt various measures aimed at protecting the rights enshrined in the Convention. Thus, for the purpose of protecting children from all forms of sexual exploitation and abuse, States Parties shall take all appropriate measures to prevent inducing or coercion of a child into unlawful sexual activity, including exploitative use in prostitution and other unlawful sexual practices, and

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24 Convention on the Rights of the Child, UNTS, 1577 (p. 3); Official Gazette of the Republic of Croatia – International Treaties No. 12/1993, 13/1997, 3/1998, 15/2002 (hereinafter: CRC).

25 The CSA phenomenon is also addressed in many other documents, such as the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (2000); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000); or the Council of Europe Convention on Action against Trafficking in Human Beings (2005). It is also covered by many instruments within the broader prohibition of human exploitation, which fall outside the scope of this paper and will not be examined further, *e.g.*: CEDAW (1979), Art. 6; Convention Concerning the Prohibition and Immediate Action for the Elimination of The Worst Forms of Child Labour No. 182 (1999), Art. 3; Convention on the Rights of Person with Disabilities (2006), Art. 16.

26 CRC, Arts. 19, 34.

27 It is a body established under the CRC primarily for the purpose of examining the progress made by States Parties in its implementation (CRC, Art. 43). Additionally, through its interpretative work, in particular in the form of General Comments and specific Guidelines, it also promotes and advances standards for the protection of children's rights. The Committee has addressed the issue of child sexual abuse and exploitation in several of its General Comments: General Comment No. 7 (2005): Implementing child rights in early childhood, CRC/C/GC/7, 1 November 2005, in particular para. 36(g); General Comment No. 13 (2011): The right of the child to freedom from all forms of violence, CRC/C/GC/13, 19 April 2011; General Comment No. 25 (2021) on Children's Rights in Relation to the Digital Environment, CRC/C/GC/13, 2 March 2021.

28 CRC Committee, General Comment No. 13, p. 10, ftn. 9.

29 *Ibid.*, para. 25.

pornographic performances and materials.[30] States are also obliged to take all necessary measures to prevent the abduction, sale, and trafficking of children,[31] which frequently result in sexual abuse and exploitation. Particular emphasis is given on States' obligation to take all appropriate measures to promote the physical and psychological recovery and social reintegration of a child victim.[32] The effectiveness of the CRC implementation is assessed through the analysis of periodic reports which States are required to submit to the CRC Committee.[33] Accordingly, in a following chapter this paper will briefly examine the most recent report submitted by the Republic of Croatia, insofar as it relates to CSA.

The first regional instrument entirely devoted to the protection of children from sexual exploitation and abuse, which has, since its entry into force in 2010, brought significant progress in this field, is the Lanzarote Convention of the Council of Europe (2007).[34] Applying the so-called "4 Ps" approach, the Convention requires States to provide a comprehensive response to sexual violence against children through prevention, protection, prosecution, and the promotion of international cooperation. Prior to its adoption, no single comprehensive international instrument existed that encompassed all forms of sexual violence against children, and the Convention may therefore be regarded as the most extensive international catalogue of criminal offences in this field. The offences it covers include: sexual abuse (Art. 18); child prostitution (Art. 19); child pornography (Art. 20); participation of a child in pornographic performances (Art. 21); corruption of children (Art. 22); and solicitation of children for sexual purposes (grooming) (Art. 23), including through online communication. The Convention establishes the Lanzarote Committee, which monitors its implementation in States Parties through thematic monitoring cycles that enable the comparison of legislative solutions, the exchange of good practices, and the identification of shortcomings in national policies, as will be illustrated below with reference to Croatia. At the same time, the Committee operates as a platform for the data collection and cooperation.[35] The Convention encourages States to reform their criminal legislation, strengthen

30 CRC, Art. 34.

31 CRC, Art. 35.

32 CRC, Art. 39.

33 CRC, Art. 44.

34 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse CETS No. 201, Lanzarote, 25 October 2007; Official Gazette of the Republic of Croatia – International Treaties No. 11/2011; 13/2011 (Hereinafter: Lanzarote Convention).

35 *A Global Tool to Protect Children from Sexual Violence, Building a Europe for and with Children*, Council of Europe, Available at: [https://rm.coe.int/lanzarote-convention-a-global-tool-to-protect-children-from-sexual-vio/16809fed1d], Accessed 15 March 2026.

preventive programmes, and improve institutional coordination and, notwithstanding continuing challenges,[36] remaining one of the most important international instruments addressing CSA.

The standards established by the Lanzarote Convention were further advanced by the most significant EU instrument in the field of combating CSA, sexual exploitation, and child pornography – Directive 2011/93/EU.[37] Its adoption marked an important step forward in the harmonisation of criminal law standards among EU Member States.[38] It establishes minimum requirements concerning the criminalisation of a broad range of conduct, including offences relating to sexual abuse (Art. 3), sexual exploitation (Art. 4), child pornography (Art. 5), and the solicitation of children for sexual purposes (Art. 6), which, in the context of information and communication technologies, constituted a relatively new category of criminal offence in EU law at the time of its adoption.[39] The Directive also emphasises the importance of preventive measures (Arts 22-23), while its particular value lies in its focus on the protection of victims, especially in the context of judicial proceedings, where it requires the adoption of measures aimed at preventing secondary victimisation and ensuring children's access to specialised support (Arts 18-20). Nevertheless, fifteen years after its adoption, and notwithstanding the fact that it was initially regarded as a progressive instrument providing a sufficient basis for combating sexual violence,[40] it is now evident that new forms of online violence call into question its adequacy in addressing the challenges of the digital environment.[41] The proposal for a Regulation COM(2022) 209 final[42] represents

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36 Council of Europe, *15 Years of the Lanzarote Convention: Achievements, Challenges and the Way Forward to Prevent and Protect Children from Sexual Exploitation and Abuse*, 2025, Available at: [https://rm.coe.int/declaration-conference-of-ministers-15-years-of-the-lanzarote-conventi/1680b68f2b], Accessed 15 March 2026.

37 Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, and Replacing Council Framework Decision 2004/68/JHA [2011] OJ L 335 (Hereinafter: Directive 2011/93/EU).

38 Rittossa, D., *Seksualni delikti na štetu djece – hrvatski kaznenopravni okvir kroz prizmu zahtjeva iz Direktive 2011/93/EU*, Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 25, No. 1, 2018, p. 33.

39 Klimek, L., *Solicitation of Children for Sexual Purposes: The New Offence in the EU*, International and Comparative Law Review, Vol. 12, No. 1, 2012, p. 142.

40 Scherrer, A.; Van Ballegooij, W., *Combating Sexual Abuse of Children Directive 2011/93/EU European Implementation Assessment*, EPRS/European Parliamentary Research Service, 2017, p. 25, Available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/598614/EPRS_STU(2017)598614_EN.pdf], Accessed 15 March 2026.

41 See, *e.g.*, Parti, Szabó, *op. cit.,* note 23, pp. 75 – 77.

42 First Proposal for a Regulation of the European Parliament and of the Council Laying Down Rules to Prevent and Combat Child Sexual Abuse, COM/2022/209 final, was introduced in May 2022. Following the adoption of its position by the Council of the European Union on 26 November 2025, negotiations with the European Parliament may continue with a view to reaching agreement on its

an attempt to overcome these shortcomings, while at the same time raising complex issues concerning the preservation of the balance between the protection of children and the safeguarding of fundamental rights. The legislative procedure for its adoption remains ongoing.[43]

2.2. Findings of the Monitoring Bodies Regarding the Implementation of the CRC and the Lanzarote Convention in the Republic of Croatia

From this perspective, the role of international law is clear: the strength of the international legal framework depends primarily on its effective implementation at the national level. Inadequate implementation is not merely a formal failure to comply with assumed international obligations; it results in insufficient and inconsistent protection mechanisms within the national system, which in turn has a direct impact on the effectiveness of criminal prosecution, contributes to inconsistent judicial practice, and ultimately leads to far-reaching consequences for child victims that are difficult to measure. It is precisely the context in which the evaluation of the implementation of international treaties must be understood. Accordingly, this section briefly examines the observations of the CRC Committee and the Lanzarote Committee with regard to Croatia, in order to assess the extent to which its legislative and institutional framework complies with the international obligations it has undertaken.

With regard to the CRC, Croatia submitted its most recent combined fifth and sixth periodic report to the Committee in June 2020.[44] The Committee's concluding observations were adopted in June 2022[45] and serve as a form of assessment of the actual degree of (non)compliance of the Croatian system with international

final text. For more see: Council of EU, *Child Sexual Abuse: Council Reaches Position on Law Protecting CHildren From Online Abuse*, 26, November 2025, Available at: [https://www.consilium.europa.eu/en/press/press-releases/2025/11/26/child-sexual-abuse-council-reaches-position-on-law-protecting-children-from-online-abuse/], Accessed 15 March 2026.

43 For a more detailed account of the legislative process and a critical assessment, see: ASSEDEL, *Regulation to Prevent and Combat Child Sexual Abuse (CSAR): Policy Analysis*, 2026, Available at: [https://assedel.org/wp-content/uploads/2026/01/1FINAL_Final-version-data-privacy-s.pdf], Accessed 15 March 2026. See also the *Proposal for a Regulation Laying Down the Rules to Prevent and Combat Child Sexual Abuse Complementary Impact Assessment*, EPRS/European Parliamentary Research Service, 2023, Available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/740248/EPRS_STU(2023)740248_EN.pdf], Accessed 15 March 2026.

44 CRC Committee, Combined Fifth and Sixth Periodic Reports Submitted by Croatia Under Article 44 of the Convention, due in 2019, 15 June 2020 (10 May 2021), CRC/C/HRV/5-6.

45 Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Croatia, CRC/C/HRV/CO/5-6, 22 June 2022.

standards, including those relating to CSA. In its findings, the Committee acknowledges certain normative progress but simultaneously identifies a number of structural shortcomings: the absence of a comprehensive policy for the protection of children from violence, particularly violence within the family (which accounts for the majority of reported cases); the prevalence of violence in schools and the increasing incidence of online violence (which often remains unreported); the insufficient development and accessibility of support mechanisms and reporting systems for CSA (including its online forms). The Committee therefore calls for the development of a comprehensive policy for the prevention, suppression, and monitoring of all forms of violence, alongside the strengthening of educational and awareness-raising programmes aimed at increasing societal understanding of CSA. It further recommends the development of measures to strengthen systems for the identification of potential victims of sexual exploitation and child trafficking. In addition, it calls for improvements in reporting, investigation, and prosecution mechanisms, with procedures adapted to the needs of children. Finally, it emphasises the need to strengthen victim support, including trauma-focused therapy, ensure sustainable funding for child helpline services, and standardise the use of audio-visual recordings of children's testimonies in criminal proceedings in order to avoid re-victimisation.[46]

It is notable that, while the CRC Committee's report remains at the level of broad systemic observations[47] and does not engage in detailed criminal law analysis of CSA, the reports of the Lanzarote Committee adopt a markedly different approach: they directly and precisely identify both strengths and weaknesses of the criminal law framework, in terms of both normative regulation and practice.

In the most recent Factsheet on Croatia (2023), updated with recent data from 2025,[48] it is noted that Croatia has taken certain steps in the field of protecting children from sexual exploitation and abuse through information and communication technologies (ICT). At the same time, however, a number of areas requiring further improvement are highlighted. One of the primary recommendations concerns the used terminology: the Committee invites Croatia to abandon the term "child pornography" and to consistently adopt the term "child sexual

46 *Ibid.*, paras. 24, 25, 43.

47 In light of the fact that almost a decade has passed since the period under consideration, it will be of particular interest to assess the findings of the seventh and eighth combined report, which Croatia is required to submit by 7 October 2027. *Ibid.*, para. 53.

48 See Factsheet – Croatia: Lanzarote Committee Implementation Report on the protection of children against sexual exploitation and sexual abuse facilitated by information and communication technologies (ICTs): addressing the challenges raised by child self-generated sexual images and/or videos (CSG-SIV), March 2023 (updated in March 2025).

abuse material" (hereinafter: CSAM), in order to avoid misperceptions regarding the seriousness of such offences. Particular emphasis is placed on the issue of the criminal liability of children in the context of self-generated sexual images and/or videos (CSGSIV), where the Committee considers that the Croatian system relies excessively on the age of criminal responsibility and the age of sexual consent as protective mechanisms.[49]

In the field of the sexual extortion of children, the Committee identifies the absence of a specific criminal offence covering situations in which self-generated content is used to force, coerce, threaten a child or obtain a financial or other benefit to the offender. It therefore invites Croatia to ensure that such cases are addressed either by introducing a specific incrimination or by prosecuting both the initial detention of such material and the extortion itself, and to guarantee that these acts are effectively investigated and prosecuted. It also invites the development of appropriate legal responses to prioritising educational measures that support children in safely navigating their sexual development while understanding and avoiding the risks associated with producing and possessing such content. Committee requires Croatia to establish mandatory trainings on children's rights and protection for all professionals who work with children, and requests to ensure that judges working on these matters have access to training on ICT facilitated sexual offences against children. It also requires to support the creation of free, accessible and confidential helplines or online service for child victims. Ultimately, in order to improve the effective implementation of the Convention, the Committee calls for the extension of international cooperation, including with civil society and non-Parties.[50]

At the same time, the Committee recognises positive aspects of Croatian legislation, particularly in the area of grooming, where the Croatian Criminal Code is identified as an example of good practice, as it does not require a physical meeting or the production of CSAM for the conduct to be considered punishable. Promising practice is also recognized in urgency of criminal proceedings in cases of criminal law protection of children, including cases of sexual abuse and exploitation of children. The Committee also welcomes the application of active personality principle without dual criminality to the solicitation of children for sexual purposes and to all acts involving child pornography, including knowingly assessing such material through ICTs. The implementation of the project for the establishment of the Barnahus model is also taken as an example of another promising practice, as well as the development of web application for reporting content related to CSA, the delivery of awareness-raising programmes, and the inclusion of challeng-

[49] *Ibid.*, p. 4.

[50] *Ibid.*, pp. 8 – 9, 11, 19 – 20, 24 – 26, 33.

es related to CSGSIV in the national educational curriculum.[51] These provisions demonstrate a high level of alignment with international standards and represents one of the areas in which Croatia receives explicit commendation.

The recommendations addressed to Croatia clearly indicate the need for further normative alignment, while at the same time the recognition of progress demonstrates that a foundation exists for the further development of the system of child protection in the digital environment. This is of particular importance, as the digital sphere today represents one of the most significant challenges in the prevention of CSA. Recent reports by bodies engaged in monitoring, *inter alia*, the phenomenon of CSA emphasise that the development of artificial intelligence further exacerbates the problem of child sexual exploitation. As emphasised by the CRC Committee, it is essential to ensure the development and regular updating of legislative, policy, and technical measures aimed at enabling children to participate in the digital environment in a safe, inclusive, and equitable manner.[52] The Lanzarote Committee has likewise highlighted the need to criminalise all forms of CSA linked to new technologies, to adopt effective sanctions aimed at strengthening offender accountability, to develop competencies in the use of technologies for identifying victims and perpetrators, and to ensure protection and support for victims. States should, *inter alia*, devote particular attention to raising public awareness, educating both children and professionals, collecting data, and strengthening international cooperation in this field.[53]

In addition to the examples of contractual monitoring mechanisms it is noteworthy that a particular role in the enforcement of international instruments addressing CSA is played by specialised mechanisms established by the UN Secretary-General, whose mandates directly or indirectly relate to the prevention of sexual violence against children. Among these, particular prominence is afforded to the Special Rapporteur on the Sale, Sexual Exploitation and Sexual Abuse of Children, Special Representative on Violence Against Children, Special Representative for Children and Armed Conflict or the Special Representative on Sexual Violence in Conflict. In addition to the bodies mentioned above, the protection of children from CSA is supported by a broad range of other international actors, including UNICEF, INTERPOL Crimes against Children Unit, EUROPOL, OSCE, global partnerships such as WePROTECT Global Alliance, and many others. Through formal mechanisms of cooperation, joint training activities, and the continuous

[51] *Ibid.*, pp. 9, 14, 16, 22, 25, 28 – 29.

[52] CRC Committee, General Comment No. 25 (2021), *op. cit.,* note 27, paras. 7, 14, 81 – 83.

[53] Lanzarote Committee, Declaration on protecting children against sexual exploitation and sexual abuse facilitated by emerging technologies, Adopted by the Lanzarote Committee at its 43rd meeting (6 – 8 November 2024), para. 13.

exchange of information, knowledge and best practices, all of them contribute to prevention, monitoring, and the development and implementation of harmonised international standards, as well as to operational responses to CSA across multiple complementary systems.

Taking into account that the early identification of risks and their systematic prevention, and above all, strengthening children's ability to recognise and avoid risky situations, can significantly reduce the likelihood of CSA (and thereby prevent consequences for the child that no subsequent criminal law response can fully remedy), particular attention should be devoted to prevention. This issue will be further examined in the following section, in the context of Directive 2024/1385 on combating violence against women and domestic violence, which complements existing EU standards of child protection and further strengthens the framework for prevention and effective responses to CSA.

3. INTERNATIONAL STANDARDS IN THE FIELD OF THE PREVENTION OF CSA, WITH PARTICULAR REFERENCE TO DIRECTIVE (EU) 2024/1385

The prevention of sexual violence constitutes an essential component of a comprehensive response to CSA, as it is directed toward ensuring that such violence does not occur in the first place. It represents a multifaceted and complex system requiring coordinated action across multiple levels, ranging from the individual and family to the institutional and broader societal spheres. A substantial body of research confirms that effective prevention can only be achieved through a combination of educational programmes for both children and adults, early identification of risk, the empowerment of children, and the establishment of institutional mechanisms enabling timely intervention.[54] Preventive strategies may be directed either at the population as a whole (universal prevention) or at specific, particularly vulnerable groups of children (targeted prevention). In this regard, three principal lines of action can be identified: first, those aimed at the entire community and at transforming social norms, attitudes, and behaviours; second, those focused on modifying the environments and circumstances that enable abuse (so-called situational prevention); and third, those aimed at reducing risk and vulnerability among children through social and economic empowerment, with particular

[54] Russell, D. H.; Trew, S.; Harris, L.; Dickson, J.; Walsh, K.; Higgins, D. J.; Smith, R., *Engaging Parents in Child-Focused Child Sexual Abuse Prevention Education Strategies: A Systematic Review*, Trauma, Violence & Abuse, Vol. 25, No. 4, 2024, pp. 3082 – 3098; Kewley, S.; Mhlanga-Gunda, R.; Van Hout, M., *Preventing Child Sexual Abuse Before it Occurs: Examining the Scale and Nature of Secondary Public Health Prevention Approaches*, Journal of Sexual Aggression, Vol. 29, No. 1, 2023, pp. 1 – 33; Deborah, A., *Prevention of Child Sexual Abuse,* The Future of Children, Vol. 4, No. 2, 1994, pp. 198 – 223.

emphasis on the importance of children's education and parental support programmes.[55] Likewise, we have to bear in mind the importance of investing in preventive programmes, including child safety skills programmes, professional training, and the development of protocols for responding to suspected abuse.[56]

This approach to prevention is grounded in an international legal framework that imposes upon States the obligation to establish systematic and comprehensive preventive measures in the field of the protection of children from sexual violence. Thus, the 1989 CRC obliges States to take all appropriate legislative, administrative, social, and educational measures to protect children from all forms of sexual exploitation and abuse. It further highlights the necessity of multisectoral cooperation, reflected in contemporary preventive models that involve schools, healthcare institutions, law enforcement authorities, and civil society organisations.[57] Building upon the fundamental international obligations enshrined in the CRC, the Lanzarote Convention also introduces precise and operational standards that States are required to implement, including the obligation to provide systematic education for children, parents, and professionals, to establish clear procedural protocols, and to develop specialised preventive programmes.[58]

Given the need for the continuous adaptation of preventive standards to emerging forms of risk, particular attention in this paper will be devoted to Directive (EU) 2024/1385 on combating violence against women and domestic violence, which represents the most recent and most ambitious legislative instrument of the European Union in the field of combating CSA.[59] Although children are not expressly mentioned in its title, the scope of the Directive encompasses them, as is clearly evident from Article 1, which defines its subject matter and scope and explicitly includes the prevention and combating of criminal offences relating to the sexual exploitation of children, as well as prevention and early intervention in cases of violence. Directive (EU) 2024/1385 introduces directly binding requirements that Member States must transpose into their national legal systems no later than 14 June 2027. Pursuant to Recital 1, its objective is to ensure a comprehensive framework for the effective prevention and combating of violence against women and domestic violence throughout the Union. To that end, the Directive lays

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55 Radford *et al., op. cit.,* note 8, p. 48.

56 See, *e.g.*, *INSPIRE: Seven Strategies for Ending Violence Against Children*, World Health Organization, Geneva, 2016.

57 CRC, Art. 19.

58 Lanzarote Convention, Arts. 4 – 8.

59 Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on Combating Violence Against Women and Domestic Violence [2024], OJ L series (Hereinafter: Directive (EU) 2024/1385).

down a broad set of measures structured across seven chapters, which may be grouped into three principal categories.[60] The first category comprises minimum rules concerning the criminalisation and sanctioning of specific forms of violence against women and domestic violence (Articles 3-13).[61] The significance of these provisions is particularly pronounced in light of new technological challenges, ranging from the dissemination of CSAM through encrypted communication channels to increasingly sophisticated forms of online grooming and extortion.[62] The second category is directed toward strengthening the protection of victims and their rights before, during, and after criminal proceedings (Articles 14-43), while the third category encompasses provisions on prevention and early intervention in cases of violence (Articles 34-37). Within this broadly defined scope, the subsequent analysis will focus on the preventive mechanisms introduced by the Directive and their impact on national policies for the prevention of violence, including the strengthening of institutional frameworks, improved coordination among competent authorities, and more effective identification of risk situations.

3.1. Directive (EU) 2024/1385 and Its Potential Reach in the Prevention of CSA

Directive 2024/1385 establishes a widely recognised tripartite model of violence prevention, encompassing three levels of prevention: primary, secondary, and tertiary. Although each level pursues distinct objectives and employs specific instruments, they operate as interrelated components of a unified system of protection.[63] Primary prevention is aimed at preventing violence before it occurs. The Directive emphasises the importance of awareness-raising campaigns, targeted educational programmes, and the strengthening of understanding of the various manifestations of violence and their consequences. Particular emphasis is placed on early education regarding consent in interpersonal relationships, in line with findings from research demonstrating that the early acquisition of knowledge concerning boundaries and consent reduces the risk of violent behavioural patterns in

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60 Braschi, S., *The new EU Directive on Combating Violence Against Women and Domestic Violence*, Zeitschrift für die gesamte Strafrechtswissenschaft, Vol. 137, No. 2, 2025, p. 425.

61 The offences in question include female genital mutilation, forced marriage, the non-consensual sharing of intimate or manipulated material, cyber stalking, cyber harassment, and the cyber incitement to violence or hatred.

62 *Internet Organised Crime Threat Assessment* (IOCTA), Europol, 2024, Available at: [https://www.europol.europa.eu/cms/sites/default/files/documents/Internet%20Organised%20Crime%20Threat%20Assessment%20IOCTA%202024.pdf], Accessed 15 March 2026.

63 Directive (EU) 2024/1385, Rec. 73.

adulthood.[64] Secondary prevention is directed toward the early detection of violence and the prevention of its progression or escalation. This level of intervention becomes necessary where primary prevention has proven insufficient. Secondary prevention thus functions as a "stopping point", capable of preventing the transition of violence into more severe forms, which is recognised in the literature as crucial for preventing recurrence and reducing the need for subsequent, tertiary prevention measures.[65] Tertiary prevention is focused on preventing reoffending and re-victimisation, as well as on mitigating the consequences of violence. The Directive indicates that tertiary prevention may include the promotion of bystander interventions, early intervention centres and intervention programmes. While this level of prevention points to shortcomings in earlier stages, it remains essential, as its absence increases the risk of recidivism and long-term consequences for victims, including psychological trauma and social isolation. The Directive clearly proceeds from the premise that these three levels of prevention are interconnected. Effective primary prevention reduces the need for secondary interventions, while well-structured secondary prevention can avert situations requiring tertiary measures. Tertiary prevention, although representing the final line of defence, is indispensable for the long-term reduction of violence and for ensuring the protection and support of victims. This conceptual framework forms the basis for understanding the specific obligations imposed on Member States in the field of prevention, as set out in detail in Chapter 5 of the Directive.

Within the chapter on prevention and early intervention, Directive develops a coherent set of obligations which together constitute a normative framework for reducing the risk of violence, ensuring its early detection, and preventing reoffending. Preventive measures encompass a broad range of educational and informational activities aimed at fostering an understanding of the causes of violence, its consequences, particularly for children, and the importance of early action. The Directive emphasises the need for awareness campaigns and educational programmes from an early age, with a mandatory requirement to adapt content to children and young people, and to involve civil society organisations, specialised services, and social partners in their design and implementation. Member States are required to ensure the availability of easily accessible information on preventive measures, victims' rights, access to justice, legal aid, and available forms of

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64 Finkelhor, D., *The Prevention of Childhood Sexual Abuse*, Future Child, Vol. 19, No. 2, 2009, p. 179; Price, S.; Dodds, L.; Mitchell, D., *Preventing Child Sexual Abuse*, Sexual Violence Research and Prevention Unit, University of the Sunshine Coast, Sippy Downs, 2025, pp. 25, 55 – 60.

65 Anderson, J.; Walker, E. A.; Glass, N., *Secondary Prevention: Harm Reduction and Supporting Intimate Partner Violence Survivors in Clinical Settings*, in Mitchell, C. *et al.* (eds.), Intimate Partner Violence: A Health-Based Perspective, Oxford University Press, New York, 2025, p. 958.

protection and support, including healthcare services. Such information must be presented in a manner that is understandable to children. Particular attention is devoted to challenging harmful gender stereotypes, promoting gender equality, mutual respect, and the right to personal integrity, as well as encouraging men and boys to act as positive role models in transforming societal patterns. Preventive measures are especially focused on offences committed online, and the Directive requires the development of digital literacy and critical thinking skills to enable users to recognise forms of violence in the digital environment, seek assistance, and prevent their occurrence. In the field of sexual violence, it underscores the central role of consent in sexual relations. Member States are required to implement measures aimed at transforming behavioural patterns rooted in historically unequal power relations between women and men and in stereotypical gender roles, particularly in the context of sexual relationships, sex, and consent. Educational materials and campaigns must clearly communicate that sexual activity without consent constitutes a criminal offence, and that consent must be given voluntarily, as the result of free will. In this way, the Directive promotes an understanding of consent as a fundamental element of sexual autonomy and protection against violence.[66]

Effective prevention also requires the training of professionals who come into contact with victims. Law enforcement officers, judges, public prosecutors, lawyers, healthcare professionals, social workers, and educational staff must be equipped to recognise the various forms of violence, respond appropriately, and refer victims to suitable support services. The role of the media is likewise recognised as an important element of prevention, with particular emphasis on the need to counter stereotypical and sexist representations and the blaming of victims in reporting. Special attention must be paid to victims who are exposed to an increased risk of violence due to intersectional discrimination, including those belonging to marginalised groups or those with specific protection and support needs.[67]

Intervention programmes constitute the final component of the preventive framework, directed at perpetrators and individuals at risk of committing such offences (potential perpetrators). Their objective is to reduce the likelihood of (re)offending, with particular emphasis placed on the inclusion of perpetrators of rape in such programmes in order to reduce the risk of recidivism.[68] Intervention programmes represent an important component of contemporary violence prevention strategies, as they address the underlying causes and behavioural patterns that

66 Directive (EU) 2024/1385, Arts. 34, 35.

67 Directive (EU) 2024/1385, Art. 36.

68 Directive (EU) 2024/1385, Art. 37. See Rec. 81 and 82.

lead to the commission of criminal offences. Unlike purely repressive measures, these programmes aim to bring about change in the various factors shaping high-risk behaviour. Research indicates that intervention programmes can lead to reductions in recidivism, as well as to changes in attitudes and increased acceptance of responsibility by perpetrators.[69] In this way, a dual effect is achieved: the likelihood of repeated violence is reduced, while at the same time the prospects for successful reintegration into the community are enhanced. In the context of sexual violence, where the consequences for victims are particularly severe, intervention programmes perform a particularly significant preventive function.

This structure of preventive and intervention measures demonstrates that the Directive conceptualises prevention as a set of measures within an integrated system that blends education, gender equality, digital safety, professional training, and work with perpetrators, thereby creating a comprehensive framework for reducing violence and protecting victims.

4. PROTECTING CHILDREN FROM SEXUAL ABUSE AND EXPLOITATION – AN OVERVIEW OF THE CROATIAN CRIMINAL CODE FRAMEWORK

The prevailing literature on normative interventions in sexual crimes shows that the conceptualisation and classification of CSA offences have been repeatedly reshaped in response to broader changes in penal policy.[70] The Croatian regulatory experience is no exception, demonstrating that sexual offences have been among the most frequently amended categories of crime over the past three decades. For example, the 1997 Criminal Code provisions concerning crimes against sexual freedom were subject to normative amendments and corrections introduced through five different legislative bills and one Constitutional Court decision.[71] Considering that the statute as a whole has undergone thirteen legislative amend-

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69 Olver, M. E.; Stockdale, K. C., *Sexual Offense Treatment Programming and Recidivism Reduction: A Meta-Meta-Analysis of Program Outcomes and Sources of Effect Size Heterogeneity*, Current Sexual Health Reports, Vol. 17, No. 1, 2025, pp. 1 – 10; Barros, S.; Oliveira, C.; Araújo, E.; Moreira, D.; Almeida, F.; Santos, A., *Community Intervention Programs for Sex Offenders: A Systematic Review*, Frontiers in Psychiatry, Vol. 13, No. 1, 2022, pp. 1 – 20.

70 Rittossa, D., *Kažnjavanje počinitelja najtežih seksualnih delikata na štetu djece u RH - zakonski okviri i postojeća sudska praksa*, Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 25, No. 2, 2018, pp. 421 – 424; Kaufman, C., *A Folly of Criminal Justice Policy-Making: The Rise and Demise of Early Release in Florida, and Its Ex Post Factor Implications*, Florida State University Law Review, Vol. 26, No. 2, 1999, pp. 410 – 411.

71 Corrections of the Criminal Code, Official Gazette No. 27/1998; Amendments to the Criminal Code, Official Gazette No. 129/2000, 111/2003, 105/2004, 71/2006; Constitutional Court of the Republic of Croatia, U-I-2566/2003, U-I-2892/2003, Judgment of 27 November 2003.

ments, it is evident that in almost half of these cases the legislator redefined the parameters of the protection of sexual freedom and was subsequently required to adjust these revisions in response to Constitutional Court interventions.[72] A similar pattern can be observed in legislative activities related to the 2011 Criminal Code. Criminal offences against sexual freedom and those protecting children from sexual abuse and exploitation were subjected to six out of twelve normative interventions no matter the fact that the Criminal Code in question entered into force on January 1, 2013.[73] The situation here likewise appears to support Ostojski's claim that the law undergoes constant modification insofar as it becomes a tool for the construction of reality.[74]

Regardless of the reasons behind the frequent amendments to sexual offences in the Criminal Code, such recurrent normative changes may result in divergent interpretations and applications in judicial practice and may undermine the coherence of regulatory policy. When legislative amendments are introduced in an *ad hoc*, almost instinctive manner, without systematic consideration of the objectives to be pursued or the potential implications for judicial practice, the protection of addressees' rights, and the wider community, they risk undermining legal certainty, a foundational principle of any legal system based on the rule of law.[75] Accordingly, the following analysis will examine, in particular detail, the extent to which mandatory international instruments on the protection of children from sexual abuse and exploitation have influenced both the frequency and substantive content of amendments to sexual offence provisions, and whether these interventions form part of a broader, comprehensively designed criminal justice policy.

4.1. Normative Developments in the Regulation of Sexual Offences against Children under the 1997 Criminal Code

In our jurisdiction, the formulation of sexual offences, particularly those intended to protect the sexual inviolability of children, has long been based on models set out in binding international instruments.[76] The influence of international law on

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72 Criminal Code, Official Gazette No. 110/1997, 27/1998, 50/2000, 129/2000, 84/2005, 51/2001, 111/2003, 190/2003, 105/2004, 71/2006, 110/2007, 152/2008, 57/2011, 77/2011.

73 Criminal Code, Official Gazette No. 125/2011 and its amendments, Official Gazette No. 144/2012, 56/2015, 118/2018, 126/2019, 84/2021, 36/2024.

74 Ostrojski, P., *Principles of Legitimate Expectations and Legal Certainty in the Context of Amendments to EU Law and National Legislation*, Ius Novum, Vol. 14, No. 2, 2020, p. 156.

75 *Ibid.*, p. 157.

76 For example, the Agreement of 4 May 1910 for the Suppression of the Circulation of Obscene Publications, together with the Convention of 12 September 1923 for the Suppression of the Circulation of, and Traffic in, Obscene Publications, served as a foundation for criminalising the display and produc-

criminalisation of CSA offences has also been acknowledged in judicial practice.[77] Furthermore, in professional discussions on the Final Draft of the Criminal Code, intended to be adopted with amendments and to take effect in 1997, particular emphasis was placed on the need to consider obligations arising from international treaties in the ongoing development of the text.[78] The positive criminal law was transformed in new legislative solutions rationally, with due caution, and only when necessary to harmonise it with the Constitution and to increase its normative value. The principal objective of the drafters of the 1997 Criminal Code was to avoid a complete break with established legal theory and practice.[79] Consequently, it is unsurprising that the provisions governing criminal offences against sexual freedom, including those involving child victims, have not undergone substantial modification. Debate was far more intense regarding the title of the chapter of the 1997 Criminal Code than the nomotechnical formulation of the offences.[80]

A detailed analysis has shown that the protection of children from sexual victimisation is ensured in two ways. The legislator has incorporated four separate criminal offences into the category of offences against sexual freedom and has prescribed aggravated forms of these offences, which may otherwise be committed against adults, when the victim is a child under fourteen or a minor under eighteen. A substantial change occurred with the introduction of sexual acts equated with sexual intercourse, paving the way for gender-neutral criminal offences. The offence of sexual intercourse with a child under Article 192 of the 1997 Criminal Code can now be committed by either a male or female perpetrator, to the detriment of both boys and girls.[81] In addition to this reform, criminalisation was further strengthened by the introduction of new offences, such as international prostitution involving a child or minor,[82] the exploitation of children or minors

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ing pornographic material involving children under the age of 14 under Art. 206 of the Basic Criminal Code of the Republic of Croatia, Official Journal of the SFRY No. 44/1976, 36/1977, 56/1977, 34/1984, 74/1987, 57/1989, 83/1989, 3/1990, 38/1990, Official Gazette No. 53/1991, 71/1991, 39/1992, 91/1992, 58/1993, 37/1994, 108/1995, 28/1996.

77 Supreme Court of the Republic of Croatia, I Kž-923/2005-5, Judgment of 28 December 2005; Supreme Court of the Republic of Croatia, Kžm-19/2012-4, Judgment of 14 February 2013.

78 Crnić, I., *Reforma hrvatskog kaznenog prava*, Hrvatski ljetopis za kazneno pravo i praksu, Vol. 1, No. 1, 1994, p. 5.

79 Horvatić, Ž., *Temeljne postavke za oblikovanje hrvatskog materijalnog kaznenog prava de lege ferenda*, Hrvatski ljetopis za kazneno pravo i praksu, Vol. 1, No. 1, 1994, pp. 18 – 19.

80 Bačić, F., *Posebni dio novog hrvatskog Kaznenog zakonika*, Hrvatski ljetopis za kazneno pravo i praksu, Vol. 1, No. 1, 1994, pp. 74 – 75.

81 Criminal Code, Official Gazette No. 110/1997 (1997 Criminal Code), Art. 192.

82 1997 Criminal Code, Art. 178(3).

for pornography,[83] and, three years later, lewd acts committed against a child.[84] Criminal law must recognise emerging societal conditions and respond to threats that undermine the fundamental principles of social life, as well as the security and protection of citizens' rights. It was in this context that the legislator justified the introduction of a new offence into the catalogue of sexual crimes: child pornography committed by the use of a computer system or network (Art. 179.a).[85] The introduction of this new incrimination was considered urgent and necessary to fulfil the obligations undertaken under the Convention on Cybercrime,[86] prompted by the "particular danger and harmfulness associated with the dissemination of child pornography via computer networks." [87] It also represented a necessary step towards ensuring the harmonisation of Croatian criminal legislation with the *acquis communautaire*. The sexual exploitation and abuse of children facilitated through information and communication technologies has long been recognised by the European community as a distinct threat to the dignity, security, and privacy of children, necessitating concrete national and more stringent criminal justice responses.[88]

In 2006, for certain CSA offences, an additional step was taken by increasing the level of repression through the imposition of more severe sanctions. The statutory minimum penalty of three months' imprisonment was raised to six months,[89] and the former six-month minimum was elevated to a statutory minimum of one year.[90] The previous sentencing range of one to eight years' imprisonment for voluntary sexual intercourse with a child under Art. 192(1), was replaced by a new statutory range of three to twelve years. Qualified forms of the offence, previously punishable by a minimum of three years' imprisonment, were elevated to statuto-

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83 1997 Criminal Code, Art. 196.

84 Amendments to the Criminal Code, Official Gazette No. 129/2000, Art. 30.

85 Amendments to the Criminal Code, Official Gazette No. 105/2004, Art. 26. Art. 179a is one of the computer-related criminal offences introduced as part of the harmonisation of substantive criminal law with the Convention on Cybercrime. Legislative amendments in this area concern Arts 89(31-33), 131, 174(4), 223, 223a, 224a.

86 Convention on Cybercrime, Official Gazette − International Treaties No. 9/2002, 4/2004, 4/2008, 7/2008.

87 The Final Draft Act on Amendments to the Criminal Code, Zagreb, July 2004, pp. 36 − 37.

88 See for example the Council Framework Decision 2004/68/JHA of 22 December 2003 on Combating the Sexual Exploitation of Children and Child Pornography [2004] OJ L 013. The said Framework Decision was a normative predecessor of the Directive 2011/93/EU.

89 Amendments to the Criminal Code, Official Gazette No. 71/2006 (2006 Amendments), Art. 54. Due to introduced amendments, the offence of satisfying lust in the presence of a child or a minor (Art. 194) was punishable by imprisonment for a term between six months and three years.

90 2006 Amendments, Art. 51(2). The discussion focuses on the offence of sexual intercourse with a minor involving abuse of position [Art. 192(2)].

ry minimums of five years or to the penalty of long-term imprisonment. Criminal sanctions were also increased for sexual intercourse with a child involving abuse of position. The previous one-to-ten-year sentencing range was replaced by a statutory minimum of at least three years' imprisonment. The most serious qualifying forms under Art. 192(4) became punishable by a statutory minimum of five years' imprisonment or long-term imprisonment, while paragraph 5 introduced a statutory minimum of eight years' imprisonment or long-term imprisonment.[91] Compared with sexual intercourse with a child, the offence of pandering of a child or minor was assessed as more serious. The previous penalty range of one to eight years' imprisonment was replaced with a statutory minimum sentence of at least three years, while the former range of one to ten years' imprisonment was replaced with a statutory minimum of at least five years. Organising or enabling sexual services for a child became punishable by a term of imprisonment ranging from one to five years.[92] The statutory severity of punishment was also increased for offences involving pornography and young persons under eighteen years of age.[93]

In the explanatory notes accompanying the proposed legislative amendments, it was stated that the tightening of criminal repression for sexual offences against children in 2006 was introduced to ensure a "more consistent use of the prescribed sentencing framework" and to "limit the imposition of mitigated sentences on offenders," given the "dangerousness and frequency" of such offences.[94] The relationship between legislative and judicial sentencing policies remains one of the most debated and unresolved issues in criminal law. In addition to its close connection with constitutional principles of the separation of powers and the reciprocal influence between the judiciary and the legislature, the issue also raises fundamental questions about the core of penal policy, the perceived role of criminal law in the community, and the determination of appropriate punitive responses. However, amendments to statutory penalties for certain criminal offences are generally implemented through the imposition of harsher sanctions, without deeper scientific or professional analysis of the general preventive effect of the prescribed penalties or the special preventive effects of the sanctions actually imposed. It is thus unsurprising that legislative measures reducing the penalties for CSA offences were shortly thereafter enacted in the 2011 Criminal Code.

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91 2006 Amendments, Art. 52.

92 2006 Amendments, Art. 54(4-6).

93 Pursuant to Art. 55 of the 2006 Amendments, offenders who exploited a child or minor for pornography could be punished with a prison sentence ranging from one to eight years. The fine was entirely removed for those who exposed children to pornography, and a prison sentence of six months to three years was introduced instead.

94 The Final Draft Act on Amendments to the Criminal Code, Zagreb, April 2006, pp. 29 − 30.

4.2. Penal Policy in the 2011 Criminal Code – A New Step Forward in Protecting Children from Sexual Abuse and Exploitation?

A detailed examination of the sanctions prescribed for CSA offences in the initial version of the 2011 Criminal Code shows that partial adjustments to the applicable penalty ranges were made for certain offences. For example, voluntary sexual intercourse with a child was originally punishable by imprisonment from one to eight years, and since 2006 from three to twelve years, while the seriousness of the corresponding offence under Art. 158(1) of the 2013 Criminal Code was aligned with imprisonment from one to ten years.[95] The level of repression was also reduced for offences involving violent sexual abuse of a child under fifteen, the basic offence of sexual abuse of a child who had already reached that age, the basic offence of satisfying lust in the presence of a child under fifteen, certain forms of child pandering, as well as the serious criminal offence of child sexual abuse and exploitation.[96] Penalty adjustments in the form of increased sanctions were introduced only for the latter offence, which establishes the perpetrator's liability for the child's death as a more severe consequence.[97] Although the legislator did not set out in official documents the reasons for the adjustments to the prescribed penalties, it appears that a middle-ground approach was ultimately adopted. This approach aimed to adjust the degree of penal repression to the gravity of the offences concerned, while ensuring coherence with the sanctioning framework applicable to sexual offences against adults and other criminal offences within the system. The gravity of the offences that the legislator refers to as 'true paedophilia' was given less prominence, as their reform was primarily linked to their separation into a distinct chapter of the Criminal Code and their alignment with the requirements of the Lanzarote Convention.[98]

The Lanzarote Convention builds upon the foundations established by relevant international documents.[99] CSA professionals agree that the main aim of the convention is to eradicate CSA throughout the European area.[100] The substantive

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95 Criminal Code, Official Gazette No. 125/2011 (2011 Criminal Code), Art. 158(1).

96 2011 Criminal Code, Arts. 158(4), 159, 160(1), 162(1, 3), 166 (1-2).

97 With the entry into force of the 2011 Criminal Code, the prescribed sanction for the offence under Article 166(3) was set at a minimum of ten years' imprisonment or, alternatively, long-term imprisonment.

98 The Final Draft of the Criminal Code, Zagreb, October 2011, p. 196.; Turković, K.; Novoselec, P.; Grozdanić, V.; Kurtović Mišić, A.; Derenčinović, D.; Bojanić, I.; Munivrana Vajda, M.; Mrčela, M.; Nola, S.; Roksandić Vidlička, S.; Tripalo, D.; Maršavelski, A., *Komentar Kaznenog zakona i drugih izvora novoga hrvatskog kaznenog zakonodavstva*, Narodne novine, Zagreb, 2013, pp. 205, 215 − 216.

99 Lanzarote Convention, Art. 42.

100 Netkova, B.; Qosaj, M. A., *International Legal Standards in Combating Child Online Sexual Abuse and Exploitation*, Journal of Liberty and International Affairs, Vol. 6, No. 3, 2021, p. 117.

criminal law provisions of the Lanzarote Convention therefore set a clear and comprehensive normative framework for state parties to criminalise certain behaviours detrimental to children's sexual inviolability and psychosocial development. Taking these provisions into account, the legislator continued to expand the scope of criminalisation for sexual offences against children. As a result, acts of inducing a child to engage in sexual intercourse or an equivalent sexual act with a third person, or with themselves, were equated in gravity with the perpetrator's direct commission of sexual intercourse or an equivalent sexual act.[101] A further innovation was the introduction of liability for offenders acting under a mistake as to the child's age. Where, in light of the objective circumstances and the offender's personal capacities, the perpetrator ought to have known that the child was under the age of fifteen, they will be held criminally liable pursuant to Art. 158(4).[102] On the other hand, and again in line with the Lanzarote Convention, the legislator further determined that consensual sexual intimacy between underage youth should not fall within the scope of criminalisation.[103] Indeed, there is much research showing that criminal repression has to be excluded in such cases to prevent undue interference with the normal sexual development of minors.[104]

Moreover, it should be acknowledged that the legislator structured the offences prohibiting sexual abuse and exploitation of children based on the legal age for sexual activities.[105] The sexual inviolability of children, as well as their limited understanding of sexuality, is protected in a manner adjusted to their age. This protection extends from prohibiting the satisfaction of lust in their presence without physical contact, through various forms of sexually motivated touching, to acts of inducing or involving them in sexual intercourse or acts equated with sexual intercourse. Once children reach the age at which sexual relations are legally permitted, the catalogue of criminal offences is modified to respect the privacy of minors and their developing capacity for autonomous decision-making. Minors older than fifteen are protected from sexual conduct initiated by persons with whom they have a special relationship, since the law irreversibly presumes that the nature of such a relationship prevents them from making an objective and informed decision about sexual intimacy or the potential consequences that may follow.[106] As a

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101 2011 Criminal Code, Arts. 158(1-2), 159(1-2).

102 Garačić, A., *Kazneni zakon u sudskoj praksi, Posebni dio (I.)*, Libertin naklada, Rijeka, 2023, p. 479.

103 Lanzarote Convention, Art. 18(3); 2011 Criminal Code, Art. 158(3).

104 Turković *et al.*, *op. cit.,* note 98, p. 216; For contrary position see Pavlović, Š., *Kazneni zakon, zakonski tekst, komentari, sudska praksa, pravna teorija*, Libertin naklada, Rijeka, 2015, p. 777.

105 Lanzarote Convention, Art. 18(1.a); 2011 Criminal Code, Arts. 158 – 166.

106 2011 Criminal Code, Arts. 158 – 160; See also Cvitanović, L.; Derenčinović, D.; Turković, K.; Munivrana Vajda, M.; Dragičević Prtenjača, M.; Maršavelski, A.; Roksandić Vidlička, S., *Kazneno pravo Posebni dio*, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2018, p. 226.

direct consequence of the obligation to harmonise domestic criminal provisions with the Lanzarote Convention, the 2011 Criminal Code introduced the offence of child enticement for the purpose of satisfying sexual needs, commonly known as grooming.[107] In addition, children under the age of fifteen are protected from exposure to pornography, while all children, regardless of age, are protected from pandering, exploitation for pornography, participation in pornographic performances, and the most serious forms of sexual abuse and exploitation.[108]

In the initial wave of normative interventions, sexual offences against children underwent linguistic revision to strengthen their nomotechnical coherence and enhance the criminal law protection of children from sexual abuse and exploitation by close persons.[109] Furthermore, the need for additional normative refinement was confirmed in 2015, when the category of potential perpetrators who sexually abuse children over the age of fifteen was broadened.[110] A closer examination shows that the conceptual structure of CSA offences remained largely unchanged even in the 2018 amendments, as the legislative focus was again directed primarily towards adjusting the sentencing framework. The legislator implemented a systematic upward adjustment of statutory penalty ranges, consistently replacing lower sentencing thresholds with higher ones. Specifically, offences previously punishable by up to one year of imprisonment became punishable by up to three years; this range was then replaced by six months to five years, and subsequently by one to eight years. Further intensification occurred when offences carrying one to eight years' imprisonment were raised to one to ten years, and the later to three to twelve years. Another finding worth discussing is that the only ranges left unchanged were the most severe: three to twelve, three to fifteen, five to twenty, and ten to twenty years of imprisonment, as well as the alternatively prescribed long-term imprisonment.[111] Although the amendment was presented as necessary to meet the requirements of the Lanzarote Convention, the expansion of sentencing ranges was justified only by reference to the "consequence of a more stringent statutory penal policy".[112] The definition of serious offences of child sexual abuse and exploitation was also reformulated, so that these offences now likewise constitute a refined aggravated form of the exploitation of children for pornography and por-

[107] Lanzarote Convention, Art. 23; 2011 Criminal Code, Art. 161; See also Turković *et al.*, *op. cit.,* note 98, p. 219.

[108] 2011 Criminal Code, Arts. 162 – 166.

[109] Amendments to the Criminal Code, Official Gazette No. 144/2012, Arts. 42 – 44.

[110] Amendments to the Criminal Code, Official Gazette No. 56/2015, Art. 47.

[111] Amendments to the Criminal Code, Official Gazette No. 118/2018 (2018 Amendments), Arts. 17 – 25.

[112] The Final Draft Act on Amendments to the Criminal Code, Zagreb, December 2018, pp. 20 − 22.

nographic performances.[113] Additionally, this adjustment was required to comply with the obligations arising from the Lanzarote Convention. Indeed, whereas no detailed analysis of CSA offences was provided, the official documents accompanying the 2018 legislative amendments concluded that these offences were in compliance with Directive 2011/93/EU.[114]

However, subsequent reviews revealed that the statutory penalties for child sexual abuse and exploitation offences are considerably harsher than the minimum maximum terms of imprisonment required by the Directive, and that there is scope for normative improvement.[115] Unsurprisingly, the European Commission promptly highlighted the normative shortcomings in its letter of formal notice (Infringement No. 2019/2233). As a result, in 2019 the legislator amended the offence of child enticement for the purpose of satisfying sexual needs and introduced more detailed definitions of child pornography and pornographic performances into Art. 163 and 164.[116] Further analysis showed that several offences against the sexual integrity of children were modified only because parallel changes were made to related adult-victim offences. Beyond the linguistic revision of Article 160(2) in 2021,[117] the second set of proposed 2024 amendments raised statutory minimums from three to five years [Arts. 158(5), 166(1)] and from one to three years [Art. 159(1)].[118] The legislator appears to undertake criminal law reform in a somewhat hasty manner. All the above considerations show that alignment with convention-based obligations, comparative best practices, and requirements emerging from judicial practice does not seem to provide a sufficient foundation for the development of a coherent and substantively meaningful reform policy.

Furthermore, it should be noted that the extensive legislative activity undertaken failed to address certain significant legal gaps and inconsistencies in the CSA offences. For example, the use of sexual services of a child under the age of fifteen, without qualifying circumstances, has not been prescribed as a separate form of child pandering.[119] This form of incrimination is envisaged exclusively for individ-

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113 2018 Amendments, Art. 25.

114 The Final Draft Act on Amendments to the Criminal Code, *op. cit.,* note 112, pp. 48 − 49, Appendix I, pp. 29 − 41.

115 Rittossa, *op. cit.,* note 38, pp. 57, 59 − 61.

116 Amendments to the Criminal Code, Official Gazette No. 126/2019, Arts. 18 – 20. The Final Draft Act on Amendments to the Criminal Code, Zagreb, December 2019, pp. 15 – 16; See also Garačić, *op. cit.,* note 102, p. 500.

117 Amendments to the Criminal Code, Official Gazette No. 84/2021, Art. 16.

118 Amendments to the Criminal Code, Official Gazette No. 36/2024, Arts. 23 – 25; The Final Draft Act on Amendments to the Criminal Code, Zagreb, February 2024, pp. 5, 10.

119 Criminal Code, Official Gazette No. 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018, 126/2019, 84/2021, 114/2022, 114/2023, 36/2024, 136/2025 (current Criminal Code), Art. 162.

uals who make use of the services of a child older than fifteen years. Consequently, offenders who violate the sexual integrity of a child under the age of fifteen in exchange for any form of remuneration or consideration are charged with sexual abuse of a child under Art. 158, and thus the elements of exploitation are not reflected in the incrimination as required by Art. 4(5-7) of Directive 2011/93/EU.[120],[121]

A lack of coherent regulation regarding sexual offences committed against children who have reached the age of sexual consent has also been noted. Due to the normative construction of Art. 159, the rape of a child older than fifteen years is prosecuted under Art. 153 or, depending on the presence of qualifying circumstances, under Art. 154. This conclusion is further supported by the jurisprudence of the High Criminal Court of the Republic of Croatia, which, in a 2024 decision, adopted the explicit position that non-voluntary sexual intercourse or equivalent sexual acts committed against a minor over the age of fifteen do not, in themselves, satisfy the qualifying circumstance of age-related vulnerability under Art. 154. Given that "every person at the age of fifteen and a half is in a stage of emotional and physical maturation," a perpetrator who, through the use of force, compelled the victim to perform oral sexual acts must be found guilty of the offence of rape under Art. 153(2) in conjunction with Art 153(1) of the Criminal Code.[122] In view of the fact that "there is no automatic correlation between the age of minority and vulnerability," such vulnerability must be expressly articulated and justified in the factual description.[123]

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120 See also Turković *et al.*, *op. cit.,* note 98, pp. 220 − 221; Rittossa, *op. cit.,* note 38, p. 59.

121 The levels of criminal law protection for children younger and older than 15 years are aligned only when the qualifying circumstances are met, so that the offence takes on the characteristics of a serious criminal offence of child sexual abuse and exploitation (Art. 166). A perpetrator who exploited the hardship of a 13-year-old boy and, in return for payment, used his sexual services while knowing that he was a particularly vulnerable child without parental care, placed in a social institution, was found guilty of the criminal offence under Art. 166(2). County Court of Zagreb, 9 Kzd-9/2022, Judgment of 5 September 2023.

122 High Criminal Court of the Republic of Croatia, I Kžzd-27/2024-15, Judgment of 9 July 2024.

123 The High Criminal Court accordingly endorsed the lower courts' conclusion that a minor over the age of fifteen may be regarded as particularly vulnerable in several circumstances: when she is an immature, unassertive, unsettled adolescent with psychological difficulties and a propensity for drug use (I Kžzd-48/2025-11, Judgment of 27 November 2025); when she exhibits an emotional disorder reflected in immature behaviour and intellectual-developmental impairments (I Kžzd-13/2022-4, Judgment of 17 January 2023); when she perceives the perpetrator as a paternal figure due to coming from a dysfunctional family marked by parental divorce, alcoholism, and the aggressiveness of her mother's new partner (I Kžzd-34/2022-9, Judgment of 22 September 2022); and when she has been diagnosed with mild intellectual disability and with difficulties in both intellectual and psychological functioning (I Kžzd-24/2022-5, Judgment of 1 September 2022).

Despite its clear relevance, the jurisprudential position developed by the High Criminal Court was not reflected in the decisions of lower courts addressing cases of sexual harassment involving underage victims. For example, in a considerable number of cases, courts of first instance have concluded that sexual harassment of a minor constitutes harassment of a person who is especially vulnerable due to their age. Particular vulnerability was ascribed to a 16-year-old high school student completing her mandatory vocational practice,[124] as well as to two underage high school students attending lessons.[125] The case law has further affirmed particular vulnerability in 14- and 15-year-old girls on the basis that they "are in a stage of emotional and physical development and consequently exhibit heightened sensitivity to stressful situations compared to adults."[126] Furthermore, the Municipal Court in Osijek held that the victim's age, being between 14 and 15 years, in itself constituted particular vulnerability, offering no additional reasoning.[127] These conclusions may be attributable to the structural gap in the Criminal Code, whereby sexual harassment of a child is not prescribed as a separate offence in Chapter XVII. This legislative omission appears to have compelled courts to construct particular vulnerability in underage victims in order to meet the statutory requirements of Art. 156, which falls within Chapter XVI on offences against sexual freedom.

Another significant omission appears in Art. 166, which does not extend aggravated liability to cases of sexual abuse involving children over fifteen. This gap creates a structural inconsistency in the criminal law framework, resulting in unequal levels of protection for children on either side of the statutory age of consent. Additionally, a more detailed examination of the offences in Chapter XVII of the Criminal Code reveals that, regarding the offence of satisfying lust in the presence of a child under fifteen, the legislature failed to exempt juvenile offenders from criminal liability when the age difference between the offender and the child does not exceed three years.[128] This legislative omission leads to the paradoxical outcome that juvenile offenders may be prosecuted for comparatively minor sexual conduct, while more serious conduct would not result in liability. Overall, the analysis demonstrates that, despite repeated legislative interventions in the area of sexual offences against children and a strong reliance on mandatory international instruments, the criminal law framework still fails to provide systematic, coherent, and harmonised protection for all children against sexual abuse and exploitation.

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124 Municipal Court of Gospić, 3-Kzd-18/2022-3, Judgment of 10 October 2022.

125 Municipal Court of Osijek, 95-Kzd-96/2021-9, Judgment of 21 September 2022.

126 Municipal Criminal Court of Zagreb, 40-Kzd-210/2020-3, Judgment of 25 August 2020.

127 Municipal Court of Osijek, 23-Kzd-15/2022-7, Judgment of 5 April 2022.

128 Current Criminal Code, Art. 160.

5. CONCLUSION

The scope and complexity of CSA require comprehensive, rights-based interventions. In this context, it is understandable that the international regulatory framework for suppressing child sexual victimisation covers core areas such as prevention, protective measures, recovery and reintegration, and the strengthening of children's rights. This study has shown that the international legal framework plays a leading role in shaping Croatian criminal law responses to child sexual abuse and exploitation. Both the concept of protecting the sexual integrity of children and the corresponding criminal offences are grounded in international and regional binding instruments. This is not surprising, as global reports confirm that almost all countries have laws prohibiting sexual violence against children in response to their international obligations.[129] However, the adoption of international guidelines and their incorporation into the 1997 and 2011 Criminal Codes has proven insufficient for building a comprehensive, consistent, and effective penal subsystem.

The findings suggest that *delicta carnis*, particularly regarding the prescribed penalties, have been revised without sufficient prior analysis, and it cannot be excluded that these changes were also influenced by public pressure for more punitive criminal justice policies targeting sexual offenders. Penal populism sits alongside the concept of a European society founded on values such as respect for human rights and the rule of law, which can create further tensions and legislative deficiencies. The legislator's primary focus on intensifying penal repression resulted in a failure to address substantive shortcomings in the definitions of certain child sexual abuse and exploitation offences, thereby weakening the coherence of child protection norms. Future reforms should criminalise the use of sexual services of a child under fifteen as a separate form of child pandering and expand the offence catalogue in Chapter XVII to include sexual harassment of a child and the rape of a child over fifteen, while also recognising that serious offences of child sexual abuse and exploitation may be committed against children above that age. Conversely, Art. 160 should incorporate a provision modelled on Art. 158(3), excluding the prosecution of a minor where the age difference between the minor and the child does not exceed three years. It should also be acknowledged that, even where political will exists to strengthen the criminal law framework, legal norms alone cannot diminish children's vulnerability to sexual abuse and exploitation or eradicate the consequences arising from such conduct. Therefore, there is a strong argument that effective implementation of legislation should be complemented by a more comprehensive approach, including preventive measures and best practices

[129] *Global Status Report on Preventing Violence against Children*, *op. cit.*, note 9, p. 12.

to safeguard the wellbeing of children. This reflects the very course pursued by the architects of the Directive 2024/1385, which sets out specific duties for EU states aimed at creating a unified pan-European preventive regime.

The Croatian system of violence prevention reveals certain shortcomings in light of the standards set by Directive 2024/1385. Although the importance of prevention and education on the risks of sexual violence, as well as the key role of the education system at all levels, is clearly recognised in strategic documents, these objectives are not sufficiently realised in practice. Preventive programmes addressing these issues have yet to be systematically integrated into regular and compulsory education, and their availability is not ensured for all children under equal conditions.[130] This assessment is further supported by the findings of relevant international bodies, which in their evaluations highlight deficiencies in preventive measures, particularly in the field of education, where mandatory and standardised programmes on gender equality, consent, and non-violent conflict resolution are still lacking.[131] The development of digital technologies has extended CSA into the online environment, thereby increasing the risk of various forms of abuse while simultaneously creating additional challenges in both prevention and the prosecution of such offences. Taken together, these factors suggest that, although Croatia has established a normative framework, adequately developed and widely accessible mechanisms for prevention specifically targeting children are not yet fully in place.

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Preliminary communication

CONTINUING LEGAL EDUCATION OF JUDGES AND PUBLIC PROSECUTORS: THE CASE OF THE REPUBLIC OF NORTH MACEDONIA AND ITS ALIGNMENT WITH THE EUROPEAN STANDARDS*

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ABSTRACT

Certain legal professions, by their very nature, require continuing legal education even after the completion of formal legal studies, particularly the professions of judge and public prosecutor. In the Republic of North Macedonia, the path toward these professions includes acquiring practical experience after graduation, passing the bar exam, admission to the Academy for Judges and Public Prosecutors, completing theoretical and practical training, passing a final examination, and appointment to judicial or prosecutorial office. National legislation has so far recognized two training models: a unified training model for both professions and a model of early specializa-

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tion, in which candidates choose one of the two career paths at the application stage. The latter approach is also reflected in the new draft Law on the Academy for Judges and Public Prosecutors.

Continuous professional development for appointed judges and public prosecutors constitutes a legal obligation, further regulated through by-laws, while failure to attend mandatory training sessions may result in disciplinary liability. The paper analyses the system of continuing legal education in North Macedonia in terms of its structure, objectives, and qualification frameworks, while also presenting the results of empirical research on the attitudes, experiences, and needs of judges and public prosecutors regarding lifelong learning and professional development.

Furthermore, the paper provides a comparative analysis of successful European models of continuing judicial training and offers a critical evaluation of the national system considering contemporary international standards and principles for judicial education, particularly those developed by the Council of Europe and the European Justice Training Network (EJTN). Special attention is also devoted to assessing the alignment of national higher education with the Standards and Guidelines for Quality Assurance in the European Higher Education Area (ESG), through a critical re-examination of the role of higher education institutions in supporting continuing legal education. In this context, the authors propose specific recommendations aimed at improving the concept of continuing legal education and strengthening the role of higher education institutions in this field.

***Keywords**: Continuing legal education, European standards, judges, judicial training, public prosecutors, Republic of North Macedonia*

1. INTRODUCTION

Continuing legal education (CLE) represents a fundamental element of judicial and public prosecutorial professionalism, independence, and efficiency in modern democratic systems. In the Republic of North Macedonia, continuing training of judges is regulated through a structured legal and institutional framework designed to ensure lifelong professional development and harmonization with European standards.

Judicial and public prosecutorial office requires not only independence but also continuing professional competence. In contemporary legal systems, characterized by legislative dynamism, European integration processes, and the expansion of human rights jurisprudence, judges and public prosecutors must engage in lifelong learning.

Continuing professional development is carried out with the aim of maintaining and expanding knowledge and expertise for quality and efficient performance of work tasks and improving the professional capabilities of professional services in courts and prosecutors' offices. In a broader sense it would contribute to strengthening and increasing the efficiency and independence of the judiciary.[1]

[1] Academy for Judges and Public Prosecutors "Pavel Shatev", Skopje, 2022, *Specialized program for voluntary continuing training*, Available at: [https://jpacademy.gov.mk/wp-content/uploads/2022/08/Specijalizirana_programa_za_sluzbenici_2023.pdf], Accessed 10 March 2026.

In the Republic of North Macedonia, continuing legal education of judges and public prosecutors (often referred to as continuing training or continuing professional development) is a structured and legally framed system aimed at keeping judges and public prosecutors up to date with legal developments, improving their skills, professional competence and ethical conduct throughout their careers.[2]

Continuing legal education for judges and public prosecutors in North Macedonia is regulated by laws and bylaws related to the Academy for Judges and Public Prosecutors "Pavel Shatev"[3] and judicial service legislation. The rules define the obligation for lifelong learning to maintain and improve knowledge, skills and personal qualities needed for proper judicial duties.[4]

This paper analyses the normative foundations, institutional organization, structure, and implementation of continuing legal education for judges and public prosecutors, together with the critical observations on the possibility and the extend of involvement of the Higher Education Academic institutions into delivering of such continuing legal education. In this sense University Law Schools are considered as Higher Education Academic institutions.

2. METHODOLOGY

The research applies normative legal analysis of the Law on the Academy for Judges and Public Prosecutors and related legislation; institutional analysis of the Academy and other relevant judicial bodies; comparative-descriptive approach based on European standards for judicial training; analytical method for evaluating strengths and weaknesses of the system. Beside the theoretical analysis, this paper also evaluates the positions of the judges and the public prosecutors regarding their opinions of the received continuing legal education through the Academy for Training of Judges and Prosecutors. Judges' and prosecutors' opinions were gathered through online voluntary survey. The questionnaire consisted of demographic questions and questions related to their previous experience of continuing legal education. The survey was distributed to judges, prosecutors, attorneys at law, enforcement agents, corporate lawyers, law clerks, notaries and legal apprentices in Republic of North Macedonia, and was open to answers in the period of 1 December 2025 till 28 February 2026.

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2 Continuing Training, Available at: [https://jpacademy.gov.mk/en/continous-training], Accessed 10 March 2026.

3 Academy for Judges and Public Prosecutors "Pavel Shatev", Available at: [https://jpacademy.gov.mk/en/], Accessed 10 March 2026.

4 *Ibid.*, supra note 3.

The team gathered 143 responses. The questionnaire was answered by 92 females, 50 males, and one respondent decided not to answer this question. This distribution is matching the population of the legal professionals, where women are predominantly members of the legal professions. The predominant average age of the respondents was in the range of 36 to 45 years with 66 respondents, and second most represented group was the age 46 to 55 years of age with 41 respondents. This age distribution of the questionnaire matches the average age of the legal professionals in North Macedonia and mostly covers the middle-career professionals that should mostly invest into their personal development through personal continuing legal education. The number of judges that responded to the questionnaire is 22. Only 20 court clerks and 3 public prosecutors have responded to this questionnaire. All the respondents from the group of judges, public prosecutors and court clerks were involved in the continuing legal education activities that were undertaken during the 2025 organized by the Academy for training of Judges and Public Prosecutors.

Unfortunately, the number of the respondents is very low in order to consider their responses as a representative sample, and due to this, these answers will be used only as a comparative model in regard to the existing information in regard to the analysis of the quality and key challenges of the model of the continuing legal education. Hence, their answers are considered mainly as indicative evidence in regard to the analysed model.

3. THEORETICAL BACKGROUND FOR CONTINUING LEGAL EDUCATION

The continuing legal education does not solely represent expanding of knowledge. It is a necessity for every lawyer, as well as added value to the profession. It is considered a supreme tool for professional development and positions the individual within the broader scope of the field relevance.

According to Le Thi,[5] the continuing legal education is a crucial bridge between legal theory and practice, equipping students with practical skills while providing legal assistance to marginalized communities. Despite its significance, the long-term sustainability of CLE programs faces persistent challenges, including financial constraints, limited institutional support, and evolving societal needs.

As Kellerhals states,[6] for centuries the continuing legal education was usually not what universities have offered, because they principally focused on primary edu-

[5] Le Thi, T., *Sustainable Clinical Legal Education: Models of Cooperation with Legal Organizations and Community Engagement*, Journal of Legal and Political Education, Vol. 2, No. 1, 2025, pp. 37-59.

[6] Kellerhals, A., *Continuing Legal Education in Switzerland – Situation today,* in: Kellerhals, A.; Mayer, M.; Elsener, J. (eds.), Continuing Legal Education - Ambition and Reality, (Conference Papers and Presentations), University of Zurich, 2023, p. 3.

cation: bachelor's programs, master's programs, and Ph.D. programs. Therefore, continuing legal education programs as such did not really exist for a long time. The continuing legal education in Switzerland, for example, started to develop in 1980s and the universities had a role in it, although one of the oldest universities in the country - the University of Basel was founded in 1460s.[7] The organization of seminars and conferences are the main activities within the continuing legal education in this country.

In some countries there are special schools that must be attended in the complex path of continuing education before taking the bar exam. For example, *École d'avocature* (School for Lawyers) is part of University of Geneva and offers a one semester program finished with CAS (Certificate of Advanced Studies). The teaching staff comprises of law professors, attorneys, prosecutors, judges etc.[8]

In Germany, the continuing legal education is an obligation for every lawyer as the Section 43a para 8 of the Federal Code for Lawyers (Bundesrechtsanwaltsordnung – BRAO)[9] states that *"A lawyer is obliged to engage in continuing professional development"*. However, according to Göcken,[10] in Germany, 15-20% of the lawyers, depending on the age group and time, do not comply with this obligation.

The most common types of continuing legal education include seminars, workshop, trainings, as well as, professional development and skill trainings. Additional aspect that needs to be taken into consideration is also the mandatory training that is required for certain legal professions, such as judges and public prosecutors. Many countries have special institutions conducting the training for the Judiciary, as North Macedonia,[11] Croatia, Portugal, Bulgaria etc. [12]

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7 *Ibid*.

8 Mangeat, H., *A School for Lawyers - The Geneva Experience,* in: Kellerhals, A.; Mayer, M.; Elsener, J. (eds), Continuing Legal Education - Ambition and Reality, (Conference Papers and Presentations), University of Zurich, 2023, pp. 115-122.

9 Federal Code for Lawyers in the consolidated version published in the Federal Law Gazette III, Index No. 303-8, as last amended by Article 13 of the Act of 23 October 2024 (Federal Law Gazette 2024 I No. 323), Availablet at: [https://www.gesetze-im-internet.de/englisch_brao/englisch_brao.html], Accessed 21 March 2026.

10 Göcken, S., *Continuing Legal Education - Mandatory or Optional?*, in: Kellerhals, A.; Mayer, M.; Elsener, J. (Eds), Continuing Legal Education - Ambition and Reality, (Conference Papers and Presentations), University of Zurich, 2023, pp. 91-97.

11 Academy for Judges and Public Prosecutors, North Macedonia, Available at: [https://jpacademy.gov.mk/en/], Accessed 21 March 2026.

12 Initial training of judges and prosecutors in the European Union, Available at: [https://e-justice.europa.eu/topics/trainings-judicial-networks-and-agencies/training-justice-professionals/national-training-systems/initial-training-judges-and-prosecutors-european-union_en], Accessed 19 March 2026.

According to Burton Raffel,[13] lawyers are the leading group of professional persons that remain active very long in their lifespan. He stresses the fact that the lawyers are not well prepared to start practice after finishing law school (at least less prepared than the medical professionals). Therefore, according to him, the continuing legal education is needed as *„comprehensive, protracted, and uniform as the needs and the deficiencies of the beginning lawyers…"* all young lawyers, according to him need continuing legal education: judges, attorneys, practitioners, public prosecutors, even teachers.

According to some published studies and articles from last century, continuing legal education exists from a long time ago. It seems that the awareness for the necessity of the continuing legal education has been on a higher level in USA. There, the continuing legal education started to develop even before the Second World War, first - locally in New York in 1910s, wider in 1930s.[14] A decade later, a revealing survey was conducted by the California Bar. According to this survey, in respect to ethics and honesty, the lawyers were ranked at the bottom of the list of all professions.[15] This was a serious indicator for the emerging need of continuing legal education. Later, in late 1940s, the American Law Institute, together with the American Bar Association, sought to create national program of continuing legal education.[16] As Friday pointed, the continuing legal education connotes a formal education experience. It can appear in the form of lecture, seminar, workshop etc. related to the practice of law and even back then, it was sponsored by a bar association or a law school.

Considering judges and public prosecutors, most of the European states have established training institutions for the Judiciary, where mandatory continuing legal education is envisaged. These institutions aim at advancement of the professional competences, integrity, ethical standards and the responsibility in the judiciary officials.[17]

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13 Raffel, B. *Continuing Legal Education: The Need and the Reason*, Journal of Legal Education 1960, Vol. 13, p. 76.

14 Friday, H.H., *Continuing Legal Education: Historical Background, Recent Developments, and the Future*, St. John's Law Review Volume 50, Number 3, Spring 1976, p. 502.

15 Raffel, *op. cit.*, note 13, p. 77.

16 Friday, *op. cit.*, note 13, p. 504.

17 Deanoska Trendafilova, A., *Integrity, Independence, Impartiality and Transparency in Judiciary as Basic Values for Rule of Law*, Third Book or Recommendations, National Convention on the EU, Skopje, 2024, pp. 11-38. Available at: [https://nkeu.mk/wp-content/uploads/2024/03/Kniga-EN-EL_compressed.pdf], Accessed 19 March 2026.

As Diaz Abad notes the training of judges when performed trough self-governing institutions and operated autonomously aims to "*guarantee judicial independence, the maintenance of the Rule of Law, the promotion of civil liberties and individual freedoms, basic human rights and the effective and transparent administration of justice*".[18]

Hence, continuing legal education for judges and prosecutors is considered as a cornerstone of the rule of law in the European Union. As a result, the European Commission's Judicial Training Strategy 2025–2030 emphasizes digitalization, cross-border cooperation, and the need for a unified European judicial space.[19] At the same time, the European Judicial Training Network (EJTN) has become the central platform for coordinating national training institutions, facilitating exchanges, and harmonizing training methodologies.[20]

4. CONTINUING LEGAL EDUCATION OF JUDGES AND PROSECUTORS IN THE REPUBLIC OF NORTH MACEDONIA: NORMATIVE FRAMEWORK, INSTITUTIONAL PRACTICE AND REFORM CHALLENGES

The transformation of contemporary legal systems accelerated legislative reforms, digitalization, and the increasing influence of international and European law require judges and prosecutors to engage in lifelong learning. Judicial competence is no longer static but dynamic, requiring continuing adaptation to evolving legal standards and societal expectations.

In North Macedonia, continuing legal education constitutes an essential component of broader judicial reform processes aimed at strengthening independence, professionalism, accountability, and public trust of the judiciary. The establish-

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18 Diaz Abad, N., *Judges', Presidents of Courts' and Members of Judicial Councils' Perspective*, in: Rule of Law in Europe Perspectives from Practitioners and Academics, European Judicial Training Network (EJTN), Available at: [https://ejtn.eu/wp-content/uploads/2022/12/2019-056-RoL-Manual-170x240-WEB_FINAL.pdf], Accessed 21 March 2026.

19 Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Judicial Training Strategy 2025 – 2030, COM(2025) 801 final.

20 There are several other judicial networks in the EU, such as the networks of the Presidents of Supreme Courts of the EU, the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU or the Judicial Councils, that offers some sort of training or coordination between its members, but the European Judicial Training Network is positioned as the most comprehensive one in regard to the continuing legal education to judges and prosecutors in EU. See: [https://ejtn.eu/].

ment and development of a centralized judicial training institution marked a turning point in the professionalization of the judiciary.[21]

The central institution competent for judicial and prosecutorial continuing education is the Academy for Judges and Public Prosecutors "Pavel Shatev".[22] The Academy performs dual functions: initial training of future judges and prosecutors; as well as continuing training of already appointed judicial office holders.[23] The initial training at the Academy consists of two phases. The first phase, which according to the 2023 Law on Academy for Judges and Public Prosecutors is regulated in Article 51, represents theoretical instruction and lasts nine months. During this theoretical instruction, several modules/subjects are studied. The final examination is taken after the completion of both phases - theoretical and practical training.

Within the final examination, the acquired legal knowledge of future judges and public prosecutors is assessed through a written exam, a mock trial simulation, and an oral examination. Among other tasks, candidates draft judgments and decisions in civil or criminal cases, as well as indictments and similar documents.

According to Article 59 of the Law on the Academy for Judges and Public Prosecutors of 2023, candidates for judges and public prosecutors at the end of the training, after successfully passing the final examination, receive a single certificate of completed initial training with a final grade. This means that future public prosecutors undergo a unique training program in terms of structure and duration after completing the Faculty of Law, before being elected as public prosecutors. The same applies to judges. Their training at the Academy is therefore not specialized depending on whether the person would later be elected as a judge or a public prosecutor.

The new draft Law on amendments of the Law on Academy for Judges and Public Prosecutors,[24] which is being prepared during 2026, foresees a different solution. According to the draft, candidates when applying on the public call will indicate whether they intend to become judges or public prosecutors, and at the end of the training they will receive a separate certificate. This means that they will decide

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21 Continuing Training, Available at: [https://jpacademy.gov.mk/en/continous-training], Accessed 21 March 2026.

22 Academy for Judges and Public Prosecutors, Available at: [https://jpacademy.gov.mk/en], Accessed 21 March 2026.

23 As regulated in the Law on Academy for Judges and Public Prosecutors, Official Gazette of the Republic of North Macedonia, No. 129/23 and 53/24.

24 Available at: [www.ener.gov.mk], Accessed 22 March 2026.

in advance in which professional field they intend to work. It is assumed that after the potential adoption of this law, the training of future judges and public prosecutors might also become partially directed or specialized according to the profession for which the candidates opted.

However, after being elected to a Basic Public Prosecutor's Office, and subsequently to higher public prosecutor's offices, the public prosecutor has obligations related to the continuous development and improvement of legal knowledge and skills. The Law provides for continuing training, which represents ongoing professional development of theoretical and practical knowledge and skills for the professional and efficient performance of judicial and prosecutorial functions.[25]

The Academy operates as an autonomous professional institution with its own governing bodies and annual training programs.[26]

Further in the paper we examine: the normative framework regulating continuing legal education; the institutional architecture of judicial and prosecutorial training; the structure and content of training programs and the alignment with European standards; the key challenges and reform perspectives.

4.1. Normative Framework of Continuing Judicial Education

Continuing legal education in North Macedonia is primarily regulated by The Law on the Academy for Judges and Public Prosecutors[27]; The Law on Courts[28]; The Law on Public Prosecution[29], bylaws governing continuing training programs.[30]

The legal framework establishes that continuing training is a professional obligation of judges and prosecutors; a mechanism for ensuring competence and ethical conduct; and a factor in professional evaluation and career advancement.[31]

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25 Art. 61 para 1, Law on Academy for Judges and Public Prosecutors.

26 Organization of the Academy, Available at: [https://jpacademy.gov.mk/about/organization/], Accessed 21 March 2026.

27 Law on Academy for Judges and Public Prosecutors, Official Gazette of the Republic of North Macedonia" No. 129/23 and 53/24.

28 Law on Courts, Official Gazette of the Republic of Macedonia No. 58/06, 62/06, 35/08, 150/10, 83/18, 198/18 and Official Gazette of the Republic of Macedonia No. 96/19.

29 Law on Public Prosecution Office, Official Gazette of the Republic of North Macedonia No. 42/2020.

30 Academy for Judges and Public Prosecutors, *Rulebook on the continuing training*, 2023, Available at: [https://jpacademy.gov.mk/en/about/normative-framework/], Accessed 11 March 2026; Academy for Judges and Public Prosecutors, Specialized program for voluntary continuing training, 2022, Available at: [https://jpacademy.gov.mk/wp-content/uploads/2022/08/Specijalizirana_programa_za_sluzbenici_2023.pdf], Accessed 11 March 2026.

31 Art. 61 para. 1, Law on the Academy for Judges and Public Prosecutors.

Participation in mandatory training activities is considered by the Judicial Council of the Republic of North Macedonia during performance evaluations and as a criterion for the appointment of a judge to a higher court. The same procedure is applied for the prosecutors, while the consideration is undertaken by the Council of Public Prosecutors. This connection between education and evaluation strengthens the functional importance of continuing legal education.[32]

The normative framework reflects an understanding that judicial independence must be accompanied by professional accountability and continuing competence enhancement.

The aim of continuing training includes strengthening judicial independence, integrity, professionalism and diligence; enhancing protection of human rights and freedoms through updated legal expertise; promoting a transparent, fair, efficient and high-quality judiciary in line with international standards of fair trial; building organizational and managerial capacities of court leaders (e.g., presidents of courts).[33]

The Rulebook on the Continuing Training, adopted by the Academy for Judges and Public Prosecutors in North Macedonia, outlines the framework for mandatory and voluntary continuing training programs aimed at enhancing the professional development of judges, public prosecutors, court presidents, lay judges, and other legal professionals.[34]

The training aims to help participants gain practical legal knowledge and skills for implementation of the law. It seeks to strengthen their professional competence, deepen their understanding of the social role of their profession, and develop their ability to incorporate an international legal perspective.[35]

The Rulebook emphasizes the importance of lifelong learning for legal professionals to ensure their independence, integrity, and efficiency in upholding the rule of law and protecting human rights.[36] It also aims to strengthen public trust in the

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32 Art. 52 para. 2, line 1, Law on the Judicial Council of the Republic of North Macedonia, Official Gazette of the Republic of North Macedonia No. 269/25.

33 Academy for Judges and Public Prosecutors, *Rulebook on the continuing training*, 2023, Available at: [https://jpacademy.gov.mk/en/about/normative-framework/], (hereinafter: Rulebook on continuing training), Accessed 21 March 2026.

34 Art. 2, *Rulebook on the continuing training*.

35 Art. 12 para. 2, *Rulebook on the continuing training*.

36 Art. 3 para. 2, *Rulebook on the continuing training*.

judiciary by improving legal knowledge, ethical standards, and professional skills, including soft skills like communication, leadership, and empathy.[37]

The Rulebook defines in more detail the training types, mandatory and voluntary training set in the Law on Academy for Judges and Public Prosecutors. Mandatory Training is required for judges, public prosecutors, court presidents, and lay judges.[38] It includes general and specialized programs, with specific number of training days depending of the years of service.[39] Voluntary Training is available for clerks in courts, in public prosecution offices, and in other entities involved in justice implementation.[40]

Training is organized independently or in collaboration with domestic and international partners.[41] It includes various formats such as seminars, workshops, simulations, and study visits, delivered both in-person and online.[42] A decentralized approach ensures regional accessibility, and participants are compensated for travel expenses.[43]

Lecturers are selected based on expertise and experience, including judges, prosecutors, academics, and legal professionals.[44] They are required to undergo training before delivering lectures and must prepare detailed training materials and reports.[45] Lecturers are entitled to remuneration, which is regulated by a separate Rulebook on Remunerations.[46]

Training programs are evaluated through participant feedback and assessments to ensure effectiveness and relevance.[47] The Academy uses a Quality Management System (ISO 9001:2015) to standardize and improve training processes.[48]

For participation in individual specialized training or training cycles, the Academy prepares a participation certificate for the participants.[49] The Academy issues

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37 Art. 3 para. 3, *Rulebook on the continuing training.*
38 Art. 6 para. 1, *Rulebook on the continuing training.*
39 Art. 6 para. 2, *Rulebook on the continuing training.*
40 Art. 9 para. 1, *Rulebook on the continuing training.*
41 Art. 21 para. 1, *Rulebook on the continuing training.*
42 Art. 17 para. 1, *Rulebook on the continuing training.*
43 Art. 19 para. 1, *Rulebook on the continuing training.*
44 Art. 22 para. 2, *Rulebook on the continuing training.*
45 Art. 25 para. 2, *Rulebook on the continuing training.*
46 Art. 28 para. 1, *Rulebook on the continuing training.*
47 Art. 31 para. 1, *Rulebook on the continuing training.*
48 Art. 11 para. 1, *Rulebook on the continuing training.*
49 Art. 42 para. 1, *Rulebook on the continuing training.*

certificates for completed training and keeps records of participation, ensuring compliance with personal data protection regulations.[50]

To sum up, the Rulebook establishes a comprehensive system for continuing training, focusing on professional development, ethical standards, and public trust in the judiciary.[51] It ensures structured implementation, quality management, and collaboration with domestic and international partners, while addressing logistical and financial aspects to facilitate participation.[52]

4.2. Structure and Content of Continuing Training and Alignment with the EU Standards

Continuing legal education is organized on an annual basis and includes both mandatory and specialized components.[53]

4.2.1. Mandatory Training

Judges and prosecutors are required to complete a prescribed minimum number of training hours annually. Mandatory topics usually include novelties to criminal, civil, and administrative legislation; jurisprudence of the European Court of Human Rights; judicial ethics and integrity; anti-corruption standards; procedural guarantees and fair trial principles etc.[54]

Judges must complete a specified minimum number of training hours per year. For example, judges with more than 8 years of experience must complete at least 30 hours of training annually, while those with over 15 years' experience must complete at least 15 hours.[55]

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50 Art. 41 para. 4, *Rulebook on the continuing training.*

51 Art. 14 para. 1, *Rulebook on the continuing training*.

52 Art. 21 para. 2, *Rulebook on the continuing training*.

53 Art. 8, Rulebook on the continuing training.

54 For details, see: General Programme for Continuing Education of Judges and Prosecutors and Specialized Programme for Voluntary Continuing Training, Availablet at: [https://jpacademy.gov.mk/wp-content/uploads/2025/01/%D0%9E%D0%BF%D1%88%D1%82%D0%B0-%D0%BF%D1%80%D0%BE%D0%B3%D1%80%D0%B0%D0%BC%D0%B0-%D0%B7%D0%B0-%D0%BF%D0%B5%D1%80%D0%B8%D0%BE%D0%B4-2025-2026-1.pdf], Accessed 18 March 2026.

55 Art. 43 paras. 3 and 4, Law on the Academy for Judges and Public Prosecutors.

Training topics cover substantive law, procedural law, ethics, human rights, international conventions, modern judicial management, and emerging areas such as cybercrime and cross-border legal issues.[56]

There are specific modules for newly elected judges, including separate programs for criminal and civil law areas.[57]

Mandatory training for public prosecutors varies in the number of hours depending on the length of their professional experience. As stipulated in the Rulebook for Continuing Training in article 8,[58] the public prosecutors with work experience of up to 3 years shall attend 10 days of training (additionally to the obligation for specialized training for the newly elected prosecutors), the public prosecutors with work experience of 3 to 8 years shall attend 6 days of training, the public prosecutors with work experience of 8 to 15 years shall attend 4 days of training and the public prosecutors with work experience of more than 15 years shall attend 2 days of training annually.

According to the Annual Report on the work of the Academy for Judges and Public Prosecutors for 2024[59], in the period from 1 January 2024 to 31 December 2024, a total of 4,610 participants took part in the trainings organized by the Academy, including 320 judges, 796 public prosecutors, 1,554 clerks in courts and in public prosecution offices, 128 judicial officers, 461 participants in initial training, and 351 representatives of other relevant institutions, organizations, the NGO sector, etc., invited by the Academy, whose work is related to the topics of the trainings. Regarding the topics of the trainings, 37 were in the field of civil law, 52 in criminal law, 13 were of common interest to both branches, 2 trainings were on overlapping subject matter, 22 were specialized trainings, 5 were in the field of administrative law, 6 in the field of commercial law, and 73 trainings were devoted to general topics. Trainings were conducted through seminars, workshops, conferences, roundtables, and interactive methods, emphasizing practical aspects. These

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56 Academy for Judges and Public Prosecutors "Pavel Shatev", Skopje, Specialized Program for Voluntary Continuing Training, 2022, Available at: [https://jpacademy.gov.mk/continous-training/], Accessed 19 March 2026.

57 CEPEJ(2024)1REV1 - European Commission for the Efficiency of Justice (CEPEJ): HFIII - Towards a Better Evaluation of the Results of Judicial Reform Efforts in the Western Balkans – "Dashboard Western Balkans" - Part 2 (A) - Beneficiary Profile - North Macedonia.

58 Art. 8, Rulebook on the continuing training.

59 Academy for Judges and Public Prosecutors "Pavel Shatev", *Annual Report on the Work of the Academy for Judges and Public Prosecutors*, Skopje, 2024, Available at: [https://jpacademy.gov.mk/wp-content/uploads/filr/7336/Annual%20Report%20on%20Academy%20for%20Judges%20and%20Public%20Prosecutor%202022.pdf], Accessed 21 March 2026.

trainings were organized independently by the Academy or in cooperation with other domestic and foreign projects, associations, organizations, and institutions.

Considering the latter, the Academy has respectable outreach regarding the continuing legal education to the judges and prosecutors on a yearly level in correlation to the numbers of the judges[60] and prosecutors[61].

The Academy's continuing training programs are integral to the professional development of legal practitioners, ensuring alignment with national and international standards.

4.2.2. Specialized and Elective Training

Specialized modules address specific judicial domains such as: Organized crime and corruption; Cybercrime and digital evidence; Commercial disputes; Human rights protection; Case management and court administration. Leadership programs are designed for court presidents and senior judges to enhance managerial competencies.

The modern training methodology includes Interactive workshops; Case-study analysis; Practical simulations; Roundtables and peer discussions; E-learning modules.

The increasing use of digital platforms reflects broader digital transformation processes within the judiciary.

4.3. Key Challenges and Reform Perspectives

One can conclude that the legal education of judges and public prosecutors shows continuity after the completion of various legal requirements. These requirements comprise of passing the bar exam, enrolment at the Academy for Judges and Public Prosecutors, attending theoretical training, passing the final exam, and obligation to attend continuing training after appointment.

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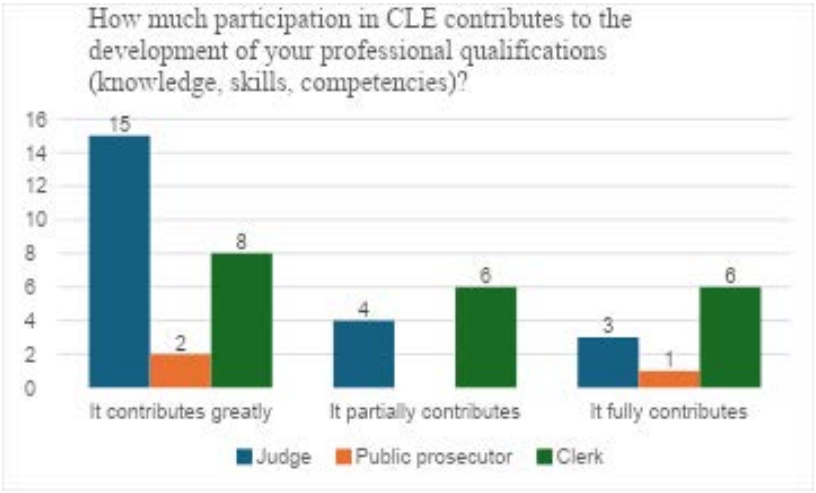
60 See Annual Report of the Judicial Council of Republic of North Macedonia, p. 6., Available at: [http://www.vsrm.mk/wps/wcm/connect/ssrm/07c2cfb1-7280-49ca-91b2-c4279989f9fa/%D0%93%D0%BE%D0%B4%D0%B8%D1%88%D0%B5%D0%BD+%D0%B8%D0%B7%D0%B2%D0%B5%D1%88%D1%82%D0%B0%D1%98.pdf?MOD=AJPERES&CVID=pqQQYG9], Accessed 21 March 2026.

61 See Annual Report of the Council of Public Prosecutors, p. 15. Available at: [https://sjorm.gov.mk/godishen-izveshtaj-za-rabotata-na-sovetot-za-2024-godina/], Accessed 21 March 2026.

These activities primarily represent education, upgrading, and improvement of legal knowledge and skills. The significance of this continuing legal education is also greatly recognised by our respondents from the commenced survey. See Graph. No. 1.

Graph 1. How much participation in CLE contributes to the development of your professional qualifications (knowledge, skills, competencies)?



Source: Authors` interpretation

However, after completing studies at the Faculty of Law, all these activities of further legal education are usually carried out outside of the university, by other institutions. This raises the question of the extent to which law faculties can participate in the implementation of such forms of education and training.

Another question that arises is whether such training after completing the primary legal education, whether mandatory or voluntary, results in obtaining a certain certificate or acquiring a certain number of credits. In the current system this is usually not the case—the completion of continuing training of judges and public prosecutors does not lead to academic credits, an official certificate recognized as part of formal education or CAS. The reason for this is that these trainings are treated as professional development aimed at practical knowledge and skills necessary for the efficient performance of the function, rather than as formal academic education and discussion in this regard have not been initiated so far.

Nevertheless, this practice could be transformed into a system that would allow some form of qualification or official recognition of the acquired knowledge. For example, each completed training or module could be associated with a certain number of credits, similar to the ECTS system used at universities, or a certifi-

cate could be awarded formally confirming the acquisition of specific professional competencies. This would also enable the transformation of continuing training into a system that is visible and recognized for professional advancement, while at the same time connecting practice with the academic structure of education.

On EU level, most of the continuing legal education is regulated by some sort of specialised institution that is either independently organized or is part of the Ministry of Justice. Hence, in most of the cases in most of the EU member states, educators are judges, prosecutors or members of the academia.[62]

In this regard we think that higher education institutions should be also involved in some sort of continuing legal education for the judges and prosecutors. In most cases universities can deliver more in-depth or even more detailed and more structured approach than the specialised state agencies that are organizing ex-officio continuing legal education. Furthermore, the members of the academia can be more prone to novelties in their method of instruction and have more theoretical approach regarding the judges and prosecutors as trainers who predominantly base their trainings upon their professional background and practice.

Due to this, we believe that besides the fact that the members from the academia are usually involved in the continuing legal education that is delivered through the specialised institutions for judicial and prosecutorial trainings,[63] higher education institutions should be more involved in regard to the continuing legal education, due to the fact that the higher education institutions *bring in specialised knowledge, interdisciplinary insights, and updated academic or practical perspectives (especially in areas where internal resources may be limited).*[64]

Considering these factors, we think that law schools should partner with the Academy for Judges and Prosecutors during the planning of the program for the continuing legal education for these professionals. Hence forward, we deem that higher education institutions in North Macedonia should provide a further detailed list of courses that they can deliver to the judges and prosecutors that should be recognized by the Academy as part of the continuing legal education for judges and prosecutors.

Additional argument for this thesis is the responses from our survey, where the respondents have predominantly stated that there is still place for improvement of the existing programmes for continuing legal education. See Graph No. 2.

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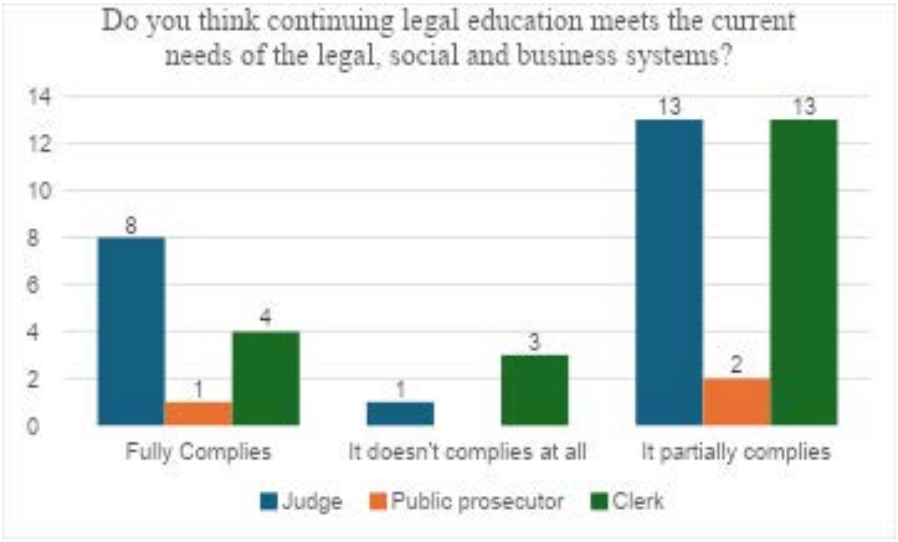
62 European Judicial Training Network, *State of Judicial Training in Europe*, January 2026, Available at: [EJTN_State-of-Judicial-Training-in-Europe2026_EN-1.pdf], Accessed 23 March 2026.

63 *Ibid.*, pp. 18-19, regarding the statistical approach of the background of the educators, within the analysis performed by the European Judicial Training Network.

64 *Ibid.*, p. 51.

Graph 2. Do you think continuing legal education meets the current needs of the legal, social and business systems?

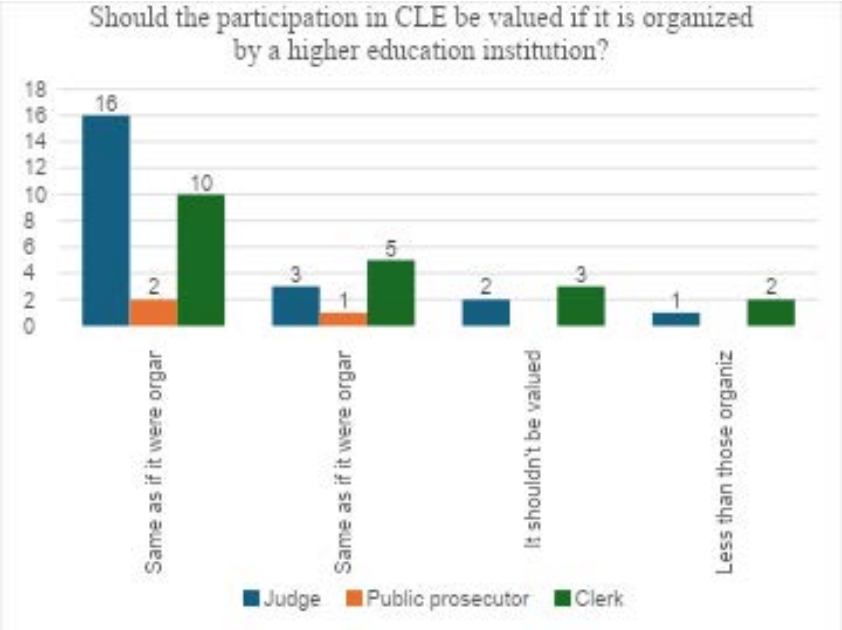


Source: Authors` interpretation

From Graph 2 we can conclude that more than half of the respondents think that the current model of continuing legal education meets the needs for legal, social and business systems. This means that for the further modernization of the Macedonian system of continuing legal education additional research should be performed in order to provide improved topics and improved curricula for continuing legal education for the judges and for the prosecutors. Indeed, in such endeavours the assistance from the law schools is crucial for support of the Academy for judges and prosecutors.

As per the opinions of the judges, prosecutors and law clerks, we can conclude that the respondents do not find any objections into the possibility of delivering such continuing legal education from the higher education institutions. Furthermore, in most of the cases the respondents (19 judges out of 22, all the prosecutors and 15 out of 20 law clerks) consider the possibility of delivering such training by the law schools should be considered on the same level as the authorised institutions for such continuing legal education. See graph No. 3.

Graph 3. Should the participation in CLE be valued if it is organized by a higher education institution?



Source: Authors` interpretation

These results only confirm that the judges, prosecutors and law clerks are more interested into the quality of the topics of the continuing legal education rather than considering who is entitled to commence such activities. Another conclusion from this survey is that the judges, prosecutors and law clerks have significant trust into their alma mater and into the higher education institutions as a knowledge provider and furthermore, they do not have any reservations regarding the quality and the significance of the education provided by the higher education institutions.

5. CONCLUSION

Continuing legal education of judges and prosecutors in the Republic of North Macedonia constitutes a cornerstone of judicial reform and professionalization. The institutional role of the Academy for Judges and Public Prosecutors "Pavel Shatev", as a single entry point, ensures structured and centralized implementation of lifelong learning.

However, the long-term effectiveness of the system depends on its ability to evolve from a primarily hour-based compliance model to a competency-driven, performance-oriented framework that directly enhances judicial quality, independence, and public trust.

From the performed theoretical and practical evaluation of the stance of the prosecutors and judges regarding the quality of the continuing legal education we have concluded that there is space for its improvement, particularly through partnership between the Academy and the accredited higher education institutions in the Republic of North Macedonia. These partnership relations should be primarily induced for improvement of the topics, quality of the instruction and broadening the content of the offered existing continuing legal education.

Finally, Continuing legal education must remain a dynamic and strategically planned process aligned with both domestic reform priorities and European legal standards.

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Original scientific paper

EXTENDED CONFISCATION FROM OPERATION OF A CRIMINAL ASSOCIATION IN CROATIA: REVOLVING THE FIRST DECISION IN THE CASE OF *J. B. AND OTHERS*[*]

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ABSTRACT

Extended confiscation is sui generis measure reintroduced in Croatian Criminal Code in 2006. After a general prohibition of retaining the material gain acquired by criminal offence, the legislator prescribed a legal presumption of illegal material gain entailing a benefit acquired by a group of people or a criminal organization temporally connected with the committed criminal offence and which can reasonably be considered to originate from that offence, because its lawful origin cannot be determined. With the amendments to the Criminal Code from 2008, a broader reach into the offender's assets was enabled, allowing for the confiscation of material gain that can reasonably be considered to originate from other (undetermined) criminal offences, and not only from the offence for which the offender is currently being prosecuted. The reason for reacquaintance of the measure in a contemporary manner was found in the urge to compliance with European standards as Croatia was candidate for the accession to European Union. Additional reason was more effectiveness in combating organized crime. The first case in Croatia including criminal association in which decision on extended confiscation was issued was the case against J. B. and others for association for the commission of criminal

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offences from Article 333 Paras 1 and 3, forgery of documents from Article 311 and fraud from Article 224 Para 4 in connection to Para 1 of the Criminal Code. The aim of the article is to assess legality and fairness of the decision on extended confiscation in convictions of the County Court in Zagreb as well as contribution of the Croatian Supreme Court in achieving the final decision. In addition, particular issues concerning association for the commission of criminal offences are addressed as: assessment of the period of involvement in a criminal association, significance of the organizational awareness and finally individual roles of association members.

Keywords: *Criminal association, Criminal offence, Extended confiscation, Material gain, Legal presumption*

1. INTRODUCTION

Extended confiscation was as *sui generis* measure reintroduced in Croatian Criminal Code in 2006 by adding special provision to the Article 82 regulating "Confiscation of material gain".[1] After a general prohibition of retaining the material gain acquired by criminal offence, the legislator prescribed the legal presumption of illegal material gain entailing a benefit acquired by a group of people or a criminal organization temporally connected with the committed criminal offence and which can reasonably be considered to originate from that offence, because its lawful origin cannot be determined.[2] The original regulation of this institute was criticized in legal theory due to deficiencies in the statutory wording and text.[3] Only with the amendments to the Criminal Code in 2008 was it made possible to confiscate assets as material gain presumed to originate from other criminal offences (and not only from the one for which the perpetrator is currently being tried), which was the actual and intended purpose of this institute. The reasons for reacquaintance of the measure in a contemporary manner were found in the urge to compliance with European standards as Croatia was candidate for the accession to European Union since 2004 as well as more effectiveness in combating organized crime.[4]

The first case in Croatia in which decision on extended confiscation included criminal association was issued was the case against *J. B. and others.*[5] The County Court in Zagreb, acting as the court of first instance, found in judgment K-US-78/09 of 13 December 2011 J. B. and five other accused persons guilty of criminal

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1 Article 13 of Amandments to the Criminal Code, Official Journal, No 71/2006.

2 *Ibid*.

3 *Infra* footnote 10.

4 In accordance with contemporary international and comparative law trends as stated by Ivičević Karas, E., *Komentar Zakona o postupku oduzimanja imovinske koristi ostvarene kaznenim djelom i prekršajem*, Narodne novine, Zagreb, 2011, p. 8.

5 The first judgment ordering extended confiscation was judgement of the County Court in Zagreb VII K-US-27/09 of 3 November 2009 in the case against Z. M., R. V. and Ž. S. for receiving a bribe.

offences against public order; association for the commission of criminal offences from Article 333 Paras 1 and 3, offences against the authenticity of documents; forgery of documents from Article 311 Para 1, and offences against property; fraud from Article 224 Para 4 in connection to Para 1 of the Criminal Code.[6] Additionally, the sixth accused was found guilty of an offence against the authenticity of documents by producing, acquiring, possessing, selling, or making available instruments for forgery. The factual circumstances of the case included a well-organized criminal association in which all participants carried out their particular roles. Namely, they offered for sale real estate owned by the City of Zagreb: municipal flats, construction land, garages, and buildings during the period from 2005 to 2009, based on forged documentation purportedly issued by the City of Zagreb as the seller. They misrepresented themselves to the injured persons and collected money under the pretense of property purchase payments, issuing false confirmations of payment, thereby unlawfully acquiring material gain, which they distributed among themselves, whereby the first accused J. B. rewarded the others with part of the proceeds.

As a result of conviction, by applying the institute of ordinary confiscation of unlawful material gain under Article 82 Para 1 of the CC/97, the Court confiscated an amount of HRK 4,950,622.90 from the J. B., and further HRK 1,348,486.00 from other convicts.[7] Applying the institute of extended confiscation under Article 82 Para 3 in conjunction with Para 1 of the CC/97, the Court also confiscated unlawful material gain from other persons – namely, from the children of the first accused J. B.: from her son in the amount of HRK 1,110,406.00 and from her daughter in the amount of HRK 681,401.10. In the reasoning of the first-instance judgment, the Court stated that the convicted persons obtained a total material gain of HRK 26,045,808.00 committing incriminated offences.[8]

The aim of the article is to assess legality and fairness of the decision on extended confiscation in convictions of the County Court in Zagreb as well as contribution of the Croatian Supreme Court in achieving the final decision. In addition, particular issues concerning association for the commission of criminal offences are addressed as: assessment of the period of involvement in a criminal association,

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6 Criminal Code, Official Journal, No. 110/1997, 27/1998, 50/2000, 129/2000, 51/2001, 111/2003-Decision of the Constitutional Court, 105/2004, 84/2005, 71/2006, 110/2007, 152/2008 and 57/2011, further in the text: CC/97. CC/97 was in Croatia in force until 2013.

7 The Croatian kuna with abbreviation HRK was the official monetary currency of the Republic of Croatia from 30 May 1994 to 31 December 2022. The kuna was replaced by the euro on 1 January 2023 after satisfying prerequisites.

8 The County Court in Zagreb, Judgement XII K-US-78/09 of 13 December 2011, p. 132.

significance of the organizational awareness and finally individual roles of association members.

2. EXTENDED CONFISCATION

As stated in introduction, Croatian legislator reintroduced extended confiscation in 2006 prescribing the legal presumption of illegal material gain entailing a benefit acquired by a group of people or a criminal organization temporally connected with the committed criminal offence and which can reasonably be considered to originate from that offence, because its lawful origin cannot be determined.[9] In 2008 new amendments were added to the CC/97 transforming the legal presumption in new directions.[10] As first, unlawfulness of the material gain acquired by criminal offence has been enlarged to the total assets of the perpetrator of criminal offences under the jurisdiction of the Office for the Suppression of Corruption and Organized Crime, unless he makes probable its legal origins.[11] As second, extended confiscation was prescribed for the material gain in the possession, on any legal basis, of the perpetrator's spouse or partner, close relative, adoptive parent or adoptee.[12] The current framework for extended confiscation was largely introduced into the Criminal Code in 2011.[13] Namely, the legislator established a legal presumption for a perpetrator of listed criminal offence(s) who owns or owned property disproportionate to their legitimate income: it is presumed that such

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9 Sokanović, L., *Extended confiscation in Croatia* in: Hryniewicz-Lach, E. (ed.), Extended Confiscation of Illicit Assets and the Criminal Law: National and EU Perspective, Routhledge, 2025, p. 23. On EU insufficient competence to legislate, the lack of reliable data that would justify EU legislative activity and the problematic concept of effectiveness in EU legislation in relation to confiscation see: Hryniewicz-Lach, E.*, Confiscation of assets in the EU – legal or (just) effective?* Archives of Criminology, Vol. 45, No. 2, 2023, pp. 43-66.

10 Amandments to the Criminal Code, Article 2, Official Journal, No. 152/2008. On the criticisms of the first solution see Bojanić. I., *Promjene u općem dijelu Kaznenog zakona prema Prijedlogu zakona o izmjenama i dopunama Kaznenog zakona iz 2005.*, Croatian Annual for Criminal Law and Practice, Vol. 12, No. 2, 2005, p. 338, and Pavišić, B.; Pleić, V.; Veić, P., *Komentar Kaznenog zakona*, Narodne novine, Zagreb, 2008, p. 266.

11 Law on the Office for the Suppression of Corruption and Organized Crime, Official Journal, No. 76/2009, 116/2010, 145/2010, 57/2011, 136/2012, 148/2013, 70/2017. The Office is a special state attorney's office, specialized in the prosecution of corruption and organized crime, headquartered in Zagreb, and is competent for the entire territory of the Republic of Croatia.

12 See Roksandić Vidlička, S.; Dragičević Prtenjača, M., *Does the crime pay off – (in)efficiency of confiscation in Croatia - new proposals for the 60th anniversary*, ECLIC 3 - International Scientific Conference "EU and Member States – legal and economic issues" in: Duić, D.; Petrašević, T. (eds.), University Josip Juraj Strossmayer of Osijek Faculty of Law Osijek, Osijek, Vol. 3, 2019, p. 599.

13 Criminal Code, Official Journal, No. 125/2011, 144/2012, 56/2015, 101/2017, 118/2018, 126/2019, 84/2021, 114/2022, 114/2023, 36/2024, 136/2025, further in the text: CC. Currently in force in Croatia.

property constitutes proceeds of crime unless they demonstrate the legitimate origin of the property to be probable (Article 78 Para 2 CC). Extended confiscation can be ordered only for criminal offences under the jurisdiction of the Office for the Suppression of Corruption and Organized Crime, criminal offences of sexual abuse and sexual exploitation of children (Chapter XVII CC) and criminal offences concerning computer systems, programmes and data (Chapter XXV CC).[14] The 2024 Amendments to the Criminal Code prescribed the application of this institute also to the criminal offences of unauthorised manufacture and trafficking of narcotic drugs (Article 190) and unauthorised manufacture and trafficking of substances prohibited in sport (Article 191a) of Chapter XIX CC. The conditions and procedure for confiscation are set out in Article 77 of the Criminal Code, which regulates ordinary confiscation of material gain, and this article also applies to extended confiscation of material gain unless otherwise is prescribed by the provisions governing extended confiscation (Article 78 of the Criminal Code).[15] If material gain originating from a criminal offence have been merged into legitimately acquired property, the entire property shall be subject to confiscation up to the estimated value of the material gain of the offence. The same manner of confiscation and the same *ratio* applies to the material gain generated by property with which the legitimately acquired assets were merged (Article 78 Para 3 CC.). Extended confiscation shall be ordered against a family member of the perpetrator, irrespective of the legal basis on which they possess it and regardless of whether they live in a shared household with the perpetrator (Article 78 Para 4 CC). Extended confiscation shall be ordered against another person irrespective of the legal basis on which it is acquired, unless the person demonstrates acquisition in good faith and at a reasonable price to be probable.[16] Previously quoted provisions from Article 78 Paras 4 and 5 CC suggest that Croatian legislator opted for different conditions for confiscating material gain acquired by family members compared to those for confiscating material gain acquired by other persons. In addition, Criminal Code distinguishes between the conditions for ordinary and extended confiscation of material gain from family members, since in extended confiscation it prescribes an irrebuttable presumption that family members did

[14] Sokanović, L., *op. cit.,* note 9, p. 25. In 2015, only the title of the provision was changed and the criminal offences of sexual abuse and sexual exploitation of children as well as criminal offences relating to computer systems, programmes and data were added as offences for commission of which extended confiscation may be imposed. At the same time, an additional condition was introduced, requiring that any offence within these categories result in material gain as a prerequisite for the application of extended confiscation. Compare Roksandić Vidlička, A.; Šamota Galjer, M., *Political Economic Crime and Extended Confiscation of Pecuniary Gain: Quo vadis Croatia?* Croatian Annual of Criminal Sciences and Practice, Vol. 22, No. 2, 2015, p. 536.

[15] Article 8 of Amandments to the Criminal Code, Official Journal, No 36/2024.

[16] Article 78, para 5 CC.

not acquire the material gain in good faith—a presumption that does not exist in cases of ordinary confiscation.[17] This is because, in ordinary confiscation, Criminal Code does not distinguish at all between confiscation of material gain from family members and from other persons, so family members are equally able to prove their good faith, just like any other persons. Such regulation is in opinion of some Croatian scholars unjustified and has therefore been criticized.[18] If a person against whom criminal proceedings have been instituted dies, the material gain from an unlawful act may be confiscated from their successors (Article 78 Para 6 CC).

Finally, it may be concluded that there are three varieties of extended confiscation in Croatia: conviction-based confiscation (which is based on a conviction and, as such, represents the rule for the application of extended confiscation), non-conviction based confiscation (which, according to the explicit wording of Article 78 Para 6, refers to the situation in the event of the defendant's death, in which the court is unable to render a conviction, and therefore, pursuant to the rules of the Criminal Procedure Act, issues a declaratory judgment establishing that the defendant, who died during the criminal proceedings, obtained material gain through unlawful conduct, which is then confiscated from his successors) [19] and confiscation from other persons (with a differentiation regarding confiscation from family members and other persons different to family members).[20]

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17 Compare Mrčela, M; Vuletić, I., *Komentar Kaznenog zakona, Opći dio*, Libertin naklada, Rijeka, 2021, pp. 479-480 and Ivičević Karas, E., *Establishing the Pecuniary Gain acquired through a Criminal Offence through the Application of the Gross or the Net Principle regarding the Legal Nature of the (Extended) Confiscation of Pecuniary Gain*, Croatian Annual of Criminal Sciences and Practice, Vol. 17, No. 1, 2010, p. 209.

18 Martinović I.; Novoselec P., *Komentar Kaznenog zakona, I. knjiga: Opći dio*, Narodne novine, Zagreb, 2019, p. 480.

19 The regulation of this form of extended confiscation is from substantive perspective incomplete. Namely, the Criminal Code does not provide substantive legal basis for all of the situations in which non-conviction based confiscation procedure can be conducted. In legal theory, this type of confiscation is more often referred to by its procedural equivalent, the "*in rem* procedure". Substantive legal basis for an *in rem* procedure is expressly prescribed only for extended confiscation, and only in the case of the defendant's death, while procedural criminal law extends the conduct of an *in rem* procedure to cases of permanent incapacity to stand trial and permanent unavailability of the defendant. For more on "*in rem* procedure" see: Tripalo, S.*, Croatia and Serbia: A Comparative Overview of the Extended Asset Confiscation Framework*, in Škulić, M.; Jokić, I.; Janković, A. (eds.), Challenges of International Criminal Law and Criminal Law: Book of Proceedings of the International Scientific Conference, Vol. 2, International Criminal Law Association – Faculty of Law, Belgrade, 2025, pp. 625-642.

20 Sokanović, L., *op. cit.,* note 9, p. 25. The third variety is in comparative legal systems usually referred to as "confiscation from the third parties". On non-conviction based confiscation see: Boucht, J., *Non-conviction based confiscation and the second aspect of the presumption of innocence under Article 6(2) ECHR*, New Journal of European Criminal Law, Vol. 16, Issue 4, 2025, pp. 426-448.

It is necessary here to emphasize diversity of terms of substantive and procedural criminal legislation related to confiscation. In cases of ordinary confiscation, the Criminal Code uses the term "the person to whom the gain has been transferred" (Article 77 Para 1) which in fact denotes another person distinct from the defendant. In the context of extended confiscation, Criminal Code uses the notion of "another person" which is divided into family members and all other persons who are not family members (Article 78 Para 4 and 5). On the other hand, the Criminal Procedure Act,[21] with regard to proceedings for the confiscation, uses the following terms: "person to whom the gain has been transferred" (Article 558 Para 1) and "another person to whom the gain has been transferred" (Article 557.a Para 1b).[22] In addition, the Criminal Procedure Act introduces another term: "third person" as a person claiming a right to the material assets that prevents the application of the provisions of Chapter XXVIII *i.e.* "Procedure for confiscation of objects and material gain". In criminal procedural terminology, a "third person" is not equivalent to a person to whom the gain has been transferred (that is, another person).[23] EU legislation further contributes to the terminological complexity in this area. Namely, Directive on the freezing and confiscation of instrumentalities and proceeds of crime[24] as well as Directive on asset recovery and confiscation[25] use the term "confiscation from a third party". Confiscation from a third party in Article 13 of the Directive on asset recovery and confiscation implies: "the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person. The confiscation of proceeds or other property shall be possible where a national court has established, based on the concrete facts and circumstances of a case, that the relevant third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation. Such facts and circumstances include: (a) the transfer or acquisition was carried out free of charge or in exchange for an amount which is clearly disproportionate to the market value of the property; or (b) the property was transferred to closely related parties while

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21 Criminal Procedural Act, Official Journal, No. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 130/20, 80/22, 36/24, 72/25.

22 The term another person to whom the proceeds have been transferred is used also in Article 557.b Para 2, Article 557.d, Article 557.e Paras 4 and 5, Article 557.g Para 3, Article 560 Para 2, Article 560.a Para 5.

23 Compare Martinović I.; Novoselec P., *op. cit.*, note 18, p. 471.

24 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, [2014] OJ L 127, pp. 39–50. See Article 6.

25 Directive (EU) 2024/1260 of the European Parliament and of the Council of 24 April 2024 on asset recovery and confiscation, OJ L, [2024] 2024/1260.

remaining under the effective control of the suspected or accused person." In conclusion, "a third party" from Directives largely correspond to the Croatian term of another person. Reluctance to use the term "a third party" in case of transfer or acquisition by a suspected or accused person to another person derives from Croatian legal system in which criminal proceeding involve only two parties: prosecutor and perpetrator or the accused.[26] All other persons potentially included in the criminal proceedings as victims or injured persons are considered participants, not parties.[27] Based on foregoing considerations, and given that this paper analyses confiscation from the defendant's children, who asserted and demonstrated that they had acquired the property from their father rather than from their mother and thus claiming a right to the property that prevents confiscation, the term "extended confiscation from third persons" will be used in relation to the present case in further text.

2.1. First Instance Ruling on Extended Confiscation from the Children of the First Accused

During the proceedings, the prosecutor - Office for the Suppression of Corruption and Organized Crime - requested the confiscation of property from the children of the first accused J. B., alleging that she had transferred the unlawful material gain acquired through the commission of the incriminated offences to her son and daughter T. and A. B. The County court in Zagreb confiscated in its judgement the material gain from the son T. B. in the amount of HKR 1.110.406,00 and from daughter A. B. in the amount of HKR 681.401,10 which amounts were partly procured by a temporary measure[28] and a prohibition of alienation of real estates owned by T. and A. B.[29] Specifically, the real estates included three apartments, a house, an office and a field. In the reasoning of the judgment, the Court noted that it has been established in the criminal proceeding that the children of the first accused "could not have acquired property which, whether formally or

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[26] Tomičić, Z.; Novokmet, A., *Plea Bargaining of Parties in Criminal Procedure – Achievements and Perspectives*, Pravni vjesnik, Vol. 28, No. 3-4, 2012, p. 150. Compare Ivičević Karas, E.; Novokmet, A.; Martinović, I., *Judgment based on agreement of the parties in Croatian law: a critical analysis from the comparative legal perspective*, Pravni vjesnik, Vol. 37, No. 1, 2021, pp. 11-34.

[27] Tomašević, G.; Pajčić, M., *Subjects in the Criminal Procedure: The Legal Position of Victim and Injured Person in the New Croatian Criminal Procedure*, Croatian Annual of Criminal Sciences and Practice, Vol. 15, No. 2, 2008, p. 817. See also: Novokmet, A.; Tripalo, D., *Opseg sudske kontrole sporazuma stranaka*, Croatian Annual of Criminal Sciences and Practice, Vol. 28, No. 2, 2021, pp. 211-213.

[28] On the issue of temporary measures, see Marušić, V.; Vučko, M.; Kuštan, M., *Confiscation of Proceeds of Crime and Temporary Measures with Special Reference to the Duration of the Measures and Difficulties in Practice*, Croatian Annual of Criminal Sciences and Practice, Vol. 27, No. 2, 2020, pp. 471 – 496.

[29] The County Court in Zagreb, Judgement XII K-US-78/09 of 13 December 2011, p. 14.

informally, is registered as their ownership."[30] The Court based this conclusion on the fact that the first accused had no property registered in her name and had obtained significant unlawful gain committing the incriminated offences, making it sole logical that she transferred such gain to her children, who then used the funds to purchase real estates. Furthermore, the Court concluded that the children could not have acted in good faith regarding the origin of the money for buying the properties, considering that their mother was unemployed during the relevant period and had no regular income.[31] Reversed burden of proof is a distinctive feature of extended confiscation, which is based on a rebuttable legal presumption of illicit origin of the perpetrator's property and the requirement to demonstrate the legitimate origin to be probable lies with the perpetrator.[32] While the prosecutor has to prove disproportionality of assets and legal income to a degree of certainty, a lower standard of proof applies to the perpetrator, who must only demonstrate the legal origin of the assets to be probable.[33] For the family members of the perpetrator, the irrebuttable presumption of *mala fide* in acquiring the assets from the perpetrator is applied, while other person only have to demonstrate acquisition of the relevant assets in good faith and at a reasonable price to be probable.[34]

The only witness questioned about this issue was V. B., ex-husband of the first accused and father of T. and A. B. In his testimony, he stated that he had transferred his business, initially a sole proprietorship of his company ten years ago to the children, and that the profits from its operations enabled them to purchase real estates, which claim the Court evaluated as unreliable as well as the statement that he used to donate them cash.[35] Based on information from the competent tax authority and the Croatian Pension Insurance Institute, the Court established that the business mostly operated at a loss and thus the income from the business was insufficient for the children to purchase properties. The value of the properties was estimated by the competent tax authority at totally HRK 1.781.907,10. Finally, the Court concluded that "T. and A. B. acquired the property in bad faith from

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30 *Ibid*., p. 132. The extended confiscation cases are classified basically as cases in criminal matters, due to their relation to assets derived from criminal activity as stated in Maugeri, A.M., *Regulation (EU) 2018/1805: mutual recognition of freezing and confiscation orders between efficiency and safeguards, "Proceedings in criminal matters" and non-conviction based confiscation*, New Jornal of European Criminal Law, Vol. 15, No. 2, 2024, p. 195.

31 *Ibid*.

32 Sokanović, L., *op. cit*., note 9 p. 28. See also Galiot, M., *Confiscation of Pecuniary Gain in the Context of International Regulations and Combating Bribery*, Collected Papers of the Faculty of Law of the University of Rijeka, Vol. 38, No. 1, 2017, p. 564.

33 Tripalo, D.; Brđanović, T., *Pecuniary claim, confiscation of pecuniary gain and interim insurance measures*, Legal Academy, Zagreb, 2023, p. 42.

34 *Ibid.*, p. 43.

35 The County Court in Zagreb, Judgement XII K-US-78/09 of 13 December 2011, p. 132.

the assets donated by the first accused" and have committed them to pay HRK 1.781.907,10 to the state budget at the account of illegally acquired property. The same property has been freezed by a temporary measure to secure this payment.

Deciding on the appeal of the parties, the Supreme Court of the Republic of Croatia found that the first-instance court committed a substantial procedural violation due to inconsistencies in the verdict's ruling.[36] Namely, decision on extended confiscation was made without giving the opportunity to the third persons – children of the first accused to participate in the criminal proceedings contrary to the Article 465 of the Criminal Procedural Act.[37] Moreover, the children of the first accused were not invited to the hearing, nor was the judgment delivered to them.[38] The Court emphasized that the children as third persons had the right to prove legality of origin of their property, the right to participate in the hearing, as well as all other rights resulting from the correct application of Article 471 including the right to appeal the judgement on confiscation.[39] Indeed, when extended confiscation is applied against third persons, they have certain rights guaranteed.[40] In proceedings concerning a predicate offence, a third person is summoned for questioning, to a session of the indictment panel, to a preparatory hearing and to a hearing at trial.[41] But the absence of a correctly summoned third person does not prevent the hearing from being held. The third persons are exempted from the obligation to testify about the method of acquiring the assets. The third person has the right to a representative, to present evidence and to examine the defendant,

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36 The Supreme Court of the Republic of Croatia, Ruling I Kž-Us-11/12 of 23 January 2013.

37 Criminal Procedural Act, Official Journal, No. 110/1997, 27/1998, 58/1999, 112/1999, 58/2002, 143/2002, 62/2003 and 115/2006, further in the text: CPC/97.

38 On development of procedural rights see: Vojvoda, N., *„Jezgra" i „periferija" kaznenog prava u praksi Europskog suda za ljudska prava*, Croatian Annual of Criminal Sciences and Practice, Vol. 30, No. 1, 2023, pp. 73 – 95.

39 The Supreme Court of the Republic of Croatia, Ruling I Kž-Us-11/12 of 23 January 2013, p. 7. More on some fundamental right problems concerning confiscation, see Kilchling, M., *Beyond Freezing? The EU's Targeted Sanctions against Russia's Political and Economic Elites, and their Implementation and Further Tightening in Germany*, Eucrim, Vol. 2, 2022, p. 143.

40 For the right of defence see Ivičević Karas, E.; Burić, Z.; Bonačić, M., *The right of defence in different stages of the Croatian criminal procedure: Results of practical studies*, Croatian Annual of Criminal Sciences and Practice, Vol. 23, No. 2, 2016, pp. 509 – 545. See also Hrupec, M., *Confiscation and Extended Confiscation of Pecuniary Gain Acquired through a Criminal offence,* Faculty of Law – University of Zagreb, Zagreb, 2019*,* pp. 16 – 17, and Pleić, M., *Procedural rights of suspects and accused persons during pretrial detention – impact of detention conditions on efficient exercise of defence rights,* EU and Comparative Law Issues and Challenges Series: EU 2020 – Lessons from the past and solutions for the future in: Duić, D.; Petrašević, T. (eds.), Osijek: Faculty of Law, Josip Juraj Strossmayer University of Osijek, Vol. 4, 2020, pp. 517-523.

41 Sokanović, L., *op. cit.*, note 9*,* p. 28.

witness or court expert.[42] A written judgment must be delivered to the third person, and the third person is entitled to appeal against it.[43]

Consequently, the Supreme Court annulled the first-instance judgment and remanded the case for retrial. It specifically indicated that the first-instance court failed to consider the subsidiary nature of confiscation of material gain in relation to upheld property claims. The Court instructed the first-instance court to correctly apply procedural rules concerning extended confiscation. Additionally, the Supreme Court directed the first-instance court to rectify the stated deficiencies and to clearly and unequivocally determine the amount of material gain both in ordinary and extended confiscation, also pointing out the issue of overlap between upheld property claims and confiscation of material gain.[44]

2.2. Final Ruling

In the repeated proceedings, the Court acted in accordance with the instructions of the Supreme Court; conducted evidentiary proceedings and heard testimonies of the children of the first accused regarding the origin of their property.[45] Court found that the children had received the money to purchase the real estates from their father i.e., the ex-husband of the first accused in 2005 or 2006.[46] The statements provided by V., T. and A. B. were consistent and corroborated, and the son of the first accused presented material evidence.[47] It was also established that the money provided by their father in 2006 and 2007 for the purchase of property originated from loans, apartment sales, and the operation of the sole proprietorship (later a company). Besides submitted documentation, three key arguments were pointed out by the Court in reasoning of rebuttal of extended confiscation. First, great significance was given to the special dynamics of personal relationships of the first accused family. The Court emphasized that the first accused did not live in the family community in 2005 and 2006, i.e. the period of the acquisition of the real estates which were object of the extended confiscation. Not only that, according to the son of the first accused she has never lived with her children in the family community.[48] The Court found as particularly impressive and convinc-

42 Tripalo, D.; Brđanović, T., *op. cit*., note 33, p. 45.

43 *Ibid.*

44 The Supreme Court of the Republic of Croatia, Ruling I Kž-Us-11/12 of 23 January 2013, p. 7.

45 The County Court in Zagreb, Judgement 2K-US-6/13 of 27 June 2013.

46 *Ibid*., p. 139.

47 On reversed burden of proof see: Hryniewicz-Lach, E., *Evidentiary proceedings in extended confiscation cases: where to draw the line?* ERA Forum, Vol. 26, 2025, pp. 9-11.

48 *Ibid*. The same was stated by the daughter of the first accused.

ing part of the testimony of T. B. his statement that the first accused was "only as a woman who gave birth of him, his biological mother". Having in mind obviously disturbed family relationships, no life logic and probability could suggest that the first accused would donate such amounts of money to her children. Even less probable would be to conclude that she would transfer them illegally acquired assets.[49] Secondly, from the fact that all real estates were acquired by the children of the first accused in the period between October 2006 and April 2007, while the period of the commission of the crimes of the whole criminal association was from 2005 to April 2009, the Court concluded that the vast majority of the acts described in the indictment were committed after the acquisition of the real estates, thus reducing the probability that J. B. transferred illegal material assets to them to the lowest possible extant.[50] Finally, the Court held irrelevant whether in the specific case V. B., the ex-husband of the first accused acquired the money donated to his children legally or illegally, after establishing that he had not acquired the money from the first accused and, for that reason, could not be regarded as another person, that is, as a person to whom the first accused had transferred the proceeds of crime. Furthermore, quoting the decision to increase the share capital of V. B. from 1999 by entering its claims for short-term loans recorded in the business books of his company, the Court suggested that V. B. was extracting profit from his company, while relativizing whether it was legally or illegally. The Court concluded that the only relevant is whether the first accused "transferred her unlawfully acquired material assets, obtained solely and exclusively through the criminal offences in this indictment, to her son and daughter."[51] Therefore, in the repeated proceedings, the Court did not issue a decision on the extended confiscation against the children of the first accused.

All accused as well as the Office for the Suppression of Corruption and Organized Crime lodged appeals against this judgment. The Office for the Suppression of Corruption and Organized Crime appealed against the imposed criminal sanctions against all the accused and the absence of a decision on extended confiscation against the children of the first accused. In its appeal, the Office for the Suppression of Corruption and Organized Crime argued that the documents provided by the children of the first accused did not constitute adequate evidence of the lawfulness of their income. The Supreme Court of the Republic of Croatia dismissed these appeals as unfounded. However, by judgment I Kž-Us-138/13 of 25 January 2016, the Supreme Court amended the contested judgment due to a significant procedural violation concerning the incorrect description of part of the

[49] *Ibid*., p. 139.

[50] *Ibid*.

[51] *Ibid*.

facts underlying the charges. Part of the appeal regarding the confiscation decision was assessed as an appeal concerning erroneously established facts and rejected as unfounded, accepting the court's findings. Still, it is important to note that the Supreme Court evaluated part of the first-instance court's reasoning as excessive and another as irrelevant for deciding on extended confiscation from the third persons, while upholding the remaining arguments of the first-instance court as well-founded grounds for rejecting the proposal for such confiscation.[52] Namely, the first-instance court's thesis that the owners of the companies could have extracted profits in various ways was exaggerated, but it did not compromise the essence of the evidence, according to which V. B. operated as the owner of a trade for a number of years, then converted it into a trading company. When converting the company, he increased the capital, which was followed by a positive audit report. Given that the capital increase was based on the entry of V. B.'s claims for short-term loans to the company, this information, in connection with the multiple loans taken out (some of which were guaranteed by T. B., who continued to repay them after his father's death), but also with the inheritance decisions from which it is evident that V. B.'s mother, regardless of the fact that she did not have any significant income, owned certain real estate, provided an acceptable factual basis for the conclusion about the legality of the income on the basis of which the property whose seizure was proposed under the Office for the Suppression of Corruption and Organized Crime was acquired.[53] The argument about the disrupted family relations between the mother, the accused J. B., and her children A. B. and T. B. was regarded inconclusive for the viability of the thesis on which Office's for the Suppression of Corruption and Organized Crime proposal for the confiscation of material assets from third parties was based.[54]

The County Court in Zagreb took in the first instance judgment progressively steps forward in urge to apply newly reinforced institute of extended confiscation in order to fully punish the perpetrators of the criminal offences for which they were found guilty. It included confiscation from the third persons – children of the first accused. As for the family members of the perpetrator, the irrebuttable presumption of *mala fide* in acquiring the assets from the perpetrator was applied, but undisputable mistake was made in failure to observe and apply procedural rights guaranteed to the third persons. They were not summoned to the hearing, nor was the judgement delivered to them. Following the instructions of the Supreme Court of the Republic of Croatia, the County Court in Zagreb paid respect to the procedural guarantees of the third persons and in its second judgement

[52] The Supreme Court of the Republic of Croatia, Judgment I Kž-Us-138/13 of 25 January 2016.

[53] *Ibid.*, p. 24.

[54] *Ibid.*, p. 25.

refused to issue decision on the extended confiscation from the third persons. In fact, the Court was satisfied that the third persons proved probability of legal origin of their assets. Namely, the assets which were previously object of extended confiscation originated from their father in general and not from their mother, the first accused. So, this important factual circumstance directed the correct application of the law. In the following procedure, the Supreme Court made another active and affirmative role in achieving a legal and fair final decision. Regardless of appeals of the convicts as well as the prosecutor, it upheld decision on rejection of extended confiscation and reasoned its decision meticulously; both factual and legal thus providing its legal obligation to ensure the uniform application of law and equality of all in its application.

3. THE RELATIONSHIP BETWEEN CONFISCATION AND PROPERTY CLAIM OF THE VICTIMS

The first instance court established that J. B. acquired total HRK 20.133.844,00 of the illegal material gain for the sale of city real estate. She rewarded other defendants from that amount. Following that decision, the same court decided to confiscate material gain according to Article 82 Para 1 in the manner that the amount of HRK 4.950.622,90 was confiscated from J. B., and HRK 1.348.486,00 from each remaining defendant, which made a total of HRK 11.693.052. Furthermore, as stated *infra 2.1*, a total of HRK 1.791.807,10 was object of extended confiscation from the third persons. Finally, the Court ordered all defendants to jointly and severally pay the property claims i.e. material compensation to the injured persons.[55] Precisely, they were ordered to pay the principal in the amount of HRK 12.538.060,00 with the corresponding statutory default interest. But the court made a mistake in adding up the amounts of confiscated gain and awarded property claims. Namely, the sum of the above amounts is HRK 26,022,920.00, so it exceeds the illegal material gain established by the first instance court for almost six million. The mistake made a contradiction in the operative part of the contested judgment and amounted to the significant violation of criminal procedure provisions according to Article 367 Para 1 Item 11 of the CPC/97 resulting in

[55] In proceedings for criminal offences for which a fine or imprisonment of up to five years is prescribed, the court may not impose a more severe penalty on a defendant who has pleaded guilty and agreed to the type and measure of the proposed penalty and other measures prescribed by criminal law, nor may it impose a different type of penalty or other measures prescribed by criminal law. However, this restriction does not apply only to the measure of confiscation of property benefits. See Martinović, I.; Radić. I., *Priznanje na raspravi i prihvaćanje predloženih kazni i mjera kao oblik sporazuma: Prijedlozi za jačanje uloge suda i osiguranje odgovarajuće obaviještenosti optuženika,* in Bonačić, M. *et al.*, Sustavni prostup modelima konsenzualne pravde u hrvatskom kaznenom postupku: Prijedlozi za rekonstrukciju normativnog okvira, Sveučilište u Zagrebu Pravni fakultet, 2024, p. 77.

wrong and incompletely determined factual situation. Although the defendants' lawyers filed appeals, as well as the Office for the Suppression of Corruption and Organized Crime, the Supreme Court of the Republic of Croatia when examining the contested decision *ex officio* found that the first instance court made the significant violation of criminal procedure provisions.

In the retrial, the County court concluded that it was not possible to unequivocally determine the proportions in which the defendants shared the material gain. The Court concluded that it would entail disproportionate difficulties in exact determination and decided on a free assessment the amounts of material benefit relating to individual defendants according to Article 466 CPC/97.[56] Taking into account all the circumstances of the actions established and explained in detail in the verdict, the number of actions and injured parties associated with each defendant, the role and significance of each defendant, the court confiscated the material gain according to the following formula: the first defendant retained 50% of the unlawful material gain, and divided the remaining 50% among the other defendants, but not in equal parts.[57] She gave the sixth accused 50% of the remaining amount, the fourth accused 20%, the fifth accused 20%, the second and third accused 5% each. Appreciating the principle of monetary nominalism, the court expressed the sums in both HRK and Euros and was guided by the middle exchange rate of the Croatian National Bank on the day of the judgment on 20 June 2013.[58] When deciding on confiscation, the Court previously deducted the amount of the awarded property claims from the total acquired material gain, obliging all defendants, in accordance with the mandatory provision of Article 132 Paras 1 and 2, to jointly and severally pay the awarded amounts to the injured parties listed in the operative part of the judgement. The remaining part of the total amount obtained, however, was confiscated from each defendant as his material gain pursuant to Article 82 Para 1 of the CC/97. Indeed, if the injured person or persons have been awarded material compensation, which by its nature and contents correspond to the material gain, only the gain exceeding the awarded material compensation shall be confiscated, as prescribed for ordinary confiscation.[59] So, according to legal provisions in Croatia, material compensation has priority over confiscation of a material gain.[60]

The Supreme Court of the Republic of Croatia was satisfied with the reasoning of the method of calculating these amounts. It was considered justified to take

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56 See Marušić; Vučko; Kuštan, *op. cit.*, note 28, p. 478.

57 The County Court in Zagreb, Judgement 2K-US-6/13 of 27 June 2013., p. 137.

58 *Ibid.,* p. 138.

59 Sokanović, L., *op. cit.*, note 9, p. 24.

60 Tripalo, D.; Brđanović, T., *op. cit.*, note 33, p. 6. The same is stated by Hrupec, M., *op. cit.*, note 40, p. 18 and Galiot, *op. cit.*, note 32, p. 564.

into account each defendant's contribution to achieving the group's objectives, as well as the nature and complexity of the activities performed by individual defendants, and the criminal intent and commitment they demonstrated through those activities.[61] But, as the Supreme court reversed the first-instance judgement, the total amount of the confiscated property gain from the first-instance judgment should have been reduced by the sum of the amounts of the property gain from the omitted indents. The same procedure was followed in relation to the material compensation.

4. CRIMINAL ASSOCIATION

The Criminal Code in the Republic of Croatia distinguishes between an agreement to commit a criminal offence and criminal association as crimes against the public order. An agreement to commit a criminal offence from Article 327 is committed by whoever agrees with another to commit a criminal offence for which a prison sentence of more than three years may be imposed by law.[62] A criminal association from Article 328 Para 4 consists of at least three persons who joined together with the common goal of committing one or more criminal offences, for which a prison sentence of three years or more may be imposed, and which does not include an association consisting of persons accidentally connected for the immediate commission of one criminal offence.[63] While a person who organizes or leads a criminal association may be punished by imprisonment from six months to five years, the very participation in the criminal association is punishable by imprisonment even if a person has not yet committed a single crime for the association or if he or she undertakes an action that is not a criminal offence but for which action he or she knows that it contributes to the achievement of the goal of the criminal association, or financially supports or in another way supports the criminal association.

4.1. Period of Involvement in the Association

At the time of commission of the criminal offences for which the perpetrators were convicted, association for the commission of criminal offences was incrimi-

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61 The Supreme Court of the Republic of Croatia, Judgment I Kž-Us-138/13 of 25 January 2016, p. 24.

62 See more in Vukušić, I., *Dogovor za počinjenje u kaznenom pravu* in Kurtović Mišić, A. *et al.* (eds.), Zbornik radova s međunarodnog znanstvenog savjetovanja "Europeizacija kaznenog prava i zaštita ljudskih prava u kaznenom postupku i postupku izvršenja kaznenopravnih sankcija", Faculty of Law – University of Split, 2017, pp. 47 – 70.

63 See more in Mušić, A., *Oblici zločinačkog udruživanja u hrvatskom i poredbenom kaznenom zakonodavstvu*, Faculty of Law – University in Zagreb, 2023.

nated in Article 333 Paras 1 and 3 of the CC/97. Para 1 implied criminalization of a person who organizes a group of people or otherwise connects three or more persons in joint action with the aim of committing criminal offences for which the law may impose three years of imprisonment or a more severe punishment. Para 3 incriminated the participation in the group. Unlike the criminal group from Article 333 Paras 1 and 3, CC/97 specifically criminalized organizing as well as leading of criminal organization in Article 333 Para 2 and participation in criminal organization in Article 333 Para 4.

In the judgment following the retrial, the County Court in Zagreb established that the factual part of the incrimination has a so-called preamble in which the participation and role of each of the perpetrators and their joint criminal activity were generally mentioned in the entire period of criminal activity, followed by individual paragraphs in which the particular actions of individual perpetrator related to certain injured parties were specifically noted, and finalized with an overall portrayal of the subdivision of the loot achieved through that overall joint activity.[64] *Actus reus* was in that way neither unclear nor contradictory, and the generally covered activity of the entire group was then individualized in paragraphs that precisely indicated the period of the specific criminal activity of each individual participant - perpetrator.[65]

Indeed, the preamble states that the first accused falsely presented herself to a large number of citizens interested in purchasing real estate owned by the City of Zagreb as "Jasna", a highly positioned employee in the City of Zagreb administration with the ability to obtain properties for citizens at below-market prices. The misrepresentation included the period from 2005 to April 2009 and was committed with the intention of acquiring significant unlawful material gain.[66] Using forged documents, she misrepresented to citizens that they could purchase city-owned properties and, in doing so, received money from them as advance payments for the purchase of these properties, even though she had neither the legal authority nor the ability to provide the promised ownership of the properties.[67] She participated in creating forged documents of the City of Zagreb, falsely presenting herself as a seller, and handed such documents over to citizens in exchange for money given in advance for the alleged property purchases. To facilitate this, she engaged a male individual who introduced himself as Ivan, and she also involved second accused A. G., third accused K. V., fourth accused M. M., fifth accused M.

64 The Supreme Court of the Republic of Croatia, Judgment I Kž-Us-138/13 of 25 January 2016, p. 7.

65 *Ibid.*

66 The County Court in Zagreb, Judgement 2K-US-6/13 of 27 June 2013., p. 2.

67 *Ibid.*

D. and sixth accused K. M., who, through their involvement, contacted citizens interested in purchasing property. The sixth accused K.M. had the specific role of collecting information about the properties that were being falsely offered to citizens for purchase.

Criminal associations are certainly not initiated with formal agreements precisely regulating participants, period of involvement and strict terms of committing particular crimes, distribution of roles and a refined reward system.[68] Therefore, the period of involvement in a criminal association is difficult to exactly determine, but at the same time, it is extremely necessary and important because it is a part of factual basis of the incriminations as well as correct legal designation of a criminal offence. So, only possible solution for the prosecutors in the cases of organized crime is to use, as in this case the preamble in which the participation and role of each of the perpetrators and their joint criminal activity are generally mentioned in the entire period of criminal activity, followed by individual paragraphs in which the particular actions of individual perpetrator related to certain injured parties or victims are specifically noted. Only in this way *actus reus* remains clear and devoid of contradiction.

4.2. Roles of the Association Members

The Court concluded that it was the first accused who misrepresented herself in the contacts with other person: injured persons, intermediaries as well as with third and fifth accused as "J" or "J. D." and "J. D. V.", which was the name of a real person employed in the City administration. Based on the content of the supervised telephone conversations with the injured persons and their testimonies and after assessing other evidence, the Court concluded that the first accused was a person at the top of the pyramid structure for committing criminal offences of fraud through the sale of city apartments that were not on the market and forgery of documents (all documentation presenting the sale as real).[69] The first accused always acted from a position of authority towards members of the group (for example towards G. V., K. M. and M. D. whom she was in daily contact with, controlling and supervising them in that way, giving them specific instructions and orders, taking over the money from them and submitting forged documents). The same position of authority was used towards intermediaries, whom she gave instructions on how to proceed and act, as well as towards the injured persons with whom she personally contacted when they became impatient and untrust-

[68] On criminal agreement see: Katyal, N. K., *Conspiracy Theory*, The Yale Law Journal, Vol. 112, 2003, pp. 1315-1316.

[69] The Supreme Court of the Republic of Croatia, Judgment I Kž-Us-138/13 of 25 January 2016, p. 16.

worthy.[70] The purport of all of these contact reveals the functioning of particular members of the group as well as organized and planned defrauding of citizens.

A. G. and K. V. point out in their appeals that, although they admitted to committing the crimes they were accused of, they were not aware that what they had done was forbidden, nor did they know that they participate in association activities. They maintained that they believed the documentation to be authentic and credible and the business to be a legitimate legal operation. But such claims were in the first-instance judgment justifiably assessed as incredible and unacceptable.[71] The Supreme Court found that many circumstances compromise such claims of A. G. and K. V. Namely, both of them knew that the first defendant was using a false name "J.", which circumstance empirically implies that these were not transparent transactions. Further, K. V. was presenting herself as "M." without providing a reasonable and convincing explanation. Both defendants accepted money from the injured parties purportedly on behalf of the City of Zagreb but did not remit those funds to the City authorities, thereby knowingly creating the false impression that they were acting for the City government. They obtained the documentation from the first accused outside the City administration building and immediately delivered it to the injured parties upon receiving the money. This circumstance further undermines the plausibility of their defence. The described procedures, in correlation with the number of actions undertaken and contacts they undertook, not only with the injured parties and mediators, but also with the first defendant and K.M., lead to the only logical and viable conclusion, i.e. that they were well aware of what they were participating in (namely, that it was a case of fraud accompanied by the submission of falsified documentation, and that this organized operation was taking place as part of an association of which they were participants), and that they wanted it.[72]

M. was also suggesting that the presented evidence does not provide an adequate factual basis for the conclusion that he participated in the association, noting that none of the co-defendants or witnesses know him.[73] This was also supported by his poor financial situation, because otherwise he would certainly have had more significant financial benefits. But the first instance court, as well as the Supreme Court noted it was not essential for the commission of the offence from Article 333 Para 3 that M. M. contacted with other defendants or witnesses except with

[70] *Ibid.*

[71] The County Court in Zagreb, Judgement 2K-US-6/13 of 27 June 2013., p. 130.

[72] The Supreme Court of the Republic of Croatia, Judgment I Kž-Us-138/13 of 25 January 2016, p. 16.

[73] *Ibid*., p. 17.

the first accused.[74] By searching the computers found at M. M. files were found in which the second page of the pre-contract form on the purchase and sale of real estate was scanned, which in appearance and content completely matched the pre-contract forms handed over to the injured persons. Neither the first accused nor M. M. explained the origin of such a file.

5. CONCLUSION

The County Court in Zagreb took in the first instance judgment progressively steps forward in urge to apply newly reinforced institute of extended confiscation in order to fully punish the perpetrators of the criminal offences for which they were found guilty. It included confiscation from the third persons – children of the first accused. As for the family members of the perpetrator, the irrebuttable presumption of *mala fide* in acquiring the assets from the perpetrator was applied. But, irrebuttable presumption concerns only assets acquired from the perpetrator. Family members though impeach the right to prove that their assets derive from some other sources other than the perpetrator. In addition, undisputable mistake was made in failure to observe and apply procedural rights guaranteed to the third persons. They were not summoned to the hearing, nor was the judgement delivered to them. Following the instructions of the Supreme Court of the Republic of Croatia, the County Court in Zagreb paid respect to the procedural guarantees of the third persons and in its second judgement refused to issue decision on the extended confiscation from the third persons. In fact, the Court was satisfied that the third persons proved probability of legal origin of their assets. Namely, the assets which were previously object of extended confiscation originated from their father in general and not from their mother, the first accused. So, this important factual circumstance directed the correct application of the law. In the following procedure, the Supreme Court made another active and affirmative role in achieving a legal and fair final decision. Regardless of appeals of the convicts as well as the prosecutor, it upheld decision on rejection of extended confiscation and reasoned its decision meticulously; both factual and legal thus providing its legal obligation to ensure the uniform application of law and equality of all in its application.

In this case, material gain acquired by committing incriminated offences was deprived from the perpetrators partly in awarding the material compensation to the injured persons, partly in applying the measure of confiscation. If the injured person or persons have been awarded material compensation, which by its nature and contents correspond to the material gain, only the gain exceeding the awarded

[74] *Ibid.*

material compensation shall be confiscated. So, according to legal provisions in Croatia, material compensation has priority over confiscation of a material gain. As it was not possible to unequivocally determine the proportions in which the defendants shared the material gain, the Court lawfully decided on a free assessment the amounts of material gain relating to individual perpetrator.

Criminal associations are certainly not initiated with formal agreements precisely regulating participants, period of involvement and strict terms of committing particular crimes, distribution of roles and a refined reward system. Therefore, the period of involvement in a criminal association is difficult to exactly determine, but at the same time, it is extremely necessary and important because it is a part of factual basis of the incriminations as well as correct legal designation of a criminal offence. So, only possible solution for the prosecutors in the cases of organized crime is to use, as in this case the preamble in which the participation and role of each of the perpetrators and their joint criminal activity are generally mentioned in the entire period of criminal activity, followed by individual paragraphs in which the particular actions of individual perpetrator related to certain injured persons or victims are specifically noted. Only in this way *actus reus* remains clear and devoid of contradiction.

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Review article

VICTIMS' RIGHTS IN EU CRIMINAL LAW AND CROATIAN PRACTICE: LEGAL STANDARDS AND IMPLEMENTATION GAPS

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ABSTRACT

This paper examines the development of victims' rights in European Union criminal law and their implementation in the Croatian legal system. It focuses on the normative framework established at the EU level, in particular Directive 2012/29/EU and related instruments, and analyses how these standards are reflected in Croatian legislation and judicial practice. Special attention is given to the case law of the Constitutional Court of the Republic of Croatia, which provides valuable insight into the practical application of victim protection standards. The analysis shows that, while the Croatian legal framework is largely aligned with EU law, certain challenges remain in practice. These are particularly evident in cases where courts apply procedural rules in a formalistic manner or fail to take into account the psychological consequences of trauma and the specific needs of vulnerable victims. At the same time, certain case law demonstrates a more developed, victim-oriented approach, especially in cases involving children and victims of serious forms of violence. The paper highlights the importance of balancing the rights of victims with the rights of the defence, as well as the need for a consistent application of legal standards. It concludes that the main difficulty lies not in the absence of

legal norms, but in their effective and sensitive application in practice. In this regard, further professional training, greater awareness of trauma-related issues and the strengthening of institutional support mechanisms are essential for ensuring effective protection of victims' rights in line with European standards.

Keywords: *Constitutional Court of the Republic of Croatia, Criminal proceedings, Directive 2012/29/EU, European Union law, European Court of Human Rights, Human rights, Secondary victimisation, Vulnerable victims, Victims' rights*

1. INTRODUCTORY REMARKS IN THE DEVELOPMENT OF VICTIMS' RIGHTS IN THE EUROPEAN LEGAL AREA

From its earliest beginnings, the concept of a criminal offence has involved both the offender on the one side and the victim on the other. Despite this, for centuries criminal law theory developed without giving much attention to the victims and their rights within criminal proceedings.[1] However, over the past few decades, European Union policy has increasingly placed victims' rights at the centre of the area of justice and equality, seeking to make them more visible, accessible and legally empowered. This development reflects broader trends in criminal law and victimology, which increasingly focus on the protection and realisation of victims' rights. Victims are no longer viewed merely as passive participants in criminal proceedings, but as procedural actors with their own interests and rights. This change is closely linked to the evolving case law of the European Court of Human Rights, which, through its interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the European Convention on Human Rights; the Convention),[2] has developed the doctrine of positive obligations of states. In relation to fundamental rights such as the right to life (Article 2), the prohibition of torture (Article 3), the prohibition of slavery and forced labour (Article 4) and the right to respect for private life (Article 8), these positive obligations require states to make measures aimed at ensuring the effective protection of those rights. They also require states to provide victims with access to an effective investigation, genuine and effective access to justice, and mechanisms that protect them from secondary victimisation.

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1 It should be noted that after World War II, particularly in response to the need to study the position of victims of crimes committed during war, religious, racial and political persecution, victimology emerged as a new discipline closely related to criminology. The World Victimology Society was founded in 1979, and in 1985 the United Nations adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN General Assembly Resolution 40/34, 29 November 1985). The Croatian Victimology Society was founded in 1991, Available at: [https://www.enciklopedija.hr/clanak/zrtvoslovlje], Accessed 20 March 2026.

2 Convention for the Protection of Human Rights and Fundamental Freedoms (Konvencija za zaštitu ljudskih prava i temeljnih sloboda), Official Gazette, No. 18/1997, 6/1999 (consolidated text), 8/1999 (corr.), 14/2002, 1/2006, 13/2017, 6/2024.

Although the criminal-law dimension of the European Convention on Human Rights has traditionally focused on protecting defendants and the rights of the defence, its case law has gradually recognised the interests of victims, as they are themselves holders of Convention's rights. These standards seek to establish a fair balance between the rights of the defence and the rights of victims, aligning procedural guarantees of the accused with the rights and interests of victims within criminal proceedings. European Union policy consistently follows these developments through its legislative and institutional initiatives. This reflects how developments in the case law of the European Court of Human Rights have been carried over into the EU legal framework. A key milestone in this regard is Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (hereinafter: Directive 2012/29/EU; the Directive)[3] on victims' rights, which establishes minimum standards on the rights, support and protection of victims of crime within the European Union, guaranteeing access to information, support services and protection from secondary victimisation. Nevertheless, its implementation remains challenging for all Member States, including the Republic of Croatia. Croatian legislation is formally aligned with EU law, and there is a growing recognition in practice of the standards developed in the case law of the European Court of Human Rights, whose influence supports a more consistent application of EU law. However, certain challenges can still be observed in judicial practice, which may limit the effective protection of vulnerable victims. One of the issues that continue to arise is the insufficient understanding of the psychological consequences of effects of trauma, which can affect both the assessment of victims' testimonies and the use of procedural protection mechanisms. In this context, there is a clear need for additional specialised training for judicial officials to improve practice.

2. NORMATIVE FRAMEWORK FOR THE PROTECTION OF VICTIMS AT THE EUROPEAN UNION LEVEL

The Charter of Fundamental Rights of the European Union (hereinafter: the EU Charter)[4] represents a key legal instrument for the protection and promotion of human rights and fundamental freedoms at the level of the European Union. As such, it is directly relevant to the protection of victims of criminal offences involving violations of fundamental rights. The EU system of victim protection is grounded

[3] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, OJ L 315, 14 November 2012, pp. 57–73.

[4] Charter of Fundamental Rights of the European Union, OJ C 202, 7 June 2016, p. 389.

in the core values of the EU Charter, in particular human dignity, the right to life, personal integrity, the prohibition of inhuman or degrading treatment, respect for private and family life, equality and non-discrimination. The right to an effective remedy (Article 47) plays a key role in ensuring that these rights can be effectively enforced in practice. However, victims' rights are primarily developed through directives, whose legal basis lies in Article 82(2) of the Treaty on the Functioning of the European Union (hereinafter: TFEU),[5] commonly referred to as the Lisbon Treaty. This provision grants the European Union the competence to adopt directives establishing minimum rights of victims of crime. The possibility of further action in the field of victims' rights under the TFEU was announced in the Stockholm Programme, particularly in point 2.3.4., which is specifically devoted to victims of crime.[6] The improvement of victims' rights, support, protection and participation in criminal proceedings, alongside the detection and punishment of offenders, was identified as a strategic priority by the European Commission in the Action Plan implementing the Stockholm Programme of the European Council (hereinafter: the Action Plan).[7] The Action Plan recognised victims' rights as an important part of developing the EU area of freedom, security and justice, as well as of strengthening fundamental rights. It also emphasised the need for stronger protection of victims of crime and terrorism through new legislative measures and coordinated action at EU level. Concrete proposals by the Commission were presented in the Communication of 18 May 2011 entitled "*Strengthening victims' rights in the EU*", which set out objectives aimed at reinforcing existing national measures and ensuring that victims of crime, including victims of gender-based violence, trafficking in human beings, sexual exploitation, child abuse and terrorism, enjoy a minimum set of rights on a non-discriminatory basis across the Union.[8] The Action Plan also called for concrete legislative measures, including a comprehensive framework for victim protection and the introduction of a European Protection Order to ensure effective cross-border protection.

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5 Treaty on the Functioning of the European Union (consolidated version), OJ C 202, 7 June 2016, p. 47.

6 Burić, Z., *Novi položaj* žrtve *u kaznenom postupku – u povodu obveze transportiranja odredaba Direktive 2019/29/EU u hrvatski kaznenopravni sustav* (hereinafter: 'Burić, *Novi položaj* žrtve *u kaznenom postupku – u povodu obveze transportiranja odredaba Direktive 2019/29/EU u hrvatski kaznenopravni sustav*"), Hrvatski ljetopis za kazneno pravo i praksu, Vol. 22, No. 2, Zagreb, p. 389.

7 Androulakis, I., *European Perspectives on Rights for Victims of Crime* (hereinafter: "Androulakis, *European Perspectives on Rights for Victims of Crime"*), *Eucrim*, vol. 9, no. 4, 2014, p. 111; See also The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, OJ C 115, 4 May 2010, § 2.3.4.; and Commission Work Programme 2011, COM(2010) 623 final, § 3.

8 Androulakis, *European Perspectives on Rights for Victims of Crime*, *loc. cit.*, note 7.

An earlier step in the development of EU victims' rights is Directive 2004/80/EC on compensation to crime victims[9], which established a framework for state compensation in cases of violent crime. Its main purpose is to ensure that victims can access compensation even where the offender is unknown or unable to pay, including in cross-border situations linked to the free movement of persons within the EU. By requiring Member States to introduce national compensation schemes and mechanisms of cooperation, Directive 2004/80/EC laid the groundwork for a more structured approach to victim protection, later further developed through instruments such as Directive 2012/29/EU, which will be examined in more details in the following section.[10]

2.1. Protection of Victims' Rights through a Horizontal Legal Framework – Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime

Directive 2012/29/EU represents the culmination of the implementation of the Action Plan and a significant step forward in the development of EU criminal law. It constitutes a more comprehensive legal instrument, providing clearer rights for victims and more precise obligations for Member States.[11] Directive 2012/29/EU builds upon the previous regulatory framework of the European Union, in particular Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings. That Framework Decision marked the beginning of EU action in the field of victims' rights[12] and constituted a turning point in the approach to victims within criminal proceedings.[13] It codified, at the supranational level, rules relating to the legal position of victims that were binding on the domestic legal orders of Member States.[14] While the earlier framework established basic procedural safeguards, Directive 2012/29/EU introduced a more systematic and individualised approach to victim protection and access

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9 Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, OJ L 261, 6 August 2004, p. 15.

10 For more on the theoretical foundations of state compensation for victims of crime, in particular the concept of social solidarity as a justification for State involvement in compensation, see Buck, K., *Can Theoretical Analysis Contribute to a Future European Framework?*, European Journal of Crime, Criminal Law and Criminal Justice, Vol. 2, No. 13, 2005, p.148 -178.

11 Burić, *op. cit.*, note 6 p. 391.

12 *Ibid.*, p. 387.

13 Pavišić, B., *Novi hrvatski Zakon o kaznenom postupku*, Hrvatski ljetopis za kazneno pravo i praksu, Vol. 15, No. 2, Zagreb, 2008, p. 533.

14 Pemberton, A.; Groenhuijsen, Marc S., *The EU Framework Decision for Victims of Crime: Does Hard Law Make a Difference?*, European Journal of Crime, Criminal Law and Criminal Justice, Vol. 17, 2009, p. 1.

to justice. It also served as a catalyst for amendments to Croatian criminal procedure legislation concerning victims.[15] A key element of Directive 2012/29/EU is the requirement to carry out an individual assessment of each victim's protection needs, particularly in cases concerning vulnerable victims. This approach allows protective measures to be adapted to the specific circumstances of each victim, while at the same time maintaining a balance between victims' rights and the rights of the defence. Although Directive 2012/29/EU has established a common EU framework on victims' rights, its implementation varies across Member States, mainly due to differences in national legal traditions and existing victim support systems.[16] Unfortunately, evaluations conducted by the European Commission have shown that full harmonisation in the realisation of victims' rights has not yet been achieved.[17] One of the main challenges identified in the European Commission's report on the implementation of Directive 2021/29/EU concerns the application of concepts such as individual assessment, specific protection needs and secondary victimisation, which requires not only an appropriate legal framework but also an adequate level of institutional awareness and professional expertise. Consequently, the formal alignment of national legislation with EU standards alone does not guarantee effective protection in individual cases. In practice, the quality of victim protection still largely depends on the sensitivity of the judicial authorities, the availability of institutional support, and the willingness of the courts and other competent bodies to adapt procedural measures to the needs of vulnerable victims. Moreover, new forms of crime, especially in the digital environment, have created new categories of victims that are not fully covered by Directive 2012/29/EU, which can create challenges in national systems that lack adequate protection.

2.2. Protection of Particularly Vulnerable Groups: Victims of Sexual Violence, Victims of Trafficking in Human Beings, and Victims of Domestic Violence and Violence against Women

Directive 2012/29/EU, as already noted, is the main EU legislative instrument on the protection of victims of crime, setting minimum standards for access to infor-

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15 Burić, *op. cit.*, note 6, p. 391.

16 For more details see European Commission, *Report from the Commission to the European Parliament and the Council on the implementation of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime* COM(2020) 188 final (11 May 2020); and European Union Agency for Fundamental Rights (FRA), *Victims of crime in the EU: the extent and nature of support for victims* (Publications Office of the European Union 2019).

17 Drožđan-Kranjčec, A.; Mamula, M., *Sustav podrške žrtvama i svjedocima kaznenih djela u Hrvatskoj - usklađenost s međunarodnim zahtjevima i standardima*, Hrvatski ljetopis za kaznene znanosti i prakse, Vol. 30, No. 2, Zagreb, 2023, p. 550.

mation, support and protection. Although its provisions are general in nature, it recognises the specific needs of particularly vulnerable groups, such as victims of domestic and sexual violence and victims of trafficking in human beings. It is this recognition that has led to the adoption of additional directives that build on its general framework, allowing for more targeted and individualised forms of protection and support aimed at reducing the risk of secondary victimisation.

2.2.1. Victims of Sexual Violence

The European Union has developed the protection of victims of sexual violence through both general and specialised instruments, aimed at addressing different forms of abuse and ensuring adequate support, protection and access to justice. Alongside the general framework established by Directive 2012/29/EU, Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children (hereinafter: Directive 2011/93/EU)[18] represents a key instrument for the protection of child victims. It sets minimum standards for defining criminal offences, sanctions and victim protection, with the aim of ensuring a more consistent approach across Member States. Directive 2011/93/EU requires the criminalisation of various forms of child sexual exploitation, including online abuse, while ensuring effective protection and support for child victims from the earliest stages of proceedings. Particular emphasis is placed on preventing secondary victimisation and providing medical, psychological and legal assistance, especially for children in vulnerable situations.[19] Directive 2011/93/EU also emphasises the protection of privacy and identity of the child and is aligned with key international instruments, including the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention)[20] and the UN Convention on the Rights of the Child.[21]

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18 Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, replacing Council Framework Decision 2004/68/JHA, OJ L 335, 17 December 2011, p. 1.

19 For more details, see Victim Support Europe, *The Child Abuse Directive*, Available at: [https://victim-support.eu/legislation/the-child-sexual-abuse-directive/?utm_source=chatgpt.com], Accessed 20 March 2026.

20 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) (Konvencija Vijeća Europe o zaštiti djece od seksualnog iskorištavanja i seksualnog zlostavljanja (Lanzarotska konvencija)), Official Gazette, International Agreements, No. 11/2011.

21 Convention on the Rights of the Child (Konvencija o pravima djeteta), Official Gazette, International Agreements, No. 12/1993.

2.2.2. Victims of Trafficking in Human Beings

In addition to the general framework established by Directive 2012/29/EU, the key EU instrument in the field of trafficking in human beings is Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, which replaced Council Framework Decision 2002/629/JHA (hereinafter: Directive 2011/36/EU).[22] It was adopted on the basis of Article 83(1) of the TFEU, pursuant to which the European Union is empowered to establish minimum rules concerning the definition of criminal offences and sanctions in areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them.[23] At the EU level, trafficking in human beings is regarded as one of the most serious forms of crime and, as such, requires a coordinated and comprehensive response. Directive 2011/36/EU establishes a comprehensive framework for preventing and combating trafficking in human beings, combining criminal prosecution with victim protection. It adopts a broad understanding of exploitation, including sexual and labour exploitation, forced begging, criminal exploitation and organ removal, while providing additional protection for children as particularly vulnerable victims. Their vulnerability is specifically recognised, which is why, in such cases, there is no requirement to prove the use of coercive means. Victim protection represents a central element of Directive 2011/36/EU. Directive 2011/36/EU requires Member States to ensure early identification and continuous support for victims, including medical, psychological and legal assistance, while placing particular emphasis on preventing secondary victimisation, especially in the case of children. It also includes preventive measures aims at reducing the demand that contributes to trafficking in human beings. Finally, it establishes a link between criminal enforcement and victim support by encouraging the use of confiscated assets for compensation purposes. In this way, trafficking is understood not only as a form of organised crime, but also as a broader social issue that requires a multidimensional response. This framework was further developed by Directive (EU) 2024/1712,[24] which expands the notion of exploitation to include newer forms such as forced marriage, surrogacy and illegal adoption, and strengthens access to compensation and victim support mechanisms. These changes reflect an effort to

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22 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15 April 2011, p. 1.

23 Đurđević, Z., *Lisabonski ugovor: prekretnica u razvoju kaznenog prava u Europi*, Hrvatski ljetopis za kazneno pravo i praksu, Vol. 15, No. 2, Zagreb, 2008, p. 1104.

24 Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, OJ L 2024/1712, 24 June 2024.

adapt the legal framework to evolving forms of trafficking while reinforcing the protection of victims.

2.2.3. Victims of Domestic Violence and Violence against Women

Directive (EU) 2024/1385 of the European Parliament and of the Council on combating violence against women and domestic violence (hereinafter: Directive (EU) 2024/1385)[25] is the first comprehensive legislative act of the European Union specifically addressing this issue. Directive (EU) 2024/1385 represents an important step in strengthening the protection of women from all forms of violence within the European Union. It is, notably, the first EU legislative instrument specifically focused on the prevention of violence against women. The Directive introduces minimum standards in substantive criminal law, particularly regarding the definition of criminal offences and sanctions related to sexual exploitation, gender-based violence, and certain forms of cyber violence. It introduces a gender-sensitive, comprehensive framework that criminalises specific forms of cyber violence, including non-consensual sharing of intimate images, cyberstalking, and cyber incitement to hatred or violence, while strengthening obligations for accessible reporting channels, specialised training for investigators and prosecutors, and individualised protection measures. By linking criminalisation with preventive and supportive obligations, Directive (EU) 2024/1385 addresses structural patterns of violence against women and domestic violence more explicitly than previous instruments, emphasising the need for timely and effective investigations that avoid secondary victimisation.[26] For Croatia, which has already aligned its legislation with the Council of Europe Convention on preventing and combating violence against women and domestic violence (hereinafter: Istanbul Convention),[27] Directive (EU) 2024/1385 offers an opportunity to further harmonise substantive criminal law and procedural safeguards. However, with the transposition deadline set for 14 June 2027, challenges are likely to arise in ensuring consistent application across judicial and law enforcement bodies, particularly in rural areas where access to specialised support services remains limited. Effective implementation will require not only legislative amendments but also sustained investment in training programmes focused on trauma-informed practices and

[25] Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence, OJ L 2024/1385, 24 May 2024.

[26] Braschi, S., *The New EU Directive on Combating Violence against Women and Domestic Violence,* Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW*)*, Vol. 137, No. 2, 2025., pp. 425 – 442.

[27] Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) (Konvencija Vijeća Europe o sprječavanju i borbi protiv nasilja nad ženama i obiteljskog nasilja (Istanbulska konvencija), Official Gazette, International Agreements, No. 3/2018.

gender-sensitive judicial reasoning. The adoption of Directive (EU) 2024/1385 is closely connected to the European Union's accession to Istanbul Convention, the first internationally legally binding instrument in Europe that systematically regulates the issue of violence against women, and which therefore represents the most significant progress in the protection of women in Europe. Directive (EU) 2024/1385 approaches violence against women and domestic violence as serious violations of fundamental rights and emphasises the need for a gender-sensitive response. It combines criminalisation with a broader framework of victim protection, including individual assessment, access to specialised support services, and measures aimed at preventing secondary victimisation. At the same time, it highlights the importance of prevention. This includes educational initiatives, as well as intervention programmes designed to address the behaviour of perpetrators. Building on the general framework of victims' rights, Directive (EU) 2024/1385 introduces more specific obligations for Member States, particularly about protection measures and perpetrator intervention programmes aimed at reducing reoffending. In this way, it establishes a more structured and comprehensive approach to combat violence against women and domestic violence. Overall, Directive (EU) 2024/1385 represents a significant step forward in strengthening victim protection and promoting a more integrated response to violence, combining legal measures with prevention and support.

2.2.4. The Relationship between EU Directives and the Case Law of the European Court of Human Rights

An analysis of victims' rights in EU law would not be complete without considering the broader system of human rights protection under the European Convention on Human Rights. All EU Member States are parties to the Convention, and the case law of the European Court of Human Rights plays an important role in shaping how victims' rights are understood and applied in practice. Although the Convention itself does not contain an explicit catalogue of victims' rights, the European Court of Human Rights has significantly contributed to strengthening their position. Through its interpretation of Convention rights, it has gradually placed greater emphasis on the protection of victims. This is particularly evident in cases involving serious forms of violence, such as sexual violence, domestic violence, and trafficking in human beings. These offences do not affect only physical integrity, but also touch upon dignity, autonomy, and personal identity. As a result, the protection of victims is increasingly understood not merely as a matter of criminal law, but as an issue of fundamental human rights. This approach is grounded in the interpretation of key Convention guarantees, including the right to life, the prohibition of torture, the prohibition of slavery and forced labour,

and the right to respect for private life. From a historical perspective, the system of human rights was primarily focused on limiting State power and preventing its abuse.[28] However, even where the threat to rights does not originate directly from the State, it may still incur responsibility for failing to respond in a timely and effective manner.[29] In this context, particular emphasis is placed on the concept of positive obligations, which, in addition to the State's duty to refrain from violating rights, also encompasses the obligation to take active measures to ensure their protection.[30] In other words, a positive obligation is one that requires the State to take measures to protect human rights.[31] This issue arises particularly in the context of relationships between private individuals. In such situations, the State has certain positive duties. These primarily include the duty to establish an appropriate legal framework, to adopt preventive and protective measures, and to ensure the existence of effective judicial procedures through which victims can obtain compensation for violations of their rights. These obligations are generally understood as forming the substantive aspect of the relevant provisions of the European Convention on Human Rights. In cases involving violent acts that violate the most fundamental human rights, such as the right to life, the prohibition of torture, the prohibition of slavery and forced labour, as well as the right to respect for private life (physical and psychological integrity of the individual), the State's positive obligation also includes a procedural dimension (the procedural aspect), namely the conduct of an effective "investigation"[32] which is aimed at elucidating all the circumstances of the particular case and bringing those responsible to justice. The case law of the European Court of Human Rights in this area is extensive. Therefore, for the purposes of this paper, only some of the key judgments that have made a particularly significant contribution to the development of the doctrine of positive obligations, and thus to the development of standards of victim protection, are highlighted. One of the earlier and particularly impor-

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28 Stoyanova, V., *Positive Obligations under the European Convention on Human Rights, With and Beyond Boundaries*, Oxford University Press, New York, 2023, p. 10.

29 Sicilianos, L.A., *Preventing Violations of the Right to Life - Positive Obligations Under Article 2 of the ECHR*, Cyprus Human Rights Law Review, Vol. 3, No. 2, 2014, p. 118.

30 Batistić Kos, V., *Pozitivne obveze prema Europskoj konvenciji za zaštitu ljudskih prava i temeljnih sloboda*, Narodne novine, Zagreb, 2012, pp. 23–24, and Stoyanova, *loc. cit.*, note 28.

31 Harris, David J. *et al.*: *Law of the European Convention on Human Rights*, 2nd ed., Oxford University Press, New York, 2009, p. 4.

32 The concept of an "investigation" in Convention law is an autonomous notion and, as such, is independent of its definition in national law. Accordingly, the requirements of an effective investigation, as developed in the case law of the European Court of Human Rights, apply to criminal proceedings as a whole, including the trial and the sentence imposed (see, among many others, *Gäfgen v. Germany* [GC], no. 22978/05, § 121, judgment of 1 June 2010).

tant case is *Osman v. the United Kingdom*.[33] In that case, the European Court of Human Rights held that a State may be responsible for failing to act where authorities knew, or should have known, of a real and immediate risk to life. In *McCann and Others v. the United Kingdom*,[34] the European Court of Human Rights stressed the need for an effective and independent investigation in cases involving a deprivation of life, capable of establishing the relevant facts and any potential responsibility. The standards developed in these judgments were later extended to other Convention rights protecting individuals from violence, particularly Articles 3, 4 and 8. An important development can be seen in *Opuz v. Turkey*[35] where the European Court of Human Rights held that a State's failure to respond adequately to repeated domestic violence may violate the right to life and the prohibition of inhuman treatment. The case is also significant for recognising gender-based violence as a form of discrimination. In *M.C. v. Bulgaria*,[36] the European Court of Human Rights further clarified the State's obligation to ensure an effective criminal law framework for the protection of victims of sexual violence, with a particular focus on effective investigation and prosecution. In *Kontrová v. Slovakia,* [37] the European Court of Human Rights found the State responsible for the police's failure to respond adequately to reports of domestic violence, which resulted in tragic consequences. This was the first judgment delivered by the European Court of Human Rights in a case concerning domestic violence. Building on that judgment, the European Court of Human Rights has developed extensive case law in the field of domestic violence.[38] Judgments concerning the protection of victims of trafficking in human beings and sexual exploitation are also of particular importance. In *S.M. v. Croatia*,[39] the European Court of Human Rights examined the State's duty to ensure an effective response to sexual exploitation and trafficking and found that there had been significant shortcomings in the procedural response of the domestic authorities to a credible claim, supported by *prima facie* evidence, that the applicant had been subjected to treatment contrary to the prohibition of slavery and forced labour. The case of *Krachunova v. Bulgaria*[40] is of particular importance, as the European Court of Human Rights recognised that profits derived from the exploitation of victims should not remain with the offender, but should

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33 Case *Osman v. the United Kingdom*, No. 87/1997/871/1083, judgment of 28 October 1998.

34 Case *McCann and Others v. the United Kingdom*, No. 18984/91, judgment of 27 September 1995.

35 Case *Opuz v. Turkey*, No. 33401/02, judgment of 9 June 2009.

36 Case *M.C. v. Bulgaria*, No. 39272/98, judgment of 4 December 2003.

37 Case *Kontrová v. Slovakia*, No. 7510/04, judgment of 31 May 2007.

38 Speed, A. *et al.*, *Research Handbook on Domestic Violence and Abuse*, Edward Elgar Publishing Limited, Cheltenham, 2024, p. 115.

39 Case *S.M. v. Croatia* [GC], No. 60561/14, judgment of 25 June 2020.

40 Case *Krachunova v. Bulgaria*, No. 18269/18, judgment of 28 May 2020.

instead contribute to the victim's compensation. In *Y v. Slovenia*[41], the European Court of Human Rights addressed secondary victimisation in criminal proceedings for sexual violence. The applicant argued that the manner of questioning caused her additional distress and humiliation. The European Court of Human Rights agreed, finding that the authorities had failed to protect her from unnecessary retraumatisation, in particular due to repeated questioning and aggressive cross-examination without adequate safeguards. It stressed that proceedings must be organised to protect victims, especially in cases of sexual violence, and to avoid unnecessary repetition of testimony. The judgment is significant in confirming that the Convention framework requires States to protect victims of violent acts from secondary victimisation during criminal proceedings.

From the foregoing overview, it is apparent that the European Court of Human Rights has, through its case law, progressively shaped standards that place increasing emphasis on the position of the victim as a holder of fundamental human rights. These standards require States to prevent violations, conduct effective investigations, ensure accountability, provide victims with access to compensation and protect them from secondary victimisation. They have also influenced the development of the EU legal framework on victim protection, particularly through the directives examined in this paper.[42] A comparison of the directives shows a clear link between EU victim protection and the standards developed under the European Convention on Human Rights. Their common aim is to ensure effective and accessible protection, in line with those standards, while allowing EU and national law to provide a higher level of protection where appropriate.

3. NORMATIVE FRAMEWORK FOR THE PROTECTION OF VICTIMS IN THE REPUBLIC OF CROATIA

Member States are required to implement EU standards on victim protection in their national systems. In Croatia, this obligation resulted in gradual legal developments aimed at strengthening both the victims' rights and their role in criminal proceedings. The rights of victims of criminal offences in the Republic of Croatia are regulated by a number of legal instruments, most notably the Criminal Procedure Act[43], the Criminal Code,[44] the Act on the Protection from Domestic Vio-

41 Case *Y v. Slovenia*, No. 41107/10, judgment of 28 May 2015.

42 See supra, Chapter 2.

43 Criminal Procedure Act, Official Gazette, No. 152/2008, 76/2009, 80/2011, 91/2012, 143/2012, 56/2013, 145/2013, 152/2014, 70/2017, 126/2019, 130/2020, 80/2022, 36/2024, 72/2025, 13/2026.

44 Criminal Code, *Official Gazette*, No. 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018, 126/2019, 84/2021, 114/2022, 114/2023, 36/2024, 136/2025.

lence, [45] and the Act on Monetary Compensation for Victims of Criminal Offences.[46] At the same time, the constitutional framework should not be overlooked. The Constitution of the Republic of Croatia,[47] as the highest legal act, provides the foundation for the protection of victims by guaranteeing fundamental rights, prohibiting discrimination and imposing a duty on the State to protect individuals from violence. However, the Criminal Procedure Act plays a central role, as it regulates the procedural position of victims and ensures that their rights can be effectively exercised throughout criminal proceedings. It is also the main instrument through which the standards set out in the directives discussed in this paper have been implemented into national law.[48] For this reason, this section focuses on the provisions of the Criminal Procedure Act governing the rights and protection of victims of criminal offences.

The Criminal Procedure Act establishes the basic framework for victims' procedural rights, including safeguards related to information, safety and participation in proceedings. It is worth noting that victims were only formally recognised as independent procedural subjects with the adoption of the 2008 Criminal Procedure Act, which distinguished them from injured parties.[49] By recognising victims as distinct legal subjects with their own rights, the Croatian Criminal Procedure Act has become a modern legislative framework and a solid basis for developing a more victim-oriented criminal justice system.[50] Croatia subsequently began implementing Directive 2012/29/EU.[51] The key provisions governing victims' rights are contained in Articles 43, 43a, and 44 of the Criminal Procedure Act. Article 43 sets out the core rights of victims, including access to support services, psychological and professional assistance, and protection from intimidation and secondary victimisation. It also guarantees their right to be heard without undue delay, to participate in proceedings, and to receive information about important procedural developments, while ensuring respect for their privacy and safety. Article 43a, introduced in 2017, adds an important mechanism of individual assessment. This

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45 Act on Protection against Domestic Violence, Official Gazette, No. 70/2017, 126/2019, 84/2021, 114/2022, 36/2024.

46 Act on Financial Compensation to Victims of Criminal Offences, Official Gazette, No. 80/2008, 27/2011.

47 Constitution of the Republic of Croatia, Official Gazette, No. 56/1990, 135/1997, 8/1998 (consolidated text), 113/2000, 124/2000 (consolidated text), 28/2001, 41/2001 (consolidated text), 55/2001 (corr.), 76/2010, 85/2010 (consolidated text), 5/2014.

48 See supra, Chapter 2.

49 Bezić, R.; Šprem, P., *Zaštita* žrtava *u kaznenom postupku - praktična implementacija direktive 2012/29/EU* Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 27, No. 2, Zagreb, 2020, p. 609.

50 *Ibid*.

51 *Ibid.*

requires the competent authorities to identify specific protection needs and adapt procedural measures accordingly. Particular attention is given to vulnerable victims, especially in cases involving domestic or gender-based violence. Finally, Article 44 strengthens the legislative framework by providing additional safeguards for particularly vulnerable groups, including children, victims of sexual offences and trafficking. These measures include legal representation at the State's expense, protection of privacy, limits on repeated questioning and the use of audio-visual tools to avoid direct contact with the perpetrator. Taken together, these provisions demonstrate a shift towards a more victim-oriented approach, aimed at ensuring that criminal proceedings protect not only the interests of prosecution, but also the dignity, safety and well-being of victims, in line with European standards.

4. AN OVERVIEW OF SELECTED DECISIONS OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

The development of victim protection in the Croatian legal system has been strongly shaped by the case law of the European Court of Human Rights and EU law, in particular Directives 2012/29/EU, 2011/36/EU and 2011/93/EU, which emphasise the need for enhanced protection of victims, especially in cases of serious violence. An analysis of selected decisions of the Croatian Constitutional Court shows how these standards have been applied in practice, but also reveals shortcomings, particularly in the courts' understanding of trauma and their sensitivity towards victims. The decisions analysed were selected using the Constitutional Court's official case law database. The review focused on decisions adopted between 2019 and 2025 concerning the protection of victims' rights in proceedings involving sexual offences, trafficking in human beings and domestic violence, as well as cases raising issues of secondary victimisation and the procedural protection of vulnerable victims. At the same time, it should be noted that the Constitutional Court does not yet have particularly extensive case law specially dealing with victims' rights and secondary victimisation, which additionally influenced the selection of decisions analysed in this paper.

4.1. Decision no. U-III-557/2019 of 11 September 2019 – Misunderstanding of the Psychological Consequences of Gender-Based Violence

The case concerned the applicant who was an Iraqi national and who had sought international protection in Croatia. The decision is particularly significant as the applicant was a potential victim of domestic violence. In the initial proceedings,

she cited war-related circumstances and fear of the terrorist organisation ISIL as the reasons for leaving her country. After her application was rejected, she submitted a new one in which she described long-term domestic violence by her husband, as well as later abuse and threats from her brother. She argued that she could not return to Iraq, as a divorced woman without a male guardian (*mahram*), because she would face a real risk of violence and persecution. She explained that she had been in a forced marriage marked by physical, sexual and psychological abuse, and that even after the divorce the threats and violence continued, particularly from her brother. She explained that she had not disclosed certain details earlier because they were highly sensitive and stigmatising, and she feared the consequences of speaking about them in her social environment. She also described the situation in Iraq, where women without a male guardian cannot live independently and face a serious risk of violence. The authorities rejected her subsequent application, finding her statements not credible because they differed from her earlier account and because she had not raised the alleged abuse in her initial application. The Constitutional Court quashed those decisions and strongly criticised the approach taken by the administrative courts. It found that the assessment of the applicant's credibility had been overly formalistic and failed to consider the psychological effects of trauma. It emphasised that victims of sexual or domestic violence often disclose such experiences gradually, due to shame, fear, social stigma or trauma. The Constitutional Court therefore found that the authorities had not shown sufficient sensitivity towards the applicant or a proper understanding of the psychological effects of trauma. By failing to consider the reasons why she had not disclosed the violence earlier, they effectively denied her the opportunity to substantiate her claims.

When assessed under Directive 2012/29/EU on victims' rights, it is clear that its standards were not applied. Directive 2012/29/EU requires an individual assessment of the victim's vulnerability and a response adapted to her needs. In this case, however, the courts focused on inconsistencies in her statements, without considering the psychological impact of prolonged violence. In such situations, it is unrealistic to expect a fully clear and consistent account, as experiences of violence, particularly against women, often have lasting psychological effects. Trauma may affect memory, the manner of expression and the willingness of a person to disclose certain circumstances, with traumatic memories often being fragmented, incomplete and partially inconsistent, which means that such inconsistencies should not, in themselves, automatically call into question the credibility of the statements.[52] This is where the principle of the benefit of the doubt becomes

[52] Davis, D.; Hogan, Alexis A.; Hart, Demi J., *Myths of trauma memory: on the oversimplification of effects of attention narrowing under stress*, *Frontiers in Psychology*, 2024.

particularly relevant. As the Constitutional Court noted, certain inconsistencies in an applicant's account do not automatically undermine its overall credibility. This does not mean that statements should be accepted uncritically, but rather that they must be assessed considering the applicant's position and circumstances. Where the account is broadly credible and consistent with known facts about the country of origin, it is justified to resolve doubts in the applicant's favour, particularly in cases involving victims of violence. While this case arises from administrative rather than criminal proceedings, its relevance here is clear. The standards developed by the Constitutional Court, particularly regarding the assessment of statements, sensitivity to victims and the avoidance of secondary traumatisation, are equally applicable in the criminal law context. For that reason, its inclusion in this analysis is justified, despite the different procedural setting. The approach taken by the Constitutional Court has broader significance and can readily be applied in criminal proceedings as well.

4.2. Decision no. U-III-641/2021 of 12 November 2024 – A Victim of Trafficking in Human Beings and Systematic Sexual Violence and the Purpose of a Civil Claim within Criminal Proceedings

This decision is of particular importance in the development of the rights of victims of the most serious violations of human rights, as it represents the first case in which the Constitutional Court examined a violation of the prohibition of trafficking in human beings in the context of forced prostitution. In doing so, the Constitutional Court confirmed that such forms of exploitation, in which the perpetrator effectively "disposes of" the victim's body and sexual services for the purpose of obtaining benefit, fall within the scope of the prohibition of trafficking in human beings as one of the fundamental human rights. In addition to forced prostitution, the case also concerned the serious criminal offence of rape. Over a prolonged period, the applicant was subjected to systematic sexual violence and exploitation by the perpetrator, who used threats and coercion to force her into sexual relations and to organise the provision of sexual services to others. He also repeatedly raped her vaginally, on average twice a week over a period of two years, even during menstruation, using force and threats against her life and the lives of her family members, and would often force her to perform oral sex afterwards. The perpetrator was ultimately sentenced to 12 years' imprisonment by a final judgment. In the criminal proceedings, the applicant brought a civil claim seeking compensation for non-pecuniary damage resulting from a violation of her personality rights. The criminal courts declined to decide on the claim and referred her to pursue compensation in separate civil proceedings, arguing that the case file did not contain sufficient evidence and that additional evidence would be needed,

which would prolong the proceedings. The Constitutional Court found this reasoning problematic and unacceptable. It emphasised that the case concerned a victim of prolonged and systematic rape and forced prostitution, making the courts' conclusion that there was no evidence of a violation of her personality rights particularly hard to justify. The Constitutional Court considered such reasoning to be problematic and unacceptable. It particularly emphasised that the case concerned a victim of prolonged, systematic rape and forced prostitution, making the courts' assertion that there was no evidence of a violation of her personality rights especially concerning. The Constitutional Court stressed that such reasoning demonstrated a lack of understanding of the nature and gravity of sexual violence, as well as of the psychological consequences that such criminal offences have on victims. The significance of this decision lies in its clear recognition of the victim's right to compensation for non-pecuniary damage as part of effective legal protection. Awarding such compensation acknowledges the seriousness of the harm suffered and its connection to violations of fundamental rights, while also reflecting the State's duty to respond adequately to such violations. In this context, the Constitutional Court criticised the practice of referring victims of serious human rights violations to separate civil proceedings. This would require them to prove their claims and relive their experiences once again, often without the same level of protection and in direct confrontation with the perpetrator. According to the Constitutional Court, such an approach places an additional burden on victims, delays the exercise of their rights and exposes them to renewed trauma. This increases the risk of secondary victimisation, which is not in line with the European standards of victim protection or with the principle of effective legal protection. For this reason, the Constitutional Court emphasised that judicial authorities should use the procedural tools already available to ensure that the victim is protected within the criminal proceedings themselves. In that context, the Constitutional Court elaborated in more detail on the purpose of a civil claim in criminal proceedings. It explained that such a claim serves three functions: a reparative one, allowing the victim to obtain compensation; a function of procedural economy, enabling the issue of compensation to be resolved within the criminal proceedings; and, importantly, a protective function, aimed at protecting the victim from secondary victimisation. It is this third function that seeks to prevent the unnecessary repetition of traumatic experiences in additional proceedings. At the same time, it pointed to the specific nature of assessing non-pecuniary damage, noting that such damage cannot be precisely quantified. It proceeded on the assumption that suffering in such cases may be presumed, making it unjustified to require additional evidence from the victim. Since non-pecuniary damage cannot be measured with precision, its assessment is left to the court's discretion, provided that all the circumstances of the case are taken into account. In the present case, the Constitutional Court

observed that the ordinary courts had not even attempted to assess the damage, despite it being clear that the victim had suffered serious harm. Referring the applicant to civil proceedings, particularly on the ground that there was no evidence of a violation of her personality rights, showed not only a lack of sensitivity towards the victim, but also a failure to understand the psychological consequences of sexual violence.

Such an approach was not in line with the obligations arising from Directive 2011/36/EU on trafficking in human beings and Directive 2012/29/EU on victims' rights, both of which require that proceedings be organised in a way that minimises additional burdens on the victim and prevents secondary victimisation. Against this background, it is particularly interesting to compare the approach taken by the criminal courts in the case examined in decision no. U-III-641/2021 with the established practice in civil proceedings concerning violations of personality rights. Namely, in the criminal proceedings that preceded decision no. U-III-641/2021, the courts refused to decide on the civil claim on the grounds that there was insufficient information to do so, without specifying what additional evidence should be obtained. From the circumstances of the case, it follows that they implicitly likely proceeded on the assumption that a psychiatric expert assessment would be required to establish non-pecuniary damage. Such an approach is difficult to justify. Firstly, in this light, the purpose of any such expert assessment in the specific case must also be questioned. It is difficult to imagine what an expert could actually determine – for example, the number of individual acts of violence, the details of each form of violence, their dynamics or duration – that would have any real significance for assessing the existence and extent of the damage. This line of reasoning is not only methodologically questionable and difficult to justify in light of the need to protect the victim's dignity but may also result in further intrusion into her private life and renewed exposure to trauma. For that reason, insisting on such evidence appears excessively formalistic and ill-suited to the nature of the harm. It is also difficult to reconcile such reasoning with established Croatian case law on violations of personality rights, particularly in cases involving media or social media publications. In those cases, courts typically assess the existence of harm based on the nature, intensity and reach of the violation, without requiring medical or psychiatric expert evidence. Instead, they rely on a free evaluation of the circumstances, taking into account, in particular, the seriousness of the interference and its impact on the individual's honour, reputation and dignity.[53] This makes the approach taken by the criminal courts in case no.

[53] See, for example, Supreme Court of the Republic of Croatia, Rev-2177/00-2 (9 November 2000); Rev-137/16-2 (8 March 2016); Split County Court, Gž-834/2019-6 (27 April 2020); Zagreb Municipal Civil Court, Pn-1271/2016 (9 March 2018).

U-III-641/2021 even more questionable. If courts can recognise non-pecuniary damage in cases concerning harm to reputation without medical evidence, there is even less justification for imposing stricter evidentiary requirements in cases involving serious forms of violence, where such demands only place an additional burden on the victims and increase the risk of secondary victimisation.

4.3. Decision no. U-IIIBi-227/2023 of 25 September 2025 – The Impermissibility of Limitation Periods in Cases of Violence

This case concerned misdemeanour proceedings against alleged perpetrator of domestic violence. The applicant claimed that she had been subjected to physical and verbal abuse by her husband in the presence of their minor children. The proceedings lasted four years, largely due to the quashing and repetition of the case, and ultimately ended with the dismissal of charges because the limitation period had expired. During that time, the court carried out only a limited number of evidentiary actions - the examination of the parties and one witness, a face-to-face confrontation between the suspect and the victim, and the review of WhatsApp messages. The Constitutional Court found a violation of the right to respect for private life in its procedural aspect (State's obligation to conduct an effective investigation). It stressed that, according to the case law of the European Court of Human Rights, cases involving violence must not end due to the expiry of limitation periods caused by the inactivity or inefficiency of the authorities, as this undermines the effectiveness of legal protection and may foster a sense of impunity. The Constitutional Court was particularly critical of the conduct of the misdemeanour courts, especially the High Misdemeanour Court. It made clear that the excessive length of the proceedings and the expiry of the limitation period were attributable solely to the courts. The first-instance court handled the case slowly and inefficiently, despite its relative simplicity and the need for urgency in cases of domestic violence. The High Misdemeanour Court further prolonged the proceedings through a formalistic approach, ordering the re-examination of a witness even though the defence had already had the opportunity to question him and had not challenged the key parts of his testimony. In doing so, it failed to take account of practical circumstances, such as the witness's unavailability, as well as the interests of the victim and the public in the effective prosecution of the case. The Constitutional Court also criticised the High Misdemeanour Court for its lack of diligence, particularly in delivering its decisions, which ultimately led to the case reaching the limitation period.

Such conduct points not only to a disregard for the time limits of the proceedings, but also to a failure to recognise the State's positive obligations in cases involving

the protection of fundamental rights. It is particularly concerning that the courts failed to show sufficient understanding of the nature of the case, which involved domestic violence and therefore called for heightened sensitivity and urgency. The case also reveals a broader lack of sensitivity towards victims of violence. The excessive length of the proceedings is not merely a procedural issue, but one with serious psychological consequences, leaving the victim in a prolonged state of uncertainty and insecurity. In cases of domestic violence, such delays may further undermine the victims' sense of safety and trust in the justice system. When assessed under Directive 2012/29/EU, the proceedings clearly fell short of its standards, which require timely and effective protection of victims and procedures that avoid causing additional psychological harm.

4.4. Decision no. U-III-7231/2022 of 14 September 2023 – Protection of Child Victim of Sexual Violence from Secondary Victimisation

This case concerned criminal proceedings for sexual abuse of a seven-year-old girl at the time of the incriminated events. The judgment was largely based on the statement of the minor victim, which she had given to court-appointed experts and a gynaecologist, and who did not testify at the hearing because the experts had assessed that confronting her again with the traumatic events could seriously endanger her psychological condition. In the specific case, the Supreme Court upheld the position of the lower courts that, in the circumstances, priority should be given to the victim, primarily based on the principle of the best interests of the child. The lower courts emphasised that the case concerned a very young child whose emotional development did not match her age, and that even a carefully conducted examination could cause further trauma and harm her psychological state. They relied on expert findings, which warned of the risk of additional harm. The Supreme Court endorsed such reasoning. It connected it with the duty to protect children as a particularly vulnerable group, especially in cases of sexual violence. At the same time, it held that the absence of the child's examination did not undermine the fairness of the proceedings or the rights of the defence, as the case could be decided based on other evidence. Priority was therefore given to protecting the child victim from secondary victimisation over the need for direct examination of every piece of evidence.

Such reasoning reflects an effort to avoid further traumatisation of a particularly vulnerable victim, in line with the principle of the best interests of the child, as well as with Directive 2011/93/EU, which requires minimising repeated questioning of child victims. It is also consistent with the Convention on the Rights of the Child, which places the child's best interests at the centre of all proceedings

concerning them. Overall, the approach adopted by the courts can be seen as positive. They showed sensitivity to the child victim's situation and a willingness to adapt procedural rules to ensure her protection, while still respecting the rights of the defence. By recognising the risk of further trauma and taking steps to avoid it, they contributed to a practice that aligns with modern standards of protecting child victims. This position was later confirmed by the Constitutional Court, which further clarified the State's obligations in protecting children as particularly vulnerable victims. It accepted that limitations on evidence-taking, including the decision not to examine the child, may be justified where necessary to protect the child's well-being. At the same time, it examined whether sufficient procedural safeguards were in place to compensate for any limits on the defence, especially where the defence had no opportunity to question the child directly.

4.5. Decision no. U-IIIBi-2031/2023 of 7 February 2024 – Disproportionate Imposition of Procedural Costs on Injured Parties (Indirect Victims) in Case of Alleged Violation of the Right to Life

In this case, the constitutional complaint was brought by the next of kin - the son - of a man who died[54] while working on the roof of an agricultural building. Criminal proceedings were initiated against the employer and another responsible person for a suspected breach of occupational safety rules, but they ended in an acquittal. After the State Attorney withdrew the charges at the final hearing, the

[54] Under the Croatian Criminal Procedure Act, the concepts of an *injured party* and a *victim* are not identical, although they often overlap in practice. An injured party is a natural or legal person whose personal or property rights have been violated by a criminal offence and who participates in the proceedings as a procedural subject, exercising the rights granted by that status. By contrast, the notion of a victim is narrower and refers to a natural person who has suffered harm because of a criminal offence, as well as the close relatives of a deceased person. In that sense, the concept of an injured party is broader and primarily procedural, while the notion of a victim reflects a more personal and protective approach, focused on the individual affected by the offence. Accordingly, although the person concerned in the present criminal proceedings had the status of injured party within the meaning of the Criminal Procedure Act, from a constitutional and Convention perspective he qualifies as an *indirect victims*, since he was not directly affected by the criminal offence but suffered its consequences through the death of his father (compare, for example, with cases of the European Court of Human Rights *Varnava and others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, judgment of 18 September 2009; *Bljakaj and others v. Croatia*, no. 74448/12, judgment of 18 September 2014; and *Trivkanović v. Croatia*, no. 12986/13, judgment of 6 July 2017). It was precisely this death that gave rise to the criminal proceedings, which concerned a serious criminal offence against public safety resulting in the death of the injured parties' close family members. Such a status is most recognised in relation to the right to life, as the direct victim of a violation of that right is, by definition, often deceased. However, it may also arise in connection with other constitutional and Convention rights, depending on the circumstances of the case (see, for example, cases of the European Court of Human Rights *Karpylenko v.* Ukraine, no. 15509/12, judgment of 11 February 2016; and the abovementioned case *Varnava and others v. Turkey*).

injured parties took over the prosecution as authorised prosecutors. Following the acquittal, the court ordered them to bear the costs of the proceedings jointly and severally, including the costs of the autopsy, expert reports and other expenses. The Constitutional Court found this outcome disproportionate. It pointed out that most of the evidentiary steps had been taken while the State Attorney's Office was still in charge of the case, meaning that the injured parties had no real control over the proceedings or the costs incurred. Applying the rule on costs in a strictly formal way therefore placed an excessive financial burden on the applicant. It concluded that this upset the fair balance between the general interests and the property rights of the individual under Article 48 of the Constitution and Article 1 of Protocol No. 1 to the Convention, particularly given that the proceedings had been initiated and largely conducted by the State.

The reasoning of the Constitutional Court can be linked to the standards set out in Directive 2012/29/EU, which emphasises that victims' participation in criminal proceedings should not expose them to additional and unjustified burdens. Significant financial costs may act as a barrier to access to justice and discourage victims from exercising their rights. In that sense, the decision reinforces the idea that rules on costs must be applied with care, so as not to place a disproportionate burden on victims, in line with the Directive's broader aim of ensuring effective access to justice and preventing secondary victimisation. Moreover, the approach taken by the criminal courts may be problematic from the perspective of Article 47 of the EU Charter, as it can discourage those whose fundamental rights guaranteed by the EU law are violated from participating in proceedings and exercising their procedural rights.

4.6. Lessons from the Case Law: Strengthening Judicial Awareness and Professional Competence

The analysis of these decisions shows that EU standards on victim protection are gradually being incorporated into the Croatian legal system. At the same time, the case law of ordinary courts still reveals certain shortcomings, particularly where those standards are not applied consistently or where the specific needs of victims are not fully recognised. This is especially evident in cases where courts apply procedural rules in a strictly formal manner, without considering the broader context or the impact such an approach may have on the victim. In several decisions, the Constitutional Court has pointed to a lack of sensitivity towards victims and a limited understanding of the psychological effects of trauma. At the same time, the practice is not uniform. Some decisions reflect a more developed approach, with courts showing a willingness to adapt procedures to the needs of particu-

larly vulnerable victims, as seen, for example, in decision no. U-III-7231/2022. However, this does not mean that victims' statements should be accepted without scrutiny. As follows from decision no. U-III-557/2019, a balanced approach is required. The benefit of the doubt does not imply uncritical acceptance, but rather an assessment of the statement in its proper context, taking into account the circumstances in which it was given and the possible effects of trauma. This is what allows both the protection of the victim and the fairness of the proceedings to be preserved. What emerges from the case law is that the main difficulty lies not in the absence of legal standards, but in their consistent, victim-oriented application in practice. The shortcomings identified point to the need for further training of all those involved in such proceedings, particularly in understanding trauma and the specific nature of sexual and gender-based violence. A trauma-informed justice response is an approach to addressing interpersonal harm (e.g., assault, abuse, domestic violence, bullying, community harm) that recognizes the widespread impact of trauma, understands how trauma affects behaviour and relationships, and integrates this knowledge into every aspect of the justice process. This includes policing, investigation, prosecution, adjudication, victim services, and alternatives such as restorative or rehabilitative programs. The role of prosecutors and other judicial authorities is not limited to the effective prosecution of criminal offences but also includes ensuring fairness and protecting the dignity and well-being of those involved in proceedings.[55] Rather than focusing solely on the legal violation, trauma-informed responses consider the physical, emotional, cognitive, and relational consequences of trauma for both victims and individuals who have caused harm.[56] These developments reflect broader tendencies towards a more victim-oriented criminal procedure, aimed not only at ensuring effective prosecution, but also at protecting victims from retraumatisation and secondary victimisation during judicial proceedings. At the same time, stronger institutional support and practical adjustments within the justice system remain necessary. Alongside training, greater attention should be given to strengthening institutional support. This could include the development of specialised judicial departments for cases involving violence, closer cooperation with psychological and social services, and clearer procedural guidelines for dealing with vulnerable victims. In Croatia, victim and witness support departments have already been established at the courts to provide emotional support, information on victims' rights, practical assistance and referrals to other competent institutions, depending on the needs of victims and witnesses. However, the existence of such departments alone is not sufficient

[55] Prata, A.J., *Prosecutorial Interviewing Reform: Applying Victim-Cantered Practices for Trauma-Informed Justice*, 2 JOURNAL ABBR., Vol. 2, 2025, p. 103.

[56] Smith, B.; Bartick, C.; Mueller, J., *Introduction to Special Issue: Trauma-Informed Justice Responses to Interpersonal Harm*, Journal of Aggression, Maltreatment & Trauma, Vol. 35, No. 1, 2026, pp. 4–5.

to ensure effective victim protection if judicial actors do not understand trauma and its consequences, particularly the risk of secondary victimisation. Ultimately, improving the system's sensitivity towards victims remains essential for ensuring effective protection of their rights. Without a proper understanding of the effects of violence and a willingness to adapt practice accordingly, it is difficult to meet the level of protection required by modern European standards.

5. CONCLUSION

In the traditional understanding of criminal proceedings, two opposing tendencies are emphasised, both reflected in Article 1(1) of the Criminal Procedure Act. One is the pursuit of efficiency ("…that the perpetrator of a criminal offence be imposed a penalty or another measure under the conditions prescribed by law and on the basis of a lawfully conducted procedure before a competent court"), while the other is the aim of preventing the conviction of an innocent person ("that no innocent person be convicted"). The development of criminal procedural law shows that, alongside these two traditional aims, a third has gradually come into focus: the protection of the rights of victims of criminal offences. This is reflected in legislative changes driven by both the implementation of EU law, including Directive 2012/29/EU, Directive 2011/93/EU, Directive 2011/36/EU and its amendment by Directive (EU) 2024/1712, and the case law of the European Court of Human Rights, as well as in the practice of the Constitutional Court of the Republic of Croatia. Under this influence, criminal proceedings are increasingly viewed as a mechanism for ensuring the protection of the dignity and safety of victims through the establishment of their procedural rights. The introduction of this third tendency has led to the need to adapt criminal proceedings, which must now balance three objectives: the efficiency of criminal proceedings (and criminal law more generally), the protection of the rights of the defendant, and the simultaneous protection of the rights of victims, considering their specific needs. In other words, criminal proceedings today must strike a balance between the pursuit of efficiency, the protection of the defendant's rights, and the needs of victims of criminal offences. The balancing required in modern proceedings should therefore include not only the relationship between efficiency and the rights of the defence, but also the protection of victims participating in the proceedings. This concerns, on the one hand, the procedural rights of the defence, such as the right to confrontation, and, on the other, the need to protect the vulnerable victims, particularly children, from secondary victimisation. Achieving an appropriate balance between these interests raises complex legal and procedural questions that go beyond the scope of this paper. The growing recognition of victims' rights, reflecting a broader shift in legal awareness, is closely linked to a change

in the perception of the position of victims in society. For a long time, victims in criminal proceedings were marginalised; their needs were overlooked, and they were regarded merely as a source of information about the facts. This traditional model, in which the victim functioned solely as evidence within the proceedings, has now changed, and that change requires corresponding adjustments in practice, particularly through greater recognition of the rights and needs of victims of criminal offences. Although the Croatian legislative framework provides for a wide range of rights and protective mechanisms for victims, case law shows that formal normative alignment with European standards does not always guarantee their full effectiveness in individual proceedings. In this context, the case law of the Constitutional Court of the Republic of Croatia plays an important role, as it periodically assesses, through constitutional complaint proceedings, whether criminal courts have ensured an adequate level of protection of the fundamental rights of victims. The Constitutional Court frequently emphasises the importance of effective investigation and the protection of victims' dignity, relying in this regard on the standards developed in the case law of the European Court of Human Rights. Despite positive developments, certain challenges can still be observed in practice. Among these, particular attention should be drawn to the limited application of certain procedural protective measures, and an insufficient understanding of the psychological consequences of traumatic experiences suffered by victims. Such circumstances may affect both the assessment of victims' statements and the scope of application of measures aimed at preventing secondary victimisation. For this reason, there is a clear need for the continuous professional training of judicial officials, as well as for the further development of institutional support mechanisms for victims, to ensure a more effective application of the existing legislative framework.

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Review article

THE ROLE OF SOCIAL SERVICES IN CRIMINAL PROCEEDING TOWARDS JUVENILE IN CROATIA

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ABSTRACT

One of the elements that differentiates criminal proceedings towards juvenile from regular criminal proceedings is the role of social welfare services. Juvenile delinquency is a broad social phenomenon that requires a comprehensive response from the state and society which includes actions of not only the judiciary but also other state systems, including social welfare. In all European countries, social services have a specific role that varies depending on the system of response to juvenile delinquency in a particular country. According to previous research, in some European countries the social services are an integral part of the juvenile court, while in other countries they operate as a separate and independent organization; in some European countries social services are involved in criminal proceedings towards juvenile from the beginning of criminal proceeding while in other countries they are included much later, after the main hearing. In Croatia social services are separated from the juvenile court and are involved in the criminal proceeding towards juvenile from the beginning. In criminal proceedings towards juvenile in Croatia, juvenile court must collect comprehensive data about juvenile and his or her personal and family circumstances in order to decide about the appropriate juvenile sanction in every case. While collecting information about the juvenile, social welfare workers have to closely cooperate with the juvenile court and their reports often play an important role when deciding about appropriate reaction to committed criminal offence. According to the Youths Courts Act, social welfare bodies participate in proceedings towards juvenile from the first moment that there is a suspicion that the juvenile has committed a criminal offense and even during the phase of execution of juvenile sanctions. The paper will analyse the role of social welfare bodies throughout all phases of criminal proceedings towards juvenile in Croatia in order to determine whether the current legislative framework complies with established standards from different European countries regarding the role of social services in criminal proceedings and whether there is a need to modernize the existing role of social services in Croatian juvenile justice system.

Keywords: *Criminal proceeding, Juvenile, Social services, Youth Courts Act*

1. INTRODUCTION

Criminal proceedings towards juveniles differ in many respects from regular criminal proceedings. While the goal of regular criminal proceedings is to determine the guilt or innocence of the accused and eventually impose a legal sentence[1], the goal of criminal proceedings towards juveniles is more focused on the resocialisation, protection, education and rehabilitation of the juvenile, in the hope that he or she can return to society as a functional member.[2] The criminal-political teachings of the sociological school of criminal law at the end of the 19th century held that society must focus on preventing criminal offences by applying measures of protection, care and education in cases of children who show signs of educational neglect or elements of pre-delinquent behaviour. The application of these protective measures spread from private charitable and church organisations to state bodies within the state administration. At the same time, in this period, within the framework of juvenile criminal legislation, the focus increasingly shifted from the criminal offence to the juvenile offender. The aim was no longer to punish the juvenile but to ensure his or her resocialisation. As a result, information about the juvenile, his or her character, family situation, social environment, and education gained increasing importance in the proceedings.[3] Subsequently, the movement to form special youth courts developed at the beginning of the 20th century as a result of scientific findings and developments in auxology, biology, psychology and other sciences of human development that confirmed the need to treat juvenile offenders differently from adult offenders.[4] In those first stages of the development of youth courts, countries adopted different solutions regarding their organisation. Today there are four main ways in which youth courts are organised in a particular country: specialised courts that are spatially and organisationally separate from regular courts, with specialised personnel and support services; youth courts as special departments of specialised courts, e.g. family courts or domestic relations courts; youth courts as special departments (departments, panels) of regular courts of general jurisdiction; and general courts that have jurisdiction in cases involving juveniles.[5] Juvenile delinquency was seen not only as a legal problem but also as a serious social problem for society that required a broader social response, with the participation of various bodies and services, including the police, the judiciary

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1 Krapac, D., *Kazneno procesno pravo, Prva knjiga: Institucije*, Narodne novine, Zagreb, 2020, p. 4.

2 Carić, A., *Kazneni postupak prema maloljetnicima*, Split, 2004, pp. 7-8.

3 Cvjetko, B.; Singer M., *Kaznenopravna odgovornost mladeži u praksi i teoriji*, zagreb, Organizator, 2011, pp. 313-314.

4 Carić, A., Kustura, I., *Sudovi za mladež: ustrojstvo, sastav i nadležnost prema Zakonu o sudovima za mladež*, HLJKPP, vol. 16, no. 2, 2009, pp. 858-856.

5 *Ibid*., pp. 859-865.

and relevant social institutions (e.g., schools, social welfare services, civil society organisations).

0It became important for the youth court to obtain information about the juvenile's personal and family life in order to make a final decision on the appropriate sanction in each individual case. At the beginning of the development of specialised youth courts, the question arose as to which state bodies and services should be involved in the criminal proceedings to assist the court with their expertise by collecting data about the juvenile's character. Initially, information about the juvenile was collected by questioning witnesses who were considered to have knowledge about the juvenile's life (e.g., family members, school). Later, specialised services began to develop within the judiciary, with specific rights and duties towards juveniles, and were expected to assist the court in collecting information about a juvenile's character.[6]

In many countries, social welfare services have been assigned this new role in criminal proceedings, i.e. providing the youth court with the necessary information about juveniles. Over time, their role has expanded, and social welfare services are now increasingly involved at different stages of criminal proceedings. The importance of the role of social welfare services in proceedings towards juveniles reflects society's aim to achieve a comprehensive response to juvenile delinquency. In Croatia, social welfare services are separate from the judiciary and are involved in criminal proceedings towards juveniles from the outset. According to the Youth Courts Act (hereinafter: YCA),[7] social welfare services participate in proceedings towards juveniles from the first moment there is a suspicion that the juvenile has committed a criminal offence and continue to be involved during the execution of juvenile sanctions. The aim of this paper is to analyse the role of social welfare services throughout all stages of criminal proceedings towards juveniles in Croatia. In the paper we will compare the role of social welfare services in Croatia with the results of research conducted in 11 EU countries and with the categories of possible roles and connections between social welfare services and the juvenile justice system identified by the aforementioned research.[8] The aforementioned study was selected as the analytical framework for examining the role of social welfare services in the Croatian juvenile justice system because, during the collection and review of literature, it was identified as the only study that specifically addressed

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6 Cvjetko, B.; Singer, M.; *op. cit.* note 3, p. 314.

7 Youth Courts Act (*Zakon o sudovima za mladež*), Official Gazette nos. 84/11, 143/12, 148/13, 56/15, 126/19.

8 For the results and methodology of the research conducted, see: Rap, S. E.; *The participation of social services in youth justice systems in Europe*, European Journal of Social Work, Vol. 18, No. 5, 2015, pp. 675-689.

the connection between social welfare services and juvenile justice systems. The research was comprehensive, conducted between 2005 and 2012, and combined legislative analysis with an examination of practice, encompassing jurisdictions representing different juvenile justice models. The only limitation of the study was the exclusion of Scandinavian countries, where social welfare services play a particularly prominent role in juvenile justice.[9] That is why this paper analyses the Danish juvenile justice system as a representative of the Scandinavian system. Nevertheless, the study's categorisation of juvenile justice systems according to the role of social welfare services appears unique in the literature and provides a suitable and methodologically sound framework for analysing the Croatian system towards the established criteria. By analysing the role of social welfare services in the Croatian juvenile justice system throughout these defined categories, it will be possible to determine in which group of countries Croatia falls, whether the current legislative framework complies with established standards from different European countries regarding the role of social welfare services in criminal proceedings, and whether there is a need to modernise the existing role of social welfare services during criminal proceedings towards juveniles in Croatia.

2. SOCIAL WELFARE SYSTEM IN THE REPUBLIC OF CROATIA

According to the Constitution of the Republic of Croatia (hereinafter: Constitution), Croatia is a welfare state, and social justice is listed as one of the highest values of the constitutional order and the basis for interpreting the Constitution.[10] The Constitution specifically highlights that the state is obligated to protect children and youth and to create social, cultural, educational, material and other conditions that promote the right to a dignified life.[11] Special care should also be provided for socially vulnerable groups, harmed and socially neglected children, as well as juveniles without parents and those who are not cared for by their parents. Everyone has a duty to protect children and vulnerable persons, and a physically and mentally harmed and socially neglected child has the right to special care and education.[12]

In view of the above, it can be concluded that the social aspect, which requires protection and assistance for the most threatened and vulnerable groups in society,

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9 *Ibid*., pp. 677-678.

10 Art. 1 and 3 of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*), Official Gazette nos. 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 76/10, 55/01, 5/14, 85/10.

11 Art. 62 Constitution.

12 Art. 63 para 5 and Art. 64 para 1 Constitution.

including children without adequate parental care, children with behavioural problems, and children who are in conflict with the law, is strongly emphasised. The welfare state assumes responsibility for ensuring minimum social security for all its citizens by intervening in economic and social life through legislative, executive, supervisory, or other measures for the sake of people's well-being and to achieve a fairer distribution of national income.[13] Social welfare is an organised activity of the state that implements its social and protective function. Social welfare is provided as a public service and is an activity of special interest for the Republic of Croatia.[14]

The social welfare system in Croatia is under the jurisdiction of the Ministry of Labour, Pension System, Family and Social Policy. The *lex generalis* that regulates social welfare activities in Croatia is the Social Welfare Act (hereinafter: SWA).[15] Social welfare is an organised activity of public interest aimed at providing assistance to socially vulnerable persons, as well as persons in unfavourable personal or family circumstances, and includes prevention, assistance, and support to individuals, families and groups, with the aim of improving quality of life, encouraging change and empowering beneficiaries for the purpose of their active inclusion in community life.[16] In the social welfare system, a beneficiary is defined as a person or household that receives compensation, social welfare services or other forms of assistance prescribed by SWA in the social welfare system. Children, as well as young adults, with behavioural problems are listed as beneficiaries of the social welfare system.[17] Social welfare activities are primarily carried out by social welfare institutions, but they may also be carried out by local and regional self-government units, i.e. the City of Zagreb, associations, religious communities and other legal entities, craftsmen and other natural persons who perform social welfare activities, under the conditions and in the manner prescribed by SWA, the regulation governing foster care and other implementing regulations.[18] Since 2023, the activities of the social welfare centre are performed by the Croatian Institute for Social Work, which is a public institution with rights, obligations and responsibilities determined by SWA and its basic act, the statute.

In the last thirty years, the Croatian social welfare system has undergone significant structural and legislative changes, partly as a consequence of the need for modernisation and the creation of an integral legal system after the country gained indepen-

13 Učur, Marinko Đ., *Socijalno pravo*, Informator, Zagreb, 2000, pp. 4-5, 42-43.

14 *Ibid.,* p. 251.

15 Social Welfare Act (hereinafter: SWA*; Zakon o socijalnoj skrbi*), Official Gazette nos. 18/22, 46/22, 119/22, 71/23, 156/23, 61/25.

16 Art. 3 SWA.

17 Art. 15 para 1 and Art. 18 paras 2 and 3 SWA.

18 Art. 17 para 1 SWA.

dence, and on the other hand, the need to implement the *acquis communautaire* of the EU into the Croatian legal system.[19] The social welfare system, as part of public administration, has also undergone a process of digitalisation, which is particularly important for this system, given that it provides assistance to the most vulnerable members of society.[20] The uncertainty of legislative solutions within the social welfare system causes additional stress for workers and can also produce unfavourable outcomes for its users.[21] The Croatian social welfare system faces numerous challenges in its daily work as it seeks to harmonise compliance with legal provisions and users' needs. Today's social welfare system lacks professional workers, and those within the system struggle with an excessive administrative burden. An additional challenge is posed by frequent legal changes that often lead to uneven treatment between individual centres, create additional stress for workers and often result in ambiguities, inconsistencies and unfavourable outcomes for the end users of social welfare services.[22] The social welfare system often touches upon very sensitive areas of an individual's life. In Croatia it is necessary to invest more effort in strengthening the position of the social work profession in society, as well as in encouraging positive changes and stability in the organisation of the social welfare system at all levels. As part of future reforms of the social system, an in-depth analysis of the existing system should be conducted, the opinions and proposals of social workers should be taken into account, and a critical analysis made of the effects that potential changes could have on users and on the social system in general.[23]

3. THE ROLE OF THE SOCIAL WELFARE SYSTEM IN JUVENILE JUSTICE ACCORDING TO INTERNATIONAL DOCUMENTS

International documents that address issues related to juvenile justice systems often emphasise that, to achieve the goals of child-friendly justice, it is necessary to involve various professional services and experts in the process of responding to juvenile offenders. The backbone of all proceedings regarding juveniles, and of both formal and informal decisions, which takes precedence over other prin-

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19 Ilijaš, A.; Podobnik, M., *Nestabilnost zakona o socijalnoj skrbi – kako utječe na rad socijalnih radnika u centrima za socijalnu skrb?,* Ljetopis socijalnog rada 25, No. 3, 2018, pp. 428-430, [https://doi.org/10.3935/ljsr.v25i3.24] For more on the development of the Croatian social welfare system, see: Šućur, Z., *Socijalna pomoć i usluge socijalne skrbi, u: Socijalna politika Hrvatske* (drugo izdanje), Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2019, pp. 290 – 291.

20 Đanič Čeko A., Guštin M., *Digitalizacija hrvatske javne uprave s posebnim osvrtom na sustav socijalne sk*rbi; Zbornik radova Pravnog fakulteta u Splitu, year 59, no. 4, 2022, pp. 808-821.

21 Ilijaš, A.; Podobnik, M., *op. cit.*, note 19, pp. 430-431.

22 *Ibid.*, pp. 429 – 430.

23 *Ibid.*, pp. 445-446.

ciples, is *the best interests of the child*, proclaimed in Article 3 of the Convention on the Rights of the Child.[24] This principle must be taken into consideration in all actions of the competent authorities, including social welfare institutions, while states are obliged to ensure protection and care through appropriate legislative and administrative measures, taking into account the child and the person responsible for him or her.[25] In order to achieve the best interests of the child, his or her needs must be considered from different perspectives, and this is also why the provisions of international documents often mention the role of the social welfare system in the treatment of juvenile offenders.

When defining the term "child-friendly" justice, the Guidelines on child-friendly justice (Guidelines)[26] state that the scope of child-friendly justice should be broader than the actual justice system and court proceedings, and should include all professionals dealing with children in and outside judicial proceedings, such as the police, social welfare services and mental health services. One of the aims of the Guidelines is to ensure that children's rights are known and respected by all these professionals.[27] Recommendation CoE 20 (2003) also states that the juvenile justice system must adopt a wider approach to tackling youth crime, and should include not only youth courts but also other official authorities or agencies such as the police, the prosecution service, the legal profession, the probation service and penal institutions. All these professional services have to work closely together. Responses to juvenile delinquency should be multidisciplinary and multi-agency in order to have an impact at different levels of society: individual, family, school and community.[28] The Beijing Rules also state that juvenile justice should be considered an integral part of the national development process of each country, within a comprehensive framework of social justice for all juveniles.[29]

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[24] Convention on the Rights of the Child (1989); Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989; entry into force 2 September 1990; Available at:
[https://www.ohchr.org/sites/default/files/crc.pdf], Accessed on 20 May 2026.; Herceg Pakšić, B., (*Kazneno)pravni položaj djeteta u sukobu sa zakonom u Republici Hrvatskoj: temeljni obrisi*, Dijete i obitelj u suvremenom društvu, no. 1, 2024, p. 12.

[25] For more on the "best interest of a child", see: Božićević-Grbić, M.; Roksandić Vidlička, S., *Reforma maloljetničkog kaznenog prava i sudovanja*, Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), Vol. 18, No 2/2011, pp. 680-687.

[26] Guidelines and their explanatory memorandum were adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, Available at:
[https://rm.coe.int/16804b2cf3], Accessed 3 April 2026.

[27] Explanatory memorandum rule 31of the Guidelines, p. 31.

[28] Art. 1 of the Recommendation of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice (Adopted by the Committee of Ministers on 24 September 2003 at the 853rd meeting of the Ministers' Deputies).

[29] Rule 1.4 of the UN Beijing Rules; United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"). Adopted by General Assembly resolution 40/33 of 29 November 1985.

The role of the social welfare system usually comes into focus during the individual assessment of the juvenile. International documents emphasise that the individual assessment should involve an interdisciplinary approach and bodies from various services, and in many countries this includes social welfare services as well. Before making a final decision regarding juvenile sanctions, all information about the juvenile's background, his or her living circumstances, and the conditions under which the offence was committed has to be properly investigated and presented to the judicial or competent authority. These social or pre-sentence reports are considered crucial, and they have to contain all relevant facts about the juvenile, their social and family background, schooling, career, educational experiences, etc. In many countries social welfare services provide this type of information to the competent authorities, and that is why "adequate social services should be available to deliver social enquiry reports of a qualified nature."[30] Directive 2016/800 EU[31] also states that children who are suspects or accused persons in criminal proceedings have to be individually assessed. The individual assessment must be carried out at the earliest appropriate stage of the proceedings with the involvement of the child, and must take into account the child's character and maturity, the child's economic, social and family background, and any specific vulnerabilities. The Directive states only that the individual assessment has to be carried out by qualified personnel using a multidisciplinary approach and involving, where appropriate, the holder of parental responsibility or another appropriate adult.[32]

In some cases, social workers will be involved in criminal proceedings because they will be assigned as an appropriate adult for the juvenile, to ensure that the juvenile is able to participate in and follow the proceedings more easily. During criminal proceedings, it is important to ensure the effective participation of the juvenile as part of the right to a fair trial. "It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court."[33] Juveniles and their parents often do not understand the course of criminal proceedings or the content of individual actions carried out during the proceedings. That is why they have to be provided not only with legal aid but also with other types of support to facilitate their participation in the procedure. States must provide such assistance

30 Rule 16 Beijing Rules.

31 Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings; OJ L 132, 21/05/2016.

32 Art. 7 Directive 2016/800 EU.

33 European Court of Human Rights (Fourth Section), judgment of 15 June 2004, S.C. v. UK, no. 60958/00, paragraph 29. For more information, see: Božićević-Grbić, M.; Roksandić Vidlička, S., *op. cit.*, note 25. p. 692.

free of charge. In some cases, legal assistance may be provided to the juvenile, but in other cases, assistance may also be provided by another service, such as social welfare services. In those situations, social workers must be trained to work with children in conflict with the law and have sufficient knowledge and understanding of the various legal aspects of the juvenile justice process.[34] All professionals who are involved in the juvenile justice system have to acquire specialised training that should include knowledge about the adolescents' physical, psychological, mental and social development, as well as the special needs of the most vulnerable children. Their education and training have to be systematic and periodic.[35]

Guidelines also stipulate that all professionals working with children, including social workers, must undergo training in communication skills, the use of child-friendly language, and improve their knowledge of child psychology. Directive 2016/800 EU also states that member states have to ensure that professionals who are involved in criminal proceedings towards juveniles have specific competence in that field or have effective access to specific training regarding children's rights, appropriate questioning techniques, child psychology and communication in language adapted to children.[36]

4. POSITION AND ROLE OF SOCIAL WELFARE SERVICES IN THE JUVENILE JUSTICE SYSTEM IN SOME EU COUNTRIES

4.1. Austria

The legal status of juvenile offenders in Austria is regulated by a special law, the Youth Courts Act (*Jugendgerichtsgesetz* 1988, hereinafter: JGG).[37] The minimum age of criminal responsibility in Austria is 14, and juveniles are persons from 14 to 18 years of age. Children under the age of 14 years are not criminally liable. When a child who is not criminally liable has committed a criminal offence, he or she will be subject to measures that are regulated in the Federal Child and Youth

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[34] General Comment no. 10 on Children's Rights in Juvenile Justice (CRC/C/GC/10, 25 April 2007), p. 10.

[35] General Comment UN no. 10, p. 13.

[36] Para 63 of the Preamble of the Directive 2016/800 EU.

[37] Bundesgesetzvom 20. Oktober 1988 über die Rechts pflege bei Straftaten Jugendlicher und junger Erwachsener (Jugendgerichtsgesetz 1988 – JGG), StF: BGBl. Nr. 599/1988, last amanedment: BGBl. I Nr. 50/2025, text Available at: [https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002825] StF: BGBl. Nr. 599/1988 (NR: GP XVII RV 486 AB 738 S. 76. BR: AB 3573 S. 507.).

Welfare Act 2013 (Bundes-Kinder und Jugendhilfegesetz 2013, hereinafter: B-KJHG 2013).[38]

In Austria, in 1928, a special body referred to as the Youth Court Assistance (hereinafter: JGH, *Jugendgerichtshilfe*) was established to provide support to youth courts and prosecutors' offices during criminal proceedings towards juveniles.[39] Social workers, psychologists, and educators work in JGH. Their main role is to collect data regarding the juvenile and his or her personal and family situation, which is then submitted in the form of a written or oral report to the youth court or the public prosecutor, in order to assist them in making decisions on imposing pre-trial detention, determining appropriate juvenile sanctions, and preparing individual assessments of the juvenile.[40] If the report is given orally, then the representative of JGH has to be questioned as a witness before the court.[41] JGG states that, when possible and necessary, JGH must be provided with the necessary facilities and telecommunications equipment free of charge in the courthouse, which means they can be located in the court building.[42] In their report, they have to provide an overview of the living and family circumstances of a juvenile, including their economic and social background, psychosocial development and level of maturity, as well as all other circumstances that may serve to assess the person and their physical, mental, and emotional characteristics (individual assessment).[43] When collecting data about a juvenile for individual assessment, JGH is authorised to summon and question all persons who could provide them with information about the juvenile, and they also have the right to talk to the juvenile directly. Everyone from the criminal police, public prosecutors' offices, courts, and institutions for the education, care, and treatment of juveniles, as well as persons working in these institutions, must provide JGH with the necessary information and grant them access to files and records regarding their role of collecting information about the juvenile.[44]

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38 Bruckmüller, K., *Austria*, in: Decker, S.H.; Marteache, N. (eds.), International Handbook of Juvenile Justice, Springer, 2017, p. 220.

39 Cvjetko, B., Singer, M.; *op. cit.*, note 3, p. 314.

40 § 47 (1) JGG.

41 § 47 (2) JGG.

42 § 47 (3) JGG.

43 All tasks of Juvenile Assistance Services are listed in § 48 JGG.

44 § 50 (1) and (2) JGG. Information about juveniles collected by JGH may be sent to other courts, for example, the Family Court, if the data constitutes an essential prerequisite, in a specific case, for those institutions to perform their assigned tasks; otherwise, all collected data must be kept confidential. § 50 (3) JGG.

In cases where a juvenile is in pre-trial detention, the court can instruct the head of the probation office to hold a social network conference with the participation of JGH and the accused juvenile, where they will assess whether, in accordance with the principle of proportionality, there is a possibility of applying a less restrictive measure instead of pre-trial detention.[45]

4.2. Germany

The position of juvenile offenders in Germany is regulated in a very similar way to Austria. Special legislation governs the position of juvenile offenders; the *Jugendgerichtsgesetz* (JGG).[46] The age of criminal responsibility in Germany is 14, and juveniles are considered persons between 14 and 18 years of age.[47]

In Germany, information about juvenile offenders is collected via Youth Court Assistance Services (hereinafter: JGHS, *Jugendgerichtshilfe*). JGHS was established back in 1923 and consists of special departments or individual employees working in youth offices as administrative bodies in a municipality.[48] JGHS works in cooperation with *Jugendhilfe im Strafverfahren* (youth assistance in criminal proceedings).[49] Employees at JGHS are social workers or social pedagogues with at least three years of university education.[50] JGHS has a dual role during criminal proceedings, on the one hand, it must fulfil purely welfare-oriented tasks (family aid, protection of children in need of care), and on the other hand, it must assist and support the prosecutor and court by providing information about the juvenile's personal and family background for the trial. JGHS is partly responsible for the execution of educational measures.[51]

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45 Pre-trial detention conference § 35a JGG.

46 Jugendgerichtsgesetz in der Fassung der Bekanntmachung vom 11. Dezember 1974 (BGBl. I S. 3427), das zuletzt durch Artikel 21 des Gesetzes vom 25. Juni 2021 (BGBl. I S. 2099) geändert worden ist.

47 § 3 JGG.

48 Cvjetko, B.; Singer, M. *op. cit.*, note 3, p. 314.

49 Differences between these two bodies are evident from their names. *Jugendgerichtshilfe* (JGHS) has a clear judicial overtone, while *Jugendhilfe im Strafverfahren* (youth assistance in criminal proceedings) signals an affiliation with the child and youth services system. JGHS focuses more on the criminal aspect regarding the juvenile offender, while YACP focuses more on the educational influence on juveniles, Available at: [https://www.kinder-jugendhilfe.info/en/tasks-and-fields-of-work/other-tasks/involvement-in-juvenile-court-proceedings], Accessed 3 April 2026.

50 Dünkel, F., *Youth Justice in Germany*, Oxford Handbook Topics in Criminology and Criminal Justice, Oxford University Press, 2015. online edition, Oxford Academic, 2 June 2014, p. 8, Available at: [https://doi.org/10.1093/oxfordhb/9780199935383.013.68], Accessed 10 April 2026.

51 *Ibid*., p. 8.

The representatives of JGHS during criminal proceedings are treated as a special procedural entity and have specific rights and duties.[52] Their role in criminal proceedings is mainly regulated by § 38 and § 50 of JGG. By observing German criminal proceedings towards juveniles in general, it is evident that different agencies are involved, especially in the early stages, and that JGHS plays a central role.[53] JGHS has to be involved in criminal proceedings towards juveniles from the earliest possible time and during all stages.[54] Its role is to assist the court by submitting a social report about the juvenile that contains information about the juvenile's character, his or her development and family, as well as social and economic background. In the report, they have to highlight the particular vulnerability of the juvenile and also advise what type of measures should be taken towards the juvenile in the event of a conviction.[55] Information about the juvenile should be available to the court as soon as possible, and the JGHS representatives who prepared the report is summoned to the main hearing, in which he or she is required to participate.[56] The representative of JGHS is permitted to speak at the main hearing on request. If the JGHS representative is absent from the hearing, a written report by JGHS may be read out in the main hearing.[57] In practice many youth welfare departments are heavily overburdened, and in less serious cases a social enquiry report is not submitted and the presence of the JGHS representative at the court hearing is not always guaranteed.[58]

JGHS is included in the mediation, supervision and execution of educational measures and in the process of deciding on pre-trial detention.[59] There are also some differences in practice regarding the way the local JGHS is organised. Usually, all the aforementioned tasks are provided directly by JGHS and are rarely delegated to other providers such as an independent specialised department in the youth welfare office or its general social welfare services department (*Allgemeiner Sozialer Dienst*, ASD).[60]

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52 Cvjetko, B., Singer, M.; *op. cit.*, note 3, p. 314.

53 Dünkel, F., *op. cit,* note 50, pp. 8-9.

54 § 37 (6) JGG.

55 § 37 (2) JGG.

56 If the circumstances regarding juvenile have changed from the initial report in essential aspect, additional research must be conducted and updated report must be sent to the youth public prosecution office, and after the charge has been filed, to the youth court. § 37 (3) and (4) JGG.

57 § 50 (3) JGG.

58 Dünkel, F., *op. cit.* note 50, p. 10.

59 *Ibid.*

60 Web page Kinder-jugendhilfe, Available at: [https://www.kinder-jugendhilfe.info/en/tasks-and-fields-of-work/other-tasks/involvement-in-juvenile-court-proceedings], Accessed 15 May 2026.

4.3. Belgium

Belgium has long been described as having one of the most welfare-oriented juvenile justice systems in Europe, but in the last two decades reforms have introduced both a penal and restorative logics into this system, making it more of a hybrid model.[61] Local social welfare services (*jeugdbeschermingscomités*) can intervene and provide help and assistance to juveniles with behavioural problems when the juvenile and his or her family seek help. In cases where they do not voluntarily cooperate with social welfare services, the youth court can order that the family be placed under the supervision of social welfare services.[62] Social welfare services are involved in different stages of criminal proceedings towards juveniles, and in many cases judicial and social intervention and collaboration are intertwined. For example, during the pre-trial stage, the youth court can impose "provisional measures" on juveniles, placing them under social welfare supervision or in a social welfare institution (private or public) to protect the juvenile and to further familiarise itself with his or her personal and family situation. Social welfare services are also involved in the execution of various juvenile sanctions, such as group conferences where both victim and offender are allowed to invite significant others, and a police officer and social worker can be present.[63]

Belgium has one of the highest ages of criminal liability in Europe, 18 years, but in some cases juveniles between 16 and 18 years can be transferred to adult court (waiver). In order for the juvenile to be transferred to adult court, he or she has to be charged with a serious criminal offence listed in the respective law: aggravated violent theft, sexual assault (with threats or violence) and battery resulting in death or severe physical injuries, rape, robbery with murder, torture or homicide/murder, or at least one youth protection measure must previously have been imposed on him or her. Before making a decision about the transfer of a juvenile, the court has to gather information about the juvenile's character by conducting a medical-psychological examination, which can be carried out by a psychiatrist, a psychologist or a multidisciplinary team of experts, and a social enquiry carried out by social workers.[64] In cases where a juvenile is transferred to adult court, all sanctions can be imposed on him or her including imprisonment. [65]

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61 Dumortier, E.; Christiaens, J.; Nuytiens, A., *Belgium* in: Decker, S.H.; Marteache, N. (eds.), International Handbook of Juvenile Justice, Springer, 2014, pp. 241-244.

62 *Ibid.*, p. 242.

63 *Ibid.,* p. 251.

64 *Ibid.,* pp. 256–257.

65 See Youth Protection Act of 1965 from Belgium, Articles 57bis and 125.

4.4. Denmark

It is well known that Scandinavian countries have a different approach to juvenile delinquency compared to other EU countries. None of the Scandinavian countries has, or has ever had, a designated Juvenile Justice System or special a Juvenile Justice Act.[66] The age of criminal responsibility in all Scandinavian countries is 15.[67] Scandinavian countries do not have special Youth Courts because the response to juvenile delinquency largely falls under the jurisdiction of social welfare systems, which have to cooperate with the judiciary. For example, the Danish social welfare system is authorised to impose measures on juveniles between 12 and 17 years who are suspected of committing a crime without a prior court decision regarding their guilt. However, if the social welfare services decide to place the child in a secure institution that is under the jurisdiction of the social welfare system, without any consent from the child or the parents, this type of decision must be confirmed by a judge. The duration of this type of confinement is not defined beforehand, and the decision should be based on a holistic assessment of the best interests of the child and is not seen as punishment.[68]

In Denmark, the police can act in relation to children (those below the age of 15) and juveniles (individuals above the age of 15). When a child or juvenile is suspected of committing a criminal offence, they can be questioned by the police. In such situations, the police must inform the parents or a representative of the social welfare system, and at least one of them has to be present during the questioning. The police are always obligated to inform the social welfare system if there is any reason to assume that the child needs support from social welfare.[69] When a child under the age of 15 has been arrested, the police must notify the social welfare services. In some cases, the child can be handed over directly to the social welfare system and placed in a secure institution. The same rules apply in cases involving juveniles.[70] When preparing a case for the court, the police and prosecutor must cooperate and collect all relevant information about the juvenile. Social welfare services prepare a report to help the judge make a decision regarding the juvenile in question.[71] In Denmark, as in many EU countries, there is a possibility to

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66 Storgaard, A., *Denmark,* in: Decker, S.H., Marteache, N. (eds.), International Handbook of Juvenile Justice, Springer, 2017, p. 268.

67 Scandinavian countries included are Denmark, Finland, Sweden and Norway. See more in Gurda, V., *Starosne granice krivično-pravnog maloljetstva u uporednom pravu*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 41, No. 3, 2020, pp. 781-802.

68 Storgaard, A., *op. cit.*, note 66, p. 270.

69 *Ibid.*, p. 274.

70 *Ibid.*, p. 275.

71 *Ibid.* p. 276.

implement different diversion measures in relation to children and juveniles. For example, the prosecutor may decide to withdraw the charges if the juvenile follows the instructions from the social welfare services (diversion), which have to be approved and accepted by the judge. Social welfare services are also responsible for supervising the execution of different juvenile sanctions (they have to monitor whether the child or juvenile has fulfilled their obligations), especially community sanctions, and various sanctions are implemented in social welfare institutions.[72] Based on the above, it can be concluded that in Denmark social welfare services have more jurisdiction if the child is under 15 years of age, while the court has more jurisdiction in cases involving juveniles over the age of 15.

In 2019, Denmark reformed its judicial system in a way that, to some extent, changed the relationship between the criminal court and social welfare services. A new form of court-like proceedings was introduced which, for the first time, included children below the age of criminal responsibility. This new policy reform, *All actions have consequences,* was introduced with the aim of communicating to children that serious crimes will produce a quick response and of removing authority from the child welfare system, which had been criticised for being too slow and lenient in cases of serious crimes.[73] Children between the ages of 10 and 17 who have committed a serious crime are now handled by two new bodies: Youth Crime Boards (hereinafter: YCB) and Youth Probation Services (hereinafter: YPS). This means that when a child (aged 10 to 17) is suspected of committing a serious criminal offence, he or she will be referred to YCB, which can issue mandatory child welfare interventions, while YPS is obligated to control and supervise the child in question during the implementation of those measures. These new court-like proceedings were introduced by the "Youth Crime Prevention Act", which was aimed at juveniles who are suspected (aged 10-14) or convicted (aged 15-17) of a violent crime or repeated serious offending. It is important to emphasise that this new regulation did not replace the old one, but simply added this new procedure to the existing system, making the whole system more complex and complicated for juveniles and their parents. [74]

The police now have to refer children aged 10 to 14 to YCB and notify the child welfare services, while children aged 15 to 17 will be referred to court and, if found guilty, will then be referred to YCB. YCB is a new body consisting of three board members: a judge, a representative from the local police and a representative from

[72] *Ibid.*, p. 277.

[73] Ostergaard Larsen, B.; Henriksen, A.; Dyrvig Henriksen, T,; Torbenfelt Bengtsson, T., *New systems responses to juvenile crime, Experience from Denmark*, Nordisk Tidsskrift for Kriminalvidenskab, No. 3, 2023, pp. 332-333.

[74] *Ibid.*, pp. 332-334.

the municipal child welfare services. When a child is sent to YCB, the board has to arrange a meeting in order to determine which type of measures should be implemented to achieve special prevention. YCB is located in the court building. During the meeting all board members must be present. The child and their parents are obligated to attend this meeting, as are the child's probation officer and the child's welfare coordinator. All of them must cooperate to decide which type of measures should be implemented: an immediate response, an improvement programme or no response. Improvement programmes are very similar to measures that can be applied to a child by social welfare services. These programmes involve social welfare services' intervention for a fixed period of up to two years. After a decision has been made, the child is referred to the child welfare services, which are responsible for implementing these measures. The child can then be referred to YPS, which is obligated to monitor the child, their parents and the work of child welfare services. [75]

When comparing the situation in Denmark before and after 2019, it can be concluded that before 2019, the social welfare system had more authority and could decide to implement different measures without the approval or control of the court system, especially in cases involving children below the age of criminal responsibility. After 2019, all children aged 10 to 17 must be referred to YCB, which now has the authority to decide which type of measure is appropriate for the child in question, while child welfare services are only part of the procedure and can provide their recommendation or opinion.[76] The current Danish system is very complex and difficult to comprehend, especially for children and their parents, who have already stated that in some cases they cannot understand the proceedings or the measure being implemented, or they have trouble distinguishing between different types of measures.[77]

4.5. England and Wales

England and Wales have one of the lowest minimum ages of criminal responsibility in Europe, only 10 years.[78] The juvenile justice system deals with children

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75 *Ibid.,* pp. 335-336.

76 *Ibid*., pp. 344-345.

77 We have a similar situation in Croatia, where juveniles and their parents have stated that they are not able to distinguish between a measure of increased care and supervision that can be imposed by a youth criminal court towards a juvenile and a measure of supervision over parental care that is imposed on parents in accordance with the provisions of the Family Act. See more on this problem in Radić, I., *Sustav maloljetničkih sankcija (Juvenile Sanction System*), doctoral thesis, Faculty of Law, University of Zagreb, Zagreb, 2016, pp. 213-219.

78 There has been extensive discussion in England and Wales regarding the minimum age of criminal responsibility. The new white paper "Cutting Youth Crime. Changing Young Lives. The youth justice

aged 10 to 17 who are suspected of committing a criminal offence. Before 1989 in England and Wales, children in conflict with the law and children in need of care and protection were both under the jurisdiction of the youth court. The 1989 Children Act introduced a separation between these two categories of children, and the family court gained authority over children in need of care and protection.[79] The data show that children who are already under the care of the local authority (children in need of care and protection) have a higher risk of committing a criminal offence and entering the juvenile justice system compared to children from the general population.[80]

Regarding the role of social welfare services in the juvenile justice system, they are involved as part of a special body, the Youth Offending Team (hereinafter: YOT). YOT is a multi-agency body that consists of a social worker, a probation officer, a police representative, and education and health workers, though it may also include representatives from other areas.[81] One of its main roles is to provide a pre-sentence report in order to inform the judge about the juvenile's character and their current family situation, and to identify the risk factors relating to the juvenile in question. In that report, it can also propose the type of sanction that should be imposed on the juvenile, taking into account the committed criminal offence and the juvenile's personal and family circumstances. YOT also supervises the execution of different juvenile sanctions.[82]

YOT is monitored by the Youth Justice Board (hereinafter: YJB). Its role is to supervise the juvenile justice system in general, identify and set national standards, and advise government ministers on the juvenile justice system.[83] It should be noted that in England and Wales youth crime in general has been on the decrease, which also means that fewer juveniles are being sent to youth courts. This is also

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system reform and delivery plan", published by the UK Government in May 2026, mentions that one element of this new policy reform in the youth justice system includes the consideration of raising the age of criminal responsibility in the UK. Available at: [https://www.lawgazette.co.uk/news-focus/in-depth-once-in-a-generation-reform-of-youth-justice-system/5126889.article], Once in a generation reform of youth justice system, Monidipa Fouzder, 25 May 2026.

79 Bateman, T., *England and Wales* in International Handbook of Juvenile justice, eds. Decker, S.H., Marteache, N., Springer, 2017, p. 288.

80 *Ibid.*, p. 289.

81 Dignan, J., *England and Wales* in: Dunkel, F.; Grywa, J.; Horsfield, P.; Pruin, I. (eds.), Juvenile Justice Systems in Europe, Current Situation and Reform Developments, Vol. 1, 2nd revised edition, 2011, p. 370.; The role of YJB is being revised in the new policy reform white paper "Cutting Youth Crime. Changing Young Lives", Ministry of Justice, UK Government, Presented to Parliament by the Lord Chancellor and Secretary of State for Justice by Command of His Majesty, May 2026, pp. 72-74.

82 For more information, see Radić (2016), *op. cit.* note 77, pp. 129-131.

83 Dignan, J., England and Wales, *op. cit.* note 81, p. 371.

a consequence of the fact that diversion measures are increasingly being applied in the juvenile system as informal sanctions. However, the cases of juveniles that remain in the system tend to be more serious or present greater challenges.[84] In many cases, juveniles and their parents state that they lack information about the juvenile justice system. There are some examples of good practice where magistrates meet with Youth Justice Services in order to help the juvenile and their family prepare for participation in criminal proceedings by explaining the proceedings in general and their role in them. In those meetings, pre-sentence reports (PSRs) are shared and discussed in advance with the juvenile and their parents but this practice is not uniform and varies across England and Wales.[85]

5. SOCIAL WELFARE SERVICES IN THE JUVENILE JUSTICE SYSTEM IN CROATIA

Different factors can affect the role and position of social welfare services in juvenile justice systems. The main aim of this paper is to determine what type of role and position social welfare services have during criminal proceedings towards juveniles in Croatia, in accordance with the results of a study that analysed the position of social welfare services in juvenile justice systems in 11 different European countries. The study was conducted from 2005 to 2012 by studying juvenile law, policy documents and through systematic observation of youth court hearings or their equivalents in 11 different EU countries. The countries that were part of the study are Belgium, England and Wales, France, Germany, Greece, Ireland, Italy, the Netherlands, Scotland, Spain and Switzerland.[86] The criteria used in the aforementioned study will serve as a framework for analysing the role of social welfare services in the Croatian juvenile criminal justice system by studying legal provisions that regulate the position of social welfare services during criminal proceedings towards juveniles. After the analysis, it will be possible to determine to which group the Croatian juvenile justice system belongs regarding the position of social welfare services during criminal proceedings.

As mentioned above, different elements can affect the role of social welfare services in a specific country, and the first element that will be observed is the legal tradition in which the judicial system operates: adversarial or inquisitorial. In practice, no purely inquisitorial or adversarial criminal proceedings exist because in many coun-

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84 Field, S.; Machura, S., *Youth Court in England and Wales: Learnings from European contexts and local developments*, Prison Service Journal, Issue 278, 2024, pp. 26, 30.

85 *Ibid.*, p. 32.

86 Scandinavian countries were not included in the study because of limitations regarding language and gaining access to court hearings. More on the methodology of the research conducted can be found in: Rap, S. E., *op. cit.* note 8, pp. 676-677.

tries elements from one tradition prevail.[87] *Common law* countries generally have a predominantly accusatory type of proceedings, while countries in continental Europe (continental legal tradition) generally have mixed-type criminal proceedings with inquisitorial elements.[88] Adversarial criminal proceedings are defined as a dispute between two equal parties that is settled before a court. The parties are more active during the trial; they present evidence directly before the court, which does not participate in proposing evidence. The court must be objective and is responsible for overseeing the entire procedure.[89] In inquisitorial proceedings, the investigation plays a very important role in the further course of the procedure. It is during the investigation that information about the juvenile is collected, which then becomes an integral part of the case file.[90] Croatia is a good example of a country that has a mixed type of criminal proceedings, with inquisitorial elements prevailing in the pre-trial stages of criminal proceedings, especially during investigation or enquiry, while adversarial elements prevail during the court hearing.[91]

Another element that can affect the role of social welfare services within criminal proceedings towards juveniles is the model of response to juvenile delinquency adopted by a particular state: a welfare or a justice approach. Juvenile justice systems that take more of a welfare approach focus on the juvenile and his or her behaviour, while the criminal offence is seen only as a symptom of various problems in the juvenile's personal and family life that have led to the delinquent behaviour. The main goal of this type of juvenile justice system is to protect and help the juvenile to achieve resocialisation into society and specialised prevention. In this type of system, social welfare services and other organisational forms through which social protection is provided are tasked with suggesting to the court, on the basis of an assessment of specific circumstances, whether and how to sanction the juvenile's criminal behaviour.[92] The opposite type is the justice approach, where more emphasis is placed on the criminal offence and the procedural rights of the juvenile. In the justice approach, the juvenile is treated as a person capable of deciding about his or her own actions, like any other individual who freely chooses to engage in socially unacceptable behaviour. In this type of system, less attention is paid to the personal and social circumstances of the juvenile and his or her family, and the juvenile is sentenced to a criminal sanction with no

87 *Ibid*., p. 677.

88 Tomašević, G., *Kazneno procesno pravo, Opći dio: temeljni pojmovi*, Split, 2011, pp. 33, 39-41.

89 *Ibid.,* pp. 31-33.

90 *Ibid*., pp. 35-36.

91 Ljubanović, V.; Novokmet, A.; Tomičić, Z., *Kazneno procesno pravo*, Osijek, 2020, pp. 209-214.

92 Kovačević, M., *Osnovni modeli maloljetničkog pravosuđa s osvrtom na ulogu i položaj socijalnog rada.* Ljetopis socijalnog rada 20, No. 2, 2013, pp. 303-306, Available at: [https://hrcak.srce.hr/112968].

or minimal intervention from social welfare services.[93] These types of systems deal only with juveniles who have committed a criminal offence, while children who have behavioural problems or a pre-delinquent status are treated by social welfare services outside the criminal justice system.[94] In most European countries, however, a mixed type of response to juvenile delinquency prevails, combining elements of the welfare and justice models in line with the features of juvenile criminal law in each country.[95] The Croatian juvenile justice system can also be characterised as a mixed type (welfare-justice model) of the juvenile justice system. YCA states that the purpose of imposing juvenile sanctions is special prevention, aimed at influencing the juvenile's upbringing and character and strengthening his or her sense of responsibility by providing help, care, protection and education so that he/ or she does not commit criminal offences in the future.[96] When choosing a juvenile sanction, the court considers the principles of individualisation, proportionality and subsidiarity. This provision clearly indicates elements of the welfare model approach.[97] On the other hand, when observing criminal proceedings towards juveniles in Croatia, it can be concluded that juveniles enjoy all procedural rights during criminal proceedings in accordance with Art. 6 ECHR and Directive 2016/800/EU, and even more, which indicates that elements of the justice model are also present.[98] In Croatia, the youth court deals only with children who are criminally liable and who have committed a criminal offence. Children under 14 are not criminally responsible and are not subject to criminal proceedings in Croatia.[99] Children whose behaviour constitutes a criminal offence but who are not criminally responsible, as well as children who exhibit behavioural problems (pre-delinquent behaviour), fall under the jurisdiction of the social welfare system, which is also an element of the justice model.

5.1. Two Main Models of Relation Between Social Welfare Services and Youth Courts

In EU countries covered by the aforementioned study, two main models have been identified regarding the relationship between social welfare services and

93 *Ibid.*, pp. 306- 310.

94 Rap, S. E., *op. cit.* note 8, pp. 678-679.

95 Radić (2016), *op. cit.* note 77, pp. 94-98.

96 Art. 6. YCA, for more information, see Carić, A.; *op. cit.*, note 2, pp. 7-8.

97 For more information, see Radić (2016) *op. cit.*, note 77, pp. 397-421.

98 Radić, I., *Implementacija Direktive o postupovnim jamstvima za djecu koja su osumnjičenici ili optuženici u kaznenim postupcima u noveli Zakona o sudovima za mladež*, Hrvatski ljetopis za kaznene znanosti i praksu, vol. 27, no. 2, 2020, pp. 571-601, Available at: [https://hrcak.srce.hr/253326].

99 Art. 49 YCA.

youth courts: either social welfare services are directly attached to the youth court (as part of the juvenile justice system), or they operate as a separate and independent organisation.[100] In France, SEAT (*Service Educatif Auprès du Tribunal pour Enfants*) is part of the court, and social workers from SEAT provide the judge with information on the young person's background before every hearing.[101] In the countries analysed in the paper, the social system is separate from the judiciary, and social workers are usually involved only through a special body that assists the court in collecting data on juveniles (Austria, Germany, England and Wales, Denmark).

In Croatia, there are also professionals who work within the court and the state attorney's office, and their role is to provide the court or state attorney with information about the juvenile. These professionals are part of the judiciary and not part of the social welfare system. Youth courts and state attorneys' offices have expert associates who may be social pedagogues, social workers or psychologists.[102] These expert associates provide the court with an expert opinion on the type of sanction that would be justified to impose on the juvenile at a court session or hearing, collect data on the implementation of the educational measure imposed on the juvenile, provide an opinion to the youth court council on the need to suspend or replace the educational measure, and perform other actions as instructed by the youth judge. Expert associates in the state attorney's office collect data and provide the expert opinions necessary for decisions within the jurisdiction of the state attorney.[103]

Croatia also belongs to the group of countries where social welfare services are independent and separate organisation from the judiciary, but collaborate with youth judges and state attorneys' offices during criminal proceedings towards juveniles. The organisation of social welfare services in Croatia is described in the second part of the paper. Within the Croatian Institute for Social Work, there is no special department with exclusive competence for juvenile offenders; instead, juvenile offenders are dealt with by professional staff in the department responsible for children, youth and families in general. Their work is most evident during the execution of juvenile sanctions, such as special obligations (Art. 10 YCA) and increased care and supervision (Arts. 11 and 12 YCA). For example, during the implementation of a special obligation, the competent social welfare centre is obliged to appoint a measure coordinator, i.e. a person who assists the juvenile

100 Rap, S. E.; *op. cit.*, note 8, p. 680.

101 *Ibid.*

102 Art. 43 para 1 YCA.

103 Art. 43 para 2 YCA.

during the period of fulfilling the special obligation, within 15 days of receiving the decision. This may be an employee of the centre or an external collaborator. The measure coordinator must send a report to the centre once a month, and the centre executive officer is obliged to submit a report on the progress of fulfilling the special obligation to the youth court and the state attorney's office every three months, or more frequently at their request.[104]

Youth courts and state attorneys' offices have an obligation to inform the social welfare services of the facts and circumstances that established during the proceedings concerning the juvenile and his or her family that indicate the need to take measures to protect the rights and well-being of the juvenile.[105] The judiciary is obligated to act if it notices that the child's rights are being violated and to alert the social welfare system so that appropriate protective measures can be taken in relation to the child. It is important to emphasise that measures within the social welfare system are applied to children who display pre-delinquent forms of behaviour, as well as in cases where there are problems in the family or violations of the child's rights, and that these measures must be taken regardless of whether the child has been convicted of a criminal offence. The social welfare system in Croatia responds to children and families who are in a state of social vulnerability, while the judiciary is competent to act only when a juvenile has committed a criminal offence.

In the paper it is often stated that the measure will be taken by the competent social welfare centre, hence it is necessary to state how the centre's jurisdiction is determined. The centre's jurisdiction in the criminal proceedings towards juveniles is determined in accordance with the jurisdiction of the youth court, which means that the competent social welfare centre will be the one based on the place of residence or temporary residence of the juvenile.[106] This principle regarding jurisdiction in the proceedings towards juveniles is accepted because it is believed that the facts and circumstances of the juvenile's life, and his or her living environment, can be determined more promptly and efficiently at the place of residence.

In each case where the state attorney acts towards a juvenile who is suspected or accused of committing a criminal offence, they are obligated to inform the competent social welfare centre.[107] The obligation of the state attorney to inform the social welfare centre about any initiated proceedings towards juveniles should be

104 Radić I. (2016), *op. cit.,* note 77, pp. 180-182.

105 Art. 56 YCA.

106 Art. 47 YCA.

107 In Croatia, competent social welfare services will also be informed in cases when the suspect is a young adult, see Art. 107, para 1 YCA.

seen as a necessary prerequisite for the centre to be able to execute their duties and safeguard the juvenile`s rights during the proceedings.[108] The aforementioned obligation also applies when a juvenile is subject to joint proceedings with an adult, as well as in the case of younger adults. A representative of the social welfare centre has the right to familiarise himself or herself with criminal proceedings, to make proposals during the proceedings, and to point out facts and evidence that are important for making a correct decision regarding the juvenile in question.[109]

The most important role of the social welfare centre during proceedings towards juveniles is to collect information necessary for assessing the psychophysical development of the juvenile, as well as information about his or her personal and family circumstances, and to submit that data in the form of a report to the competent judicial authorities.[110] The juvenile's parents or legal guardian and other persons who can provide the necessary information in order to obtain the aforementioned information about the juvenile will be questioned. In cases where the juvenile has already been sentenced to a juvenile measure, a report on the implementation of that measure will also be obtained.[111] The state attorney is obligated to collect this information about the juvenile during criminal proceedings and has two options: he or she can entrust the collection of this information to aforementioned expert associate working at the state attorney's office, or to the social welfare centre. In some cases, when it is considered necessary, the opinion of a doctor, psychologist or pedagogue will be sought to assess the juvenile's medical condition, psychological development or characteristics. In some cases, an opinion may also be requested from a healthcare, social welfare or other institution.[112]

In practice, if there is an expert associate working in a state attorney's office, the state attorney will entrust that person with the collecting data about the juvenile. When the expert associate receives that request, in most cases he or she will contact the competent social welfare centre to determine whether it has information about the juvenile and their family, whether they are being monitored by the social welfare services, and whether there has been any report about that family to the social welfare services. The social welfare services must be informed about criminal proceedings towards juveniles, but they are also informed in order to determine whether the juvenile has already been reported to the centre for some form of delinquent behaviour. Another institution that is usually approached is

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108 Cvjetko, B., Singer, M., *op. cit.* note 3, p. 317.

109 Art. 57 YCA.

110 Art. 78 para 1 YCA.

111 Art. 78 para 2 YCA.

112 Art. 78 paras 3 and 4 YCA.

the school that the juvenile attends or has attended, because important data about the juvenile's character can also be obtained from the school's counselling and support services. This part clearly shows how important it is that multi-institutional cooperation and an approach that encompasses various aspects of the juvenile's life be applied within the framework of the treatment of the juvenile so that he or she can be provided with appropriate help and support.[113]

The state attorney is also obliged to notify the centre of the decision to submit a proposal for the imposition of a juvenile sanction or to suspend the preparatory proceedings within eight days of that decision.[114] The obligation to notify the social welfare centre about any procedural action that significantly changes the juvenile's procedural position is connected with the need for the social welfare services to be informed of the juvenile's current procedural position so that they can provide him or her with appropriate support.

5.2. Stage of Criminal Proceedings Towards Juveniles at Which Social Welfare Services Become Involved

The study also found differences between countries regarding the stages of criminal proceedings towards juveniles at which social welfare services become involved. Again, two models can be observed: countries where social welfare services are in contact with juveniles from the beginning of the criminal proceedings, and countries where social welfare services become involved at later stages of the proceedings.[115] In some countries, social welfare services are involved from the beginning of the criminal proceedings towards juveniles. For example, in Germany JGHS must be involved in criminal proceedings towards juveniles from the earliest possible stage. In Denmark, the police must inform the parents or social welfare services about the juvenile's arrest. In a study conducted by Rap it was concluded that in countries with a more welfare-oriented juvenile justice system, such as Belgium, France, the Netherlands and Switzerland, social welfare services are informed about the proceedings at the pre-trial stage (in cases of arrest or pre-trial detention).[116] In another group of countries, social welfare services are usually involved at a much later stage of criminal proceedings. These are usually countries

[113] For more information on the importance of individual assessment of juveniles during criminal proceedings, see: Radić, I. (2020), *op. cit.* note 98, pp. 586-588.

[114] Art. 79 para 3 YCA.

[115] Rap, S., *op. cit.* note 8, p. 682.

[116] *Ibid.,* pp. 682-683.

that have a more justice-oriented approach in the juvenile justice system, especially Anglo-Saxon countries such as England and Wales, Ireland and Scotland.[117]

Croatia belongs to the first group of countries. In Croatia, social welfare services must be informed in every situation where a juvenile is suspected or accused in criminal proceedings from the very beginning, before formal criminal proceedings have started, and their role then differs according to the stage of the proceedings. In cases where a juvenile is arrested or temporary measures, precautionary measures or pre-trial detention have been imposed on him or her, the competent social welfare centre must be informed.[118] During criminal proceedings, after the court has obtained information about the juvenile's personal and family life from the social welfare services, the court may *ex officio,* or upon the proposal of the state attorney, decide that the juvenile be temporarily placed under the supervision of the social welfare centre during the proceedings for the purpose of providing assistance and protection, or that he or she be temporarily placed in a social welfare institution, when this is appropriate to the expected sanction, in order to protect the juvenile from further endangerment of his development, especially from the temptation to repeat the criminal offence.[119] Temporary placement in a social welfare institution and supervision are implemented during criminal proceedings towards juveniles as educational measures of supervision (Art. 11 YCA) and referral to an educational institution (Art. 15 YCA). These measures can last until the final conclusion of the proceedings, but the court is obliged to examine the grounds for temporary placement every two months, counting from the date of the finality of the previous decision. The time the juvenile spends in temporary placement in a social welfare institution will be included in the duration of the institutional educational measure.[120]

In many European juvenile justice systems, it is possible to impose an informal sanction on juveniles before criminal proceedings have formally begun, at the pretrial stage. Informal sanctions are usually imposed by the state attorney at the pretrial stage of criminal proceeding before the juvenile has been found guilty. Social welfare services often play a major role in the application of these informal sanctions, as they supervise the juvenile during the implementation of these measures and give their opinion on the possibilities of imposing a specific measure on the

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117 In those countries, social workers are instructed to prepare a pre-sentence report or social enquiry report and advise the judge about the personal circumstances of the juvenile in question. Rap, *op. cit.* note 8, p. 683.

118 Art. 63 para 1 YCA and Art. 68 YCA.

119 Art. 65 YCA.

120 Art. 65 paras 3 and 4 YCA.

juvenile.[121] Croatia is not an exception because, in criminal proceedings towards juveniles, the principle of opportunity is broadly applied in practice. For example, 40% of cases of juvenile offenders were decided based on the principle of opportunity by the state attorney in 2024, and 41,5% in 2023.[122] In YCA, there are several possibilities for applying the principle of opportunity. Primarily, Arts. 71-73 YCA provide this possibility to the state attorney, but there is also a possibility for the youth judge to apply this principle during criminal proceedings. In Croatian practice, the principle of opportunity is mainly used by the state attorney at the pre-trial stage. There are two main types of the principle of opportunity: unconditional and conditional opportunity. In both cases the state attorney can decide gainst initiating criminal proceedings even if there is reasonable suspicion that the juvenile has committed a criminal offence for which a fine or a prison sentence of up to five years is prescribed, if the state attorney concludes that conducting criminal proceedings would not be purposeful, taking into account the nature of the offence, the circumstances in which it was committed, the juvenile's previous life and his or her character. The state attorney can attach additional requirements, special obligations, to this decision. In order to determine all the circumstances regarding the juvenile and the criminal offence committed, the state attorney can request information from the juvenile's parents and other competent institutions (including social welfare services) or request that this information be collected by an expert associate at the state attorney's office.[123] Again, information about the juvenile's personal and family life has to be collected and, in practice, social welfare services will be contacted. If the state attorney has decided to apply the principle of unconditional or conditional opportunity, he or she is obligated to submit the decision with an explanation to the social welfare services.[124] The role of social welfare services will continue in cases of conditional opportunity because then social welfare services have to assist and monitor the juvenile during the implementation of special obligations. When the juvenile has fulfilled his or her obligations, the state attorney will make a final decision not to initiate proceedings towards the juvenile.[125] The state attorney is obliged to notify the social welfare services of his or her decision to submit a proposal for the imposition of a juvenile sanction or

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121 For more information, see Puharić, B.; Radić, I., *Primjena načela svrhovitosti u postupanju prema maloljetnicima*, HLJKPP, Zagreb, vol. 22, no. 2, 2015, pp. 635-670.

122 Source: According to the State Bureau of Statistics data, in 2023 and 2024, based on the principle of opportunity, 40% (455/1096 reported) of criminal proceedings towards juveniles were not initiated, and in 2021, 41,5% (506/1268 reported). For more information on statistics for previous years, see: Puharić, B., Radić, I.; *op. cite,* note 121, pp. 649-653.

123 Art. 71 para 1 YCA.

124 Art. 71, para 3 and Art. 72 para 3 YCA.

125 Art 71 paras 2 and 3 YCA.

to suspend the preparatory procedure within eight days from the date of the decision.[126] This provision also indicates that the state attorney is obligated to inform the social welfare services of his or her decisions regarding the juvenile at different stages of criminal proceedings in order to ensure that the social welfare services have all the information about the juvenile's current legal position and that they can execute their duties and safeguard the juvenile`s rights during the proceedings.

All of the aforementioned elements affect the role that social welfare services have during hearings before the youth court in different juvenile justice systems. In some countries, such as Belgium and France, social workers are not always present at every court hearing because they have already submitted their written report to the judge and may also have an informal meeting with the judge in his or her chambers.[127] In other countries, social workers have a more active role during court hearings and are required to be present, for example in Germany and Austria. However, in many cases the role of the social worker during the hearing lies somewhere in between, meaning that social workers can be present at the hearing but do not have an active role. In Germany, for example, a social worker may be present at the hearing, but in practice, because of the work overload, social workers are usually not present at hearings, especially in cases of less serious criminal offences.[128]

In Croatia, social welfare services are among the participants in criminal proceedings. These are persons and bodies that participate in criminal proceedings and whose legal status is determined by the regulations of criminal procedural law.[129] It is important to emphasise that in criminal proceedings towards juveniles in Croatia, social welfare services do not have the role of a party to the proceedings and do not have the same legal status as the state attorney or defence attorney.[130] The representative of the social welfare centre has the right to become familiar with the course of the proceedings, to make proposals during the proceedings and to draw attention to facts and evidence that are important for making the correct decision.[131] This means that the representative of social welfare services may be present at different stages of criminal proceedings towards juveniles in Croatia. As mentioned, they must be informed in cases of a juvenile's arrest or when the youth court is deciding on pre-trial detention. A representative of the centre may

126 Art. 79 para 3 YCA.

127 Rap, *op. cit.* note, p. 685.

128 Dunkel, F.; *op. cit*. note 50, pp. 9-10.

129 Tomašević, G.; *op. cit.* note 88, p. 24.

130 Cvjetko, Singer, *op. cit.* note 3, p. 316.

131 Art. 57 para 1 YCA.

be present during the youth court council session when a decision is made on the state attorney's proposal to impose a sanction on the juvenile,[132] and they must be summoned to the main hearing.[133] The absence of representatives of social welfare services does not prevent the court from holding the hearing.[134] If the representative of social welfare services is present during these stages of criminal proceedings, they have the right to present proposals and to point out facts that are important for making the final decision. This does not only refer to the facts and evidence that are necessary for the evaluation of the juvenile's character and living environment, but may also refer to circumstances related to the committed criminal act.[135]

Social welfare services are also involved in the implementation of juvenile sanctions such as special obligations (Art. 10 YCA), increased care and supervision (Art. 11 YCA) and institutional educational measures carried out in institutions within the social welfare system (Arts. 13, 15 and 17 YCA).[136] Social welfare services must submit a report on the progress of the implementation of different educational measures every three months to the court that imposed those measures and to the competent state attorney. The youth judge may at any time request a report on the implementation of educational measures from the social welfare centre or an expert associate.[137]

6. CONCLUSION

After analysing the legal provisions that regulate the position of social welfare services during criminal proceedings towards juveniles in Croatia, it can be concluded that Croatia is one of the countries that combines elements of different systems to achieve the best possible solutions. The Croatian juvenile justice system combines elements of the welfare model, especially regarding the implementation of juvenile sanctions, and elements of the justice model, which are more prominent during criminal proceedings towards juveniles. As emphasised at the beginning of the paper, Croatia is a welfare state, which also affects the role of the social welfare services system in society in general. The role and position of social welfare services in the juvenile system are regulated within the framework of these

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132 Art. 84 para 1 YCA.

133 Art. 86 para 2 YCA.

134 Art 86 para 3 YCA.

135 Hirjan, F.; Singer, M., *Komentar Zakona o sudovima za mladež i kaznenih djela na štetu djece i maloljetnika*, Nakladni zavod Globus, Zagreb, 2002, p. 129.

136 Due to limitations in the scope of the paper, it will not address the role of social welfare services during the implementation of juvenile sanctions. For more information on the subject, see: Radić (2016), *op. cit.* note 72, pp. 164-288.

137 Art. 98 YCA.

basic features. The social welfare system in Croatia is separated from the judiciary and falls under the jurisdiction of a separate ministry. This system encompasses various beneficiaries and activities, of which children with behavioural problems represent only a small part.

Social welfare services are organisationally separate from the juvenile justice system, but during criminal proceedings towards juveniles they must collaborate to achieve the same goal: the resocialisation and special prevention of the juvenile. The primary role of social welfare services is focused on providing assistance to the juvenile and his or her family during a difficult time by giving them advice and support and helping them overcome the problematic situation. On the other hand, their role is also to assist the youth court by collecting and presenting information about the juvenile's character and family situation in order to help the court choose an appropriate measure for the juvenile. The influence of social welfare services is most visible in the report on the psychophysical and social anamnesis of the juvenile. The individual assessment of the juvenile is in many ways crucial when deciding on the juvenile's sanction. In their report, social welfare services propose a measure that they consider to be adequate in that individual case. In many cases, it can be hard to reconcile these separate goals. On the one hand, social welfare services have to focus on the needs of the juvenile, but on the other hand they have to assist the youth court, show the juvenile that he or she is responsible for his or her behaviour, and, in some situations, ensure that society is protected from the consequences of such behaviour. This dual role of social welfare services also corresponds to the dual purpose of criminal proceedings towards juveniles.

When examining the role of social welfare services throughout the course of criminal proceedings towards juveniles in Croatia, it can be concluded that social welfare services are involved in criminal proceedings even before the proceedings have formally begun; they must be informed about every procedural action taken towards juveniles by the state attorney or youth court so that they can participate actively; their role also depends on the stage of the criminal proceedings in question. During criminal proceedings, they play an active role and may be present during court hearings. Comparing the role of social welfare services in Croatia with other countries that have been analysed in this paper, and with the results of the research conducted by Rap, it can be concluded that the legislative framework of the Croatian juvenile justice system is very similar to that in a large number of EU countries, especially those that belong to the European continental legal tradition, such as Germany and Austria.

The only question that remains is how these legislative solutions are implemented in practice. The legislative analysis presented in this paper can serve as a basis for further research on how social welfare services exercise their rights and obligations in practice during criminal proceedings. It can be assumed that, due to various persistent problems in the social welfare services system over many years – such as work overload, low wages, employee turnover and users' dissatisfaction, there are also difficulties in implementing the aforementioned provisions in practice.

In our opinion, there is a need to reconsider the role of social welfare services in criminal proceedings towards juveniles in Croatia. One possible solution would be to establish a specialised department within the existing social welfare services system that would have exclusive competence for cases involving juvenile offenders. Alternatively, specialised multidisciplinary teams (similar to those in Germany, Austria or Denmark) could be formed within the judicial system and assigned the responsibilities currently performed by social welfare services. The role performed by social welfare services within the Croatian juvenile justice system is undoubtedly necessary and valuable. However, the question remains whether the existing system, burdened by numerous structural and organisational challenges, is capable of fulfilling this role effectively and consistently in practice.

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Review article

PROTECTION OF VICTIMS OF HUMAN TRAFFICKING IN CROATIAN LAW: CRIMINAL PROCEEDINGS, SUPRANATIONAL STANDARDS AND GRETA RECOMMENDATIONS*

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ABSTRACT

This paper examines the protection of victims of human trafficking in Croatian criminal proceedings through the lens of supranational standards, selected case law of the European Court of Human Rights, relevant European Union law, and GRETA recommendations. The starting point of the analysis is the development of positive obligations under Article 4 of the European Convention on Human Rights, particularly the obligation of States to establish an effective legislative and administrative framework, take timely operational measures, and conduct an effective investigation whenever there are credible indications of human trafficking. Special attention is given to the case law of the European Court of Human Rights, including Rantsev v. Cyprus and Russia, S.M. v. Croatia, Chowdury and Others v. Greece, Zoletić and Others v. Azerbaijan, and more recent developments concerning proactive investigations, victim identification, and the avoidance of excessive reliance on victims' testimony.

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The paper further analyses the Croatian legal framework, including the Criminal Procedure Code, Criminal Code, Social Welfare Act, Act on the Suppression of Undeclared Work, Aliens Act, and related legislation. It assesses recent legislative amendments aimed at strengthening victims' rights, access to support services, protection from secondary victimisation, and procedural participation. However, the analysis also identifies persistent shortcomings highlighted in GRETA's third and fourth evaluation reports, particularly concerning early identification of victims, access to compensation, the non-punishment principle, protection of migrant workers, labour exploitation, and insufficient operational mechanisms for effective assistance and protection.

The paper argues that Croatia has made significant progress in developing a formally comprehensive framework for combating trafficking in human beings, but that its practical effectiveness depends on clearer statutory mechanisms. In particular, the paper proposes a more precise procedural mechanism for the non-punishment of victims, improved access to compensation within criminal proceedings, stronger early identification procedures, and better coordination between criminal justice, labour, migration, social welfare, and victim-support systems.

Keywords: *Article 4 ECHR, Effective investigation, Human trafficking, GRETA recommendations, Victims' rights*

1. INTRODUCTORY REMARKS

Last 30 years in the European judicial area there has been a strong trend of strengthening the role and procedural position of victims of crime, the foundations of which are firmly established in the practice of the European Court of Human Rights (hereinafter: ECtHR) and the concept of procedural positive obligation of the state to conduct effective investigations where there is a credible suspicion that an individual's rights have been violated.[1] In the EU legal framework, the position of victims of crime was entrusted in general through Directive 2012/29/EU establishing minimum standards on the rights, support, and protection of victims of crime.[2] For certain groups of victims the EU adopted specific rules like Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography,[3] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human

[1] A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Bloomsbury Publishing, 2004, pp. 44-45.

[2] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, [2012] OJ L 315/57.

[3] Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, Official Journal of the European Union, [2011] L 335/1.

beings and protecting its victims[4] and Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.[5]

One of the most significant aspirations aimed at strengthening the position of victims of crime is realized through the active work of the Group of Experts on Action against Trafficking in Human Beings (hereinafter: GRETA), which is responsible for monitoring the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings (hereinafter: Convention).[6] With its victim-oriented approach, GRETA has profiled itself as a true promoter of the rights of victims of criminal offenses that represent trafficking in human beings and therefore a violation of Art. 4 of the European Convention on Human Rights (hereinafter: ECHR). In four evaluation rounds, GRETA urged the Croatian authorities to take additional legislative and practical measures to ensure that suspected cases of trafficking in human beings are investigated and prosecuted effectively and lead to effective, proportionate, and dissuasive sanctions, and that the offence of trafficking in human beings is excluded from the plea-bargaining procedure.[7]

The Croatian legal framework is not one-dimensional, so a solution for the rights of the victims of human trafficking cannot be found under the stipulations of one code or act. Core solutions can be found as part of the Criminal Procedure Code and Criminal Code. More comprehensive approach subsumes other acts and codes like the Social Welfare Act, the Act on the Suppression of Undeclared Work, the Law on Foreigners, the Law on International and Temporary Protection, the regulations on the work of foreigners, the Labour Act, and many others. There are a lot of modalities for committing the crime of human trafficking, and

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4 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Official Journal of the European Union, [2011] L 101/1.

5 Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims [2024] OJ L 2024/1712.

6 Council of Europe Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series - No. 197, [2005] Available at: [https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008371d], Accesed 24 January 2026.

7 GRETA, *Evaluation Report Croatia, Third evaluation round*, Access to justice and effective remedies for victims of trafficking in human beings, 2020(10), p. 25. Available at: [https://rm.coe.int/report-on-the-implementation-of-the-council-of-europe-convention-on-ac/1680a09509], Accesed 24 January 2026.

there are different dimensions of this phenomenon. From criminal, economic, labour, political, and governence so, it is not surprising that there is a complex and intricate legal framework for effective protection of victims of human trafficking.[8] That is why there are recommendations across all of these dimensions for the improvement of the national legal framework, which highlight the imperative of a holistic approach.

Taking into account the demands that GRETA communicated to the Republic of Croatia in its evaluation reports, as well as the recent judgments of the ECtHR, this paper examines the extent to which the Croatian legal system secures the right to an effective investigation in the context of trafficking in human beings, and whether the protection of the victims is in line with European positive legal standards. In this sense, the European standards for the protection of victims of trafficking in human beings established under the ECtHR and Directive 2011/36/EU on preventing and combating trafficking in human beings are analyzed, as well as Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU. A detailed analysis of the Croatian legal framework that includes provisions of the multiple *de lege lata* stipulations is provided as a core for the understanding of the Croatian approach to the problem of human trafficking. That approach is compared with the GRETA recommendations to identify the shortcomings of the existing practice of law enforcement and judicial authorities, as well as those of the normative framework. The observed shortcomings of the domestic legal framework are critically considered. Taking into consideration comparative legal solutions, recommendations are made for its improvement to harmonize national legislation with European standards.

The methodological starting point of this paper is the distinction between formal normative compliance and practical effectiveness of victim protection. The analysis does not merely describe the relevant supranational standards and domestic provisions, but examines whether the Croatian legal framework provides mechanisms capable of ensuring effective identification, protection, participation, and compensation of victims of trafficking in human beings. For that purpose, the paper combines doctrinal legal analysis, case-law analysis, and a limited comparative method. The comparative references are not used as models to be directly transplanted into Croatian law, but as analytical tools for assessing whether Croatian law should regulate certain issues through substantive criminal law, criminal procedure, migration law, labour law, or victim-support mechanisms. The central argument of the paper is that the Croatian framework has largely achieved formal

[8] For more see: Turek, J. M., *Human Security and Development Issues in Human Trafficking* in: Burke, M. C. (ed.) Human Trafficking : Interdisciplinary Perspective, Routledge, 2013, pp. 73-88.

alignment with European standards, but that its practical effectiveness remains dependent on clearer statutory mechanisms, especially in relation to the non-punishment principle, compensation, early identification, and protection of migrant workers.

2. EUROPEAN POSITIVE LEGAL STANDARDS ON INVESTIGATIONS AND PROSECUTION OF TRAFFICKING IN HUMAN BEINGS

Considering the structure of Article 4 of ECHR, one might initially conclude that the issue of human trafficking does not fall within its scope and is not expressly regulated by the Convention. Consequently, the main interpretative challenges faced by the Court concern determining the material scope of Art. 4, particularly in relation to the concepts it outlines, namely slavery, servitude, and forced labor, as well as the positive obligations arising from them.[9]

Ranstsev v. Cyprus and Russia is one of the landmark cases in which the ECtHR, for the first time, brought human trafficking under the protection of Art. 4 of the ECHR. Relying on the existing definitions of human trafficking, the Court concluded that human trafficking, as defined in the Palermo Protocol and the CoE Trafficking Convention, falls within the protective scope of Art 4.[10] The Palermo Protocol in Art. 3(a) and Art. 4(a) of the CoE Convention define trafficking in human beings as follows:

"*Trafficking in persons shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs*".[11]

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9 Wendelin, A.-N., *Protection of Human Trafficking Victims: The Positive State Obligations under Article 4 of the European Convention on Human Rights*, Tectum, 2024, p. 30.

10 For basis of material scope of human trafficking see: Cvitanović, L. *et al.*, *Kazneno pravo – posebni dio*, Pravni fakultet Sveučilišta u Zagrebu, 2018, pp. 52-59.

11 UN General Assembly, Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organized Crime, 15 November 2000, Available at: [https://www.refworld.org/legal/agreements/unga/2000/en/23886], Accessed 12 November 2025; Council of Europe Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series - No. 197, [2005] Available at:

An examination of these definitions clearly reveals three core elements: (1) the act, which includes recruitment, transportation, transfer, harboring, and other forms of conduct; (2) the means, such as coercion, threats, abduction, fraud, or abuse of a position of vulnerability; and (3) the purpose, which encompasses various forms of exploitation, including the exploitation of prostitution, forced labor, slavery, or practices similar to slavery.

However, despite relying on these definitions, the Court ultimately chose to focus on the characteristics of the phenomenon which can be described as the ECtHR characteristics approach, emphasizing the inherent features of human trafficking, treating individuals as commodities involving minimal or no payment, the continuous surveillance of victims, the use of violence and threats, and extremely poor living conditions.[12]

One of the fundamental requirements of the ECtHR regarding the investigation and prosecution of criminal offenses marked as trafficking in human beings is that the investigation must meet the standards of effective investigation. Namely, the ECtHR in *Rantsev v. Cyprus* and Russia pointed out that Art. 4 ECHR entails a procedural obligation to investigate situations of potential trafficking.[13] The requirement to investigate does not depend on a complaint from the victim or next-of-kin, but rather that the authorities must act of their own motion once the matter has come to their attention. It further affirmed that for an investigation to be effective, it must be independent from those implicated in the events and that it must also be capable of leading to the identification and punishment of individuals responsible, an obligation not of result but of means. Moreover, a requirement of promptness and reasonable expedition is implicit in all cases, but where the possibility of removing the individual from the harmful situation is available, the investigation must be undertaken as a matter of urgency. Finally, the victim or the next-of-kin must be involved in the procedure to the extent necessary to safeguard their legitimate interests.[14]

[https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008371d], Accesed 24 January 2026.

12 Judgment *Rantsev v Cyprus and Russia*, (2010) EHRR §281.

13 Judgment *Rantsev v Cyprus and Russia*, (2010) EHRR §288; See: R. Piotrowicz, *States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations*, International Journal of Refugee Law, Vol. 24, No. 2, 2012, pp. 181-201.

14 Judgment *Rantsev v Cyprus and Russia*, (2010) EHRR §288; See also: European Court of Human Rights, Guide on Article 4 of the European Convention on Human Rights - Prohibition of slavery and forced labour, 2026, p. 19, Available at: [https://www.echr.coe.int/documents/guide_art_4_eng.pdf], Accessed 24 March 2026.

Following these standards, GRETA, in its second evaluation report, warned the Croatian authorities to take the necessary measures to ensure in the domestic legal system that the sentences imposed on perpetrators of trafficking in human beings are effective, proportionate, and dissuasive and to exclude the possibility of plea agreements for these offenses.[15] The stronghold for such an attitude undoubtedly derives from the Convention itself. In Art. 27 para 1 of the Convention is proscribed requirement that Member States ensure that investigations and prosecution of trafficking in human beings are undertaken on their own initiative *ex parte* and *ex officio*, as well as that the criminal offenses of trafficking in human beings are punishable by effective, proportionate and dissuasive sanctions, which is stipulated in Art. 23 para. 1. of the Convention. It is therefore necessary to support GRETA's view that failure to convict traffickers and the absence of effective, proportionate and dissuasive sanctions, including such resulting from plea bargaining procedures, undermines efforts to combat trafficking in human beings and guarantee victims 'access to justice.[16]

In its third evaluation report, GRETA primarily criticizes Croatia for the gap between the normatively established system of protection of victims of trafficking in human beings and its practical effectiveness.[17] Victims are still not sufficiently informed early and systematically about their rights, especially about the recovery and reflection period. Legal aid is not always available from the earliest stage of the procedure, and access to compensation for damage remains almost exclusively a theoretical possibility, without truly effective mechanisms for its realization.[18] The state's criminal law response is particularly problematic. GRETA warns that reports of possible trafficking in human beings are not always taken with the necessary seriousness, that cases are sometimes reclassified as minor criminal offenses, that investigations rely too much on the victim's testimony instead of special evidentiary actions, financial investigations and confiscation of property gains, and that Croatian law still does not have a clearly regulated provision on the non-punishment of victims for illegal acts to which they were forced.[19] In terms of process, the biggest complaint is that the system does not yet provide sufficiently stable, specialized, and trauma-informed protection for victims, especially children, migrants, asylum seekers, male victims of labor exploitation, and unaccompanied

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15 GRETA, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Croatia*, Second evaluation round, 2015(33), p. 33, Available at: [https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680630e7c], Accessed 24 January 2026.

16 GRETA, 2020(10), *op. cit.* note 7, p. 28.

17 *Ibid.*, pp. 3-5.

18 *Ibid.*, pp. 14-18, 21-25.

19 *Ibid.*, pp. 4-5.

minors, which is why there is an increased risk of secondary victimization, failure to recognize victims and their return to situations of repeated exploitation.[20]

Last round of GRETA evaluation was done in 2025.[21] In their fourth evaluation report, at the level of criminal law and procedural response, GRETA once again warns of insufficiently effective victim identification, excessive dependence of the procedure on police assessment and the provability of the criminal offence, weak involvement of specialised civil society organisations, a low number of proceedings for trafficking in human beings for the purpose of labour exploitation, and the risk of reclassification into minor criminal offences.[22] Two systematic complaints from the previous cycle are particularly repeated: victims of trafficking in human beings are still not provided with real access to compensation in practice, and Croatian law still does not have a clearly regulated principle of non-punishment of victims for unlawful acts committed under the coercion of an exploitative relationship.[23]

3. SELECTED CASE LAW OF ECTHR ON THE RIGHT TO AN EFFECTIVE INVESTIGATION OF VICTIMS IN CASES OF HUMAN TRAFFICKING

Although the procedural position of victims may in certain contexts be examined under Article 6 of the ECHR, the Convention-based protection of victims has primarily developed through the positive obligations arising under Articles 2, 3, and, in the context of trafficking in human beings, Article 4 of the ECHR. These obligations can be grouped into three categories: first, the duty to criminalize certain forms of conduct; second, the duty to take preventive measures; and third, the duty to conduct an effective investigation to determine whether a violation has occurred.[24] The category of the victim's right to an effective investigation is the only one among the three that is conditioned on a criminal offence having already taken place, while the other two are directed toward prevention. For the holistic approach, all the categories will be analyzed subsequently.

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20 *Ibid.*

21 GRETA, *Evaluation Report Croatia: Fourth Evaluation Round – Measures to prevent and detect vulnerabilities to human trafficking*, 2025(06), pp. 4-5., Available at: [https://rm.coe.int/greta-evaluation-report-on-the-implementation-of-the-council-of-europe/1680b66807], Accessed 24 January 2026.

22 *Ibid.*, pp. 6-7.

23 *Ibid.*, pp. 46-49.

24 Bachmaier Winter, L., *Council of Europe Instruments and the Case Law of ECtHR on Victim's Rights: What Influence the EU Law?*, in: Burchet, J.; Weyembergh, A. (eds.), Stronger Victims' Rights in EU Law: Assessment and Prospects, Oxford, 2025, p. 126.

3.1. Legislative and Administrative Framework

As previously stated, Rantsev v. Cyprus and Russia is one of the landmark cases in which the ECtHR developed the positive obligation to establish an appropriate legislative and administrative framework for the prevention and suppression of trafficking in human beings. Concerning Cyprus, the first finding concerned the breach of the State's positive obligation to establish a legislative and administrative framework that effectively prohibits human trafficking. Such a framework must be practical and effective, not merely declaratory, in line with the principle that the rights guaranteed by the Convention must be *practical and effective, not theoretical and illusory*[25], a standard that applies equally to State obligations. This means that States must criminalize human trafficking, establish oversight mechanisms in sectors where the risk of exploitation is particularly high, conduct checks on employers and intermediaries, and ensure systems for victim identification and intervention whenever indicators of trafficking arise.[26]

In relation to Cyprus, the Court found that although the State formally had a specific anti-trafficking law (Law 3(1)/2000), the entire *artiste visa* regime, visas routinely issued to women recruited to work in bars and nightclubs, operated in a manner that enabled exploitation rather than preventing it. Employers exercised almost complete control over the women, including control over their movement and personal documents. At the same time, the State lacked any system for monitoring working conditions, the legality of employment arrangements, or trafficking risks.[27] It was a deficient regime, widely known as a vehicle for prostitution, and as such, it failed to provide *practical and effective* protection against trafficking and exploitation.[28]

It can be concluded that the Court in this case followed the reasoning from the case *Siliadin v. France*, in which the conclusion was that the positive obligation under Art. 4 of the ECHR implies the duty of the state to prescribe behavior as a criminal offense and to ensure the effective prosecution of any action aimed at maintaining such a state, whether it is servitude or forced labor. Now the same argumentation has been applied to the concept of human trafficking. Croatian scholarship has similarly emphasised that the prohibition of slavery and forced labour under Article 4 of the ECHR cannot be reduced to formal criminalisation, but requires an effective legislative, administrative and judicial framework capable of preventing

25 Judgment *Airey v Ireland* (1979) EHRR §24.

26 Judgment *Rantsev v Cyprus and Russia*, (2010) EHRR §267.

27 Judgment *Rantsev v Cyprus and Russia*, (2010) EHRR §290-293.

28 Harris, D.; O'Boyle, M.; Bates, E.; Buckley, C., *Law of the European Convention on Human Rights*, Oxford, 2023, p. 291.

exploitation, protecting victims and ensuring effective prosecution.[29] Similar judgment was made by the ECtHR in the case of *Chowdury and others v. Greece,* where the Court found a positive obligation for States to address recruitment of people for the purposes of exploitation, and that implies forced labour as well. An imposed positive obligation is formed as a duty to address these issues through a regulatory framework and as a measure to prevent human trafficking, and that can be done through criminalisation of this behavior and effective prosecution.[30] This reasoning was continued in later Court jurisprudence in cases like *T.I. and Others v. Greece,* where the Court concluded that Greece didn't ensure an effective legislative and legal framework that led to the termination of the prosecution for two of the accused. The main reason for that was the fact that human trafficking for the purpose of sexual exploitation had not constituted a separate criminal offence, which led to a shorter limitation period for a lesser criminal offence.[31] Victims' rights are still in focus in contemporary jurisprudence of the ECtHR, considering the conclusion that Moldova didn't fulfill its positive obligation because the State didn't provide practical and effective protection from trafficking and servitude. That is based on the fact that people with intellectual disabilities were deinstitutionalised and removed from state care, which resulted in her being subjected to forced labour by the family into whose care she had been placed.[32]

Consideration of this first category clearly shows that the reach of positive obligations must be viewed in a broader context, primarily through all three aspects, and this implies the establishment of a legislative and administrative framework for the prohibition and punishment of human trafficking, measures to prevent human trafficking, and the protection of the victims themselves.[33] The last two elements will be the subject of analysis in the subsequent chapters of the paper.

3.2. Operational Measures

In addition to establishing an appropriate legislative framework, States have a duty under Art. 4 of the ECHR to take timely and proactive measures to protect an individual whenever there are facts indicating that the person may be a potential victim of human trafficking. In the context of *Rantseva*, the Court identified clear

[29] Herceg Pakšić, B.; Jukić, M., *Primjena konvencijskog prava u području zabrane ropstva i prisilnog rada: europski standardi i hrvatska postignuća*, Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 23, No. 2, 2016, p. 302.

[30] Judgment *Chowdury and others v. Greece* (2017) EHRR §87-89.

[31] Judgment *T.I. v Greece* (2019) EHRR §143-146.

[32] Judgment *I.C. v Republic of Moldova* (2025) EHRR §152-157.

[33] Batistić Kos, V., *Pozitivne obveze prema Europskoj konvenciji za zaštitu ljudskih prava i temeljnih sloboda*, Narodne novine, 2012, p. 66.

failures on the part of the Cypriot authorities. From the moment her employer brought her to the police station and stated that she *wanted to go home*, there were obvious indicators that she might be a trafficking victim, particularly given that she had been employed as an *artiste* in a sector well known for the systematic exploitation of foreign women.[34] The Court emphasized that the State does not need to know in advance that a serious violation will occur; it is sufficient that there are signs of a real and immediate risk. In Rantseva's case, these signs were more than evident: a young woman who had recently arrived, wished to escape, was brought to the police by her employer, worked in a high-risk sector, and had no genuine freedom of movement. All these circumstances, according to the Court, created a *credibility of suspicion* that triggered the duty to take protective measures.[35] The authorities' failure to remove Rantseva from her employer's control, to assess her situation, to provide protective measures, or to initiate victim-identification procedures constituted a violation of Art. 4 in its operational dimension.[36]

In the case of *L.E. v. Greece*, the Court concluded that there was a violation of Art. 4, because more than nine months had passed between the applicant's claim that she was a victim of human trafficking and the formal recognition of her victim status.[37] The case is important because it shows that protective measures must be taken promptly. Although the applicant was referred to a specialised unit for victims of trafficking, the expulsion procedure was suspended, and she was eventually granted victim status, the authorities failed to justify the delay of more than nine months. Such delay may undermine the practical effectiveness of protection, especially where victim status is required for access to assistance, residence rights and other support measures.[38]

The court also found a violation in the case of *F.M. and others against Russia*, given that the victim was in real and imminent danger of further exploitation and abuse by the shopkeepers, the Russian authorities had a duty under their positive obligations under Art. 4 of the ECHR to take operational measures to remove her from that risk or situation.[39] Despite being aware of the second applicant's increased vulnerability, due to her age, her family situation as an orphan and the fact that she was allegedly the victim of exploitation and violence over a period of more than three years, they did nothing more than interview her alleged trafficker, R.M.

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34 Judgment *Rantsev v Cyprus and Russia*, (2010) EHRR §296-298.

35 Judgment *Rantsev v Cyprus and Russia*, (2010) EHRR §319-321.

36 Judgment *Rantsev v Cyprus and Russia*, (2010) EHRR §297-298.

37 Judgment *L.E. v Greece* (2016) EHRR §77.

38 Judgment *L.E. v Greece* (2016) EHRR §78.

39 Judgment *F.M. v Russia* (2025) EHRR §295-296.

Authorities were satisfied with his denial of any wrongdoing, which was supported by the statements of several individuals under his control, they decided not to open a criminal investigation.[40]

Considering operational action as the basis for victim protection, one of the key elements is early identification and granting of status, and only subsequently a decision on possible criminal prosecution. The idea is that the decision of the competent authorities should be one of the factors that will influence further decision-making on all other decisions of the prosecutor. The essence of the court's argument is that such decisions must be made *in concreto* and the mere fact that a criminal offense was committed within the framework of human trafficking does not exculpate the victim *ex lege*, but rather it is necessary for the prosecutor to prove that such criminal prosecution makes sense because the criminal offense is not the result of force or coercion arising from the fact that the person is a victim of the criminal offense of human trafficking.

3.3. Effective Investigation

The Court held that Art. 4 of the ECHR contains an independent procedural obligation requiring the State to conduct an effective investigation as soon as there are credible indications of human trafficking.[41] Human trafficking is a complex and often transnational phenomenon, and any investigation must therefore encompass the entire chain of events, from recruitment to exploitation, and include international cooperation. The Court further defined an *effective investigation* as one in which the authorities take genuine and concrete measures to protect victims or even potential victims of human trafficking, thereby establishing a legal standard according to which the authorities knew or ought to have known of the risk of trafficking.[42] An investigation must be initiated independently of any complaint or initiative by the victim, meaning that the victim's passivity cannot justify the authorities' inaction; such inaction constitutes a failure on the part of the investigative bodies.[43]

The authorities must act independently and impartially, focusing on the identification and punishment of those responsible, using all appropriate means but

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40 Judgment *F.M. v Russia* (2025) EHRR §297.

41 Judgment *Rantsev v Cyprus and Russia*, (2010) EHRR §284-286.

42 Brđanović, T.; Supančić, G., *Suzbijanje trgovanja ljudima – neki materijalnopravni i procesnopravni aspekti*, Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 29, No. 2, 2022, Zagreb, pp. 553–554.

43 European Court of Human Rights, Guide on Article 4 of the European Convention on Human Rights - Prohibition of slavery and forced labour, p. 19, Available at: [https://www.echr.coe.int/documents/guide_art_4_eng.pdf], Accessed 24 March 2026.

without any strict obligation as to the result. Importantly, this implies that the investigation should not be limited only to the objective and subjective elements of the offence but should also address the broader context of the trafficking situation.[44] Moreover, investigative measures must be undertaken promptly and with due diligence, ensuring the victim's participation in the proceedings to safeguard her rights and interests. Where necessary, the authorities are also required to engage in close international judicial cooperation to uncover the full chain of events and actors involved in the trafficking network.[45]

In Cyprus, the investigation into Rantseva's death was ineffective; the police ignored clear indicators of trafficking, prematurely concluded that the case involved an accident or suicide, and failed to investigate the employer's role in exercising control over her and returning her to the club. Although this shortcoming was not formally assessed under Art. 4, since the Court had already found a procedural violation of Art. 2, the reasoning makes clear that an investigation which disregards possible trafficking cannot satisfy the standard required by Art. 4.[46] With respect to Russia, the Court found a direct violation of Art. 4 because the authorities failed to conduct any investigation into how Rantseva had been recruited and did not respond to Cyprus's request for mutual legal assistance. The Court emphasized that Russia was the only State capable of examining the initial phase of the trafficking process and that the fact that exploitation occurred in another State does not absolve a State of its obligation to investigate when indications of recruitment originate on its own territory.[47]

Today, when the cross-border element of human trafficking is even more present, effective investigation also depends on the cooperation of national authorities with other authorities in investigating human trafficking outside their territory. Although the standard was established in the *Ransteva v. Cyprus* decision, the same standard was reiterated in a more recent case of *Zoletic and Others v. Azerbaijan*.[48]

The procedural obligation to investigate human trafficking, including forced prostitution, requires States to apply adequate criminal law mechanisms to prohibit and punish such conduct. The general principles governing effective investigations under Arts. 2 and 3 of the ECHR also apply to Art. 4.[49] For an investigation to be effective, it must be capable of establishing the facts and identifying, and possibly

44 Brđanović; Supančić, *op. cit.*, note, 42, p. 554.

45 Harris, O'Boyle, Bates, Buckle, *op. cit.*, note 28, pp. 293-294.

46 Judgment *Rantsev v Cyprus and Russia*, (2010) EHRR §232-242.

47 Judgment *Rantsev v Cyprus and Russia*, (2010) EHRR §307-309.

48 Judgment *Zoletic and others v Azerbaijan* (2022) EHRR §191.

49 Harris, O'Boyle, Bates, Buckle, *op. cit.*, note 28, p. 294.

punishing, those responsible. Authorities must act on their own initiative and cannot shift the burden of initiating proceedings to the victim. The duty is one of means, not of results; what matters is that reasonable steps are taken and that the investigation follows a logical and objective line of inquiry.[50]

Applying these principles in the case of *S.M. v Croatia*, the Court found that while the applicant had been granted the status of a potential victim of trafficking, this did not amount to recognition that trafficking had occurred; that determination had to be made through the criminal process. Given the circumstances of the case, the Court concluded that the applicant had presented a credible claim, supported by *prima facie* evidence, that she had been a victim of treatment contrary to Art. 4.[51] T.M.'s approach via Facebook offering employment, his provision of accommodation for sexual services, his admission of using force, financial control that could amount to debt bondage, and his abuse of a position of power over a vulnerable young woman all pointed to credible indicators of forced prostitution or trafficking, triggering the State's procedural obligation under Art. 4.[52] Although the police and prosecution acted promptly, they failed to pursue obvious lines of inquiry that could have clarified the relationship between the applicant and T.M. They did not examine the parties' Facebook communication, question the applicant's parents, particularly her mother, who had prior contact with T.M., nor interview neighbors, the landlord, or others who helped her escape. Given these deficiencies, the Court found that the investigation was so inadequate that it prevented the domestic authorities from determining the true nature of the applicant's relationship with T.M. and whether she had been exploited. The shortcomings in the application of criminal law mechanisms, therefore, amounted to a procedural violation of Article 4 of the ECHR.[53] In line with GRETA's recommendations, the Court stressed that investigations into human trafficking must not depend excessively on the victim's testimony, as trauma often impedes victims' ability or willingness to cooperate.[54]

In a more recent case, *T.V. v. Spain,* the Court held that the applicant had presented an arguable complaint of human trafficking and forced prostitution, supported by *prima facie* evidence sufficient to trigger the State's procedural obligations under Art. 4 of the Convention.[55] Despite this, the Spanish authorities failed

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50 Bachamier Winter, *op. cit.*, note 24, pp. 73-76.

51 Judgment *S.M. v Croatia* (2020) EHRR §322-323.

52 Judgment *S.M. v Croatia* (2020) EHRR §326-332.

53 Judgment *S.M. v Croatia* (2020) EHRR §347-348.

54 Judgment *S.M. v Croatia* (2020) EHRR §344.

55 Judgment *S.M. v Croatia* (2020) EHRR §92-94.

to act with the requisite diligence during the investigative phase, allowing long periods of inactivity and neglecting obvious lines of inquiry that should have been pursued given the seriousness and credibility of the allegations.[56] In particular, the Court criticized the superficial and insufficiently reasoned domestic decision to provisionally dismiss the case against the alleged traffickers, noting that the ruling focused narrowly on the applicant's age rather than on the broader trafficking indicators and the available corroborative evidence.[57] These shortcomings, according to the Court, revealed a blatant disregard for the obligation to investigate serious allegations of human trafficking, an offence recognized for its severe impact on victims.[58] The Court also acknowledged the third-party intervention by GRETA, which emphasized the need for proactive investigations using specialized investigative techniques, financial inquiries, and methods that avoid overreliance on victims' testimony. GRETA further stressed that age-assessment procedures must not be used to cast doubt on a person's claim of being a trafficking victim, a concern the Court noted when assessing Spain's handling of the applicant's case.[59] Overall, the Court concluded that Spain had applied essential criminal-law mechanisms in a defective manner**,** resulting in an ineffective investigation and a violation of its procedural obligations under Art. 4 of the Convention.[60]

It can be seen that ECtHR often uses the argumentation and GRETA standards in its reasoning, so it is not justifiable to look at them as two separate systems rather than a complex and intertvined ones. The ones developed by CJEU are also no exception and will be analyzed.

3.4. CJEU

Through preliminary rulings and interpretations of European law, the CJEU has also contributed to the development of victims' rights in the context of the crime of trafficking in human beings. The consideration of the above issue through the

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56 Duncan Lewis Solicitors LLP, *ECHR Rules Spanish Authorities' Ineffective Investigation into Trafficked Minor Violated Her Human Rights*, 2024, Available at: [https://www.duncanlewis.co.uk/publiclaw_news/CHR_Rules_Spanish_Authorities%E2%80%99_Ineffective_Investigation_into_Trafficked_Minor_Violated_Her_Human_Rights_%2814_October_2024%29.html], Accessed 13 November 2025.

57 Judgment *T.V. v Spain* (2024) EHRR §109-112.

58 Judgment *T.V. v Spain* (2024) EHRR §109-116.

59 Council of Europe, European Court of Human Rights reaffirms states' duties to investigate human trafficking in T.V. v Spain judgment, 2024, Available at: [https://www.coe.int/en/web/anti-human-trafficking/-/european-court-of-human-rights-reaffirms-states-duties-to-investigate-human-trafficking-in-t.v.-v.-spain-judgment], Accessed 13 November 2025.

60 Judgment *T.V. v Spain* (2024) EHRR §188.

lens of the criteria for the content of rights developed through the decisions of the CJEU can be divided into general and procedural. The analysis of these cases implies broader principles of victims' rights, such as compensation, protection, and the definition of a victim, which are also applicable to victims of trafficking in human beings, as well as those related to it.

One of the fundamental issues is the compensation, where the CJEU has repeatedly emphasized that it is the obligation of Member States to ensure fair and adequate compensation for victims of all violent crimes committed intentionally, like in the case of *European Commission v Italian Republic*.[61] This is important as a right because, in the aforementioned case, such compensation is emphasized not only as a necessary means of recovery but also as a potential means of cooperation from the victim in investigations, which can often be a key element in conducting an effective investigation. For this to be achieved, the CJEU, analyzing the concept of fair and applicable compensation, concluded that it must not be symbolic or manifestly insufficient.[62] The same objective as previously stated applies to this interpretation. Third and Fourth GRETA report on Croatia emphasizes the problem of an inefficient legal framework for the compensation of the victims and its overconnection with states attorneys office.[63]

In Case C-66/21, the Court directly interpreted Art. 6 of Directive 2004/81/EC, emphasising the right of third-country nationals who are potential victims of trafficking in human beings to a reflection period and a prohibition on the execution of an expulsion order, including a transfer under the Dublin III Regulation, during that period.[64] The Court clarified that a reflection period must be granted as soon as a Member State has reasonable grounds to believe that the person may be a victim, regardless of the final confirmation.[65] The Court reached a similar conclusion in the case in the context of the right to remain and the postponement of the transfer of third-country nationals who are victims of trafficking in human beings and who cooperate with the competent authorities. It was held that national legislation may provide for the postponement of the execution of a transfer decision, but that this must not entail a suspension of the transfer period provided for in the Dublin III Regulation.[66]

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61 Case C-601/14 *European Commission v Italian Republic* [2016] ECLI:EU:C:2016:759, §48-51.

62 Case C-129/19 *Prezidenza del Consiglio dei Ministri v BV* [2020] ECLI:EU:C:2020:566, §63.

63 For more see: GRETA, 2020(10), *op. cit.*, note 7, pp. 14-18, 21-25; GRETA, 2025(6), *op. cit.*, note 21, pp. 46-49.

64 Case C-66/21 *O.T.E. v Staatssecretaris van Justitie en Veiligheid* [2022] ECLI:EU:C:2022:809 §84.

65 Case C-66/21 *O.T.E. v Staatssecretaris van Justitie en Veiligheid* [2022] ECLI:EU:C:2022:809 §49.

66 Case C-338/21 *Staatssecretaris van Justitie en Veiligheid v S.S., N.Z., S.S.* [2023] ECLI:EU:C:2023:269 §75.

Although this is a different aspect of the issue of the rights of victims of human trafficking, the CJEU's practice has also highlighted what has been detected as a problem in the Republic of Croatia, which is the issue of compensation for victims, which is related to criminal proceedings, the state attorney's office, and formal conditions. The following chapters will analyze the current state of the Croatian legislative framework regarding the position of victims and the possibility of exercising the right to an effective investigation, along with an analysis of potential solutions for harmonization with European recommendations and standards.

4. SELECTED PARTS OF CROATIAN LEGAL FRAMEWORK ON VICTIMS OF HUMAN TRAFFICKING

The issue of human trafficking is a global and legal phenomenon that encompasses multiple dimensions, sociological, economic, criminal, political, and many others.[67] As a result, the state's approach must not be limited only to solutions within the framework of criminal legislation.[68] Therefore, the following chapter will analyze the adjustments of the criminal law framework, as well as other laws that complement the solutions in question, as the key to a comprehensive fight against human trafficking. Several recent amendments to the Criminal Procedure Code, Criminal Code, Social Welfare Act are aimed at meeting supranational standards established by the case law of the ECtHR and the CJEU, but also at meeting GRETA reports. Some new legislation like The Act on the Suppression of Undeclared Work was adopted in 2023 that exapnds the legal framework for the combating human trafficking or some of its modalities. In the following, we provide an analysis of the changes in legislation, as well as an overview of areas in which there is still room for improvement.

4.1. *De lege lata* Croatian Approach

Croatia made important progress with the 2024 amendments to the Criminal Procedure Code, which strengthened the procedural position of victims of criminal offences.[69] Although subsequent amendments were adopted in 2025 and 2026, the 2024 amendments are particularly relevant for the present analysis because

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[67] See more, Musa, I., *Trgovina ljudima – Ropstvo 21. Stoljeća*, Hum: časopis Filozofskog fakulteta Sveučilišta u Mostaru, Vol. 12, No. 17-18, pp. 87-102.

[68] Zwaak, L., *Prohibition of Slavery and Forced Labour*, in: van Dijk, P.; van Hoof, F.; van Rijn, A., Zwaak, L., Theory and Practice of the European Convention on Human Rights - Fifth edition, Intersentia, 2017, pp. 427-429.

[69] Amendments to the Criminal Procedure Code, Official Gazette No. 36/2024 (hereinafter: Amendments).

they directly concern victims' access to support services, information, confidentiality and protection from secondary victimisation. This certainly contributes to the standard of effective victim participation, i.e., ensuring greater protection and cooperation, which is also one of the standards prescribed by the practice of the ECtHR. For this purpose, amendments and clarifications of the provisions regulating the general and special catalogues of victims' rights are proposed, in relation to those victims' rights where there are doubts regarding their implementation in practice.[70] Thus, the general catalogue of victims' rights in Art. 43. para. 1. point 1. expands the right of the victim in such a way that immediately after the commission of a criminal offense and for as long as necessary, the victim has the right to easily accessible, confidential, and free access to support services for victims of criminal offenses.[71] This is one of the key aspects in the context of this criminal act, which enables the victim to receive support, and can also help with cooperation, given that support will be provided from the earliest stages. The earlier provision did not sufficiently specify the moment from which it is possible to obtain support or how long the support can last.

In the point 6. of the same article it is expressly stipulated that the victim has the right to be accompanied by a person of their choice, from the time the criminal offense is reported until the final conclusion of the criminal proceedings. A new general right of the victim to confidentiality of information whose disclosure could endanger their safety or the safety of the victim's close relatives is prescribed.[72] This is also one of the key stipulations considering the endangerment of the victims and their fear. This is one of the key aspects in the context of this criminal act, which enables the victim to receive support, and can also help with cooperation, given that support will be provided from the earliest stages. The earlier provision did not sufficiently specify the moment from which it is possible to obtain support or how long the support can last.

The victim's rights to information from the previous points 10 and 11 of Article 43 of the Criminal Procedure Code/08, which were previously prescribed as rights that the victim exercised *upon request*, were introduced by the 2024 Amendments in such a way that it is assumed that the victim wishes to receive the prescribed information, except in the case of the victim's waiver of the aforementioned right.[73]

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70 Art. 43 Amendments to the Criminal Procedure Code.

71 Art., para. 1., point 1. 43 Amendments to the Criminal Procedure Code.

72 Art. 43., para. 1. point 6 of the Criminal Procedure Code, Official Gazette No. 152/08, 76/09, 80/11, 121/11 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 126/19, 80/22, 36/24, 72/25, 13/26) (hereinafter: CPC).

73 *Cf.* Art. 43., para. 1. point 10 and 11 of the Criminal Procedure Code, Official Gazette No. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 126/19, 80/22.

The right to information on the release of the perpetrator, which previously referred to information on the termination of detention, pre-trial detention, escape, or release from serving a prison sentence, is being expanded to also prescribe the victim's right to information on the release of the arrested person.[74]

The right to be questioned via audio-video devices is being introduced into the special catalogues of rights of victims of crimes against sexual freedom, victims of the crime of trafficking in human beings, and victims in respect of whom special protection needs have been determined, unless the victim herself requests to be present in the courtroom during the testimony.[75] The previous solution implied that the victim had the right to request, which, of course, placed an additional burden on the victim and their knowledge of their rights. Now, interrogation via an audio-visual device is mandatory unless they themselves request to be present. This increases the potential for cooperation and participation of the victim and reduces the degree of secondary victimization as much as possible. The examination as a witness of a victim of a criminal offence against sexual freedom, a criminal offence of trafficking in human beings, a criminal offence of violence against women, domestic violence and violence against close persons and a victim in respect of whom special protection needs have been established in accordance with Article 43a of this Act shall be conducted using audio-video devices operated by a professional person, without the presence of the judge and the parties in the room where the victim is. The examination shall be recorded using an audio-video recording device, and the recording shall be sealed and attached to the record. Such a witness may only exceptionally be re-examined if the court deems it necessary.[76] The examination shall not be conducted in this manner if the victim requests to be present in the courtroom during the testimony. The way of this measure is prescribed in an operational way to show the full potential of stopping the secondary victimization and help the victims to participate in criminal proceedings. However, the effectiveness of these special procedural rights depends on the quality and timing of the individual assessment of the victim. The formal availability of audio-video questioning, avoidance of contact with the accused, and other protective measures does not, by itself, guarantee effective protection unless the victim's vulnerability and special protection needs are identified at an early stage and reassessed throughout the proceedings.[77]

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74 Art. 43. Para. 1. Point 11 of CPC.

75 Art. 44. Para. 4. Point 5. of CPC.

76 Art. 292. Para. 6. of CPC.

77 Martinović, I.; Vučkov, D., *Pojedinačna procjena žrtve u kaznenom postupku: izazovi u tumačenju i reformski prijedlozi,* Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 46, No. 2, 2025, pp. 368, 371, 379–380.

The second important area of changes has also occurred through the Criminal Code and its alignment with the Directive on the Amendments and Supplements to the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.[78] The amendments to the Criminal Code also affected limitation periods. For the qualified form of trafficking in human beings resulting in the death of a child, Croatian law now excludes both the limitation period for criminal prosecution and the limitation period for the enforcement of the sentence.[79] This legislative solution reflects the particular gravity of the offence and the heightened protection afforded to child victims. The description of the criminal offence has also been changed by adding a new modality of perpetration through exploitation for surrogacy. Art. 1 para. 6 of Directive (EU) 2024/1712, stipulates a positive obligation for Member States to establish measures that will empower competent authorities not to prosecute or impose penalties in relation to unlawful acts committed by victims of trafficking in human beings under the influence of force. An analysis of criminal substantive and procedural legislation already speaks in favour of their compliance with the requirements of Directive (EU) 2024/1712, which can be achieved through the general institute of last resort proscribed in Art. 22 of the Criminal Code[80] and through the principle of purposefulness (opportunity) of criminal prosecution[81], which, as an exception to the principle of official prosecution, allows the state attorney to, under the conditions prescribed by law, in certain criminal offences (for which a penalty of up to five years of imprisonment is prohibited) not to initiate criminal prosecution in the public interest or to abandon it.[82] In accordance with the latest GRETA report, it could be concluded that the more appropriate solution is to prescribe a specific basis for not initiating prosecution.

Another area that is part of the legal framework for the protection of the victims of human trafficking is the Social Welfare Act, whose amendments in 2022 enabled victims placed in shelters to exercise their right to minimum compensation.[83] Victims of domestic violence and victims of trafficking in human beings

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78 Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims [2024] OJ L 2024/1712.

79 Art. 81. Para. 2. And Art 83. Of Criminal Code (Croatia), Offical Gazette No. 125/11, 144/12, 56/15, 101/17, 118/18, 126/19, 84/21, 114/22, 114/23, 36/24, 136/25.

80 See more: Novoselec, P., *Opći dio kaznenog prava*, Pravni fakultet Osijek, 2016, pp. 169-183.

81 See more: Ljubanović, V.; Novokmet, A.; Tomičić, Z., *Kazneno procesno pravo – Izabrana poglavlja*, Sveučilište Josipa Jurja Strossmayera u Osijeku, Pravni fakultet Osijek, 2020, pp. 41-44.

82 Krapac, D., *Kazneno procesno pravo – prva knjiga: Institucije*, Narodne novine, 2020, pp. 94-98.

83 Art. 28. Para. 3. of Social Welfare Act, Offical Gazette No. 18/22, 46/22, 119/22, 71/23, 156/23, 61/25.

who have been categorized for receiving accommodation services in crisis situations are granted right to guaranteed minimum compensation in the amount of 100% of the guaranteed minimum compensation referred to in Art. 28, para. 3 of this Social Welfare Act.[84] That is, if they meet the conditions prescribed by this Act. A very important service that can significantly affect the victim's willingness to participate in criminal proceedings. Question of the material means outside of the scope of human traficking is necessery for the resocialization and as a potential incentive to effectivlz participate knowing that you will have enough income.

One of the newst additions is the Act on the Suppression of Undeclared Work that was adopted in 2023.[85] The Law on Suppression of Undeclared Work was adopted with the aim of a unified normative regulation of various forms of undeclared work, including completely undeclared work, false self-employment and partially undeclared work. The legislator's starting point was that such forms of work have multiple negative consequences, both for the state and the economy, and for the workers themselves. Undeclared work leads to avoidance of payment of public benefits and reduction of state budget revenues, while simultaneously depriving workers of social security, employment rights, appropriate working conditions and occupational safety.[86] In addition, it enables the abuse of the system of social benefits and other rights financed from public funds. One of the more important novelties of the law is the introduction of the joint and several liability of the contractor for the payment of wages to the workers of subcontractors who participate in the execution of the contracted work. In this way, efforts are being made to ensure more effective protection of workers and to encourage business entities to cooperate with employers who operate in accordance with the law.[87] Such a solution builds on the already existing model from the legislation on posted workers, but extends it to all activities and all categories of workers, with the aim of ensuring equal treatment and reducing the risk of labor exploitation.

In the context of human trafficking, it is particularly significant that undeclared work and non-transparent labor relations create a suitable environment for various forms of labor exploitation. People who work without a formal labor law status are often in an extremely vulnerable position due to dependence on the employer, lack of knowledge of rights, language barriers or uncertain migration status, which

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84 Art. 28. Para. 3. of Social Welfare Act, Offical Gazette No. 18/22, 46/22, 119/22, 71/23, 156/23, 61/25.

85 Law on the Suppression of Undeclared Work, Offical Gazette, No. 151/22.

86 Draft of the final proposal of the Law on Suppression of Undeclared work, Reasoning, P.Z.E. No. 395, 2022, pp. 12-14.

87 *Ibid.*

can represent an important risk factor for human trafficking for the purpose of forced labor. This is precisely why the strengthening of supervision over the labor market and suppression of undeclared work is one of the important preventive mechanisms in the fight against human trafficking.

This is of great importance, if we take into account that human trafficking encompasses the *modus operandi* of forced and other types of labor.[88] Also, the fact that a great part of the workforce comes from third countries.[89] Nevertheless, there is a lot to cover considering standards that were analyzed before and the adaptations of the Croatian national legal framework to those standards. The gaps between the *de lege lata* legal framework and completely adopting the standards will be analyzed in the

4.2. *De Lege Ferenda* Croatia Approach – Between ECtHR Standards and GRETA Recommendations

The last two GRETA reports show that Croatia does not necessarily need to rebuild the system for combating trafficking in human beings, but rather that the existing system must be made legally clearer, more operational, and less dependent on the logic of police and criminal procedure.

The key change should be that victim identification, access to assistance, legal protection, compensation for damage, and impunity are not linked exclusively to the success of criminal prosecution, but to the existence of reasonable grounds that a person has been subjected to trafficking in human beings or a related form of exploitation. Such a solution already stems from the Council of Europe Convention on Action against Trafficking in Human Beings, which provides for the obligation to compensate victims, the possibility of not punishing victims for illegal activities to which they were forced, and the possibility of civil society organizations participating in supporting victims during the proceedings. In its third report, GRETA specifically criticizes Croatia for not providing information, legal aid, and lawyers early enough, especially for asylum seekers and persons in detention, before they decide whether to cooperate with the prosecuting authorities. This was one of the reasons for aforementioned changes which sucesfully give precision and

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88 Palumbo, L., *Taking Vulnerabilities to Labour Exploatation Seriosly: A Critical Analysis of Legal and Policy Approaches and Instruments in Europe*, IMISCOE Research Series, Springer, 2024, p. 270.

89 According to official data from the Ministry of the Interior Affairs, 170,723 permits for foreign workers were issued in the Republic of Croatia in 2025, and the activities represented were those that could be considered risky for victims of human trafficking, Available at: [https://mup.gov.hr/UserDocsImages/statistika/2026/1/Mjesecne%20statistike%20prosinac%202025.pdf], Accessed 30 March 2026.

operational possibilities for the victims of human trafficking to acess legal help from the earliest stages.

The first and most important legislative intervention concerns the non-punishment principle. It could be introduced into the Criminal Code as a substantive basis for excluding criminal liability or into the Criminal Procedure Code as a special basis for waiving prosecution, but the optimal solution would be to combine both approaches.[90] Such a solution should also be understood in the broader context of Croatian scholarship on conditional deferral and withdrawal of criminal prosecution, which shows that opportunity-based mechanisms may operate as legally structured exceptions to the principle of mandatory prosecution when they are expressly prescribed by law and narrowly defined.[91] Comparatively, the British Modern Slavery Act 2015, section 45, provides for a special defence for victims of slavery or human trafficking who have committed a criminal offence in relation to their exploitative position, with the threshold of protection for children being lower than for adults.[92] The German model, contained in § 154c StPO, provides for the procedural possibility for the public prosecutor to waive prosecution for a minor criminal offence that came to light because the victim reported coercion, extortion, or human trafficking.[93] The example of section 45 of the UK Modern Slavery Act 2015 is useful as an illustration of a victim-oriented approach, but it cannot be directly transposed into Croatian law because English criminal law does not operate with a general part of criminal law in the continental sense. Therefore, a special statutory defence in English law performs a function which, in Croatian law, must first be assessed through the existing institutes of the general part of criminal law, in particular necessity. For that reason, the more appropriate Croatian solution would be a layered model. First, where the statutory requirements are fulfilled, the victim's conduct should be assessed under the general institute of necessity. However, where the strict requirements of necessity are not met, but the unlawful act is nevertheless closely connected with the victim's exploitation, coercion, dependency, fear, abuse of vulnerability, or control exercised by the trafficker, the Criminal Procedure Code should provide a special procedural basis for

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90 Following the conclusion of Munivrana Vajda, M.; Dragičević Prtenjača, M.; Maršavelski, A., *Nekažnjavanje žrtava trgovanja ljudima u Hrvatskoj – pravni standard kao fikcija ili stvarnost*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 53, No. 4, 2016, p. 1008.

91 Burić, Z.; Pleić, M.; Radić, I., *Conditional Deferral (and Withdrawal) of Criminal Prosecution from National and Comparative Legal Perspective*, Pravni vjesnik, Vol. 37, No. 1, 2021, pp. 84–85.

92 Modern Slavery Act, 2025, c. 45. Available at: [https://www.legislation.gov.uk/ukpga/2015/30/section/45], Accessed 11 March 2026.

93 Art. 154c of Code of Criminal Procedure in the version published on 7 April 1987, Federal Law Gazette I, p. 1074, 1319, as last amended by Article 2 of the Act of 17 July 2025 (Federal Law Gazette 2025 I No. 163).

waiving prosecution or discontinuing proceedings. Such a solution would not interfere with the structure of the general part of substantive criminal law, but would broaden the application of the opportunity principle in a narrowly defined category of cases involving victims of trafficking in human beings. Accordingly, the Criminal Procedure Code should expressly provide that the State Attorney may refrain from initiating criminal prosecution or discontinue prosecution where there are reasonable grounds to believe that the suspect is a victim or presumed victim of trafficking in human beings and that the offence was committed as a direct consequence of the trafficking situation. The provision should also require the prosecutorial authority to assess this connection *ex officio* before initiating or continuing proceedings. Such a solution would respond to GRETA's repeated criticism that Croatian law still lacks a clear and operational non-punishment mechanism, while preserving the legality principle in substantive criminal law and introducing an explicit statutory exception within criminal procedure.[94] Current model gives a lot of discreditory powers considering that decision on the non prosecution depend exclusively on the practice of the state attorney's office and specific provisions provided by CPC, which introduces legal uncertainty and can have a demotivating effect on the victim, both for reporting the criminal offense and for effectively participating in the criminal proceedings.

The second key intervention concerns compensation for victims of trafficking in human beings. Croatia should amend the Act on Financial Compensation to Victims of Crime so that trafficking in human beings is explicitly included as an independent basis for state compensation, without excessive reliance on the criterion of serious bodily injury or serious impairment of health. GRETA explicitly states in its fourth report that in the reporting period, no victim of trafficking in human beings received compensation in criminal or civil proceedings, and again calls for state compensation to be made available to all victims when the crime was committed in Croatia, regardless of citizenship or residence status.[95] Comparatively relevant is the Dutch model, in which victims of violent crimes can receive compensation from a state fund, and the system also includes an advance payment mechanism when the perpetrator fails to pay the compensation awarded by the court.[96] The Croatian Criminal Procedure Code should stipulate that in

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94 GRETA, 2025(6), *op. cit.*, note 19, p. 49.

95 *Ibid.*, p. 47-48.

96 See: VOCIARE, National Report, Netherlands, Victims of Crime Implementation Analysis of Rights in Europe, pp. 51-54, Available at: [https://victim-support.eu/wp-content/files_mf/1564676869VOCIARE_National_Report_Netherlands_interactive.pdf], Accessed 11 March 2026.; see also: Schadefonds Geweldsmisdrijven, Are you a victim of a violent or sexual crime? 2025, Available at: [https://schadefonds.nl/wp-content/uploads/2025/06/Folder-Engels.pdf], Accessed 11 March 2026.

cases of trafficking in human beings, the collection of evidence of damage is part of the investigation itself, lost earnings, unpaid wages, medical and psychological costs, non-pecuniary damage, financial benefits of the perpetrator, and reintegration costs should be documented already in the criminal proceedings, so that the victim is not routinely referred to litigation. This argument is further supported by the recent decision of the Constitutional Court of the Republic of Croatia No. U-III-641/2021. Although the case did not formally concern a conviction for trafficking in human beings, it is directly relevant for victims of sexual exploitation and trafficking-related conduct because it addresses the practice of referring victims to civil litigation after criminal proceedings. The Constitutional Court emphasised that deciding on a civil claim within criminal proceedings serves not only procedural economy, but also the effective and prompt protection of the victim's rights. In cases involving serious violence, sexual exploitation, and long-term abuse, the routine referral of the victim to civil litigation may expose the victim to repeated testimony, renewed confrontation with the perpetrator, and secondary victimisation[97]. For victims of trafficking in human beings, this reasoning is particularly important. If the criminal court has already established the factual basis of exploitation, coercion, abuse of vulnerability, or financial gain obtained by the perpetrator, the victim should not be referred to civil litigation by means of formulaic reasoning. Instead, the Criminal Procedure Code should be interpreted and, if necessary, amended in a way that requires criminal courts to decide on the victim's compensation claim whenever the case file provides a reliable basis for at least partial adjudication. In trafficking cases, the collection of evidence relevant to compensation should therefore form part of the investigation itself, including unpaid wages, lost earnings, non-pecuniary damage, medical and psychological costs, and the financial benefit obtained by the perpetrator.[98]

The third group of amendments relates to early identification and the national referral mechanism. The Protocol on the Identification, Assistance and Protection of Victims of Trafficking in Human Beings should be amended to formally recognize the status of a presumed victim, i.e., a person for whom there are reasonable grounds to suspect that he or she is a victim of trafficking in human beings. Such a person should have immediate access to information, an interpreter, legal aid, safe accommodation, and psychosocial support, regardless of whether there is sufficient evidence at that time for criminal prosecution. The revised Directive (EU) 2024/1712 further reinforces this direction by requiring Member States to

[97] Constitutional Court of the Republic of Croatia, Decision No. U-III-641/2021 of 12 November 2024, Official Gazette No. 13/2025, paras. 47–48, 58.

[98] Constitutional Court of the Republic of Croatia, Decision No. U-III-641/2021 of 12 November 2024, Official Gazette No. 13/2025, paras. 64–65.

establish mechanisms for early detection, identification, assistance, and support for identified and presumed victims, in cooperation with relevant support organisations.[99] This is particularly important because GRETA criticizes Croatia for the fact that identification in practice is too closely tied to the police and the ability to prove a criminal offense, with insufficient involvement of specialized civil society organizations.[100]

The fourth intervention should cover the Aliens Act, the Law on International and Temporary Protection, and the regulations on the work of foreigners. For foreign workers, asylum seekers, and irregular migrants, mandatory screening for indicators of human trafficking should be introduced, in particular before forced removal, change of employer, loss of work permit, or detention.[101] The Belgian model can serve as a useful comparative solution as it provides for a 45-day reflection period for foreign potential victims of human trafficking, access to social assistance during this period, and a special status for victims if the person decides to file a report or make a statement.[102] The Italian model, in particular Article 18 of the Consolidated Immigration Law, is relevant because of the idea of a residence permit for social protection reasons and the inclusion of the victim in assistance and reintegration programmes, which is particularly useful for foreign workers who are afraid to report to their employer because their stay is related to employment.[103] Under the current Croatian framework, a third-country national identified as a victim of human trafficking may be granted temporary residence on humanitarian grounds if he or she accepts the assistance and protection programme. Such a victim has the right to secure accommodation, healthcare, social welfare services, education, and work, and a third-country national granted temporary residence on humanitarian grounds may work without a separate residence and work permit. Croatian law also provides for humanitarian temporary residence where a third-country national cooperates with the authorities and his or her participation is necessary in criminal proceedings against an employer who unlawfully employed him or her.[104] However, the current framework does not appear to

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99 Art. 9. Of Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims [2024] OJ L 2024/1712.

100 GRETA, 2025(6), *op. cit.*, note 21, p. 33.

101 In alignment with CJEU case law, see supra chapter 3.4.

102 Art. 61/2 of Belgium, Law of 15 December 1980 on access to the territory, residence, settlement and removal of foreign nationals.

103 Art. 18(1), (3-bis) and (5), Italy, *Legislative Decree No. 286 of 25 July 1998, Consolidated Act on Immigration and the Status of Foreign Nationals*, Art. 18(1), (3-bis) and (5).

104 Arts. 79(1)(1), 79(1)(4), 80–82, 86, 103.a–103.d. of Aliens Act, Official Gazette No. 133/20, 114/22, 151/22, 40/25.

provide a broader temporary protective residence status for all persons for whom there are reasonable grounds to suspect human trafficking or labour exploitation, independent of formal identification, acceptance of the assistance programme, or cooperation in proceedings against the employer.

The fifth group of amendments concerns the exploitation of migrant workers and their protection. It is necessary to link the Labour Act, the Act on the Suppression of Undeclared Work, the Aliens Act, and the regulations on employment mediation. At a minimum, the following should be prescribed: the obligation to provide written and understandable information to foreign workers in a language they understand, the prohibition of charging intermediary fees to the worker, minimum accommodation standards, the obligation to have employment contracts available in an understandable language, a secure application channel without automatic loss of residence status, and specialized inspection protocols for risky sectors. In its fourth report, GRETA specifically warns of the vulnerability of foreign workers due to language barriers, dependence on the employer, insufficient supervision of employment agencies, and insufficient information about their rights. In this regard, the comparative solution should not be the adoption of a single national model, but a combination of: labour law screening, inspection indicators of human trafficking, the obligation of interpreters in inspection supervision, and the protection of workers who report exploitation from immigration consequences.

The sixth intervention concerns Information and communication technologies facilitated trafficking in human beings. Croatia should develop a special operational framework for online recruitment, digital surveillance of victims, exploitation via platforms, job advertisements, social networks, and messaging apps. General campaigns on online safety are not sufficient in this area; it is necessary to strengthen the capacities of the police and the state prosecution for proactive online investigations, the use of digital tools, faster preservation and acquisition of electronic evidence, and international cooperation. In its fourth report, GRETA explicitly recommends investing in capacities and digital tools for proactive investigations, as well as the ratification of the Second Additional Protocol to the Convention on Cybercrime on enhanced cooperation and discovery of electronic evidence.[105]

Finally, all the above-mentioned changes should be linked to the strengthening of institutional oversight. Croatia still does not have an independent national rapporteur on trafficking in human beings, although GRETA reiterates that the establishment of such a body or the appointment of an existing mechanism that would independently monitor the effectiveness of state institutions should be

[105] GRETA, 2025(6), *op. cit.*, note 19, p. 51.

considered. This would move the reform away from fragmented amendments to individual laws towards a systematic model in which criminal, migration, labor, social, and children's law mechanisms are viewed as a single chain.

5. CONCLUSION

The practice of the ECtHR has shown that at the heart of the positive obligations of states in the fight against trafficking in human beings is the right of the victim to an effective investigation. An effective legislative framework goes beyond criminal law aspects, which, although still the dominant means, needs to be supplemented by a number of other regulations as previously outlined. Operational measures also implies the use of new techniques and technologies that should be aimed primarily at prevention, but also, in the event of unsuccessful prevention, at more effective identification and punishment of perpetrators, while respecting the vulnerability of the victim. Such a holistic approach is complemented by GRETA standards and recommendations that truly put the position of the victim at the forefront.

The Republic of Croatia has done a lot in recent years to create an effective legal framework for combating trafficking in human beings. This also applies to the victim's position. However, considering the most recent GRETA report from 2025, it is expected that legislative changes will take exactly that direction, implying the creation of an effective framework for implementing the non-punishment principle for victims and a more effective exercise of the right to compensation. Potential solutions are either a combination of existing criminal law institutions and the purposefulness (opportunity) of criminal prosecution, or through new provisions that would specify the category of victim of trafficking in human beings. Given that in the draft law the legislator stated that the existing institutions are sufficient to satisfy this GRETA recommendation[106], the non-punishment principle should not be regulated through internal prosecutorial instructions, but could be regulated through an explicit statutory provision in the Criminal Procedure Code. Such a provision would preserve the principle of legality, because any limitation of mandatory prosecution would be determined by the legislature itself and not by prosecutorial practice.

The second necessary step will be to revise the Crime Victims Compensation Act, which has not been changed since 2011.[107] In addition to the amounts being inadequate to the actual circumstances, there is also the potential for a more immedi-

[106] Draft of the final proposal of the Criminal Code, Reasoning, P.Z.E. No. 395, 186, 2025, p. 8.

[107] Crime Victims Compensation Act, Offical Gazette No., 80/08, 27/11.

ate and easier realization of the right to compensation. One of the fundamental problems that has also emerged through the ECtHR standards in recent judgments is lost earnings. The Court established a positive obligation for the states to secure victims of human trafficking the possibility to make a claim against the perpetrators for the lost earnings.[108] In the *de lege lata* framework, a special category of victims of human trafficking should be created, as is the case with the realization of certain rights in the CPC, and in this way, conditions similar to those in the Netherlands should be created for the realization of the right to compensation. Since the fund already exists, a pre-trial system could be effectively implemented, thus facilitating the victim's participation in criminal proceedings, which is one of the fundamental tenets of the victim's right to an effective investigation.

Digital tools and artificial intelligence could be a new step, especially considering the GRETA report, which highlighted the problem of prevention and detection of victims of crime. The ECtHR standards also go in this direction, as they require effective and practical protection that includes both prevention and detection; this standard extends to operational measures, but also to effective investigation, if it comes to that. In the latter case, it is possible to imagine the situation of a real-time facial recognition, which is specifically designed to find victims of human trafficking.[109] In such narrowly defined exceptions, the potential of such technologies to help in such situations is clearly recognized, which means that in the future we will rely more on such technology, which has the potential for cross-border application. It is precisely the EU AI Act regulation, by ensuring unification, that creates a foundation that such evidence could be used in cross-border investigations. Another form of prevention, before the latter is activated, is the prediction of victims of crime, given that the issue of identification itself has been identified as one of the fundamental problems.[110] Although current prediction systems have different characteristics, the identification of certain risk factors in both individuals and certain groups may be a future solution.[111] This is extremely important for a country like the Republic of Croatia, which is not only on the external borders of the Schengen area but also represents one of the sections of the so-called Balkan

[108] E.g. Judgment *Krachunova v Bulgaria* (2024) EHRR §177-178.

[109] Simmler, M.; Canova, G., *Facial recognition technology in law enforcement: Regulating data analysis of another kind*, Computer Law & Security Review: The International Journal of Technology Law and Practice, Vol. 56, 2025, p. 8.

[110] Lannier, S., *Using US Artificial Intelligence to Fight Human Trafficking in Europe*, Eucrim, Vol. 18, No. 1., 2023, pp. 67–69.

[111] See more: Tiwari, A.; Smart Solutions to Dark Crimes: Exploring AI's Potential in Preventing Human Trafficking, Indian Journal of Integrated Research in Law, Vol. 5., No. 2, pp. 1816, 1818, 1820.

route of migration.[112] These are new solutions that, together with the previously mentioned legislative proposals, can represent an appropriate and effective step in accordance with the GRETA recommendations and European standards of operational conduct within the framework of the victim's right to an effective investigation.

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Chapter 3

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Review article

ARTIFICIAL INTELLIGENCE (AI) AS AN EXISTENTIAL THREAT: THE ROLE OF THE EUROPEAN UNION AND ITS AI ACT IN TRANSNATIONAL POLICYMAKING

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ABSTRACT

Apart from various benefits artificial intelligence (AI) brings for humanity, recent years have generated greater awareness of multifaceted dangers and threats it could represent. Among them, the most usually invoked are the disturbance of the labor market, potential threats for the human creativity and protection of intellectual property rights, human alienation, risks of manipulative media content and cross-border cyber interference, and, finally, the greatest threat of all: the existential one. Already well-known and thoroughly discussed potential causes of catastrophic outcomes for humanity include all-encompassing threats, such as climate change, nuclear war, or pandemics. While terminology varies, threats that could result in partial or complete destruction of humanity are typically termed "existential risk/threat" or a threat to "existential security". On the list of possible threats, one of the most recent entries is the danger to humanity's survival posed by the actions of some advanced, potentially self-aware, and highly destructive AI.

The EU Regulation 2024/1689 of 13 June 2024 laying down harmonised rules on artificial intelligence (EU AI Act) is the first supranational legally binding act of this kind. However, due to various reasons – such as the EU's internal political dynamics and the limitations imposed by its decision-making processes – the EU AI Act is the smallest common denominator of its Member States' regulatory intentions, leading to controversial, complex and often unenforceable legal norms. While Art. 5 of the EU AI Act is dedicated to different prohibited AI practices, the EU legislation does not offer an applicable regulatory framework dedicated to existential threat from AI. At the same time, different trans-national initiatives – such as Center for AI Safety, Future of Life Institute, AI Red Lines – have already proposed different policy and regulatory measures to mitigate the risk of extinction from AI.

The article first focuses on the notion of existential threat from AI and the potential self-awareness AI could achieve (Chapter 2), before turning to the issue of global regulatory initiatives aiming to mitigate the most significant AI risks (Chapter 3); then it examines the existing EU legislation, as well as the Union's current and potential role in transnational AI-related policymaking (Chapter 4). The methodological approach is based on dynamic and holistic legal content analysis of the EU legislation and policy documents, while the literature review is combined with references to relevant jurisprudence and insights into legal reasoning of policy makers and other relevant stakeholders. Finally, whenever appropriate, the analysis is based on convergence of legal studies with interdisciplinary explorations of political science, psychology, and technology.

Keywords: *Artificial intelligence, EU AI Act, European Union, Existential threat, Global regulation of AI*

1. INTRODUCTION

As counter-intuitive as it may sound, the astonishing progress of the science in the last several decades has not made shorter the list of all-encompassing, global threats for humanity. Apart from deadly weather perils and pandemics, which have been decimating the humans in numerous occasions in the previous centuries,[1] the technological progress added some new, previously totally unknown threats, such as nuclear war, but also augmented risks related to human-driven climate changes.[2] In the current geopolitical context, the humanity's "failure to establish existential security"[3] is particularly striking, while the list of potential existential threats has become even longer. The newly identified threat is artificial intelligence (AI), while more and more organizations and scientific experts in various fields continue to warn about the danger it could pose. Despite the numerous benefits AI offers humanity, recent years have heightened the awareness of its multifaceted risks. Among these, the most commonly cited are labor market disruptions, threats to human creativity and intellectual property protection, human alienation, risks from manipulative media content and cross-border cyber interference, and above all, the existential threat. The European Union was one of the frontrunners in adopting legislation dedicated to the regulation of AI, but its regulatory response has been excessively burdened by long decision-making processes and limited scope of legislative intervention. The article will, therefore, first critically examine the notion of the existential threat from AI and how it is intertwined

[1] For a detailed overview, see Piret, J.; Boivin, G., *Pandemics Throughout History*, Frontiers in Microbiology Vol. 11, 2021, pp. 1-16.

[2] For different, but equally valuable approaches, see McLaughlin, A., *Existential Risk, Climate Change, and Nonideal Justice*, The Monist, Vol. 107, No. 2, 2024, pp. 190-206; Huggel C. *et al.*, *The existential risk space of climate change*, Climatic Change Vol. 174, No. 1-2, 2022, pp. 1-20.

[3] Lewis-Jones, R., *Addressing Humanity's failure to establish Existential Security*, Journal of International Political Theory, Vol. 22, No. 1, pp. 92-110. See also Scouras, J., *Nuclear War as a Global Catastrophic Risk*, Journal of Benefit-Cost Analysis, Vol. 10, 2019, pp. 274-295.

with its potential self-awareness (Chapter 2), before turning to the issue of global regulatory initiatives to mitigate major AI risks (Chapter 3); the focus will then be on the existing EU legislation applicable to the regulation of AI, as well as the Union's current and potential role in transnational AI policymaking (Chapter 4).

2. AI AS AN EXISTENTIAL THREAT

In various doctrinal studies and global initiatives dedicated to different potential dangers AI could represent, diverging notions and approaches have been used. Whereas some sources mention the threat to "existential security"[4] AI could represent, or evoke the eerie perspective of "existential anxiety"[5] it provokes, others mention "existential risk"[6], seen a as "the hypothetical threat posed by an artificial system that would possess both the capability and the objective, either directly or indirectly, to eradicate humanity".[7] While it is not only difficult, but also unnecessary to make a clear distinction between the notions of existential risk/threat, or threat to existential security, in order to illustrate how the already existing risks from AI can slowly transform in existential threat, it seems perfectly appropriate to quote one particularly strong part of an open letter, titled "Pause Giant AI Experiments", published by the Future of Life Institute on 22 March 2023: "Should we let machines flood our information channels with propaganda and untruth? Should we automate away all the jobs, including the fulfilling ones? Should we develop nonhuman minds that might eventually outnumber, outsmart, obsolete and replace us?".[8] However, if it goes beyond any doubt that AI-driven deepfakes are more and more present in media, while automated AI-based systems continue to replace human workers, these dangers cannot be defined as an existential threat taken *stricto sensu*. On the other hand, the perspective in which "nonhuman minds" are outnumbering and replacing humans already represents a scenario endangering the very existence of mankind.

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4 For some sources using this terminology, see Subasri, V. *et al., Potential for near-term AI risks to evolve into existential threats in healthcare*, BMJ Health & Care Informatics, Vol. 27, 2025; Bernstein, S. *Existential security and the governance challenge: Confronting the antinomies of securitisation*, Global Policy Vol. 14, 2023, pp. 638-642.

5 Alkhalifah, J.M. *et al.*, *Existential anxiety about artificial intelligence (AI) – is it the end of humanity era or a new chapter in the human revolution: questionnaire-based observational study*, Frontiers in Psychiatry, Vol. 15, 2024, pp. 1-13.

6 Hoes, E.; Gilardi, F., *Existential risk narratives about AI do not distract from its immediate harms*, Proceeding of the National Academy of Sciences of the USA Vol. 122, No. 16, 2025, e2419055122, pp. 1-18.

7 VanRullen, R., *AI Consciousness and Existential Risk*, Available at: [arXiv:2511.19115v1] [cs.AI], 2025, Accessed 7 February 2026.

8 Future of Life Institute, *Pause Giant AI Experiments: An Open Letter*, Available at: [https://futureoflife.org/open-letter/pause-giant-ai-experiments/], Accessed 4 February 2026.

The question whether and, if yes, to what extent, AI could represent an existential threat for humans should begin with possible reasons for such an outcome. Although numerous scenarios can be imagined, the following two possibilities seem most likely. First, AI tools and/or systems could be, in a manner similar to the nuclear weapons, in the hands of a state, organization, or a group of persons intending to use it in order to inflict harm or as a deterrence against threats. Second, AI could – either because it has achieved self-consciousness and perceives humans as a threat, or for some other reason – independently seek to bring about the destruction of humanity or certain groups of individuals. While the second scenario remains a mere possibility, the first is already a reality. Consequently, if the challenges AI raises in the economy, media, and artistic creation have left someone indifferent to the need for a better and more detailed legal regulation of its development and use, then the perspective of the destruction of mankind should substantially change their views. In any case, the existential threat AI poses for humanity is closely intertwined with its (potential) aptitude to reach self-consciousness. This standpoint is particularly well developed by VanRullen, who claims that "consciousness could be viewed as a means towards AI alignment, thereby lowering existential risk; or, it could be a precondition for reaching certain capabilities or levels of intelligence, and thus positively related to existential risk".[9] In both scenarios, the linkage between the consciousness of AI systems and existential risk is very difficult to deny, and, therefore, merits more thorough examination.

Every attempt to unequivocally determine whether AI can become self-conscious – and, in the case of a positive answer, to (at least roughly) predict when this will occur – is significantly hampered by the fact that not only the human consciousness itself has not been sufficiently explored, but also that there are various concepts in its definition. Therefore, it is of a particular importance to establish certain boundaries of insight that are possible to reach. The nature of consciousness is multidimensional, so before considering AI's aptitude to possess it, it is necessary to specify which dimension and/or form of consciousness is being targeted. As Farisco and others have rightfully pointed out, "whilst the extension of other mental terms like attention and intelligence to non-human animals and AI systems may appear less problematic than consciousness, we should distinguish two semantic dimensions when referring any mental term to AI: the epistemological dimension (i.e., what is the nature of the feature indicated by the term?), and the functional dimension (i.e., how does the feature indicated by the term work? What is the relevant architecture, that is the adequate combination of structure

[9] VanRullen, R., *op. cit.*, note 7, p. 1.

and functionalities?)".[10] If this distinction is accepted, extending the first dimension to AI is, at its current level of development, almost impossible, while "the extension of the second dimension may be more straightforward, provided that relevant structures and functions may be replicated at the adequate scale or level of details".[11] Therefore, AI could potentially have some functional elements of consciousness, but its content would differ from the same property we recognize in humans. However, these elements should be sufficient to consider AI as an existential threat. In the apocalyptic scenario in which AI turns against humans, one of the key reasons for this is a quantum leap – which some authors have also named "the moment of technological singularity"[12] – taking place when AI becomes self-conscious.

There is a significant number of authors who consider that a self-conscious AI (at least, for now) is impossible. In this respect, it is particularly interesting to confront the standpoints of different authors regarding AI tools based on large language models (LLM). For example, in their article apodictically entitled "There is no such thing as conscious artificial intelligence", Porębski and Figura affirm that "unlike human use of language, there is no intention behind the strings of characters generated by LLMs [while] their language use is stripped of reference to meanings (those existing in the world rather than represented numerically in the vectors), making them comparable to stochastic parrots".[13] On the other hand, in the article "Signs of consciousness in AI: Can GPT-3 tell how smart it really is?" – which, adding some awkwardness in the entire debate, was published in the same journal just a few months earlier – Bojić, Stojković and Jolić Marjanović uphold that "although there are no definitive standards and conclusions regarding its consciousness, its [GPT-3's] ability to receive inputs (similar to reading), reason, analyze, generate predictions, and perform NLP tasks suggests some aspects of subjectivity, perception, and cognition [while] these observations highlight the need to continually examine the potential emergence of awareness and self-awareness in large language models."[14] What seems particularly important to underline is

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10 Farisco, M. *et al.*, *Is artificial consciousness achievable? Lessons from the human brain*, Neural Networks Vol. 180, 2024, pp. 1-14.

11 *Ibid.*, p. 10.

12 Vinge, V., *The Coming Technological Singularity: How to Survive in the Post-Human Era*, Available at: [https://ntrs.nasa.gov/api/citations/19940022856/downloads/19940022856.pdf], Accessed 7 February 2026.

13 Porębski, A.; Figura, J., *There is no such thing as conscious artificial intelligence*, Humanities & Social Sciences Communications Vol. 12, 2025, pp. 1-12.

14 Bojić, L.; Stojković, I.; Jolić Marjanović, Z., *Signs of consciousness in AI: Can GPT-3 tell how smart it really is?*, Humanities & Social Sciences Communications Vol. 11, 2024, pp. 1-15, 8.

exactly this need to permanently examine and evaluate AI's aptitude for consciousness/awareness, chiefly because AI models are evolving with remarkable rapidity.

Finally, there is yet another important legal issue related to the status of AI: its potential personhood and legal conditions under which it could be granted. The issue is highly divisive, as well as ethically and politically sensitive. Some authors have identified new constructs to complement the taxonomy of arguments for AI legal personality, such as "cognitive strain, consciousness, cyborg paradox, reasoning replicability, relativism, AI misuse, excessive human effort and substitution".[15] On the other hand, AI can become a legal subject, "namely a derivative legal subject like a legal organization,"[16] but specific conditions in different legal orders significantly vary and often lack precision. The most sensitive issue regarding AI's legal personhood still remains possible consequences of such regulatory choice, especially given the absence of detailed and universally accepted guidelines on the use of AI tools.

3. GLOBAL REGULATORY INITIATIVES TO MITIGATE MAJOR AI RISKS

The number of national and supranational organizations, fora and initiatives aiming to achieve certain level of transnational regulation of major AI-related risks is constantly increasing over the last few years. In May 2023, the Center for AI Safety presented its "Statement on AI Risk", supported by a large number of influential individuals and still open for signatures. The statement consists of a single sentence: "Mitigating the risk of extinction from AI should be a global priority alongside other societal-scale risks such as pandemics and nuclear war".[17] What the Statement refers to as "risk of extinction" other organizations, such as the Future of Life Institute – in an article authored by Ariel Conn and published in November 2015 – term "existential risk", defined as "any risk that has the potential to eliminate all of humanity or, at the very least, kill large swaths of the global population, leaving the survivors without sufficient means to rebuild society to current

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15 Staszkiewicz, P. *et al.*, *Artificial intelligence legal personality and accountability: auditors' accounts of capabilities and challenges for instrument boundary*, Meditari Accountancy Research, Vol. 32, No. 7, 2024, pp. 120-146.

16 Putriyanti, E.D. *et al.*, *Artificial Intelligence: Legal Status and Development in the Establishment of Regulatory*, in: Umiyati, M. *et al.* (eds.), Proceedings of the International Conference on "Changing of Law: Business Law, Local Wisdom and Tourism Industry" (ICCLB 2023), Advances in Social Science, Education and Humanities Research 804, pp. 446-457, 450.

17 Center for AI Safety, *Statement on AI Risk*, Available at: [https://safe.ai/work/statement-on-ai-risk], Accessed 9 February 2026.

standards of living".[18] Regardless of the term chosen, it is clear that this concerns a threat whose deepest essence lies precisely in the unpredictability of consequences arising from accelerated AI development. For this very reason, numerous initiatives have proposed and continue to propose more concrete measures to mitigate this threat, while its complete elimination appears difficult to achieve. Among the proposed measures, those particularly standing out are, on the one hand, appeals for governments to reach a binding international agreement, and, on the other, calls for a moratorium on training and developing AI models.

The initiative named "AI Red Lines", launched in September 2025, has published a Global Call, in which it directly urges the governments of all countries to reach an international agreement on "red lines" in AI development that all parties would commit not to cross. Although the Global Call does not define precisely what it considers as red lines, this initiative is accompanied by a useful explanation. Namely, some advanced AI systems have already demonstrated the capacity for deceptive and harmful behavior, yet they are being granted ever greater autonomy to take actions and make decisions in the world, which has led many experts, "including those at the forefront of development [of AI systems], to warn that it will become increasingly difficult to exert meaningful human control in the coming years".[19] Unlike the brief statement of the Center for AI Safety, this elaborated initiative enables somewhat deeper analysis. Namely, three factors that render AI development genuinely threatening can be identified. First, the combination of the speed and unpredictability of that development, particularly given that only a small portion of information about the capabilities of advanced AI systems reaches the public. Second, some harmful effects of AI use are already known, and in combination with the previous element, it can be expected that there will be more of them, with increasingly damaging impacts. Third, the emphasis is on acting before it is too late, that is before the moment when human control becomes very difficult or impossible. Once again, the danger of the unknown, namely of AI slipping from human control and beginning to act independently, lies at the very core of the concept of existential threat from AI.

In March 2023, the Future of Life Institute published an Open Letter calling for a moratorium (lasting at least 6 months) on training and developing AI-based systems "more powerful than GPT-4". This initiative has so far been supported by over 33,000 signatures, including internationally recognized scientists (Yuval

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18 Conn, A., *Existential Risk*, Future of Life Institute, Available at: [https://futureoflife.org/existential-risk/existential-risk/], Accessed 9 February 2026.

19 AI Red Lines, *Global Call for AI Red Lines*, Available at: [https://red-lines.ai/], Accessed 9 February 2026.

Noah Harari, Max Tegmark), as well as founders or directors of major technology companies (Steve Wozniak, Elon Musk, Emad Mostaque). Alongside citing several references, the letter presents compelling argumentation, stating that contemporary AI-based systems are now becoming competitive with humans in general tasks. The Open Letter emphasizes that "powerful AI systems should be developed only once we are confident that their effects will be positive and their risks will be manageable [while] AI labs and independent experts should use this pause to jointly develop and implement a set of shared safety protocols for advanced AI design and development that are rigorously audited and overseen by independent outside experts".[20] This argumentation is, undoubtedly, understandable and easy to agree with. However, core flaw in such a formulation mirrors the problem already identified in international arms race. Namely, if not all actors active in AI development accept such an initiative, it can achieve only partial or no success whatsoever, since non-accepting parties will, while others pause, gain an unattainable developmental advantage. Therefore, even individuals and companies responsible for AI development who agree with the initiative and wish to accept it often hesitate to do so, fearing they will be sidelined in the technological race.

4. THE ROLE OF THE EU AND ITS LEGISLATION IN TRANSNATIONAL AI POLICYMAKING – FOCUS ON EXISTENTIAL SECURITY

Although numerous national and international institutions, bodies and initiatives have already elaborated a wide range of recommendations, standards, guidelines and similar documents striving to contribute to the regulation of AI tools, systems and practices,[21] the first supranational legally binding act dedicated exclusively to AI is the EU Regulation 2024/1689 of 13 June 2024 establishing harmonised rules on artificial intelligence[22] (hereinafter: EU AI Act). While the existence of

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[20] Future of Life Institute, *Pause Giant AI Experiments: An Open Letter*, Available at: [https://futureoflife.org/open-letter/pause-giant-ai-experiments/], Accessed 9 February 2026.

[21] The Organization for Economic Co-operation and Development launched „The OECD.AI Policy Navigator", defined by the Organization itself as "a living repository from more than 80 jurisdictions and organizations", Available at: [https://oecd.ai/en/dashboards/overview]. However, on the international level, the repository comprises only 8 initiatives from the following organizations: the African Union, G7, the United Nations, the Association of Southeast Asian Nations, the Inter-American Development Bank, The United Nations Educational, Scientific and Cultural Organization, the EU and the OECD/GPAI itself.

[22] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJ L series.

significantly different national legislations in a particular area is neither prohibited nor always undesirable, in the field of AI uniform rules at the EU level have been necessary in order to make its single market viable. It is particularly worth noting that – even before the adoption of the EU AI Act, the Court of Justice of the EU (CJEU)[23] was invoking the provisions of EU legislation (such as, for example, recitals 9 and 13 of Directive 2019/1024 on open data and the re-use of public sector information[24]) which peripherally mention AI in the context of "advanced digital technologies".[25] However, given the significant number of pending cases, it is yet to be seen how the CJEU will interpret some core provisions of the EUAIA.

In September 2024, three months after the adoption of the EU AI Act, the Council of Europe's (CoE) Framework Convention on Artificial Intelligence and human rights, democracy and the rule of law[26] has been opened for signature. While the CoE has declared that this convention is "the first-ever international legally binding treaty in this field,"[27] legal doctrine presented more nuanced views, pointing out that "key compromises made in the negotiation process – including exemptions for private sector regulation and national security uses of AI – will likely weaken the Framework Convention's effectiveness".[28] Moreover, narrowed to the issues of human rights, democracy and rule of law, the CoE's Framework Convention sidesteps high-risk AI systems in general, let alone the issues such as the existential threat from AI.

The European Commission published the Proposal for a Regulation of the European Parliament and of the Council establishing harmonized rules on AI in April 2021,[29] marking the first formal step leading to the adoption of a legally binding Union act dedicated exclusively to AI. This text was the product of lengthy and arduous discussions and negotiations, during which the two key milestones were the

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23 Case C-336/23 *HP – Hrvatska pošta d.d. v Povjerenik za informiranje* [2024], ECLI:EU:C:2024:979.

24 Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information, [2019] OJ L 172, pp. 56-83.

25 Directive (EU) 2019/1024, recital 9.

26 Council of Europe Treaty Series – No. 225, Available at: [https://rm.coe.int/1680afae3c], Accessed 14 February 2026.

27 Council of Europe - Framework Convention on Artificial Intelligence and human rights, democracy and the rule of law, Available at: [https://www.coe.int/en/web/artificial-intelligence/the-framework-convention-on-artificial-intelligenceg, Accessed 14 February 2026.

28 Hoxtell, W., *Global AI Regulation at a Time of Transformation: The Council of Europe's Framework Convention on Artificial Intelligence,* EnsuredEurope, Available at: [https://www.ensuredeurope.eu/publications/global-ai-regulation], Accessed 14 February 2026.

29 For the full text of the Proposal, see: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52021PC0206], Accessed 14 February 2026.

Commission's Communication *Artificial Intelligence for Europe*[30] from April 2018 and its *Report on the safety and liability implications of artificial intelligence, the Internet of Things and robotics*[31] from February 2020. It was not until mid-March 2024, almost three years after the publication of the proposal, that the European Parliament, in the first reading under the ordinary legislative procedure, adopted the EU AI Act. Two months later, the Council of the EU adopted the same text, which was published in the Official Journal of the EU on 12 July 2024. For the sake of legal certainty and to allow sufficient time for all subjects to which the EU AI Act applies, Article 113 provides that the general rule is that the act shall apply from 2 August 2026. However, it is envisaged that certain provisions thereof shall apply from 2 February 2025 (prohibited AI practices), 2 August 2025 (e.g., provisions on general-purpose AI models), or 2 August 2027 (provisions on high-risk AI systems).

The EU AI Act did not dedicate – even distantly – a single provision to the issue of existential risks/threats AI could represent for the humanity. The main corpus of substantive provisions of the EU AI Act addresses five main themes: prohibited practices (Article 5), high-risk AI systems (Articles 6-49), transparency obligations for providers and users of certain AI systems (Article 50), and general-purpose AI models (Articles 51-63). Moreover, considering that the preamble to the EU AI Act comprises 180 recitals, praise is due to the EU legislators for the effort to justify the document's background and various regulatory solutions, indicating that the drafting process was open and democratic. However, due to the specific features of the EU's decision-making process – and above all, the slowness conditioned by the complexity of the topic and conflicting economic and political interests – the Act does not go far enough in many provisions, which might lead both to its limited effects and to significant problems in its interpretation and implementation in the EU Member States. The following analysis will first examine some major elements of the existing structure and content of the EU AI Act that could allow the future legislative steps in the direction of a more direct and straightforward regulation of AI existential risk (section 4.1), before turning to the issue of the key features of a potential supranational regulatory framework dedicated to AI and, in particular, existential threat it represents (section 4.2).

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30 Artificial Intelligence for Europe, COM(2018) 237 final, Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A237%3AFIN], Accessed 15 February 2026.

31 European Commission, Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics, COM(2020) 64 final, Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0064], Accessed 15 February 2026.

4.1. The Pathways for the Evolution of the EU AI Act

In spite of the fact that the EU AI Act did not have any ambition whatsoever to mitigate the existential risk from AI, some of its provisions could be interpreted in a sense that, by means of the future amendments to the Act, it could represent a base – or, at least, a contextual and teleological justification – for regulating AI-related existential risk. The need for such legislative changes is beyond any doubt, while some authors have pertinently pointed out that "AI's exponential growth outpaces static laws, rendering traditional command-and-control regulation inadequate".[32] While the EU secondary legislation has to respect the limits imposed by the treaties and, in particular, those related to the Union's competences, the existing regulatory framework does not allow the conclusion that a common European regulation of AI existential threat is beyond reach. It is, therefore, appropriate to examine the EU AI Act's existing provisions dedicated to the risks and harms AI may cause, as well as the issue of how its provisions on prohibited AI practices could evolve in the direction of regulating existential risks.

Recital 5 of the EU AI Acts is one of its most forward-looking provisions, stating that "depending on the circumstances regarding its specific application, use, and level of technological development, AI may generate risks and cause harm to public interests and fundamental rights that are protected by Union law". In the context of AI-based existential threat, the key issue here is whether the survival of mankind could be considered as a "public interest" or "fundamental right" protected by EU law. Until now, this issue has been treated only partially, and in the context of environmental law.[33] However, would the Art. 2-1 of the Charter of Fundamental Rights of the EU, guaranteeing that "everyone has the right to life", could be used a legal basis for the adoption of the amendments to the EU AI Act dedicated to AI existential threat? In the current state of the Union's legislation and jurisprudence, there is no explicit legal base or interpretation that would indicate a positive answer to this question. Moreover, although the EU AI Act "classifies AI systems into three categories: unacceptable-risk, high-risk and limited and minimal-risk, it still falls short of the requirements needed to protect several fundamental human rights and to prevent AI from being used in ways that would aggravate existing inequities and discrimination".[34] Therefore, it seems that

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32 Mahmutovic, A., *The EU AI Act: a proactive framework for comprehensive AI regulation*, International Journal of Law and Information Technology, Vol. 33, 2025, pp. 1-12, 7.

33 See Somsen, H., *From Improvement Towards Enhancement: A Regenesis of EU Environmental Law at the Dawn of the Anthropocene*, in: Brownsword, R; Scotford, E.; Yeung K. (eds.), The Oxford Handbook of Law, Regulation and Technology, Oxford Handbooks, 2017.

34 Federspiel, F. *et al.*, *Threats by artificial intelligence to human health and human existence*, BMJ Global Health, Vol. 8, No. 5, 2023, pp. 1-6, 3.

the first step in improving the EU AI Act would be to define the nature and scope of unacceptable risks.

While the EU AI Act comprises detailed rules related to the classification of high-risk AI systems (Art. 6), requirements related to them (Art. 8), risk management system (Art. 9), data governance (Art. 10), transparency (Art. 13), human oversight (Art. 14) and numerous other issues, there are no core provisions of the Act dedicated to unacceptable risks, an issue that has remained entirely unregulated. Apart from the two provisions of the preamble (recitals 46 and 179) mentioning *expressis verbis* the notion of "unacceptable risk", no core provision reiterates it, let alone defines it. Moreover, the contextual interpretation of recital 26, stating that "in order to introduce a proportionate and effective set of binding rules for AI systems, a clearly defined risk-based approach should be followed [...] it is therefore necessary to prohibit certain unacceptable AI practices, to lay down requirements for high-risk AI systems," leads to the conclusion that the category of "unacceptable risk" has only been introduced in order to justify the rules on prohibited AI practices. In other words, from the perspective of the EU legislators, AI practices demonstrating an unacceptable risk should be prohibited, while high-risk AI systems are heavily regulated. On the other hand, even a summary analysis of the EU AI Act's provisions on prohibited AI practices reveals that they remain unrelated with AI existential threats. In conclusion, if its existing regulatory structure and logic is to be preserved, the EU AI Act could evolve towards regulating AI-based existential risks by embracing significantly wider perspective on prohibited AI practices, combined with a detailed definition of unacceptable risks.

4.2. Key Features of a Supranational Regulatory Framework

As it has already been outlined in Chapter 3, supranational regulatory initiatives propose the adoption of different measures, but substantially remain legally non-binding. On the other hand, the EU AI Act mentions different risks and regulates prohibited AI practices but remains silent when it comes to existential threat from AI. In such a context, one overarching question becomes particularly urgent: what would be the most appropriate nature, scope and content of a supranational regulatory framework dedicated to the development and use of AI systems and tools which could, on the one hand, ensure the preservation of AI's numerous advantages while, on the other, preempt all the undeniable threats it brings? This issue becomes particularly salient in the context of the existential threat from AI, as it is impossible to imagine a greater risk that AI systems could potentially represent for humanity. The following considerations will, therefore, focus on some key characteristics of a desired and potentially most effective regulatory framework

dedicated to AI; the objective of this endeavor is also to distill how and to which extent regulatory solutions and approaches set out in the EU AI Act could serve as a starting point in adopting future normative acts with cross-border effects.

First, any transnational regulation of AI purporting to be effective must consist of legally binding norms, for which sovereign states – in the current state of development of international relations and institutions, best positioned for the task – should ensure effective methods of implementation, oversight, and sanctions. The aforementioned Global Call for AI Red Lines[35] also insists on this element, calling upon the governments to "reach an international agreement on red lines for AI, ensuring they are operational, with robust enforcement mechanisms" to prevent universally unacceptable risks. While in the current, politically significantly weakened system of international law, there are some conventions accepted by nearly all states, ensuring mechanisms for an effective implementation of their norms is a considerably more difficult task. All the existing international attempts to regulate the development and use of AI systems and tools are non-binding texts (initiatives, calls, recommendations, collections of good practices) which are not easy to translate into compulsory, enforceable, and effective legal norms.

Second, the very nature and fundamental characteristics of AI tools and systems impose one major feature of its successful regulation: it must be supranational. In the context of the global technological race, it is practically impossible to imagine that the results (or consequences) of the development of AI systems will not spill over from the islands where legal rules do not apply onto the territories of the states that have adopted (and enforced) a certain legal framework. As it has been pertinently remarked, "given the borderless nature of this issue, an internationally coordinated response is necessary,"[36] followed by a "fundamental change of mindset regarding the nature of regulation".[37] Apart from non-governmental regulatory initiatives already examined in Chapter 3, various international organizations (United Nations, Organization for Security and Co-operation in Europe, G7 Group) have also drafted and published certain documents that purport to regulate the issue of AI at the global level. However, all these acts lack two key features: universal acceptance by the states and a sufficiently wide scope. In this respect, a model introduced by the EU AI Act could be a good starting point of global regulatory efforts.

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35 AI Red Lines, Global Call for AI Red Lines, *loc. cit.*, note 17.

36 Zaidan, E.; Ibrahim, I.A., *AI Governance in a Complex and Rapidly Changing Regulatory Landscape: A Global Perspective*, Humanities and Social Sciences Communications Vol. 11, No. 1121, 2024, pp. 1-18, 9.

37 Erdélyi, O.; Goldsmith, J., *Regulating artificial intelligence: Proposal for a global solution*, Government Information Quarterly, Vol. 39, No. 4, 2022, pp. 1-7, 5.

Third, the global regulation of AI should be as comprehensive as possible, covering the largest number of threats that are not only currently present, but can also be expected in the future. Critics may object that this requirement runs counter to the principles of the rule of law, legal certainty, as well as so-called protection of legitimate expectations, the latter of which is particularly well developed in the case law of the CJEU.[38] However, the speed of the development of AI tools and systems would render meaningless, within just a few months, any set of binding legal rules incapable of encompassing the expected harmful consequences of advanced AI systems that may emerge in the foreseeable future. The EU has, through the provisions of Article 5 of the EU AI Act on prohibited AI practices – attempted to take such a step. This regulatory effort, in numerous aspects, did not go "far enough, introducing a series of legal standards that would raise issues of interpretation, and thus potentially lead to its unsatisfactory level and quality of enforcement".[39] On the other hand, the existing EU legislation – while at least offering some pathways for a potential global regulation of prohibited AI practices – should still find a genuinely European response to the issue of AI existential threat.

Fourth, given that "the traditional top-down tack to regulation may stifle innovation and creativity and stop AI from realizing its transformative potential",[40] every desirable global, legally binding, effective, comprehensive, and forward-looking AI regulation should also be designed so as not to hinder the development of legitimate, undoubtedly positive and beneficial AI systems and tools. Given the significant obstacles to achieving any international AI regulation whatsoever, this requirement appears less significant than the previous three. Both at the international and national levels, there are so few elaborated legally binding rules on AI that it is difficult to expect any existing acts aimed at its regulation to be capable of slowing the development of AI's positive aspects. What is urgently and critically needed is precisely the regulation of the dangers and threats that the development and use of AI can bring. In spite of its limitations, the existing legal framework introduced by the EU AI Act could represent a solid basis for the elaboration of

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38 There is a long-standing CJEU jurisprudence regarding this issue; see, for example, the judgements in cases C-776/23 P *Commission v Spain and Others* to C-780/23 P, ECLI:EU:C:2025:487 (ECR not yet assigned), paras 32, 39, 46, 55, 59; C-568/11 *Agroferm*, ECLI:EU:C:2013:407, para 13; C-203/07 P, *Hellenic Republic v Commission of the European Communities,* ECR 2008 I-08161, para 16; C-144/14, *Cabinet Medical Veterinar Dr. Tomoiagă Andrei v Direcția Generală Regională a Finanțelor Publice Cluj-Napoca prin Administrația Județeană a Finanțelor Publice Maramureș*, ECLI:EU:C:2015:452, paras 41, 48.

39 Ćemalović, U., *Prohibited artificial intelligence practices according to Article 5 of the European Union's regulation on AI - between the 'too late' and the 'not enough'*, International Journal of Law and Information Technology Vol. 32, No. 4, 2024, pp. 1-13, 11.

40 Unknown authors, *Co-Governance and the Future of AI Regulation,* Harvard Law Review, Volume 138, 2025, pp. 1609-1632.

a global regulatory framework for a responsible, human-centered AI, designed to eliminate (or, at least) reduce its existential threat to humanity.

5. CONCLUSION

AI-based tools and systems are developing in such a rapid pace that practically every regulatory framework aiming to regulate them can soon be rendered outdated. While numerous specific threats AI poses across diverse fields (such as, for example, its impact on the labor market, creative industries, media and protection of intellectual property rights) have already become reality – and, therefore, have received, at least partial, regulatory response – the issue of existential threat from AI is often seen as purely speculative. The critical examination of the notion of AI's existential threat and how it is intertwined with its potential self-awareness (Chapter 2) has shown that AI could – either because it has achieved self-consciousness and perceives humans as a threat, or for some other reason – seek to bring about the destruction of humanity or certain groups of individuals. The analysis of recent global regulatory initiatives to mitigate major AI risks (Chapter 3) has revealed that, among the proposed measures, those particularly standing out are, on the one hand, appeals for governments to reach a binding international agreement, and, on the other, calls for a moratorium on training and developing AI models. However, the closest reference to the existential threat from AI can be found in the "Statement on AI Risk" elaborated by the Center for AI Safety, which underlines that "mitigating the risk of extinction from AI should be a global priority alongside other societal-scale risks such as pandemics and nuclear war". While the EU AI Act is the first supranational legally binding act dedicated exclusively to artificial intelligence, it did not dedicate a single provision to the issue of existential risks/threats AI could represent for the humanity. However, the scrutiny (Chapter 4) of its provisions on prohibited AI practices and high-risk AI systems has led to the conclusion that, in spite of its limitations, the Act could represent a solid basis for the elaboration of a legally binding, transnational and comprehensive regulatory framework, also designed to substantially mitigate AI's existential threat to humanity.

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Review article

DIGITAL SERVICES ACT ENFORCEMENT IN THE NATIONAL CONTEXT – THE CASE OF SLOVAKIA*

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ABSTRACT

The enforcement of the Digital Services Act is ensured through both the European Union and different competent national authorities. In the national context, the main competences are entrusted to Digital Services Coordinators designated by individual Member States (the Council for Media Services in Slovakia). Other national authorities may also be assigned specific tasks or sectors by the Member State in this regard, e. g. courts or other public authorities may adjudicate different civil, administrative or criminal delicts that sanction the dissemination of different categories of illegal content on the Internet. In this paper, we examine the national enforcement of Digital Services Act provisions in Slovakia, focusing on the established case-law of the Council for Media Services and reflecting the limitation of its competences in the national legislation through the restriction of illegal content categories that may be investigated and sanctioned by this authority. The position of the Council for Media Services is further examined in light of the case-law of other national authorities with competences in this regard, addressing also the role of the recently established out-of-court dispute settlement body certified in Slovakia. We also look at the practical utilization of Articles 9 and 10 of the Digital Services Act enabling the competent authorities to issue orders to the providers of intermediary services to act against illegal content or to provide specific information about specific individual recipients of their services, focusing on selected intermediaries with significant representation in the national digital market. On this basis, we try to identify the emerging practices in the national enforcement of Digital Services Act and the processes established to ensure the effective sanctioning of the publication and dissemination of illegal content online.

Keywords*: Digital Services Act, Digital services coordinators, Enforcement, Illegal content, Intermediary service providers, Other competent authorities*

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1. INTRODUCTION

The adoption of the Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC („*Digital Services Act*") aims at setting out harmonised rules for a safe, predictable and trusted online environment that facilitates innovation and in which fundamental rights enshrined in the Charter, including the principle of consumer protection, are effectively protected.[1] The regulation provides harmonised rules on the provision of intermediary services in the internal market, expanding the existing regulatory framework through the closer precision of the provisions on liability exemptions, reflecting the interpretative conclusions reached by the CJEU, and the establishment of rules on specific due diligence obligations tailored to different categories of intermediary service providers.

Considering the serious effects of illegal content dissemination and the speed with which it can be circulated online, the effective and timely enforcement of the Digital Services Act is key.[2] Enforcement of its provisions is entrusted to different authorities operating both at the European Union and national level. In this paper, we focus on the Digital Services Act enforcement in the national context, examining the practices being established in one of the European Union Member States – Slovakia. The objective of this paper is to answer the following research question: "*What is the present state of enforcement of Digital Services Act provisions in Slovakia and what future developments can be expected in this regard?*" To provide an answer to this research question, we stipulate the following research sub-questions:

1. "*Which national authorities are entrusted with competencies in the enforcement of the Digital Services Act?*"
2. "*What impact has the classification of different categories of illegal content on the determination of national authorities' competencies?*"
3. "*What insights can be gained from the examination of the emerging case-law of the Slovak Council for Media Services, reflecting also the previous decisions of other national authorities adopted in this regard?"*

The methodology of this paper is based on the qualitative analysis and interpretation of the applicable European Union and national regulation regarding the Digital Services Act enforcement, examination of the corresponding case-law of

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[1] Article 1 (1) of the Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC ('Digital Services Act'). OJ L 277, 27 October 2022, pp. 1–102.

[2] Eifert, M.; Metzger, A.; Schweitzer, H.; Wagner, G., *Taming the giants: The DMA/DSA package,* Common Market Law Review, Vol. 58, Issue 4, 2021, pp. 987-1028, Available at: [https://doi.org/10.54648/cola2021065], Accessed 4 April 2026.

the Slovak Council for Media Services and selected information sources providing insights into the practical utilization of competences stipulated in the Digital Services Act (transparency reports of selected intermediaries, annual statistics on the prosecution of selected criminal offences sanctioning the dissemination of illegal content online), reflecting also the current academic discourse on discussed issues.

This paper is organized into four sections. Section 1 includes introduction and specifies the methodology and the stipulated research questions. Section 2 examines the role of the national authorities in the enforcement of Digital Services Act provisions and analyses the impact of illegal content classification on their competences. Section 3 focuses on the emerging case-law of the Council for Media Services, a key national authority designated as the national Digital Services Coordinator. Section 4 concludes the article and provides insights into possible future developments in the enforcement of the Digital Services Act.

2. THE ROLE OF NATIONAL AUTHORITIES IN THE DIGITAL SERVICES ACT ENFORCEMENT

National enforcement of the Digital Services Act is ensured primarily through the designation of independent national authority – the Digital Services Coordinator tasked to oversee and coordinate the monitoring, application and enforcement of this regulation[3] in relation to providers of intermediary services whose main establishment is located in the given Member State (*country of origin principle*). Digital Services Act also envisages the involvement of other competent national authorities in its enforcement, specifically authorities assigned specific tasks or sectors by their Member State, e. g. electronic communications, media or consumer protection. These authorities may also include national courts that adjudicate different civil, administrative or criminal delicts that sanction the dissemination of illegal content online. As the Digital Services Act "*covers so many areas, it will inevitably be a tool for many authorities with different types of expertise*."[4] Both categories of competent national authorities "*play a crucial role in ensuring the effectiveness of the rights and obligations laid down in this Regulation and the achievement of its objectives*."[5] Nonetheless, the Digital Services Coordinator is responsible for ensuring coordination at national level and for contributing to the effective and consistent supervision and enforcement of this regulation throughout the European

[3] Wilman, F.; Kaléda, S. L.; Loewenthal, P.J., *The EU Digital Services Act. A Commentary,* Oxford, UK: Oxford University Press, 2024, p. 346.

[4] Husovec, M., *Principles of the Digital Services Act*, Oxford, UK: Oxford University Press, 2024, p. 426.

[5] Recital 111 of the Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC ("Digital Services Act"), OJ L 277, 27.1 October 2022, pp. 1–102.

Union.[6] Digital Services Coordinator also possess the so-called "*fallback competence*" for the supervision and enforcement of the Digital Services Act provisions, if and insofar as the Member State has not assigned certain tasks/sectors to another competent authority.[7]

In Slovakia, the competences of the Digital Services Coordinator are executed by the Council for Media Services (formerly Council for Broadcasting and Retransmission), a pre-existing authority designated as the national Digital Services Coordinator. The Council's general objective is the promotion of public interest i.e. in relation to the provision of content sharing platforms, intermediary services, online intermediary services and search engine services, protection of freedom of expression, right to information and right to access to cultural values and education, and exercise of state regulatory powers in this regard.[8] Pursuant to Article 110 (2) (b) of the Act No. 264/2022 Coll. on media services as amended ("*Act on media services*"), the competences of the Council for Media Services within the state administration include the supervision of compliance with obligations stemming from this act, as well as from other legislative acts, including the Digital Services Act. More specifically, the Council supervises the compliance of intermediary service providers' activities falling under its competence with the applicable regulation and imposes sanctions on these providers in cases of identified infringements. Articles 151 – 153 of the Act on media services also define a new type of proceedings on the prevention of dissemination of illegal content. However, these provisions do not provide the Council for Media Services with a blanket right to act in cases of illegal content dissemination. The competences are restricted through the determination of specific categories of illegal content that may form the subject of these proceedings. Specifically, the Council for Media Services may initiate (on the basis of a third-party motion or its own investigation, if the matter cannot be delayed) proceedings on the prevention of dissemination of the following categories of illegal content:

a) content that fulfils the characteristics of child pornography or extremist material,

b) content that incites to conduct that fulfils the characteristics of any of the terrorism offences,

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6 Article 49 (2) of the Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC ("Digital Services Act"), OJ L 277, 27.10.2022, pp. 1–102.

7 Rademacher, T., *Article 49 Commentary,* Digital Services Act, Article-by-Article Commentary, in: Hofmann, F.; Raue, B. (eds.) Germany: Nomos Verlagsgesellschaft mbH & Co, 2025, ISBN: 978-3-8487-8616-9. p. 861.

8 Article 109 (3) of the Act No. 264/2022 Coll. on media services as amended.

c) content that approves conduct that fulfils the characteristics of any of the terrorism offences, or

d) content that fulfils the characteristics of the offence of denial and approval of the Holocaust, crimes of political regimes and crimes against humanity, the offence of defamation of a nation, race and belief or the offence of incitement to national, racial and ethnic hatred.[9]

It is clear that the above provided list of illegal content categories does not cover all types of content that can be considered illegal pursuant to Article 3 (h) of the Digital Services Act that provides a very extensive interpretation of the concept of illegal content. In this regard, the objective sought by the legislator must be reflected, which is primarily the determination of the Council for Media Services' competences in relation to the prevention of illegal content dissemination. Nonetheless, the Council's competences are significantly limited through the provision of an exhaustive list of content categories that may be investigated by this authority. The reason for such limitation may be the need to focus the Council's efforts primarily on the most serious categories of illegal content with significant impact on the democracy, society or rights of the affected parties. It must also be noted that all of these content categories are also sanctionable as criminally offences. In this regard, the support provided to competent authorities (police, prosecutors and national courts) by the Council for Media Services in relation to intermediaries that host such material may be necessary. Article 110 (2) (b) of the Act on media services, however, specifically stipulates the obligation of the Council for Media Services to ensure the compliance with the provisions of the Digital Services Act in its entirety, including all types of content that may be considered illegal pursuant to this regulation.[10] It can be concluded that the full potential of the Digital Services Act, which was intended to enable the sanctioning of all categories of illegal content[11], including those that are generally not provided the same level of attention by intermediaries given to their perceived lesser seriousness[12] or the limited possibility

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9 Article 151 (2) of the Act No. 264/2022 Coll. on media services as amended.

10 See also: Rojszczak, M., *The Digital Services Act and the Problem of Preventive Blocking of (Clearly) Illegal Content,* 2023, Institutiones Administrationis - Journal of Administrative Sciences, Vol. 3, Issue 2, pp. 44-59, Available at:
[https://doi.org/10.54201/iajas.v3i2.85], Accessed 5 April 2026.

11 See: Goanta, C., *Now What: Exploring the DSA's Enforcement in Relation to Social Media Platforms and Native Advertising,* in: Hoboken, J. *et al.,* Putting the Digital Services Act into Practice. Enforcement, Access to Justice, and Global Implication. Verfassungsbooks, 2023, ISBN Print 978-3-757517-96-0, Available at:
[DOI 10.17176/20230208-093135-0], Accessed 4 May 2026.

12 To illustrate, in a study provided by Goanta and Ortolani the authors examined four social media platforms (Twitter, Facebook, TikTok a Twitch), focusing on the identification of the type of content that the users of these platforms reported as illegal. The authors concluded that the content in question

of sanctioning them through criminal means, is thus not being fully realized in the national context.

As regards other competent national authorities, these include, primarily, courts that adjudicate different civil, administrative or criminal delicts that sanction the dissemination of illegal content on the Internet. Partial competences are also provided to other state authorities such as the Personal Data Protection Office of the Slovak republic that sanctions cases of unlawful processing of personal data. These may include cases such as the unauthorized recording of data subjects through camera information systems, the unauthorized disclosure of personal data on the Internet or the unauthorized sending of personal data to third parties via online communication tools.[13] Another relevant authority is the Gambling Regulatory Authority that sanctions the promoting or operating of gambling websites without the necessary license.

In Slovakia, an out-of-court dispute settlement body[14] – *the Central European Appeals Hub, n.o.* – established pursuant to Article 21 of the Digital Services Act was recently certified by the Council for Media Services. Its main purpose is to adjudicate the disputes arising from platform decisions that resulted in the removal of information, making it inaccessible or restricting its visibility, suspension or termination of the provision of a service or the user account itself, or restriction or termination of the user's ability to monetize their content. The majority of claims addressed to this body so far, however, originated from users outside the territory of Slovakia. This may possibly reflect the lack of interest or knowledge about the existence of subjects with the authority to examine the decisions adopted by intermediaries and resolve disputes arising from them. How this dispute resolution mechanism will be utilized in practice and whether it will be able to protect the

concerned primarily the categories of content that may be sanctioned as criminal offences and cases of intellectual property rights infringements. Other illegal content categories such as content in breach of consumer protection legislation (e. g. failure to provide the necessary information, unfair practices, etc.) were not included. See: Goanta, C.; Ortolani, P., *Unpacking content moderation: The rise of social media platforms as online civil courts,* in: Kramer, X.; Hoevenaars, J.; Kas, B.; Themeli, E. (eds.), Frontiers in Civil Justice: Privatisation, Monetisation and Digitisation. Edward Elgar Publishing, 2022, S, pp. 192-216, Available at: [https://doi.org/10.4337/9781802203820.00017], Accessed 4 May 2026.

13 See: Klarić, M.; Proso, M., *Challenges of personal data protection on the Internet – impact on democracy, public administration and the rule of law in the EU*, in: Petrašević, T.; Duić, D.; Novokmet, A. (eds.), EU and Comparative Law Issues and Challenges Series (ECLIC), 2024, 8, pp. 1033-1055, Available at: [https://doi.org/10.25234/eclic/32313], Accessed 4 May 2026.

14 See: Hučková, R.; Pezlár Selecká, J., *Digital Services Act and the new mechanism of online dispute resolution,* in: Katkovčin, M.; Pintérová, D.; Ťažká, D. (eds.), Bratislava Legal Forum: Current issues of commercial law, financial law and economic sciences in the context of the impact of European law on national legal systems, Bratislava: Comenius University in Bratislava, 2024.

rights of users originating in Slovakia,[15] specifically their freedom of expression and right to information,[16] will be an interesting question to examine in the future.

3. EMERGING CASE-LAW OF THE COUNCIL FOR MEDIA SERVICES AND THE EMPLOYMENT OF ITS OTHER COMPETENCES IN THE FIGHT AGAINST ILLEGAL CONTENT ONLINE

3.1. Proceedings on the prevention of dissemination of illegal content

The proceedings on the prevention of dissemination of illegal content are initiated either on the basis of a third-party motion or the Council's own investigations, if the matter cannot be postponed.[17] In case of a third-party motion, the Council will examine the objected content and begin proceedings if it concludes that such content is potentially illegal and its dissemination may endanger the public interest or represents a significant interference with the individual rights or legitimate interests of a person within the scope of the legal order of the Slovak Republic. Concurrently, the Council must ensure that the content service provider was demonstrably informed about the existence of potentially illegal content through its

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15 See: Treščáková, D. *Individuals and their rights in the middle of digitalization and technological progress of the society*, in: Petrašević, T.; Duić, D.; Novokmet, A. (eds.), EU and Comparative Law Issues and Challenges Series (ECLIC), Digitalization and green transformation of the EU: conference book of proceedings, Josip Juraj Strossmayer University of Osijek, Osijek, 2023, ISBN 9789538109546, Available at: [https://doi.org/10.25234/eclic/27453], Accessed 6 May 2026.

16 See: 1) Treščáková, D. *Freedom of expression on the internet vs. digital services act: chosen aspects*, in: Petrašević, T.; Duić, D.; Novokmet, A. (eds.), EU and Comparative Law Issues and Challenges Series (ECLIC), Strong and Secure Europe: Legal and Economic Aspects: Book of proceedings: International Scientific Conference, Josip Juraj Strossmayer University of Osijek, Osijek, 2025, 9, Available at: [https://doi.org/10.25234/eclic/38095], Accessed 6 May 2026 and 2) Sudar, V.; Mišević, S., *Freedom of speech and democracy in Europe: legal challenges and institutional responses,* in: Petrašević, T.; Duić, D.; Novokmet, A. (eds.), EU and Comparative Law Issues and Challenges Series (ECLIC), Strong and Secure Europe: Legal and Economic Aspects: Book of proceedings: International Scientific Conference, Josip Juraj Strossmayer University of Osijek, Osijek, 2025, 9, Available at: [https://doi.org/10.25234/eclic/38089], Accessed 6 May 2026.

17 According to the Council for Media Services 2024 Annual report, it initiated its own investigations of illegal content in two instances directed at intermediary services Facebook (1) and YouTube (1) with the objective to examine the presence of illegal content on these platforms. In both cases the Council began administrative proceedings against the respective intermediaries on the basis of the possible dissemination of illegal content. In the case of Google (YouTube), all objected content (14 comments) was removed, therefore the Council suspended the proceedings in this matter. As the intermediary Meta (Facebook) has not responded to the Council's notification on the proceedings beginning, the Council adopted a decision ordering a removal of the objected content (14 comments published under the post regarding the Roma and Muslim minorities and migrants that included calls for physical disposal or violent acts against these groups).

own mechanisms designated for this purpose, and if they do not exist, in another appropriate manner and the provider:

a) without delay, no later than two days after receiving this information, did not inform the person who provided it with the information, about the solution of this situation,
b) without delay, no later than five days after receiving this information, did not remove the potentially illegal content in question, or
c) notified the person who provided it with the information that it will not remove the potentially illegal content in question.

If the Council concludes the illegality of content in question and that its dissemination endangers the public interest or constitutes a significant interference with the individual rights or legitimate interests of a person within the national legal order, it will issue a decision on the prevention of illegal content dissemination, ordering the responsible intermediary to remove the illegal content in question and prevent its further dissemination. This decision does not preclude the right of the affected users to seek protection in court proceedings. If the intermediary fails to comply with the obligations stipulated in the Council's decision, the Council may impose on it a fine in the amount between 2 500 and 100 000 €.

To analyse the emerging case-law of the Council, we examined its decisions adopted in the proceedings on the prevention of dissemination of illegal content. The number of decisions available at the time of this paper preparation was, however, limited (only 9 relevant decisions were identified).[18] The reason for this may be the short period of time between the time the Council acquired the competences to act in this regard. Nonetheless, an interesting development could already be identified. The initial active approach of the Council reflected in the first years after it acquired the corresponding competences, where all the decisions available as of date were issued (2023 - 2024), was followed by the absence of any decisions adopted in the calendar years 2025 and 2026. The reason for such pause in its decision-making practice is unclear. The available decisions, an overview of which is provided in Table 1 below, focused, primarily, on content that fulfilled the characteristics of the criminal offence of incitement to national, racial and ethnic hatred under Section 424(1) of the Criminal Code.[19] The intermediaries af-

[18] Two of these decisions were examined in detail also by: Rudohradská, S., *Practical Application of the Digital Services Act - The Case of the Slovak Republic,* in: Petrašević, T.; Duić, D.; Novokmet, A. (eds.), EU and Comparative Law Issues and Challenges Series (ECLIC), Strong and Secure Europe: Legal and Economic Aspects: Book of proceedings: International Scientific Conference, Josip Juraj Strossmayer University of Osijek, Osijek, 2025, 9, Available at: [https://doi.org/10.25234/eclic/38129], Accessed 7 May 2026.

[19] Referencing Article 151 (2) (d) of the Act No. 264/2022 Coll. on media services as amended.

fected included operators of large social media platforms (X, Facebook, Instagram, YouTube), as well as websites of national tabloids or a disinformation blog. In the majority of decisions, the Council discontinued the proceedings as the reason for the proceedings had ceased to exist because the intermediary concerned had removed the contested illegal content. In only two decisions an obligation was imposed to remove the identified illegal content and prevent its further dissemination; the obligation was directed towards Meta Platforms Ireland Limited and Twitter International Unlimited Company. This may indicate the preference of affected intermediaries to resolve disputes being adjudicated by Digital Services Coordinators in a quick manner, avoiding lengthy proceedings and possible sanctions that may be imposed in case of identified infringements that may be significant.

Table 1. Overview of Council for Media Services decisions adopted in the proceedings on the prevention of illegal content dissemination

Decision No.	Intermediary	Content category	Nature of illegal content	Conclusion
RZK/139/2023[20]	Twitter International Unlimited Company	§ 151 (2) (d)	a post on platform X, in which the user incited violence against a group of persons because of their belonging to the Roma nationality or ethnic group, or to restrict their rights and freedoms, thereby fulfilling the elements of the criminal offence of incitement to national, racial and ethnic hatred (Section 424, paragraph 1 of the Criminal Code)	suspension of proceedings, removal of user post
RZK/138/2023[21]	Meta Platforms Ireland Limited	§ 151 (2) (d)	a comment on Facebook that meets the characteristics of extremist material pursuant to Section 130, paragraph 7, letter c) of the Criminal Code and also constitutes incitement to violence against a group of persons because of their belonging to the Roma nationality or ethnic group, or to the restriction of their rights and freedoms, thereby meeting the characteristics of the criminal offence of incitement to national, racial and ethnic hatred (Section 424, paragraph 1 of the Criminal Code)	suspension of proceedings, removal of user comment

[20] Council for Media Services Decision No. RZK/139/2023 from 25 October 2023.

[21] Council for Media Services Decision No RZK/138/2023 from 8 November 2023.

Decision No.	Interme-diary	Content category	Nature of illegal content	Conclusion
RZK/ 137/ 2023[22]	Meta Platforms Ireland Limited	§ 151 (2) (d)	comments on Instagram that constitute incitement to violence against a group of persons because of their belonging to the Roma nationality or ethnic group, or to the restriction of their rights and freedoms, and thus meet the characteristics of the criminal offence of incitement to national, racial and ethnic hatred (Section 424 (1) of the Criminal Code)	suspension of proceedings, removal of user comments
RZK/ 44/ 2023[23]	Google Ireland Limited	§ 151 (2) (d)	a comment on YouTube that constitutes incitement to violence against a group of persons because of their belonging to the Roma nationality or ethnic group and meets the characteristics of the criminal offence of incitement to national, racial and ethnic hatred (Section 424(1) of the Criminal Code)	suspension of proceedings, removal of user comments
RZK/ 41/ 2023[24]	HEURÉKA EVOLUTION, s.r.o.	§ 151 (2) (d)	a blog on the website "Hlavné správy" that incites national, racial and ethnic hatred towards the Jewish community, thereby fulfilling the elements of the crime of inciting national, racial and ethnic hatred (Section 424, paragraph 1, of the Criminal Code)	suspension of proceedings, removal of blog
RZK/ 38/ 2023[25]	FPD Media, a.s.	§ 151 (2) (b), (c)	photographs of the suicide note of the terrorist attacker from Zámocká Street published on the website cas.sk, which incite to conduct that meets the characteristics of one of the criminal offences of terrorism, as well as approve of conduct that meets the characteristics of one of the criminal acts of terrorism	suspension of proceedings, removal of content

[22] Council for Media Services Decision No. RZK/137/2023 from 25 October 2023.

[23] Council for Media Services Decision No. RZK/44/2023 from 6 July 2023.

[24] Council for Media Services Decision No. RZK/41/2023 from 7 June 2023.

[25] Council for Media Services Decision No. RZK/38/2023 from 26 April 2023.

Decision No.	Interme-diary	Content category	Nature of illegal content	Conclusion
RZK/ 6/ 2023[26]	Zoznam, s.r.o.	§ 151 (2) (b), (c)	quotes and an authentic photograph of the suicide note of the terrorist attacker from Zámocká Street published on the internet portal Topky.sk, which incite to conduct that meets the characteristics of one of the criminal acts of terrorism, as well as approve conduct that meets the characteristics of one of the criminal acts of terrorism	suspension of proceedings, removal of content
RNO /2/ 2024[27]	Meta Platforms Ireland Limited	§ 151 (2) (a)	comments on the Facebook platform that meet the characteristics of extremist material, as well as the characteristics of the criminal offense of defamation of a nation, race and belief (Section 423 of the Criminal Code) and the characteristics of the criminal offense of incitement to national, racial and ethnic hatred (Section 424 of the Criminal Code)	imposition of an obligation to remove content
RNO/ 1/ 2024[28]	Twitter International Unlimited Company	§ 151 (2) (a), (d)	a post on platform X that meets the characteristics of extremist material as well as the characteristics of the criminal offence of incitement to national, racial and ethnic hatred (Section 424 of the Criminal Code)	imposition of an obligation to remove content

In the national context, all categories of illegal content that fall under the competence of the Council for Media Services may also be prosecuted as criminal offences under different provisions of the Slovak Criminal Code (Act No. 300/2005 Coll.). While in some instances the case law established by competent courts is quite extensive, in other cases there are no judicial decisions to refer to. To illustrate, the dissemination of terrorist content may be prosecuted as the criminal offence of certain forms of participation in terrorism (Article 419b of the Criminal Code) that covers incitement and public approval of the characteristics of any of the terrorism offences. The practical application of this provision is, however, rare (we were not able to find any judicial decision applicable in this regard). On the other hand, the criminal offence of child pornography dissemination (Article

[26] Council for Media Services Decision No. RZK/6/2023 from 22 February 2023.

[27] Council for Media Services Decision No. RNO/2/2024 from 18 December 2024.

[28] Council for Media Services Decision No. RNO/1/2024 from 24 April 2024.

369 of the Criminal Code) is applied frequently, with dozens of perpetrators being prosecuted every year in Slovakia (e. g. in the last five calendar years, 244 persons were convicted for this offence).[29] The analysis of 101 decisions adopted between 1.1.2019 and 31.12.2023[30] revealed that in most cases, the perpetrators make child pornography material available through different communication applications to other unidentified users (e. g. Facebook, WhatsApp, Telegram, Skype, Snapchat or Instagram) or publish such material directly on their social media profiles. The punishments awarded in this regard are, however, not severe, as in most instances only conditional punishment of imprisonment is imposed, in some instances combined with low pecuniary fines or forfeiture of items used in the commission of a crime. Similarly, extremist content punishable as the criminal offence of extremist content dissemination pursuant to 422b of the Criminal Code is also frequent subject of prosecution, with 83 convictions recorded in the last five calendar years.[31] The most commonly prosecuted cases of extremist content dissemination cover instances of making such content available on the perpetrators social media, e. g. by its publication on the offenders' public profiles, including writing offensive comments under other users' posts or even liking extremist content published by other users. Analogously as in the case of child pornography, the punishments imposed may be considered less severe, not reflecting the seriousness of such content dissemination.[32] Criminal prosecution of the above examined categories of illegal content always targets individual perpetrators – users that published or otherwise circulated illegal content online. To our knowledge, as of date there are no cases in which intermediaries, whose services were being used for the dissemination of illegal content, were held liable in any scope in the national context. Here, of course, the exemptions from liability of intermediary services providers come into play. Specifically, the application of the

[29] This data is based on the Statistical yearbooks published by the Ministry of justice of the Slovak republic. The number of convicted persons in a given year based on the available data is as follows: 40 convictions in 2024, 52 in 2023, 61 in 2022, 44 in 2021 and 47 in 2020. Available at: [https://www.justice.gov.sk/ministerstvo/analyticke-centrum/], Accessed 6 May 2026.

[30] The detailed analysis is provided in: Bachňáková Rózenfeldová, L., *Regulácia nezákonného obsahu a súvisiacich deliktov na internete*. Bratislava, C. H. Beck, 2025.

[31] This data is based on the Statistical yearbooks published by the Ministry of justice of the Slovak republic. The number of convicted persons in a given year based on the available data is as follows: 11 convictions in 2024, 15 in 2023, 11 in 2022, 20 in 2021 and 26 in 2020. Available at: [https://www.justice.gov.sk/ministerstvo/analyticke-centrum/], Accessed 21 May 2026.

[32] It must also be noted that a proposal for the amendment of the Slovak Criminal Code was recently submitted to the National Council of the Slovak Republic aiming to remove the so-called extremist criminal offences, including the criminal offence of extremist content dissemination, from the list of criminal offences regulated in the Criminal Code, effectively excluding the possibility to criminally sanction the dissemination of such content. As of date, this proposal was not included in the regulator's agenda, but the proposal seems to lack the necessary support for its adoption.

hosting exemption stipulated in Article 6 of the Digital Services Act ensuring that intermediaries providing information society services consisting of the storage of information provided by the recipients of their services are not liable for information stored at the request of the recipient of the service on the condition that they do not possess actual knowledge of illegal nature of such information or upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the illegal content. Nevertheless, the provision of new competences of the Council for Media Services in the proceedings on the prevention of dissemination of illegal content directed at intermediaries may prove helpful and ensure the inclusion of parties enabling the circulation of illegal content in the process of its removal or blocking access to it.

3.2. Case study of the Council's application of Article 9 and 10 of the Digital Services Act

To provide a more comprehensive overview of the state of the Digital Services Act enforcement in Slovakia, we also examined the available transparency reports of selected intermediaries with significant representation in the national digital market. Our objective was to identify the real utilization of the competences awarded by the Digital Services Act and the corresponding national regulation implementing its provisions to competent authorities. We focused, specifically, on the practical employment of the following competences:

1. the right to issue an order to act against one or more specific items of illegal content to providers of intermediary services (Article 9 of the Digital Services Act)
2. the right to issue an order to provide specific information about one or more specific individual recipients of the service to providers of intermediary services (Article 10 of the Digital Services Act).

The enumeration of the selected providers of intermediary services is provided in Table 2.

Table 2 - Selected intermediary services and their average monthly active recipients in Slovakia

Intermediary service	The average monthly active recipients of the service
YouTube	4 300 000 – 4 500 000 (from 1 January 2023 to 31 December 2025)
Facebook	3 200 000 – 3 300 000 (from 25 April 2023 to 30 June 2025)
Instagram	2 300 000 – 2 500 000 (from 25 April 2023 to 30 June 2025)

Table 3 provides an overview of the practical employment of Articles 9 and 10 of the Digital Services Act by the competent national authorities in relation to selected intermediary services with significant basis of average monthly active service recipients in Slovakia. Whereas no orders to act against illegal content or to provide information may be identified in relation to the platform YouTube, this is not the case when it comes to platforms Facebook and Instagram operated by Meta Platforms, Inc. to which multiple orders were addressed, primarily in 2024. A clear preference can be distinguished in issuing orders to act against identified illegal content, with only a few instances of orders issued with the objective of obtaining the information on individual recipients of intermediary services can be detected.

Table 3. – Practical employment of Articles 9 and 10 of the Digital Services Act by Slovak authorities in relation to selected intermediary services

Intermediary service	Number of orders to act against illegal content issued	Number of orders to provide information issued	Examined time period
YouTube	0	0	September 2023 – February 2024
	0	0	July – December 2024
Facebook	0	0	April – September 2023
	1	1	October 2023 – March 2024
	6	2	April – September 2024
	24	0	October – December 2024
	7	0	January – June 2025
Instagram	0	0	April – September 2023
	0	1	October 2023 – March 2024
	4	2	April – September 2024
	0	0	October – December 2024
	4	0	January – June 2025

The above-provided analysis of the transparency reports published by providers of selected intermediary services revealed the current lack of interest of national competent authorities in applying their powers established in the Digital Services Act that enable them to issue orders to act against illegal content (Article 9) or to provide information about individual service recipients (Article 10) to providers of intermediary services. The services examined above cover some of the most visited websites in Slovakia with millions of daily users viewing presented content that, naturally, includes instances of content that may be considered illegal. This confirms our argument that the national authorities have not yet been able to fully utilize the competences provided for by the Digital Services Act in practice. It may be argued that the reason for such development is the lack of interest in furthering the fight against illegal content online in the national context beyond the previously established practices. These are primarily based on prosecuting the most serious instances of illegal content dissemination as criminal offences or other delicts, depending on their nature, focusing on individual perpetrators and not providers of services through which was such content made available online. The absence of experience in requiring the cooperation of intermediary service providers in cases of illegal content prosecution may, therefore, lead to the postponement of the full implementation of the Digital Services Act in the national context.

4. DISCUSSION AND CONCLUSION

The law is only as good as its enforcement.[33] Naturally, the enforcement will not happen overnight.[34] The Digital Services Act enforcement system is multifaceted, requiring the participation of competent authorities on both the European Union[35] and Member State level. In the national context, the main competences are entrusted to digital services coordinators appointed with the task of supervising the ap-

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33 Bartels, M. *Enforcement,* in: Kraul, T. (ed.), New Digital Services Act, A Practitioner's Guide, Germany, Nomos Verlagsgesellschaft mbH & Co., 2024, ISBN: 978-3-7560-0318-1. S. p. 132.

34 Husovec, M., *Will the DSA work? On money and effort*, in: Hoboken, J. van *et al.* (eds.) Putting the DSA into Practice: Enforcement, Access to Justice, and Global Implications, Berlin, Verfassungsbooks, 2023, Available at: [https://doi.org/10.17176/20230208-093135-0], Accessed 26 April 2026.

35 See: Geese, A., *Why the DSA could save us from the rise of authoritarian regimes*, in: Hoboken, J. van *et al.* (eds.), Putting the DSA into Practice: Enforcement, Access to Justice, and Global Implications, Berlin, Verfassungsbooks, 2023, Available at: [https://doi.org/10.17176/20230208-093135-0], Accessed 27 April 2026 and Buri, I., *A Regulator Caught Between Conflicting Policy Objectives Reflections on the European Commission's Role as DSA Enforcer,* in: Hoboken, J. van *et al.* (eds.), Putting the DSA into Practice: Enforcement, Access to Justice, and Global Implications. Berlin, Verfassungsbooks, 2023, Available at: [https://doi.org/10.17176/20230208-093135-0], Accessed 27 April 2026.

plication and, where necessary, enforcing the provisions of the Digital Services Act.[36] In Slovakia, this position is held by the Council for Media Services. As discussed in this article, the competences of this authority are significantly limited through the enumeration of specific categories of illegal content that may be investigated within the scope of the proceedings on the prevention of dissemination of illegal content. This is in contrast to the objectives of the Digital Services Act that aims to cover all categories of illegal content, notwithstanding the degree of their seriousness.[37] While the extensive interpretation of the Act on media services may provide a basis for the Council's participation in dealing with other categories of illegal content not explicitly covered in the applicable national regulation, a clearer designation of competences in this regard would be preferable. The emerging case-law of the Council confirms the authority's willingness to initiate investigations into both large intermediary services providers (prosecution of illegal content found on social media platforms such as Facebook, YouTube, Instagram or X), as well as smaller, local intermediaries (websites of local tabloid magazines or disinformation media). Noteworthy is, however, the lack of decisions adopted after 2025. The smaller number of decisions adopted as of date of this paper preparation in the proceedings on the prevention of dissemination of illegal content as well as the rather scarce use of the competences to issue orders to act against illegal content or to provide information about specific individual recipients of the service to providers of intermediary services corresponds to the short time period following the Digital Services Act adoption and coming into effect. Concurrently, the existing preference of prosecuting the most severe instances of illegal content dissemination through the instruments of criminal law in the national context, focusing on individual perpetrators while "ignoring" the role that intermediaries play in the dissemination of illegal content online, may be another reason for the slower application of Digital Services Act provisions in Slovakia. How the Council for Media Services will step into its role of the national digital services coordinator and whether it will try to ensure the achievement of the full potential of the Digital Services Act in the national context will be an interesting topic for future analysis.

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[36] Jaursch, J,. *Platform Oversight Here is what a Strong Digital Services Coordinator Should Look Like,* in: Hoboken, J. van *et al.* (eds.), Putting the DSA into Practice: Enforcement, Access to Justice, and Global Implications, Berlin, Verfassungsbooks, 2023, Available at: [https://doi.org/10.17176/20230208-093135-0], Accessed 27 April 2026.

[37] See: Goanta, C., *Now What Exploring the DSA's Enforcement Futures in Relation to Social Media Platforms and Native Advertising*, in: Hoboken, J. van *et al.* (eds.), Putting the DSA into Practice: Enforcement, Access to Justice, and Global Implications, Berlin, Verfassungsbooks, 2023, Available at: [https://doi.org/10.17176/20230208-093135-0], Accessed 27 April 2026.

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Review article

SMART CONTRACTS IN DIGITAL FINANCE: BETWEEN INNOVATION AND LEGAL CERTAINTY*

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ABSTRACT

The development of digital finance and blockchain technology has led to the increasingly widespread use of smart contracts as instruments for the automation of financial and contractual relationships, particularly in the field of online lending and consumer loans. Smart contracts enable the automated conclusion, execution, and enforcement of obligations through computer code deployed on distributed ledger systems, thereby reducing the need for intermediaries. At the same time, however, their application raises complex legal questions concerning legal certainty, consumer protection, and the scope of judicial intervention. These challenges are especially pronounced in forms of digital lending based on standardised and mass-applied contractual arrangements, which may result in a significant imbalance in the equivalence of contractual performances and an increased risk for the weaker contracting party.

This article examines the legal aspects of the use of smart contracts in digital finance, with a particular focus on their application in consumer credit and online lending. It builds upon the conceptual and technological framework of blockchain technology and smart contracts, drawing on contemporary Croatian legal doctrine, which does not treat smart contracts as a single

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legal category but rather distinguishes between so-called "strong" and "weak" smart contracts, as well as between public (decentralised) and private (centralised) blockchain infrastructures. In this context, the article explores whether smart contracts may constitute independently binding legal agreements or whether they primarily function as technical tools for the execution of a previously concluded contractual relationship, emphasising the decisive role of the parties' intent and the structure of the specific transaction.

Furthermore, the article engages with existing analyses of cross-border digital consumer lending and short-term high-cost loans, highlighting additional risks that arise when such financial products are implemented through automated smart contracts. Particular attention is paid to the potential circumvention of national interest rate caps and other consumer protection mechanisms through the cross-border provision of digital financial services, as well as to issues relating to the determination of the applicable law and the supervision of foreign financial service providers.

The article also addresses procedural law challenges associated with the use of smart contracts in consumer lending, including issues of proof, judicial control over automated execution, nullity and void ability of contracts, and restitution in cases of unlawful or unfair lending practices. In this regard, the role of collective consumer redress-particularly through representative actions is analysed as a potentially effective mechanism for protecting consumers in situations involving the mass use of standardised smart contracts in digital finance.

In conclusion, the article argues that smart contracts in the field of digital lending should not be viewed merely as a technological innovation, but as legal instruments that require a carefully balanced approach between automation and traditional mechanisms of legal protection. It advocates a hybrid regulatory and contractual framework capable of fostering innovation while ensuring legal certainty and effective consumer protection, in line with the fundamental principles of contract and consumer law within the European legal order.

***Kaywords**: Consumer credit, Consumer protection, Digital finance, Legal certainty, Smart contracts*

1. INTRODUCTION

The rapid development of digital technologies over recent decades has fundamentally reshaped the financial sector, particularly through the rise of digital finance, fintech business models, and decentralised technological infrastructures. Among the innovations that have had the greatest impact on contemporary financial relations, blockchain technology and blockchain-based smart contracts occupy a central position. These mechanisms enable the automated performance of predefined actions through computer code, reducing or, in some cases, eliminating the need for continuous intervention by traditional intermediaries. Their practical significance is especially evident in digital finance, where speed, efficiency, standardisation, and lower transaction costs are regarded as key advantages.

A particularly important field of application is digital lending, including online credit markets, peer-to-peer (P2P) financing models, and decentralised finance (DeFi). In such environments, smart contracts may be used to automate loan

origination, calculate interest, monitor repayment schedules, and trigger contractual consequences in the event of default or non-performance. At the same time, their growing use raises complex legal issues that extend well beyond their technical design and require assessment within the existing frameworks of contract law, consumer law, and financial regulation.

The central issue concerns the legal nature of smart contracts. Neither legal doctrine nor practice has reached a settled position on whether smart contracts should be regarded as autonomous legally binding agreements or primarily as technological tools for the execution of obligations arising from a separately concluded contract. The answer is decisive for determining their validity, interpretation, legal effects, and the availability of judicial remedies in the event of a dispute. Additional difficulties arise from the fact that computer code is often inaccessible to the average user, automated execution may limit ex post judicial control, and the decentralised and cross-border character of these systems creates further questions relating to liability, applicable law, and the effective protection of weaker contracting parties.

These concerns become particularly pronounced in the context of digital lending. While a high degree of automation and standardisation may increase the efficiency and accessibility of financial services, it may also intensify information asymmetries, reduce the transparency of contractual terms, and complicate the application of traditional consumer protection mechanisms. This is especially relevant in cross-border digital services and decentralised lending models, where the identity of the service provider, regulatory oversight, and the enforcement of mandatory national rules may be both legally and practically difficult to establish.

The contribution of this paper lies in its differentiated analysis of smart contracts in digital lending according to the structure of the technological and legal environment in which they are used. Rather than treating smart contracts as a single legal phenomenon, the paper distinguishes between platform-based lending models and fully decentralised lending protocols. This distinction is significant because it determines whether the smart contract remains merely a technical mechanism for the performance of a pre-existing contractual relationship, or whether, in highly decentralised systems, the code itself assumes the function of the de facto normative framework governing the relationship between the parties.

On that basis, the paper seeks to contribute to the existing literature by connecting the general discussion on the legal nature of smart contracts with the specific legal risks of digital lending. In particular, it examines how automation, immutability and decentralisation affect the application of traditional contract law concepts, such as consent, interpretation, validity, nullity, voidability and liability. The paper

further argues that the consumer protection framework applicable to digital lending cannot be assessed solely by reference to the financial product itself, but must also take into account the technological architecture through which the lending relationship is created and performed.

Against that background, this paper examines the legal implications of the use of smart contracts in digital finance, with particular emphasis on their legal nature and their role in digital lending. The paper applies doctrinal legal analysis, supported by a regulatory and comparative assessment of Croatian and European Union law. It first outlines the technological and conceptual foundations of blockchain systems as the infrastructure on which smart contracts operate. It then analyses the concept and classification of smart contracts, with particular attention to the distinction between public and private blockchain networks, as well as between so-called strong and weak smart contracts. The paper further considers their legal character, including whether they may constitute contracts in the legal sense or should generally be understood as mechanisms for contractual performance, and their relationship with electronically concluded agreements. The final part focuses on the use of smart contracts in digital lending, with particular regard to the distinction between platform-based and fully decentralised lending models, the risks arising from automated execution, and the need to adapt consumer protection mechanisms to code-based financial relationships.

2. DEVELOPMENT AND FUNDAMENTAL CHARACTERISTICS OF BLOCKCHAIN TECHNOLOGY

The concept of smart contracts is not a recent development. Its intellectual origins can be traced to the late twentieth century. In 1999, the cryptographer Nick Szabo developed the concept of the so-called God Protocol, designed to enable two or more parties to conclude and perform transactions through minimal information exchange, while the system itself would ensure proper performance of obligations and transparent verification of outcomes.[1] This approach was grounded in the idea of informational efficiency and the automation of contractual relations, while reducing the degree of trust traditionally required between contracting parties.[2]

The primary objective behind the development of smart contracts was to enable the decentralised exchange of goods and services over the internet without the

[1] See: Blocher, W., *The next big thing: Blockchain-Bitcoin-Smart Contracts*, Anwaltsblatt, Vol. 66, 2016, p. 612.

[2] Szabo, N., *The God Protocols*, 1997, Available at: [https://web.archive.org/web/20140406003844/http://szabo.best.vwh.net/msc.html], Accessed 10 March 2026.

involvement of central authorities or traditional intermediaries. Within such a model, the contracting parties themselves provide the relevant input data, while an automated mechanism performs the transaction in accordance with predefined conditions.[3]

Although the concept of smart contracts existed long before the emergence of modern blockchain platforms, the technological infrastructure required for their practical implementation was not yet available. Only with the development of blockchain technology[4], particularly through the emergence of Bitcoin[5], did smart contracts move from a theoretical concept into practical use. Bitcoin was developed as a response to the double-spending problem[6], a fundamental challenge in digital payment systems that arises where no central authority is available to verify the validity of transactions.

In traditional financial systems, this problem is resolved by banks and other financial institutions acting as intermediaries and maintaining centralised transaction records. By contrast, blockchain technology enables the maintenance of a decentralised and distributed ledger in which each transaction is recorded as part of a chain of blocks, publicly accessible, and secured through cryptographic methods. Instead of relying on a central authority, confirmation of a transaction and verification of available funds are provided by the majority of participants within the decentralised network through consensus mechanisms based on cryptographic hashing[7] and Merkle tree structures. Network participants, commonly referred to as miners, validate transactions by solving complex computational tasks through the proof of work mechanism. Once verified, the transaction is incorporated into a new block and added to the existing chain. Although transactions remain publicly visible, the identity of users is not directly disclosed, as the system relies on pseudonymity through public key addresses.[8]

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3 Perkušić, M.; Jozipović, Š.; Mamut, J., *Mogućnost korištenja i pravnog uređenja takozvanih pametnih ugovora u Republici Hrvatskoj*, in: Tot, I.; Slakoper, Z. (eds.), Hrvatsko obvezno pravo u poredbenopravnom kontekstu: Petnaest godina Zakona o obveznim odnosima, Zagreb, 2022, p. 666.

4 Blockchain technology represents a decentralised form of distributed ledger that operates as a peer-to-peer network of nodes, in which each participant has access to the data and takes part in their verification and validation, while the data are cryptographically linked into a chain of blocks. Hecht, J., *Notariat 4.0 und Blockchain-Technologie*, MittBayNot, 2020, pp. 314-315.

5 For the concept and characteristics of Bitcoin see: Perkušić, M., *Pravo elektroničkog plaćanja*, Zagreb, 2020, pp. 311 ff.

6 Nakamoto, S., Bitcoin: A Peer-to-Peer Electronic Cash System, 31 October 2008, Available at: [https://bitcoin.org/bitcoin.pdf], Accessed 10 March 2026.

7 A hash is a cryptographically generated string of characters that represents a unique digital fingerprint of data. See: Köchling Mayán, R., *Hashfunktion und Blockchain*, Konstanz, 2021, pp. 1-16.

8 Perkušić*, et al., op. cit.*, note 3, p. 667.

A further stage in the development of blockchain technology was marked by the emergence of Ethereum, which represented a significant advancement beyond Bitcoin. Ethereum was designed as an extension of the Bitcoin blockchain model with the aim of enabling the creation and execution of smart contracts, as well as the development of decentralised applications (DApps).[9] This made it possible to deploy autonomous programs that execute automatically once predefined conditions are satisfied, without the need for further intervention by the contracting parties.[10]

A particular advantage of the Ethereum system lies in its ability to transfer both value and data simultaneously, while also supporting the execution of multi-layered transactions. Transactions are therefore no longer limited to the simple transfer of funds but may incorporate a series of predefined conditions and interconnected actions. This has enabled the creation of smart contracts capable of operating as digital escrow mechanisms[11], whereby funds are automatically released only once specified conditions have been fulfilled.[12]

3. CONCEPT AND CLASSIFICATION OF SMART CONTRACTS

Smart contracts constitute one of the central concepts of contemporary digital finance and blockchain technology.[13] They represent a specific form of digital pro-

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9 Werbach, K.; Cornell, N., *Contracts Ex Machina*, Duke Law Journal, Vol. 67, 2017, pp. 344-345, Available at:
[https://scholarship.law.duke.edu/dlj/vol67/iss2/2], Accessed 24 March 2026.

10 One of the key limitations of Bitcoin lies in its inability to execute more complex programmable operations, which restricts its use to simple transfers of value. Ethereum, by contrast, introduces more advanced programming capabilities combined with appropriate security mechanisms, thereby enabling the automated execution of more complex contractual relationships. See: Buterin, V., Ethereum: *A Next-Generation Smart Contract and Decentralized Application Platform*, 2014, Available at:
[https://ethereum.org/en/whitepaper/], Accessed 11 March 2026.

11 For a more detailed analysis of escrow smart contracts, see: Onyekachi, E. C., *The Influence of Explainable AI (XAI) and Smart Contracts on Consumer Trust and Acceptance of Decentralised Escrow Services*, SSR Journal of Artificial Intelligence, Vol. 3, No. 2, 2026, pp. 1-20.

12 Ethereum enables interaction between smart contracts, as well as their ability to independently initiate new transactions. In this way, smart contracts become active participants in legal and financial relationships, rather than merely passive tools for execution. Although Bitcoin and Ethereum share a similar basic architecture, they differ in their approach to data storage. Ethereum employs a more advanced model that allows for the recording of the current state of the system and more flexible data management, thereby facilitating the development of more complex applications and contractual relationships. This enhanced functionality represents the fundamental distinction between Bitcoin and Ethereum and constitutes a key precondition for the development of modern forms of digital finance. Perkušić, *et al., op. cit.,* note 3, p. 670.

13 See: Zetzsche, D. A.; Buckley, R. P.; Arner, D. W., *The Distributed Liability of Distributed Ledgers: Legal Risks of Blockchain*, University of Illinois Law Review, No. 4, 2018, pp. 1382-1402.

tocol designed to enable the automated performance of contractual obligations through computer code. Their use has significantly altered the traditional understanding of contractual relations, particularly with regard to the manner in which contracts are concluded and performed.[14]

This chapter examines the concept and core characteristics of smart contracts, their relationship with contracts concluded by electronic means, and the principal forms and classifications of smart contracts developed in legal theory.

3.1. Concept and Characteristics of Smart Contracts

Despite their name, smart contracts are, in essence, computer code stored and executed within a blockchain system.[15] The blockchain serves as the underlying infrastructure for their operation, while crypto assets may facilitate the performance of transactions arising from such arrangements.[16] [17] In technical terms, smart contracts are computer programs composed of lines of code designed to coordinate the conduct of two or more parties and to enable the automated execution of obligations assumed between them.[18]

3.2. Classification of Smart Contracts According to Blockchain Systems

As already noted, smart contracts operate on blockchain systems, and their classification may therefore be linked to the classification of blockchain networks themselves. This distinction is also relevant from a legal perspective, as it may serve as a basis for determining an appropriate regulatory approach.

In the literature, blockchain systems are commonly divided into fully public, fully private, and hybrid or consortium models.[19] Public blockchain systems, such

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[14] Cvetković, P., *Ugovor kao algoritam: uvodna razmatranja*, Zbornik radova Pravnog fakulteta u Nišu, Vol. 62, No. 92, 2021, pp. 20-22.

[15] See: Buchwald, M., *Smart Contract Dispute Resolution: The Inescapable Flaws of Blockchain-Based Arbitration*, University of Pennsylvania Law Review, Vol. 168, No. 5, 2020, pp. 1369-1423. Available at: [https://www.jstor.org/stable/45467490], Accessed 17 March 2026.

[16] Perkušić, M., *The Legal Treatment of Smart Contracts under Croatian Law*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 61, No. 4, 2024, p. 474.

[17] For a more detailed analysis of the characteristics of smart contracts, see: Cvetković, P., *Pravni aspekti primene blokčejna: primer pametnih ugovora*, Pravna riječ, God. XVII, No. 63, 2020, pp. 73-96.

[18] Koteshov, D., *Smart vs. Ricardian Contracts: What's the Difference*?, Available at: [https://www.elinext.com/industries/financial/trends/smart-vs-ricardian-contracts/], Accessed 1 April 2026.

[19] See: Buterin, V., On Public and Private Blockchains, Ethereum Blog, 7 August 2015, Available at: [https://blog.ethereum.org/2015/08/07/on-public-and-private-blockchains], Accessed 12 March 2026.

as Bitcoin and Ethereum, are characterised by decentralisation, open access, and availability to all users. In such systems, no central authority manages the network, and operation depends on user participation together with the use of cryptocurrencies or tokens.[20] As a result, smart contracts executed on public blockchains function within a decentralised environment in which no clearly identifiable responsible entity exists.

By contrast, private blockchain systems operate under the control of a designated central authority that determines access rights and the manner in which data are stored. Such systems need not be linked to cryptocurrencies, and smart contracts within them are typically used in specific commercial settings, such as online lending, insurance, or industrial processes.[21] The key distinction from public systems therefore lies in the existence of an identifiable person or organisation responsible for the operation of the system, a feature with significant legal implications.[22]

Hybrid systems combine elements of both models, with a certain degree of control retained by a predefined group of participants or organisations. Although they may incorporate aspects of decentralisation, they also preserve some form of centralised governance and, from a legal perspective, often resemble private systems more closely than fully public ones.[23]

This classification demonstrates that smart contracts do not constitute a single and uniform legal phenomenon. Rather, they appear in different structural forms that may produce different legal consequences, which in turn raises the question of their legal nature, examined in the following chapter.

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20 In the context of smart contracts, a token may be understood as a form of electronic bond stored within a blockchain system. In this sense, a token is not merely a unit of account, but also constitutes a specific type of investment or debt certificate. Perkušić, M., Pravo elektroničkog plaćanja, Zagreb, 2020, p. 335.

21 For examples of the application of smart contracts, see: Dešić, J., Prijenos prava na nekretninama putem ugovora sklopljenih u elektroničkom obliku s posebnim osvrtom na tehnologiju blockchain i na pametne ugovore, Zbornik radova Pravnog fakulteta u Splitu, Vol. 60, No. 4, 2023, pp. 717–738; Corkery, M.; Silver-Greenberg, J., *Miss a Payment? Good Luck Moving That Car*, New York Times, 2014, Available at: [https://dealbook.nytimes.com/2014/09/24/miss-a-payment-good luckmoving-that-car/], Accessed 15 March 2026.; Biryukov, A.; Khovratovich, D.; Tikhomirov, S., Privacy-Preserving KYC on Ethereum, 2018, Available at: [https://pdfs.semanticscholar.org/8aa3/5a333495bda6fca2e75cbae6d7a3ffc62b7f.pdf], Accessed 2 April 2026.; Gatteschi, V., *et al.*, *Blockchain and smart contracts for insurance: Is the technology mature enough?*, Future Internet, Vol. 10, No. 2, 2018, p. 20.

22 Perkušić, *et al., op. cit.,* note 3, p. 686.

23 *Ibid.*

4. LEGAL NATURE OF SMART CONTRACTS

The legal nature of smart contracts is one of the central issues in contemporary legal debate on digital finance. Although, at the technical level, smart contracts appear as computer programs that automatically perform certain actions once predefined conditions are met, their legal qualification remains unsettled. Croatian law does not contain specific statutory rules expressly governing smart contracts. Their legal status must therefore be assessed through the application of general principles of contract and obligations law, while taking into account the relevant European regulatory framework. In that context, it is essential to distinguish between the technical function of a smart contract and its possible legal function.[24]

For proper legal classification, it is also necessary to distinguish between smart contracts implemented on public and those deployed on private blockchain networks. Public blockchain systems are based on open-source code and are accessible to an unrestricted number of users, whereas private blockchain networks are established by a specific entity for a defined purpose, with access and the ability to modify the system limited to predetermined participants.[25]

This distinction is of fundamental importance because only public blockchain systems enable full decentralisation, which as a rule results in the immutability of recorded transactions. By contrast, private blockchain systems allow intervention by the governing entity or authorised persons, including the modification, suspension, or reversal of transactions.

In legal theory, this distinction is further reflected in the classification between so-called strong and weak smart contracts. Immutable smart contracts, which operate without the possibility of subsequent intervention, are generally described as strong smart contracts, whereas modifiable smart contracts, in which a third party may influence execution, are regarded as weak smart contracts. The existence of such a third party carries important legal consequences, as it creates an additional legal relationship between the contracting parties and the entity responsible for managing the system.[26]

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[24] Perkušić, M., *op. cit.*, note 16, pp. 479-480.

[25] See: Budimir, N., *Blockchain tehnologija u osiguranju*, Zbornik radova Veleučilišta u Šibeniku, Vol. 14, No. 1-2, 2020.

[26] Raskin, M., *The Law and Legality of Smart Contracts, Georgetown Law Technology Review*, Vol. 1, No. 2, 2017, p. 310. Available at: [https://georgetownlawtechreview.org/wp-content/uploads/2017/05/Raskin-1-GEO.-L.-TECH.-REV.-305-.pdf], Accessed 21 March 2026.

The foregoing classification shows that smart contracts may operate in different environments: as fully decentralised systems without an identifiable responsible entity, as systems controlled by a specific organisation, or as hybrid arrangements combining elements of both models. This diversity is of central importance for the legal analysis and regulation of smart contracts. Accordingly, the question of whether smart contracts constitute contracts in the legal sense or merely a mechanism for contractual performance cannot be answered in abstract or uniform terms. It necessarily depends on the specific structure of the legal relationship, the role assigned to the code, and the intention of the contracting parties.[27]

4.1. Smart Contracts as Legally Binding Agreements

Legal doctrine also recognises the view that smart contracts may display the characteristics of contracts in the legal sense, insofar as they serve to implement predefined rights and obligations arising from the mutual intention of the parties.[28] However, their legal qualification ultimately depends on how the concept of contract is understood within a particular national legal system. For that reason, it is difficult to determine in universal terms whether smart contracts constitute autonomous legally binding agreements or merely technical mechanisms for their performance.

Under Croatian law, a contract is concluded when the parties reach agreement on its essential terms.[29] In accordance with the general rules of the law of obligations, a contract is formed by acceptance of an offer, and acceptance may be expressed not only through an explicit declaration but also through conduct which, in the circumstances of the case, may reasonably be understood as assent.[30] Furthermore, since Croatian contract law is based on the principles of party autonomy[31] and freedom of form, a contract may be concluded in any manner from which the parties' mutual consent can be established.[32]

Accordingly, if a contract is understood as a concordant expression of will by two or more parties directed toward the production of lawful legal effects, its validity requires that at least the essential terms be clearly expressed by one party and accepted by the other. Such manifestation of intent may be made orally, in writ-

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27 Perkušić, M., *op. cit.*, note 16, p. 474.

28 Werbach, K.; Cornell, N., *op. cit.,* note 9, pp. 338-343.

29 Art. 293 of the Obligations Act, Official Gazette No. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018, 126/2021, 114/2022, 156/2022, 145/2023, 155/2023 (hereinafter: Obligations Act).

30 Klarić, P.; Vedriš, M., *Građansko pravo*, Zagreb, 2009, pp. 401-402.

31 Art. 2. Obligations Act.

32 See: Gorenc, V. *et al., Komentar Zakona o obveznim odnosima*, Zagreb, 2014, pp. 442-444.

ing, or through conclusive conduct. The legal order does not restrict the medium through which consent is expressed; what matters is that its content is sufficiently clear and understandable to the contracting parties[33]

In that context, the question arises whether computer code may constitute a form of written expression of intent. Although programming languages are not languages ordinarily used by natural persons in everyday communication, they nevertheless represent structured systems of signs and rules whose meaning is understood by specialised actors, most notably programmers. It may therefore be argued that an agreement between two parties on the content of a particular code script is, in principle, an agreement on text expressed in a specific language and thus a form of written manifestation of consent.[34]

Furthermore, in certain situations a smart contract may come into existence through conclusive conduct. For example, the purchase of a token functionally linked to a particular smart contract may amount to acceptance of the predefined terms embedded in that code. In such cases, a party who is aware of the existence and effects of the smart contract manifests consent through conduct by engaging with the digital system, thereby indirectly agreeing to its execution.[35]

It follows that there is no principled obstacle to treating computer code, or interaction with a smart contract, as a means of expressing contractual intent in appropriate circumstances. Where the conduct of the parties, their interaction with the blockchain system, and the content of the code itself clearly indicate consent to specific legal effects, such forms of digital communication may constitute a legally relevant manifestation of will. In that sense, code may serve as a medium through which intent is expressed, in the same way as an electronic message, a click on a digital interface, or another form of conclusive conduct in an electronic environment.[36]

However, the fact that code may function as a medium for expressing intent does not automatically mean that every smart contract is, in itself, a legally binding contract. In most cases, the parties do not reach agreement on the code as such, but on the effects that the code is intended to produce. In other words, the object of their consent is usually not the programming structure itself, but the economic

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33 Perkušić, M., *op. cit.*, note 16, pp. 482-483.

34 See: Cvetković, P., *Ugovor kao algoritam: uvodna razmatranja*, Zbornik radova Pravnog fakulteta u Nišu, Vol. 62, No. 92, 2021, pp. 15-34.

35 Werbach, K.; Cornell, N., *op. cit.,* note 9, pp. 329-331.

36 Matić, T., *Formularni ugovori u elektroničkom obliku (Sklapanje ugovora klikom miša-elektroničkim očitovanjem volje putem Interneta na web stranici – click-wrap i browse-wrap ugovori)*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 58, No. 3, 2008, pp. 779-803.

and legal purpose of the transaction. For that reason, it is difficult to maintain as a general proposition that every smart contract constitutes an autonomous contract in the legal sense.[37]

This will be possible only where the code itself contains the essential elements of the specific contract and where the circumstances of the case show that the parties intended that code to embody their final and binding agreement.[38] It may therefore be concluded that, under Croatian contract law, smart contracts can only exceptionally qualify as autonomous legally binding agreements, namely where the program code simultaneously incorporates the essential terms of the legal transaction and constitutes a demonstrable manifestation of the parties' mutual consent.[39]

4.2. Smart Contracts as a Mechanism for Contractual Performance

Although it is possible to envisage situations in which a smart contract displays the characteristics of a contract in the legal sense, the prevailing view is that, in practice, smart contracts most commonly function as a mechanism for performing a previously established contractual relationship. This position is also reflected in contemporary Croatian legal literature, which emphasises that the technical role of smart contracts as instruments of automated performance is not legally controversial, whereas their status as autonomous legally binding agreements remains unresolved.[40]

In that respect, a smart contract should be distinguished from a contract as the source of an obligation. A contract, in the legal sense, determines the content of the parties' rights and duties, defines its object, legal basis, and essential terms, and serves as the foundation for assessing validity, voidability, nullity, and liability for breach. A smart contract, by contrast, is a technical instrument through which a previously agreed performance is executed automatically once programmed conditions occur. It does not necessarily create the underlying obligation but may instead serve only to implement it operationally.[41]

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37 De Filippi, P.; Wright, A., *Blockchain and the Law*, Cambridge, MA, 2018, p. 84.

38 Accordingly, such a situation may arise where the contracting parties enter a legal relationship through a so-called "strong" smart contract associated with a pseudonymous, decentralised blockchain system. However, even in such cases, this does not constitute an automatic legal qualification, but rather an exception that must be assessed considering whether the general requirements for the formation of a valid contract are fulfilled. Perkušić*, et al., op. cit.*, note 3, p. 691.

39 Perkušić, M., *op. cit.*, note 16, pp. 482-483.

40 *Ibid.*

41 Perkušić*, et al., op. cit.*, note 3, p. 671.

This understanding is particularly evident in private and hybrid blockchain systems, as well as in so-called weak smart contracts. In such systems, there is an identifiable entity that manages the infrastructure, permits or restricts access, and often retains the ability to intervene in contractual performance. Consequently, in these models the smart contract does not operate as an autonomous normative framework between the parties, but rather as part of a broader commercial and contractual arrangement administered by a platform, service provider, or other intermediary. In such cases, the parties' rights and obligations usually arise from a written agreement, general terms and conditions, or platform rules, while the smart contract serves only to automate their implementation.[42]

It is therefore more accurate to conclude that, in most practical settings, smart contracts are technical tools for contractual performance rather than contracts in themselves. This approach reflects their actual use in digital finance, insurance, tokenisation, and other forms of platform-based business models, where the contractual relationship exists at the legal level and the smart contract functions as its automated execution mechanism. The distinction between the contract and its performance is central to any further analysis of interpretation, liability, and the legal protection of the parties.

4.3. Relationship Between Code and Contractual Text

One of the most complex issues in the legal analysis of smart contracts concerns the relationship between computer code and the textual expression of the agreement. In practice, most individuals, and often even representatives of legal entities, do not possess the technical knowledge required to read and understand the code underlying a smart contract.[43]

What the parties ordinarily agree upon in practice is not the lines of program code themselves, but the expected legal and economic effects that the smart contract is intended to produce. Those effects are typically described in separate documents, general terms and conditions, platform rules, user instructions, or other textual explanations accompanying the smart contract. For that reason, the starting point in most cases should be that the parties' consent to textually expressed contractual terms, while the computer code serves as the means of implementing them.[44]

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42 Perkušić, M., *op. cit.*, note 16, p. 486.

43 Cvetković, P., *Ugovor kao algoritam: uvodna razmatranja*, Zbornik radova Pravnog fakulteta u Nišu, Vol. 62, No. 92, 2021, pp. 17-18.

44 Perkušić, M., *op. cit.*, note 16, pp. 485-486.

Such an approach is also consistent with the rules of Croatian contract law on contractual interpretation. Under the Croatian Obligations Act, contractual provisions are to be applied according to their wording, but disputed terms must not be interpreted solely based on their literal meaning. Instead, it is necessary to ascertain the common intention of the parties and to construe the provision in a manner consistent with the general principles of the law of obligations.[45] Where a contract has been drafted in advance or prepared by one party, ambiguous terms are interpreted in favour of the other party. In the context of smart contracts, this means that textual documentation, the user interface, functional descriptions, and other accompanying information will generally be of decisive importance in determining the parties' actual intention.[46]

Difficulties arise where a discrepancy exists between the textual description of the arrangement and the actual operation of the code. In such situations, the issue is not only what was "written", but also what was technically executed. Where a weak smart contract is involved, or where the system includes a governing entity, the code will primarily be assessed as a means of performance. Greater interpretative weight will therefore be given to the textual agreement and the accompanying explanations. If the code produces an outcome that departs from what was agreed, questions may arise concerning defective performance, liability for errors in execution, and potentially the responsibility of the platform provider or oracle service[47].[48]

By contrast, in the case of strong smart contracts, particularly where the parties are anonymous or pseudonymous, the relationship between code and text becomes considerably more complex. In such situations, where no genuine possibility of subsequent intervention exists, the functionality of the code may largely determine the actual substance of the parties' relationship. If one party mistakenly believed that the smart contract would operate differently from the way it was programmed, the issue cannot easily be resolved through traditional methods of contractual interpretation. Instead, it is more likely to raise the question of legally relevant mistake[49]. In other words, a divergence between the expected outcome

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45 On the interpretation of contracts, see: Gorenc *et al., op. cit.,* note 32, pp. 506-513.

46 Perkušić, M., *op. cit.*, note 16, pp. 485-486.

47 For a more detailed analysis of blockchain oracles, see: Au, C. D.; Stein, D., *Smart Contracts und die Bedeutung von Blockchain-Oracles für das Vertragswesen der Zukunft*, in: Seidel, M.; Reuse, S. (eds.), Banking & Innovation 2022/2023, Wiesbaden, 2023, pp. 565-575; Caldarelli, G.; Ellul, J., *The blockchain oracle problem in decentralized finance-A multivocal approach*, Journal of Applied Sciences, Vol. 11, No. 16, 2021, pp. 1-32.

48 Perkušić, M., *op. cit.*, note 16, pp. 487-488.

49 See: Klarić*, et al., op. cit.,* note 30, pp. 162-167.

and the programmed result in such contracts may not merely be an interpretative issue, but a potential ground for avoidance of the contract.[50]

The question of "code versus text" therefore cannot be resolved through a single universal rule.[51] In most practical situations, the text of the agreement and the accompanying documentation will remain the primary basis for determining the content and meaning of the contract, while the code performs an executory function. However, in highly decentralised and immutable systems, code may in practice assume the role of the principal carrier of contractual content. For that reason, the legal analysis of smart contracts must always begin with the actual structure of the specific relationship, the degree of decentralisation of the system, and the extent to which an average user can understand the effects of automated execution.[52]

In conclusion, the legal nature of smart contracts is not uniform. In certain circumstances, they may constitute a means of expressing contractual intent and may therefore exceptionally display the characteristics of contracts in the legal sense. In most cases, however, they remain technical mechanisms for the performance of a previously agreed legal relationship. This dual nature is particularly visible in the field of digital lending, where contractual terms, algorithmic processing, and automated execution frequently intersect. For that reason, their use as instruments of digital finance requires separate analysis in the following chapter.

4.4. Smart Contracts and Electronic Contracts

At the outset, it should be emphasised that the concepts of contracts concluded by electronic means and smart contracts are not identical, although certain points of overlap exist between them. Contracts in electronic form are governed by both national and European legal frameworks, in particular the Croatian Obligations Act, the Electronic Commerce Act[53], and Regulation (EU) No 910/2014 on electronic identification and trust services (eIDAS)[54].

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50 Perkušić, M., *op. cit.*, note 16, pp. 487-488.

51 Compare with: Cvetković, P., *Sinteza pravnog teksta i programskog koda: slučaj Rikardijanskog ugovora*, Zbornik radova Pravnog fakulteta u Nišu, Vol. 60, No. 90, 2021, pp. 61-76.

52 Perkušić, M., *op. cit.*, note 16, pp. 487-490.

53 Electronic Commerce Act, Official Gazette No. 173/2003, 67/2008, 130/2011, 36/2009, 30/2014, 32/2019, 67/2025 (hereinafter: Electronic Commerce Act).

54 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [2014] OJ L 257/73 (eIDAS Regulation); Act on the Implementation of Regulation (EU) No 910/2014, Official Gazette No. 62/2017.

Under Article 2(6) of the Croatian Electronic Commerce Act, contracts in electronic form are defined as contracts concluded, sent, received, or terminated by natural or legal persons through electronic, optical, or similar means. Furthermore, Article 9(1) of the same Act provides that such contracts have full legal validity and legal effect equivalent to contracts concluded in written form.

This framework is complemented by the Croatian Obligations Act, which in Article 293 provides that a contract is concluded when the parties have agreed on its essential terms. It follows that Croatian contract law does not distinguish contracts according to the form in which they are concluded. What is decisive is the existence of mutual consent regarding the essential elements of the agreement, except where the law expressly requires a specific form as a condition of validity.[55] [56]

Despite certain similarities, smart contracts cannot be equated with e-contracts. Although both operate within a digital environment, their legal function differs significantly.[57] E-contracts are primarily legal agreements expressed in digital form, whereas smart contracts generally constitute technical mechanisms for the automated performance of predefined contractual obligations through computer code.

The similarities between these two categories are most apparent in the fact that both rely on electronic means and involve certain methods of identifying the contracting parties. In that context, Article 2(3) of the Croatian Electronic Commerce Act defines an electronic signature as a set of data in electronic form used to identify the signatory and to confirm the authenticity of the content. In the case of smart contracts, identification and authorisation are carried out through cryptographic mechanisms, particularly public and private key systems, which functionally pursue a purpose similar to that of an electronic signature. At the level of the European Union, Regulation (EU) No 910/2014 further determines the legal effects of electronic signatures, while a qualified electronic signature has the same legal effect as a handwritten signature.[58]

However, these similarities remain limited. The key distinction lies in their legal function. In the case of e-contracts, the digital form relates to the way contractual intent is expressed, whereas in the case of smart contracts the digital form is linked to the manner in which the agreement is performed. Put differently, an e-contract defines the content of the legal relationship, while a smart contract technically

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55 See Article 286. Obligations Act.

56 See: Nikšić, S., *Pisani oblik ugovora i drugih pravnih poslova*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 72 No. 1-2, 2022., pp. 299-328.

57 See: Matić, T., *op. cit.,* note 36, pp. 779-803.

58 Article 25(2) of the eIDAS Regulation.

implements that relationship. It follows that statutory rules governing e-contracts cannot be applied directly to smart contracts without qualification. Nevertheless, the two categories may operate in a complementary manner. In practice, smart contracts are likely to be used increasingly as mechanisms for the performance of agreements concluded electronically, in which case those legal rules relevant to the performance stage of the contract may become applicable.[59]

In conclusion, smart contracts represent a distinct legal and technological phenomenon that goes beyond existing concepts of digital contracting. Their complexity, particularly in the context of blockchain technology, indicates the need for a more specific regulatory approach capable of taking into account their particular function and technical characteristics.

5. SMART CONTRACTS AS AN INSTRUMENT OF DIGITAL LENDING

Digital lending has undergone rapid transformation in recent years under the influence of fintech solutions, algorithmic data processing, and blockchain technology. The traditional lending model, based on banks, paper documentation, and manual creditworthiness assessment, is increasingly being supplemented or replaced by digital processes that enable faster, more transparent, and more accessible forms of financing.[60] In that context, smart contracts have emerged as a particularly important instrument because they allow the automated execution of specific elements of the lending relationship, including the disbursement of funds, monitoring of repayment schedules, calculation of interest, and activation of contractual consequences.[61]

In the broadest sense, smart contracts in digital lending make it possible to translate predefined terms of the credit relationship into computer code that executes automatically once specified conditions have been satisfied.[62] This reduces the need for intermediaries and shortens the time required for credit processing and

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59 Perkušić, *et al., op. cit.*, note 3, p. 688.

60 Glucksman, M.; Hossein, R., *Smart Contracts and Decentralized Finance*, New York, 2025, pp. 6-9, Available at: [https://www.stern.nyu.edu/sites/default/files/2025-05/Glucksman_Hossein_Smart%20Contracts%20and%20Decentralized%20Finance.pdf], Accessed 3 April 2026.

61 Benetti, Z.; Piazza, F., *Decentralised Finance: A categorisation of smart contracts*, ESMA TRV Risk Analysis, 11 October 2023, pp. 1-21, Available at: [https://www.esma.europa.eu/sites/default/files/2023-10/ESMA50-2085271018-3351_TRV_Article_Decentralised_Finance_A_Categorisation_of_Smart_Contracts.pdf], Accessed 3 April 2026.

62 Kandregula, N., *Smart Contracts and DeFi Protocols: Enhancing Security, Transparency, and Efficiency in Financial Transactions*, International Journal of All Research Education and Scientific Methods, Vol. 7, No. 6, 2019, pp. 105-106.

disbursement. Such a model is particularly developed in the field of decentralised finance (DeFi), where lending and borrowing services are provided through blockchain protocols without reliance on traditional banking institutions.[63] The literature notes that decentralised lending platforms enable users to obtain loans and provide liquidity in the form of crypto assets in return for interest, with the entire relationship structured through smart contracts.[64] [65]

The advantages of using smart contracts in digital lending are most commonly associated with automation, transparency, and cost reduction. Algorithmic data processing can accelerate decisions on the granting of finance, while smart contracts enable the automatic performance of contractual obligations without the need for additional administrative intervention. For that reason, recent literature increasingly identifies automated lending processes and smart contracts as important drivers of the future development of digital finance.[66]

For the purposes of legal analysis, it is necessary to distinguish between different models of applying smart contracts in digital lending, since the legal nature of the relationship and the level of user protection largely depend on the structure of the system through which the lending activity is carried out.

5.1. Models of Digital and Decentralised Lending

In this context, two fundamentally different models of digital and decentralised lending may be identified, each giving rise to distinct legal implications.

The first model concerns platforms that operate as digital intermediaries or marketplaces. Users enter into lending relationships through the platform, while the

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63 Auer, R.; Haslhofer, B.; Kitzler, S. *et al., The technology of decentralized finance (DeFi*), Digital Finance, Vol. 6, 2024, pp. 55-95.

64 Mitzlaff, A.; Johns, M., *Decentralized Finance (DeFi): A New Financial System?*, Mittweida, 2021, pp. 12-15, Available at: [https://monami.hs-mittweida.de/files/13088/Druckversion_Mitzlaff_Johns.pdf], Accessed 30 March 2026.; Kaplan, A., *Financial Technology and the Future of Banking*, Cham, 2023, pp. 145-150.

65 Read, O., *Decentralised Finance: Growth, Risks and Regulation of a Shadow Financial System with Crypto-assets*, Wiesbaden, 2025, pp. 4–5, Available at: [https://www.hs-rm.de/fileadmin/HSRM/EXTERN/Fachbereich/Wiesbaden_Business_School/Forschung/Institute_und_Forschungszentren/wifin/WP/wifin_WP_18_2025_Read_v1.pdf], Accessed 22 March 2026.

66 Bračun, S.; Turkalj, K., *Utjecaj Fin-Tech kompanija na digitalnu transformaciju bankarstva u Republici Hrvatskoj*, Obrazovanje za poduzetništvo, 2020, pp. 83–85.; World Bank, Smart Contract Technology and Financial Inclusion, Washington, D.C., 2020, pp. 18-22, Available at: [https://documents1.worldbank.org/curated/en/710151588785681400/pdf/Smart-Contract-Technology-and-Financial-Inclusion.pdf], Accessed 28 March 2026.

platform itself provides the necessary infrastructure, including standardised smart contracts. In such cases, smart contracts primarily perform an executory function by implementing predefined contractual terms, whereas the legal relationship arises from the conditions established by the platform. Although such systems are often described as decentralised, they retain certain elements of the traditional lending model because an identifiable entity designs the rules and may bear responsibility for their application. Consequently, existing rules governing credit and financial services, particularly in the field of consumer protection, may in principle be applied to these models.[67]

The second model concerns so-called fully decentralised protocols in which no identifiable service provider or intermediary exists. In such systems, the lending relationship arises through the user's direct interaction with computer code, while the loan is executed through the automatic conversion of pledged crypto assets into borrowed assets. These systems operate as open and permissionless infrastructures in which any user may participate without prior authorisation.[68]

5.2. Legal Nature of the Lending Relationship and Contracting Through Code

Having distinguished the principal lending models, it is necessary to consider the legal nature of the relationships created through their use, particularly in the context of fully decentralised systems.

In that regard, it should be emphasised that smart contracts do not, in themselves, alter the legal nature of the lending relationship. Their primary role is usually technical: they implement what the parties have already agreed. Accordingly, the general view developed earlier also applies in the lending context, namely that smart contracts are, as a rule, mechanisms for contractual performance rather than contracts as such.[69] Nevertheless, in certain cases, especially within decentralised and immutable systems, the boundary between contractual content and the technical mechanism of execution becomes significantly less clear.[70]

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67 See: Jozipović, Š.; Perkušić, M.; Vukušić, K., *Pravna regulacija kratkoročnih potrošačkih zajmova i kredita dodijeljenih putem digitalnih platformi,* Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 44, No. 3, 2023, pp. 675-700.

68 Read, O., *op. cit.,* note 65, p. 4-5.

69 Chapter 4.2.

70 See: European Law Institute, ELI Principles on Blockchain Technology, Smart Contracts and Consumer Protection, Vienna, 2022, pp. 10-15, Available at:

In the first, platform-based model, the legal relationship continues to arise from the terms defined by the platform, while the smart contract performs primarily a technical executory function. In such cases, it is relatively easy to identify the contracting parties, the content of the agreement, and the responsible entity. For that reason, these relationships can generally be subsumed under existing legal categories governing credit and financial services.[71]

By contrast, fully decentralised systems give rise to a materially different legal situation. Users do not enter into a relationship with a specific legal person but interact directly with computer code that automatically applies predefined rules. It is precisely in these circumstances that the idea of contracting through code becomes most visible, since the smart contract ceases to be merely a mechanism of performance and becomes the de facto normative framework of the relationship.[72]

Such a structure also produces a specific form of conclusive consent. For example, by transferring crypto-assets or activating a particular function within the protocol, the user accepts the rules embedded in the code through conduct, even though those rules are often neither fully understandable nor transparently presented. The relationship is therefore based on behaviour capable of producing legal effects, but without the level of information and negotiation ordinarily expected in traditional contractual settings.[73]

In such cases, the question arises whether the user enters a contract in the classical legal sense at all, or rather participates in a relationship defined by the execution of predefined computer code whose content and consequences are not fully accessible to the average user. This issue lies at the centre of the legal analysis of smart contracts in the field of digital lending.

5.3. Consumer Protection and the Applicable Regulatory Framework

The distinctions outlined above also give rise to significant challenges in the field of consumer protection and the application of the existing regulatory framework. The use of smart contracts does not eliminate the need for consumer protection. On the contrary, it may intensify the need for such protection because the consumer

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[https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_on_Blockchain_Technology__Smart_Contracts_and_Consumer_Protection.pdf], Accessed 20 March 2026.

71 Jozipović, Š.; Perkušić, M.; Vukušić, K., *op. cit.*, note 67, pp. 679-680.

72 Raskin, M., *The Law and Legality of Smart Contracts*, Georgetown Law Technology Review, Vol. 1, No. 2, 2017, pp. 305-341, at pp. 306-307.

73 De Filippi, P.; Wright, A., *op. cit.*, note 37, pp. 344-345.

is often confronted not only with standardised contractual terms, but also with automated execution mechanisms whose operation may be technically complex, insufficiently transparent and difficult to challenge once execution has taken place.

In platform-based lending models, where an identifiable entity defines the contractual terms and enables access to the system, consumer protection rules can in principle be applied, including duties of disclosure, transparency requirements, responsible lending obligations and liability for unfair contractual terms. In such cases, the smart contract primarily functions as an instrument for the automated performance of the lending relationship, while the legal content of the relationship remains contained in the contractual documentation, platform rules and pre-contractual information provided to the consumer. In that way, at least part of the legal protection traditionally associated with financial services remains preserved.

However, in fully decentralised systems such mechanisms are largely absent or significantly weakened. There is no clearly identifiable service provider, nor any entity that could readily bear responsibility for the content and execution of the smart contract. The consumer may interact directly with computer code without concluding a contract with a clearly identifiable legal person. The protocol may automatically determine collateral requirements, liquidation thresholds, interest mechanisms or consequences of default. As a result, a user participating in such a system may assume significant financial obligations without any realistic possibility of identifying the responsible party or obtaining effective legal protection.[74]

A further difficulty lies in pronounced information asymmetry. The technical complexity of smart contracts and decentralised protocols means that the average user often lacks sufficient knowledge to understand how the system operates or the consequences that may follow from its use. Such information asymmetry is not limited to the economic terms of the transaction, but extends to the technological mechanism through which the transaction is performed. In such circumstances, serious questions arise regarding the user's actual level of information and the freedom of consent, both of which are fundamental preconditions for contractual validity in modern contract law.[75]

The central consumer protection concern therefore lies in the discrepancy between formal consent and informed consent. A consumer may technically accept

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[74] Aufiero, S.; Bartolucci, S.; Caccioli, F.; Vivo, P., *Mapping Microscopic and Systemic Risks in TradFi and DeFi:* A Literature Review, 2025, p. 3, Available at: [https://arxiv.org/abs/2508.12007], Accessed 26 March 2026.

[75] See: Weston, G., *Most Common Smart Contract Vulnerabilities*, Available at: [https://101blockchains.com/most-common-smart-contract-vulnerabilities/], Accessed 26 March 2026.

the operation of a smart contract by interacting with the protocol, transferring crypto-assets or activating a particular digital function, but such conduct does not necessarily imply genuine understanding of the contractual and economic consequences of the transaction. This is especially relevant where the code performs functions that would, in traditional lending relationships, be subject to contractual explanation, statutory disclosure requirements, judicial review or regulatory supervision. In digital lending through smart contracts, these safeguards may be weakened if the contractual relationship is partially or entirely displaced from readable legal text into computer code.

Although the existing legal framework of the European Union is, in principle, applicable to digital forms of lending, its application in the context of decentralised and automated systems may prove difficult. This is particularly true of the rules contained in Directive (EU) 2023/2225 on credit agreements for consumers[76], Council Directive 93/13/EEC on unfair terms in consumer contracts[77], Directive 2005/29/EC concerning unfair commercial practices[78], Directive 2011/83/EU on consumer rights[79], and Regulation (EU) 2023/1114 on markets in crypto-assets (MiCA)[80]. These instruments generally proceed on the assumption that there is a clearly identifiable service provider and a transparent contractual relationship. In decentralised lending models, where such an entity may be absent or difficult to identify, the effective application of those rules becomes uncertain, particularly in cross-border settings.

The rules on unfair terms in consumer contracts are particularly important in this context. Smart-contract-based lending may involve standardised, non-negotiated contractual arrangements whose effects are implemented automatically through

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76 Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers and repealing Directive 2008/48/EC [2023] OJ L 2225.

77 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29.

78 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) [2005] OJ L 149/22.

79 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (Consumer Rights Directive) [2011] OJ L 304/64.

80 Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 (Markets in Crypto-Assets Regulation) [2023] OJ L 150/40.

code. If such arrangements create a significant imbalance in the rights and obligations of the parties to the detriment of the consumer, they may fall within the logic of unfair terms control under Directive 93/13/EEC. This is especially relevant where the automated execution of a smart contract gives practical effect to a term that the consumer could not realistically understand, negotiate or challenge before execution.

The case law of the Court of Justice of the European Union under Directive 93/13/EEC provides an important point of reference. In Banco Español de Crédito[81], the Court emphasised the duty of national courts to examine of their own motion whether a contractual term falling within the scope of the Directive is unfair. This principle is relevant for smart-contract-based lending because automated execution must not deprive the consumer of judicial protection against unfair terms. Similarly, in Aziz[82], the Court addressed the relationship between unfair terms and enforcement proceedings in the context of a consumer mortgage loan agreement, stressing the need for effective judicial protection where contractual terms may produce serious consequences for the consumer. This reasoning is particularly relevant where smart contracts automatically trigger consequences comparable to enforcement, such as the liquidation of collateral or the transfer of assets, without prior judicial intervention. Finally, in Dziubak[83], the Court considered the consequences of removing unfair terms from a consumer contract and the question whether the contract may continue to exist without those terms. In the context of smart contracts, this raises the further question of how nullity, voidability and restitution should operate where the automated code has already executed the disputed transaction.

These cases demonstrate that consumer protection cannot be reduced to a formal declaration of consent. It must include effective control of unfair terms, meaningful transparency and the possibility of judicial intervention. Accordingly, even where performance is automated through code, the legal system must preserve mechanisms capable of assessing whether the consumer was adequately informed, whether the contractual terms were fair and whether the consequences of automated execution are compatible with mandatory consumer protection rules.

A further problem concerns the cross-border nature of digital lending. Smart-contract-based lending services may be accessible to consumers in one Member

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81 See: Case C-618/10, *Banco Español de Crédito SA v Joaquín Calderón Camino*, Judgment of the Court of Justice of 14 June 2012, ECLI:EU:C:2012:349.

82 See: Case C-415/11, *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, Judgment of the Court of Justice of 14 March 2013, ECLI:EU:C:2013:164.

83 See: Case C-260/18, *Kamil Dziubak and Justyna Dziubak v Raiffeisen Bank International AG*, Judgment of the Court of Justice of 3 October 2019, ECLI:EU:C:2019:819.

State while being designed, operated or promoted from another jurisdiction, or while having no clearly identifiable provider at all. This creates difficulties in determining the applicable law, jurisdiction and competent supervisory authority. In platform-based models, these issues may be addressed through existing rules on consumer contracts and financial services. In fully decentralised models, however, the absence of a centralised operator makes it difficult to identify the person responsible for complying with mandatory consumer protection rules.

In addition, requirements relating to transparency, pre-contractual information and creditworthiness assessment, which arise from EU consumer and financial law, are not easily reconciled with the fully automated performance of contractual obligations through smart contracts. For that reason, there is a clear need for a more tailored regulatory approach capable of safeguarding the fundamental principles of consumer protection within digital and decentralised financial environments.[84] Such an approach should not focus only on the formal technological structure of the transaction, but also on its economic function, the degree of consumer exposure, the level of standardisation, the existence or absence of an identifiable provider and the practical possibility of judicial or regulatory control.[85]

In the Croatian context, it is also important to note that the digital transformation of the financial sector remains primarily focused on payment services, while fintech lending and the use of smart contracts in lending are still at an earlier stage of development.[86] Although digital credit products and automated financial services are increasingly recognised as a future direction of market development, the legal framework governing such models has not yet been fully developed, which further contributes to legal uncertainty in this area.[87]

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84 Perkušić, M., *op. cit.*, note 16, pp. 491-492.

85 European Law Institute, ELI Principles on Blockchain Technology, Smart Contracts and Consumer Protection, 2022, pp. 18-22, Available at: https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_on_Blockchain_Technology__Smart_Contracts_and_Consumer_Protection.pdf, Accessed 20 March 2026; World Bank, Smart Contract Technology and Financial Inclusion, 2020, pp. 27-30, Available at: [https://documents1.worldbank.org/curated/en/710151588785681400/pdf/Smart-Contract-Technology-and-Financial-Inclusion.pdf], Accessed 28 March 2026.

86 In the Croatian legal system, consumer protection in the field of financial services is primarily governed by the Consumer Protection Act, Official Gazette No. 19/2022, 59/2023, the Consumer Credit Act, Official Gazette No. 75/2009, 112/2012, 143/2013, 147/2013, 9/2015, 78/2015, 102/2015, 52/2016, 128/2022, 156/2023, and the Act on Representative Actions for the Protection of the Collective Interests and Rights of Consumers, Official Gazette No. 59/2023, which establishes a framework for collective judicial consumer protection.

87 Bračun, S.; Turkalj, K., *op. cit.*, note 66, pp. 84-86.

In conclusion, consumer protection in smart-contract-based digital lending requires a differentiated approach. Platform-based models can, in principle, be integrated into the existing framework of contract, consumer and financial law. Fully decentralised protocols, however, reveal the limits of that framework. In such systems, the legal challenge is not only whether a consumer contract exists, but also who can be held responsible, how unfair terms can be controlled, how automated execution can be reviewed and how restitution can be achieved where the transaction has already been performed by code. It is precisely this transformation, in which the contractual relationship is partially or entirely shifted from legal text into computer code, that constitutes the central legal challenge of digital lending in the contemporary financial system.

6. CONCLUSION

The analysis undertaken in this paper demonstrates that smart contracts in digital finance do not constitute a single legal category, but rather an instrument whose legal effects depend on the structure of the relationship, the degree of decentralisation of the system, and the role of the actors involved in its design and execution. Although automation through computer code may contribute to the speed, efficiency and standardisation of financial services, it simultaneously raises a range of issues that cannot be resolved through a purely technical approach, but require clear legal qualification and appropriate protective mechanisms.

The paper has shown that, in the field of digital lending, it is necessary to distinguish between two principal models of applying smart contracts. In platform-based systems, where a specific entity facilitates the connection between lenders and borrowers while defining the conditions of use and standardised contractual terms, the smart contract generally retains the function of a technical mechanism for the performance of a pre-existing contractual relationship. In such cases, there remains a clear basis for applying existing rules of contract, consumer and financial law, as well as for determining the responsibility of the entity that designs, operates or offers the system.

By contrast, in fully decentralised protocols, where no identifiable service provider or intermediary exists, the legal relationship arises through the user's direct interaction with computer code. In these situations, the smart contract ceases to be merely a mechanism of performance and effectively becomes the de facto normative framework of the relationship itself. This creates the possibility that a user, particularly in the context of a loan or other financial obligation, gives conclusive consent to the execution of code whose content, scope and consequences are not fully understood. Such a situation is especially problematic from the perspective of

consumer protection, since it calls into question the user's actual level of information, the freedom of consent and the effectiveness of legal remedies.

The central legal problem of digital lending through smart contracts therefore lies in the relationship between automated execution and legal control. The more decentralised and immutable the system, the weaker the possibility of subsequent intervention, judicial review and identification of a responsible entity. As a result, traditional mechanisms for the protection of the weaker contracting party, which are based on transparent contractual terms, pre-contractual information duties and the existence of a person responsible for providing the service, become difficult to apply or may prove practically ineffective.

The analysis of consumer protection confirms that the use of smart contracts must not lead to the exclusion of mandatory protective rules. This is particularly relevant in relation to unfair terms in consumer contracts. The case law of the Court of Justice of the European Union under Directive 93/13/EEC shows that consumer protection requires more than formal acceptance of contractual terms. It requires effective judicial control, meaningful transparency and the possibility of examining whether standardised terms create a significant imbalance to the detriment of the consumer. This reasoning is also relevant for smart-contract-based lending, since automated execution may give immediate practical effect to contractual terms before the consumer has had a realistic opportunity to challenge their fairness, validity or legal consequences.

In that context, particular attention should be paid to the legal consequences of automated execution. Where a smart contract has already performed the disputed transaction, traditional remedies such as nullity, voidability and restitution may be more difficult to apply in practice. This does not mean that such remedies should be excluded. On the contrary, it confirms the need to adapt legal analysis to the technical structure of the transaction and to ensure that code-based execution does not deprive consumers of substantive legal protection. The question is therefore not only whether a smart contract can perform an obligation, but also whether the legal system can effectively review, suspend or reverse the consequences of such performance where mandatory rules have been infringed.

For these reasons, smart contracts in digital lending should not be viewed solely as a technological advancement, but as a legal challenge requiring a differentiated approach. Platform-based models can, in principle, be integrated relatively successfully into existing legal categories. Fully decentralised models, however, reveal the limits of the current regulatory framework and the need for its further development. Future normative solutions should therefore aim to strike an appropri-

ate balance between technological innovation and legal certainty, with particular emphasis on transparency, accountability, consumer protection, judicial control and the availability of effective remedies in situations where the contractual relationship is partially or entirely transferred from legal text into computer code.

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Review article

CREDITORS' COMMITTEES UNDER NEW INSOLVENCY III DIRECTIVE AS GATEKEEPERS OF ECONOMIC STABILITY: STRENGTHENING THE EU'S POSITION IN THE NEW GLOBAL ORDER*

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ABSTRACT

Discrepancies in national insolvency proceedings are the subject of numerous criticisms and are considered one of the key reasons why the EU single market is not sufficiently attractive to investors in comparison with other competitive markets. In order to address the aforementioned issue, the European Commission published the Proposal for the Insolvency III Directive (Directive) in December 2022. After an extensive legislative procedure on March 30, 2026, the Directive was adopted, with a tendency of harmonising several key substantive legal matters in the national laws of the Member States. Inter alia, the Directive addresses the improvement of the position and enhanced protection of creditors in insolvency proceedings (especially cross-border creditors and employee representatives). The creditors' committee in the context of the Directive is a body that represents the interests of creditors, supervises the activities of the insolvency practitioner, and ensures the harmonization of the conflicting interests of creditors. By representing the interests of all creditors, the creditors' committee ensures the right to ensures

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full oversight of insolvency proceedings and a fair distribution of the assets of the insolvency estate. In addition, the Directive introduces the rules for the involvement of cross-border creditors who would otherwise not participate in national insolvency proceedings for the purpose of exercising their rights. Such an approach not only increases transparency in insolvency, but also strengthens legal certainty in the legal system. The paper critically examines the provisions of the Directive, with regard to the establishment, appointment, rights, duties, remuneration and operating costs of creditors' committees in national insolvency proceedings. The final part of the paper analyses the possible implications of the Directive on the Croatian legal framework, i.e. the potential impacts on the efficiency of insolvency proceedings in Croatia and gives recommendations for de lege ferenda.

Keywords: *Creditors' committees, Cross-border, EU Insolvency III Directive, Insolvency Law*

1. INTRODUCTION

Strengthening the position of creditors in national insolvency proceedings among the EU represents a long process. On 7 December 2022, the European Commission (EC) adopted a Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law (Proposal), with the aim of improving the Capital Markets Union.[1] The proposal proceeds from the premise that among the Member States there is a difference in the legal regulation of the insolvency proceedings, which often leads to different outcomes of insolvency proceedings. In other words, the non-uniformity of legal norms at the EU level in practice leads to more protracted proceedings, as well as higher costs.[2] Such differences not only entail the issue of legal certainty regarding the outcome of the proceedings in the first place for investors and creditors, but at the same time represent a particular problem for cross-border investors when considering investments.[3] Given that the conditions at the national level are not the same for all, investments in Member States with more developed insolvency rules are generally perceived as safer compared to those in countries with insufficiently developed legal regimes.[4] Such differences ultimately lead to an uneven distribution of investments and constitute an obstacle to cross-border capital movements and the efficient functioning of the single capital market at EU level.[5] With regard to this,

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1 European Commission, *Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law*, COM(2022) 702 final, Brussels, 7 December 2022 (hereinafter: Proposal), p. 1. For further discussion on the background, objectives and structure of the Proposal in the context of the Capital Markets Union, see Pool, J. M. W.; Boon, J. M. G. J.; Vriesendorp, R. D., *Harmonisation of European Insolvency Law: Operation Patchwork has Commenced, but Where Will it Take Us?,* Tijdschrift voor Insolventierecht, 2023, pp. 2-4.

2 Proposal, p. 1.

3 Proposal, p. 2.

4 Proposal, p. 2.

5 Proposal, p. 2.

the European Commission, through its Proposal, emphasises the need to reduce differences between national insolvency regimes, and thereby mitigate existing economic disparities between Member States.[6] In addition, the energy crisis and limited opportunities for public subsidies in the future may greatly influence the increase in the number of companies that would cease to operate, whereby many would be threatened with an unsustainable level of debt.[7] In order to prevent such circumstances, more effective and harmonised insolvency rules were a necessary measures required by the EU when proposing and legislatively adopting the Directive,[8] in order to mitigate the consequences of economic crises and reduce the negative effects on the financial position of companies.[9]

The Directive is structurally divided into six key areas, and the paper is limited to the provisions of Title VI on the creditors' committee. One of the key objectives of the Directive was to strengthen the position of creditors. The current position of creditors in EU law is uneven and subject to national insolvency rules. In other words, it is very limited, primarily due to the small value of the existing insolvency estates, the small value of creditors' claims or cross-border issues[10] such as geographical distance or the inability of cross-border creditors to participate in insolvency proceedings in other Member States due to lack of knowledge and information. Given the different regulation at national level,[11] many Member States do not have mechanisms that would enable creditors to participate in the proceedings to an extent that would enable them to participate in making key decisions.[12] Consequently, such a limited position of creditors at the EU level may lead to reduced transparency and insufficient supervision of insolvency proceedings by creditors.[13] It was precisely for that reason that the EC proposed the establishment of a creditors' committee in the Proposal for a Directive [14] as a body aimed at strengthening the position of creditors, which would represent the interests of

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6 Proposal, p. 2.

7 Proposal, p. 2.

8 Directive (EU) 2026/799 of the European Parliament and of the Council of 30 March 2026 harmonising certain aspects of insolvency law [2026] OJ L 2026/799 (Directive).

9 Proposal, p. 2.

10 On the role of applicable law in cross-border insolvency and restructuring, see Leandro, A., *The Rome I Regulation in EU Cross-Border Insolvency and Restructuring*, European Insolvency and Restructuring Journal, 2025.

11 On the impact of the EU insolvency harmonisation efforts on different national legal systems, see Mak, C. H. W., *The Impact of the Recent EU Insolvency Directive on Scottish Insolvency Law*, Scots Law Times, 2024, pp. 1–5.

12 Proposal, p. 19.

13 Proposal, p. 12.

14 On the role and justification of creditors' committees in insolvency proceedings, see UNCITRAL, Legislative Guide on Insolvency Law, United Nations, New York, 2005, pp. 197-202.

all creditors and act independently of the insolvency practitioner.[15] Therefore, the establishment of a requirement for more effective representation of creditors' interests, through a creditors' committee,[16] represents a response to the stated shortcomings of the current national legislative frameworks. In particular, creditors are enabled to participate more actively in the proceedings and, above all, oversee key decision-making during the insolvency proceedings.[17]

The paper therefore provides a doctrinal critical analysis of the Directive, with the key focus on the provisions on the creditors' committee, facilitating their potential application in practice and also providing guidelines for the effective transposition into Croatian law. The paper is based on the legislative procedure for adopting the provisions of the Directive, which concern the creditors' committee from Title VI of the Directive. The central part of the paper analyses the procedure for the establishment and appointment, as well as the rights and obligations of the creditors' committee, as well as the issue of the liability of the aforementioned body in insolvency proceedings under the Insolvency III Directive. Although the adoption of harmonised rules regarding creditors' committees brings substantial advantages, the issue of harmonisation of national insolvency laws in the legislation of the Member States also brings certain challenges. Therefore, the final part of the paper critically analyses the possible implications of the Directive on the Croatian legal framework, i.e. the expected impacts on the efficiency of insolvency proceedings in Croatia. Consequently, based on a comprehensive analysis, the paper examines whether the aforementioned rules will achieve their purpose and provides guidelines on achieving the harmonisation of the Directive with Croatian national legislation.

2. LEGISLATIVE PROCEDURE A LONG WAY FROM THE EC PROPOSAL TO THE OFFICIAL VERSION

The procedure initiated by the EC Proposal of December 2022, concludes on 30 March 2026 with adoption of the final text of the Directive. In the Proposal itself, the EC emphasised that its aim is to address previously reported shortcomings in national insolvency procedures, i.e. to increase cross-border investments, increase legal certainty and to ensure more level playing field conditions for market participants.

[15] Proposal, p. 20.

[16] Proposal, p. 12.

[17] Proposal, p. 12.

The text of the Proposal [18] is generally focused on three key aspects of insolvency: preserving and increasing the value of the insolvency estate, increasing the efficiency of insolvency proceedings and the predictable and fair distribution of the insolvency estate among creditors.[19]

Title VII of the Proposal regulates the rules on the creditors' committee, which introduces, for the first time, rules governing the legal position of creditors at EU level. Concerning this, the Proposal was primarily focused on strengthening the position of creditors. The Proposal served as a starting point for amendments during the further stages of the adoption of the Directive, which were subsequently considered in the Council of the European Union (Council).

Thereafter, on March 23, 2025, the Council proposes amendments to the provisions on the creditors' committee. However, the Council's amendments do not alter the substance of the EC Proposal regarding the creditors' committee, but to a certain extent specified the conditions for the establishment of the committee, its composition and working methods, while emphasising the flexibility that member states have at their disposal.[20]

At a later stage, the European Parliament in its Report from 1 of July 2025 proposes amendments,[21] which do not introduce substantive changes but rather consist in increasing the representativeness of the creditors' committee. In other words, they refer to the further elaboration and clarification of the existing provisions on the creditors' committee.

Having regard to the proposed measures of the EC, the proposals of the Council and the amendments of the European Parliament, in the course of the legislative process the final text of the Directive was adopted. Therefore, in the next chapter is critically elaborated the legal concept of the creditors' committee as finally regu-

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18 It should also be noted that the Proposal introduces rules on pre-pack proceedings aimed at facilitating the sale of a debtor's business as a going concern and maximising value for creditors. For a more detailed discussion, see Thery, A., *The Pre-pack Regulation in the EU Commission Proposal for a Second Insolvency Directive*, European Insolvency and Restructuring Journal, 2023; Van Zanten, M. R., *Proposal for European Rules on Pre-pack Proceedings Should Be Supported*, Tijdschrift voor Insolventierecht, 2023, pp. 1-2, 8-9.

19 Proposal, p. 12.

20 Council of the European Union, Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law – General approach, 9257/25, Brussels, 23 May 2025 (Council General Approach), p. 6.

21 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council harmonising certain aspects of insolvency law (COM(2022)0702 – C9-0410/2022 – 2022/0408(COD)), A10-0126/2025, 1 July 2025 (Parliament Report).

lated by the Insolvency III Directive and also examines the potential implications for the EU single market.

3. CREDITORS' COMMITTEES UNDER INSOLVENCY III DIRECTIVE

3.1. Scope of Application and Definition of the Term 'Creditors' Committee

Whereas, in the Proposal, the provisions on the creditors' committee are set out in Title VII, in the final text of the Directive they are set out in Title VI, in the provisions of Articles 44-50. When comparing the existing provisions of the Directive in detail with the initial EC Proposal, it can be noted that the final text essentially contains the fundamental structure of the creditors' committee from the Proposal.

In particular, in the final version of the Directive, the creditors' committee, regulates in six articles the issue of the establishment of the creditors' committee, then the appointment and composition of the creditors' committee, the removal and replacement of members, the working methods and function of the creditors' committee, the issue of the functions, rights and duties of the creditors' committee, costs and fees and finally the liability of the creditors' committee.[22]

The regulation of creditors' committees at EU level is a very important issue in terms of harmonization of insolvency proceedings because currently at EU level there are countries that have clearly elaborated provisions on creditors' committees and they are relatively frequently used in national insolvency proceedings. Although it is recognised in different legal systems, it is not necessarily established with the same frequency nor is it given the same weight in the proceedings.

In Dutch law,[23] the creditors' committee is formally recognised, but its appointment remains exceptional and creditors do not always have an effective possibility to secure its establishment at an early stage. By contrast, German legislative framework gives creditors a stronger position through the creditors' meeting and,

[22] The Proposal also regulates avoidance actions aimed at maximising the value of the insolvency estate. For a detailed analysis, see Pannevis, N. B., *The European Harmonisation of Avoidance Rules, a Dutch Perspective on Reshaping an Age-old Instrument*, Tijdschrift voor Insolventierecht, 2023, pp. 4-7.

[23] Although Dutch law provides for a creditors' committee, it is rarely established in practice because the decision is only made at the late verification hearing. Since creditors have no opportunity to request its establishment earlier, and such requests are routinely rejected in practice, its role in insolvency proceedings is therefore limited.. See in detail Van Galen, R. J., *The creditors' committee under the Proposal*, TvI, 2023, p. 1.

where appointed, through the creditors' committees.[24] At the same time, German practice also points out that such committees may not be established in many cases where the liquidation has limited economic significance. These differences also show why the regulation of creditors' committees may raise concerns of overharmonisation. The EU framework established by the Directive seeks to strengthen creditors' participation, although its practical effects may vary across Member States. The analysis therefore turns to the way in which the Directive regulates the creditors' committee as a common legal instrument of collective creditor participation.

3.2. Establishment of the Creditors' Committee

One of the essential elements when establishing a creditors' committee[25] is the timing of the regulation; whether it is established before or after the commencement of insolvency proceedings. In fact, Article 44 of the final text of the Directive stipulates that Member States must enable the establishment of a creditors' committee after the commencement of insolvency proceedings. Exceptionally, it may be provided by the decision of the Member States, in accordance with national law, that the creditors' committee can be established even before the commencement of insolvency proceedings.[26]

If the creditors' committee is established after the commencement of insolvency proceedings, then it can be established by a decision of the creditors or at the request of the general meeting.[27] In the absence of a general meeting of creditors, the committee may be established at the request of the creditors, in accordance with national law.[28]

Furthermore, the Directive, in accordance with Article 44 (3), also provides for the possibility that, in order to preserve the balance of creditors' interests and

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24 In the German jurisdiction, if the general meeting of creditors decides to establish a creditors' committee, the committee must be established. *Ibid.*, p. 3.

25 The importance of the timely initiation of insolvency proceedings should also be emphasised, as reflected in the Proposal's establishment of directors' duties to file for insolvency, which are aimed at preventing delays that may reduce the recovery value for creditors, see Karapetian, A.; Lennarts, L., *The Directors' Duty to File for Insolvency Proceedings in the European Commission's Proposal for Harmonising Insolvency Law: the Dutch Perspective*, Tijdschrift voor Insolventierecht, 2023.

26 The establishment of a creditors' committee prior to the commencement of insolvency proceedings may be justified by the need for early creditor involvement. However, where the rules are not further specified, practical difficulties may arise, particularly with regard to the transition from a provisional to a permanent creditors' committee. See in detail Van Galen, *op. cit.*, note 24, p. 3.

27 Directive, art. 4 (1).

28 Directive, art. 4 (1).

rationalise the costs of the proceedings, in some cases a creditors' committee may not be established.[29] Therefore, the Directive in Article 44 (3) lists the cases where the establishment of a committee is omitted.[30] The prescribed cases are not exhaustive listed and, *inter alia*, refer to the following circumstances: a small number of creditors, a small value of the insolvency estate, or if these circumstances would negatively affect the financial position of the creditors.[31] In such a case, Member States must decide not to establish a creditors' committee. At the same time, Member States are allowed to limit the establishment of committees exclusively to proceedings related to larger undertakings.[32] However, for smaller undertakings,[33] as well as for other reasons for its non-establishment, this matter is to be regulated by national law.[34]

On the one hand, this approach takes into account that a committee is not required in every insolvency proceeding, which can be justified by reducing costs and preserving the estate. On the other hand, leaving the decision in the hands of the Member States could lead to the actual purpose of implementing the creditors' committee rules being ignored and to the committee becoming a body that is established only in exceptional cases. Therefore, it is important to interpret the exceptions to its establishment in Article 44 (3) restrictively.

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29 This view is also supported by literature indicating that the establishment of a creditors' committee may prolong the proceedings and increase costs. A similar tendency can be seen in comparative practice, where, even in legal systems that already recognise this institution, often only one committee is formed, or no committee is established at all. See in detail Wessels, B., *Towards a European Code of Conduct for Creditors' Committees*, International Corporate Rescue, Vol. 18, No. 6, 2021, p. 377.

30 Article 58 (3) of the Proposal allows exceptions only where the establishment of a creditors' committee is not economically justified, especially in cases involving few creditors or a micro enterprise debtor. This exception has been criticised in legal doctrine as too narrowly framed. For further discussionn, see Van Galen, *op. cit.* 24, p. 3; Renssen, S., *Simplified Winding-up Proceedings for Insolvent Microenterprises: a Company Law v. Insolvency Law in-between?*, Tijdschrift voor Ondernemingsbestuur, 2023.

31 Council General Approach, Art. 58 (3). The Council's approach is convincing. A mandatory creditors' committee would be difficult to justify in proceedings involving few creditors or limited complexity, where it may only increase costs and reduce the insolvency estate. In line with the well-founded position of the Council see also Clifford Chance, EU Directive Harmonising Certain Aspects of Insolvency Law: adopted by the Council, Available at: [https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2026/04/eu-directive-harmoning-certain-aspects-of-insolvency-law-adopted-by-the-council.pdf], Accessed 26 February 2026.

32 Directive, recital 65.

33 Directive, recital 65.

34 The Council takes a similar approach to Article 58 (3) of the Proposal, through a less prescriptive regulatory framework in which the committee's composition, working methods, organisation and powers are left to national law. Council General Approach, art. 58 (3).

3.3. Appointment and Removal of Members of the Creditors' Committee

When establishing the creditors' committee under Article 45, the Directive itself there is a tendency to avoid prolonging the proceedings by appointing the committee immediately at the general meeting of creditors or by a decision of the creditors.[35] However, the Directive does not provide any limits on the number of committee members, [36] leaving it to the Member States to specify that matter. [37]

Furthermore, Member States may, pursuant to Article 45 (3), also provide for the committee of creditors to include cross-border creditors.[38] The wording of the provision is contentious, stating that "cross-border creditors are eligible for appointment to creditors' committees", which could mean that Member States are not obliged to allow their appointment to the committee.

Furthermore, Member States are also obliged to ensure the representation of different groups of creditors, in order to protect their interests. In this regard, the possibility is expressly provided for of appointing employee representatives to the committee,[39] as well as persons other than creditors themselves but represent the interests of a particular group of creditors.[40] In other words, the appointment of persons other than creditors, provided they represent the interests of certain groups of creditors, entails greater representativeness, making the committee more balanced and helps ensure that the Committee takes fair and balanced decisions.[41]

Upon closer examination, the policy reasons for such a decision lie in the fact that, although creditors who are members of the committee of creditors represent and

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35 By contrast, Article 59 of the Proposal provides for a relatively complex mechanism for representing different creditor interests. While such representation is necessary, the possibility of subsequent challenges to the committee's composition has been criticised in legal doctrine, as it may complicate the procedure and delay the committee's establishment. See in detail Van Galen, *op. cit.,* note 24, p. 4.

36 Comparative legal doctrine indicates that the creditors' committee represents creditors as a whole and should therefore reflect the different interests within the creditor body. This requirement must, however, be balanced against costs, which is why most legal systems limit the number of committee members. Wessels, *op. cit.*, note 30, p. 377.

37 Unlike the final text of the Directive, Article 61 of the Proposal fixed the number of members of the creditors' committee at between three and seven. This limitation was justified by considerations of efficiency, since a smaller committee may decide more easily, while the prescribed range still allowed for the representation of different categories of creditors. See in detail Wessels, *op. cit.,* note 30, p. 377.

38 This approach reflects the increasingly cross-border nature of insolvency proceedings and the need to address divergences between national legal systems through a common framework for cooperation and coordination among Member States. See in detail Das, I., *The Need for Implementing a Cross-Border Insolvency Regime within the Insolvency and Bankruptcy Code,* 2016, Vikalpa, Vol. 45, No. 2, 2020, p. 108.

39 See Parliament Report, art. 59(3)(1a); Directive, art. 59 (3).

40 Directive, art. 45 (2).

41 Parliament Report, art. 59 (3) (1a).

advocate the interests of the creditors, they often have conflicting interests among themselves. Therefore, it is necessary to ensure the representativeness of both small and represented groups, regardless of the amounts of the claims and their number. This objective is, to a certain extent, at odds with that set out in Article 45 (2), which states that "Member States must ensure that the composition of the committee of creditors fairly reflects, as far as possible, the different interests of creditors."

Furthermore, the Directive itself, in Article 46, provides for the possibility of the removal and replacement of members. Moreover, Member States must provide for such matters in their national law, and the reasons for this may include, amongst others, a serious breach of duties, a conflict of interest, wilful misconduct or gross negligence, etc.[42] In this regard, it is evident that the provisions on the removal and replacement of members serve to preserve the integrity of the creditors' committee. However, the vague criteria contained within them, such as "gross misconduct" for the removal of a member, can make the harmonisation of this provision difficult in practice. There is also a risk of inconsistent application by Member States, as well as unequal protection for creditors at an EU level.

3.4. Functioning and Powers of the Creditors' Committee

Member States must, in accordance with Article 47 of the Directive, lay down the rules governing the working methods of the committee of creditors, with regard to the voting procedure; who is entitled to vote, how quorum is to be secured and with regard to conflicts of interest; how information is to be kept and how records of the decisions taken are to be kept.

Subsequently, in accordance with Article 47 (2), there is a possibility to further determine the working methods of the committee of creditors through protocols.[43] The possibility of establishing a protocol is an important element of the Directive because, in addition to the rules set out above, it allows other rules of proceedings to be prescribed, which is of particular importance with regard to other non-mandatory but significant elements concerning the creditors' committee, such as the methods of appointment and removal of members, costs etc. At the same time, it allows other competent authorities, such as the court or an insolvency practitioner, access to information on the functioning of the committee itself.

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42 Directive, art. 46 (2).

43 By contrast, Article 63 (1) and (2) of the Proposal required the adoption of a protocol on working methods and specified the matters to be regulated by it. This was a more appropriate solution, as the adoption of such a protocol by the committee itself would have reinforced its position in the proceedings. See in detail Van Galen, *op. cit.*, note 24, p. 6.

Furthermore, Article 47 (3) provides for the possibility that participation and voting need not be in person only, but may be by electronic means, in order to keep pace with modern technologies and to enable cost-effectiveness and better participation in the functioning of the committee'. This is of particular importance for cross-border creditors.[44]

Furthermore, with regard to the functions, rights and duties of the committee of creditors,[45] these are laid down in Article 48. First and foremost, they are intended to ensure that Member States safeguard creditors' involvement in the proceedings and, *inter alia*, right to be heard by the insolvency practitioner,[46] the right to be consulted, and the right to be informed.[47] They may also appoint secretaries and seek external advisers to best represent their interests.[48] Indeed, the provision of this article is the fundamental provision regarding the role of the creditors' committee. In particular, the provisions of Article 48 (2) stipulate that "Member States must ensure that creditors' committees, in the performance of their activities, represent the interests of the creditors and act independently of the insolvency practitioner in the event of insolvency", which derives the committee's fundamental function as a representative body. Therefore, this article certainly succeeds in increasing the transparency of the proceedings. However, the effectiveness of its implementation depends on how restrictively these rules are prescribed in the national laws of the Member States.

3.5. Costs and Remuneration

Of particular interest is the provision of the Article 49, which deals with the costs and renumeration of the creditors' committee. In particular, Member States must

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44 On improved access to information and asset tracing in cross-border insolvency proceedings, see Moeliker, M., *Tracing Assets by Insolvency Practitioners*, Tijdschrift voor Insolventierecht, 2023.

45 In support of this, the Council's General Approach reduces the level of detail at EU level and leaves matters such as the organisation of the committee's work, the scope of its powers, its composition and mode of operation primarily to national law. Council General Approach, art. 58 (3).

46 By contrast, Article 64 (1) (c) of the Proposal expressly provides for the insolvency practitioner to be subject to the oversight of the creditors' committee, which some authors consider particularly significant as it strengthens the position of the creditors' committee. See in detail Van Galen, *op. cit.*, note 24, pp. 5-6.

47 On the basis of the Proposal, in particular Article 64, a narrowing of the scope of the creditors' committee's powers is evident. Indeed, the Proposal in Article 64(1)(e) provides for the committee's right to provide and receive information from creditors who represent the committee, which, according to authors in the literature, contributes to increased transparency of the proceedings, for example by convening a meeting of creditors when the circumstances of the case so require. See in detail Van Galen, *op. cit.,* note 24, p. 6.

48 Directive, art. 48 (1).

clearly specify who will bear and cover the costs incurred in carrying out the functions, rights and duties of the creditors' committee..[49] Such costs are covered by the insolvency estate, and it is important that the court or competent authority, or the insolvency practitioner, has the right to reduce them if they are disproportionate, irrational, etc.[50] In this regard, it is necessary to refer to the possibility for the insolvency practitioner to limit unjustified costs of the creditors' committee.[51]

On the one hand, such an approach can be justified because it is based on the need to preserve the insolvency estate and prevent costs that are not necessary for the committee's functioning, in order to conduct the proceedings more economically. On the other hand, such a measure creates uncertainity, given that the committee of creditors is a body intended to have a supervisory function. Since one of the committee's duties is to oversee the activities of the insolvency practitioner, the question arises as to whether the insolvency practitioner's authority to control the costs of the proceedings could affect the independence of the creditors' committee. In particular, it opens up the potential possibility of disapproving certain costs. Of course, the advantage of such an approach lies in protecting the estate, but its effectiveness depends on how restrictively these limitations will be applied in practice. Therefore, it remains to be seen whether this approach will weaken the role of the creditors' committee in insolvency proceedings.

3.6. Liability of the Members of the Creditors' Committee

With regard to the liability of creditors, Member States must ensure that at least one of the two proposed rules is applied, in accordance with Article 50 of the Directive. Namely, members of the creditors' committee should, as a rule, be exempt from personal liability for actions taken in their capacity as members in the committee's work, unless they have committed some offences, intentionally or through gross negligence, thereby jeopardising the creditors' interests.[52] In the absence of above, they are required to maintain insurance in place to cover any losses deriving from their liability.[53] Such a solution gives Member States the choice of which rule

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[49] Directive, art. 49 (1).

[50] Directive, art. 49 (2).

[51] Such a final arrangement stems from the Council General Approach, in particular Article 65 (2).

[52] By contrast, Article 66 of the Proposal contains a limited rule on the liability of creditors' committee members. It excludes personal liability except in cases of gross negligence, fraud, wilful misconduct or breach of fiduciary duty towards creditors. Since such duties may include oversight of the insolvency practitioner and the duty to inform creditors, the literature points to the need for indemnity insurance for committee members. See in detail Van Galen, *op. cit.,* note 24, p. 6.

[53] Directive, art. 50 (1) (b).

to apply, but it remains to be seen how to treat situations involving minor harm, for which there is a risk that the functioning of the committee may be obstructed.

4. CREDITORS' COMMITTEE UNDER THE CROATIAN BANKRUPTCY ACT: POSSIBLE IMPLICATIONS FOR TRANSPOSITION INTO CROATIAN NATIONAL LAW

In order to assess the compliance and implications of the Directive on the Croatian legal system, it is first necessary to present the institution of the creditors' committee as regulated by the provisions of the Croatian Bankruptcy Act. Special attention is paid to the composition, appointment and powers of the creditors' committee and the compliance of domestic solutions with the objectives and requirements of the Directive.

4.1. Establishment of the Creditors' Committee

According to the Bankruptcy Act, the creditors' committee is a special body of the insolvency proceedings, whose purpose is to protect the interests of creditors and to oversee the activities of insolvency practitioners.[54] The current legal framework implies that the creditors' committee is the only optional body in insolvency proceedings.[55] In particular, it is generally established where the insolvency estate is substantial, but also where there are particular issues to be addressed.[56] Accordingly, the existence of a creditors' committee in the Croatian legal system is conditioned by the circumstances of the specific proceedings. For example, if the number of creditors is smaller than the prescribed number or if it is a low-value insolvency proceedings, the committee will not be established.[57]

With regard to the establishment of the creditors' committee, the question arises of when the committee can be established. Thus, according to the Bankruptcy Act, the creditors' committee can be established only after the commencement of insolvency proceedings, i.e. the court can establish the creditors' committee and appoint its members prior to the first hearing.[58] Although, as a rule, the establish-

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54 Bankruptcy Act (Stečajni zakon), Official Gazette, No. 71/2015, 104/2017, 36/2022 and 27/24. In insolvency law, reference is made to the.*best creditor interest test*. See in detail McCormack, G., The European Restructuring Directive, Edward Elgar Publishing, Cheltenham, 2021, p. 177.

55 Čuveljak, J., *Komentar Stečajnog zakona*, Official Gazette, Zagreb, 2018, p. 294.

56 *Ibid.,* p. 297.

57 *Ibid*., p. 294.

58 Creditors generally participate in the creditors' committee. Judgment of the High Commercial Court of the Republic of Croatia, Pž-7504/2018-2, 8 January 2019 concludes the following: 'This court points out that, by operation of law, all of the debtor's personal creditors who, at the time the insolven-

ment of a creditors' committee is decided by the creditors at the creditors' general meeting,[59] as the key decision-making body of the insolvency proceedings.[60] Under the Article 44 of the Directive, Member States may decide to establish a creditors' committee even before the commencement of insolvency proceedings. Since domestic law does not provide for the establishment of a creditors' committee prior to the commencement of insolvency proceedings, it remains to be seen whether the national legislator will decide to introduce such an option.

The Croatian Bankruptcy Act, in terms of the powers of the committee, regulates the legal position of creditors, including in situations where the committee is not established, in a way that enables all creditors to exercise its functions. In particular, if there are fewer than five creditors, the powers of the creditors' committee will be vested in all creditors.[61] Such an approach can be justified because in practice it allows creditors to exercise their critical role in the proceedings, and at the same time does not generate additional costs within that same proceedings. Such a measure in Croatian law also corresponds to the text of the Directive from the provisions of the Article 44 (3) because it explicitly prescribes the cases when a creditors' committee does not have to be established. Therefore, it can be said that the solution from the Directive is already contained in Croatian law.

4.2. Appointment and Composition of the Creditors' Committee

The Bankruptcy Act also prescribes the composition of the creditors' committee. Namely, participation in the functioning of this body is conditioned primarily by a decision of the court or the creditors' meeting, and then by a specific appointment to the position of a member of the committee.[62] Accordingly, the creditors' committees requires representation of insolvency creditors with the largest claims, but also creditors with small claims, as well as representation of representatives of the debtor's former employees.[63] In addition, creditors with separate satisfaction

cy proceedings are commenced, have any pecuniary claim against him, have the status of bankruptcy creditors (Bankruptcy Act, art. 137(1)).' Therefore, to acquire that status, it is not necessary for the creditor's claim to have been previously established by a decision on the determination of claims, as the appellant incorrectly believes.".

59 Art. 97 (1) of the Bankruptcy Act.

60 Marković, N., *Uloga stečajnog upravitelja*, in: Barišić, D. *et al.,* Stečajni postupak: aktualna pitanja zakonodavstva i pravne prakse, Inženjerski biro, Zagreb, 2012, p. 64.

61 Art. 96 (6) of the Bankruptcy Act.

62 Marković, *op. cit.,* note 61, p. 64.

63 Art. 96 (2) of the Bankruptcy Act.

right, as well as persons other than creditors, who can contribute their knowledge to the functioning of the committee, may also become members.[64]

Moreover, representatives of, for example, chambers of crafts or chambers of commerce can be appointed on behalf of creditors.[65] Thereby, the maximum number of committee members can reach nine, but must be odd,[66] which is intended to avoid burdening the committee itself and the consequent burden of the insolvency estate with costs.[67] The described legislative framework also seeks to ensure equal representation of different groups of creditors, which is of particular importance because it prevents creditors with larger claims from having a decisive influence on the course of the proceedings. In particular, it is believed that such standardisation of the institute gives importance to transparent proceedings and thereby increases legal certainty.

Croatian law does not explicitly provide for the possibility of cross-border creditors participating in the creditors' committees. However, in Article 13.a (2) of the Bankruptcy Act, according to which a cross-border creditor may, in cross-border cases, lodge a claim, submit a restructuring plan or a repayment plan, send notifications to creditors and lodge objections or legal remedies.[68] Regarding employee representatives, they should be represented in the creditors' committee if creditors participate with significant claims,[69] which in, to some extent, limits the position of the employee as a creditor.

By comparing the text of the Directive and the provisions of the Bankruptcy Act, it is evident that the Bankruptcy Act follows the extensive representation of insolvency creditors in the creditors' committee, which largely overlaps with the objectives of the Directive. It can be concluded that the Bankruptcy Act in this regard it provides for almost all optional forms of representation of different groups of creditors in the creditors' committee, except that it does not explicitly prescribe the possibility of appointing cross-border creditors to the creditors' committee. Therefore, it remains to be seen whether the Croatian legislator will amend these provisions in a way that would explicitly provide for their application in insolvency proceedings. In any event, it is recommended to implement them into national law in order to achieve the aim and purpose of the Directive. As an additional national transposition problem, it is worth noting the marked passivity of credi-

64 Art. 96 (3) of the Bankruptcy Act.

65 Čuveljak, *op. cit.,* note 56, p. 296.

66 Art. 96 (4) of the Bankruptcy Act.

67 Čuveljak, *op. cit.,* note 56, p. 296.

68 Art. 13a (2) of the Bankruptcy Act.

69 Art. 96 (2) of the Bankruptcy Act.

tors in Croatian insolvency proceedings in practice. This is most often due to the low attendance of creditors at meetings, which entails a reduced efficiency of the proceedings.[70]

4.3. Powers of the Creditors' Committee

The Croatian Bankruptcy Act does not perceive the creditors' committee solely as an advisory body, but as a body that the legislator authorises and obliges to assist and supervise the insolvency practitioner in the conduct affairs within the insolvency proceedings.[71] In other words, within the scope of its activities, the creditors' committee is required to perform tasks consisting of considering the insolvency practitioner's report, reviewing the accounting records, lodging objection, approving the estimated costs of the proceedings and, ultimately, providing an opinion at the request of the court.[72] Although the literature previously warned about the lack of constant oversight of the activities of the insolvency practitioner, the role of the creditors' committee today represents a key mechanism for overseeing the proceedings.[73]

Moreover, members of the committee can now also request the removal of an insolvency practitioner, for important reasons, such as failure to submit a report on the course of the insolvency proceedings, or in the event of failure to realise assets forming part of the insolvency estate, and especially if he fails to comply with a court order. In doing so, the court takes the position that a request for removal can only be submitted by the creditors' committee or the general meeting of creditors. Accordingly, if the request for removal is not submitted by either the committee or the general meeting of creditors, the court shall dismiss the application as inadmissible. Furthermore, the prescribed task of the committee is particularly emphasised, according to which the creditors are obliged to approve the estimated costs of the proceedings. Such an approach undoubtedly implies the significance of the Committee in the oversight of assets. This is precisely why the legislator grants the committee the possibility to control the costs of the proceedings, in order to contribute to the preservation of the insolvency estate. In other words, if creditors did not control the costs of the proceedings, unjustified costs could occur and consequently the insolvency estate would be reduced, which would pose a

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70 Zubak, G., *Pravni položaj i uloga skupštine vjerovnika u stečajnom postupku*, IUS-INFO, Available at: [https://www.iusinfo.hr/strucni-clanci/CLN20V01D2024B2010], Accessed 18 March 2026.

71 Čuveljak, *op. cit.*, note 56, p. 299.

72 Article 98 (2) of the Bankruptcy Act.

73 Bodul, D.; Vuković, A., *Još jedna reforma stečajnog zakonodavstva - funkcionalizacija stečajno pravne zaštite ili placebo efekt*, Zbornik Pravnog fakulteta u Rijeci, Vol. 36, No. 1, 2015, p. 203.

certain risk to creditors legal position. Case law results in a limitation of the powers of the committee, in the sense that it does not have decisive powers regarding the liquidation of assets, but rather gives an exclusive opinion, and final decisions remain within the jurisdiction of other insolvency proceedings bodies.

In addition, what supports increased control over the insolvency proceedings itself is expressed through the possibility of lodging an objection with the court. Also, in accordance with the provisions of the Bankruptcy Act, the duty to report to the court on the course of the proceedings and the state of the insolvency estate is emphasised. It follows that the creditors' committee is not fully independent of the creditors. Therefore, in general, with this approach to the duties of the committee, the legislator introduce greater control and enhanced oversight of the proceedings, but also seeks to reduce potential irregularities in the activities of the insolvency practitioner. It can be concluded that the described powers of the creditors' committee in the Bankruptcy Act overlap with those set in the Directive.

4.4. Participation in the Functioning of the Creditors' Committee

Upon closer examination of the issue of oversight over the internal functioning of the committee, the provisions of the Bankruptcy Act indicate that the committee decides on issues within its scope at meetings of the committee, with the presence of a majority of members.[74] In other words, in order to adopt valid decisions, the presence of a majority of members of the creditors' committee is required.[75] Both the court and the insolvency practitioner are required to be invited to the meetings of the committee, however, they do not have voting rights.[76] Notwithstanding this, the meetings of the committee may be validly held without their presence, but given the duty to submit reports to the committee, most meetings cannot be held without the presence of the insolvency practitioner.[77] Furthermore, it is stipulated that the first meeting, at which the members elect the chair of the creditors' committee, is convened by the court,[78] and subsequent meetings are also authorised to be convened by the chair of the committee.[79] However, such an approach does not mean that the judge is not able to convene a meeting when it is necessary to obtain the opinion of the creditors' committee, which relates to issues within

74 Article 101 (1) of the Bankruptcy Act.

75 Čuveljak, *op. cit.*, note 56, p. 309.

76 *Ibid.,* p. 310.

77 *Ibid.*

78 Art. 101 (2) of the Bankruptcy Act.

79 Art. 101 (3) of the Bankruptcy Act.

their scope of competence.[80] In the event of a tie vote, the matter in question is decided by the court,[81] which implies that, in certain cases, the court is entitled to vote.[82] This is intended to simplify the decision-making process in the case of conflicting views and ultimately prevent a potential delay in the proceedings. The importance of the will of the bankruptcy creditors is also expressed through the possibility of the court annulling the committee's decision, if such a decision is contrary to the common interest of the bankruptcy creditors.[83] It aims to "correct" decisions that could be contrary to the interests of the creditors or the insolvency estate. Such clearly defined rules of proceedings of the committee's also serve to ensure the timely adoption of decisions that are important for the course of the insolvency proceedings.

The current text of the Bankruptcy Act does not explicitly provide for the possibility of online participation in the functioning of the creditors' committee. However, such a possibility may nevertheless be inferred from the broader context of the insolvency proceedings and the application of Article 115 of the Civil Procedure Act[84] to insolvency proceedings in Croatia. The provision stipulates that the court may order that the hearing be held remotely, with the use of appropriate audio-visual devices and a technological platform for remote communication, or that certain evidence be presented in that manner.[85] Nevertheless, it would be preferable to expressly provide for this in order to clearly achieve and apply the objectives of the Directive in the practice of Croatian insolvency proceedings.

4.5. Removal and Liability of Members

The court may dismiss a member of the creditors' committee *ex officio* or at his request.[86] Namely, it is authorised to do so throughout the insolvency proceedings, if there is no longer any interest in their being members of the committee or for other, particularly important reasons.[87] This is intended to ensure the effective

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80 Čuveljak, *op. cit.,* note 56, p. 309.

81 Art. 101(6) of the Bankruptcy Act.

82 Čuveljak, *op. cit.*, note 56, p. 310.

83 Art. 101 (7) of the Bankruptcy Act in conjunction with Article 108.

84 Art. 115 of the Civil Procedure Act (Zakon o parničnom postupku), Official Gazette, No. 4/1977, 36/1977, 36/1980, 6/1980, 69/1982, 43/1982, 58/1984, 74/1987, 57/1989, 20/1990, 27/1990, 35/1991, 53/1991, 91/1992, 112/1999, 129/2000, 88/2001, 117/2003, 88/2005, 2/2007, 96/2008, 84/2008, 123/2008, 57/2011, 148/2011 – consolidated text, 25/2013, 89/2014, 70/2019, 80/2022, 114/2022, 155/2023, 146/2025.

85 *Ibid.*

86 Art. 99 (1) of the Bankruptcy Act.

87 Čuveljak, *op. cit.* note 56, p. 301.

functioning of the creditors' committee and prevent the possibility of its abolition, if the number of members were to decrease. Of course, the court is obliged to adhere to the rules on the mandatory composition of the creditors' committee.[88] What the Bankruptcy Act additionally provides is the possibility of appointing another member of the committee by the creditors. Accordingly, if the number of members were to fall below three due to removal, the court is obliged to appoint a new member of the committee.[89] For instance, if a member were removed from office as a member of the Committee due to a conflict of interest, the court may appoint a new member, so that the proceedings can continue without any disruption. The legislator next defines the issue of the liability of the members in the event of a breach. In other words, in the event of a breach of their legal duties, the committee members are obliged to compensate creditors with separate satisfaction right and insolvency creditors,[90] which demonstrates the importance of the duty that the creditors' committee has towards creditors, but also the responsibility for the consequences of performing that duty. Consequently, in action for damage, it is necessary to prove that the committee member breached his statutory duty by a culpable act or omission, which caused the clamant to suffer certain harmful consequences.[91]

The domestic legal literature has discussed whether the Croatian legal framework reduces the interest of creditors in participating in committee, given that taking on such a function also means taking on responsibility for potential damage, because the establishment of the above-mentioned strict rules on liability may not motivate creditors' committee members to act within the committee, expecting that other members will take on the obligations, which may lead to passivity of members of the creditors' committee.[92] However, the aforementioned discussions become irrelevant after the implementation of the Directive, since the text of the Directive provides an alternative option for Member States to either introduce liability of committee members or to conclude a liability policy for damage caused by members of the creditors' committees in in the performance of their duties within. Therefore, it remains to be seen which alternative the Croatian legislator will decide on, although it is assumed that it will remain in favour of the existing solution and will not make any amendments to the Bankruptcy Act in this regard.

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88 *Ibid.*

89 Art. 99 (2) of the Bankruptcy Act.

90 Art. 100 of the Bankruptcy Act.

91 Čuveljak, *op. cit.*, note 56, p. 308.

92 McKenzie, T. A., *Representing the Interests of Creditors in Insolvency Proceedings, American Bankruptcy Institute Law Review*, Vol. 15, 2007, p. 5.

4.6. Costs and Remuneration

The Croatian Bankruptcy Act provides for the right to remuneration for work on the committee, as well as the right to reimbursement of expenses. Accordingly, the legislator also determines the amount of remuneration for each day spent performing tasks within its scope. Furthermore, a special remuneration may exceptionally be determined for a member of the committee who is not a creditor, given the scope of the tasks entrusted to him, which is decided by the court, in a special decision, based on the proposal of the creditors' committee. This exception was introduced because experts are often appointed to the creditors' committee who, although they are not representatives of creditors, undoubtedly contribute to the functioning of the committee with their knowledge. This precise legislative regulation, which aims to prevent the granting of disproportionate fees and remuneration, aims to ensure the protection of the insolvency estate from unnecessary costs, but at the same time fair remuneration for the members of the creditors' committee. It can be concluded that this solution also corresponds to the approach of the Directive because, in relation to costs, according to which the costs of the proceedings are generally covered from the insolvency estate. Therefore, no major changes to the existing provisions of the Bankruptcy Act are expected here.

The cost issue is of particular importance because it may directly affect whether a creditors' committee is established at all. Although the Croatian Bankruptcy Act contains relatively developed provisions on creditors' committees, they appear to be established rather rarely in practice, mainly because they generate additional costs. This shows that the practical role of the committee depends not only on the existence of legal rules, but also on whether its establishment is economically justified in the particular proceedings.

5. INSTEAD OF CONCLUSION: IMPLICATIONS OF THE TRANSPOSITION OF THE INSOLVENCY III DIRECTIVE INTO THE CROATIAN INSOLVENCY REGIME: WHAT TO EXPECT?

The Insolvency III Directive was adopted on 30 March 2026, after an extensive legislative proceeding of almost 3.5 years. The Directive introduces a range of objectives and innovations in terms of introducing minimum harmonisation of certain aspects of insolvency law. In relation to the creditors' committee, the Directive seeks to unify the differences currently existing in national laws and ensure a minimum of harmonisation in order to fairly and evenly represent the interests of creditors in insolvency proceedings, all in order to increase the competitiveness of the EU capital market.

Following an analysis of the final text of the Directive, it can be concluded that the Directive is highly successful in terms of the set objectives, at least on paper. However, it remains to be seen how the national transpositions will proceed, and to what extent the objectives and proposed amendments will be effectively implemented in the practice of the Member States.

With regard to the current regulation of the Bankruptcy Act concerning the creditors' committee, it is evident that the Croatian Bankruptcy Act already contains a highly sophisticated, developed and precise legislative regulation of the institution of the creditors' committee. In other words, the Bankruptcy Act prescribes in detail the legal rules regarding the establishment, appointment, dismissal, composition, powers, costs and remuneration of committee members, the functioning and the responsibilities of the creditors' committee.

However, certain open issues introduced by the Directive remain, and those are not explicitly or at all contained in the Bankruptcy Act. These include, for example, the possibility of establishing a creditors' committee even before the commencement of insolvency proceedings, the possibility of cross-border creditor participation in the creditors' committee, etc.

In conclusion, the regulation of the creditors' committee in the Bankruptcy Act is currently already highly aligned with the provisions of the Directive.

Therefore, the existing framework in Croatia should not only focus on formal alignment with the Directive, but also on the conditions under which creditors' committees can exist. Accordingly, the Croatian legislator should not only maintain the existing provisions on creditors' committees, but should clarify how the economic justification for their establishment is assessed in practice. This should not diminish the importance of the creditors' committee as an instrument for creditor participation. Instead, since its establishment entails additional costs, the decision to establish it should be based on whether the committee can effectively contribute to the proceedings in a way that justifies the burden on the insolvency estate. Such an approach would better align the objective of the Directive on improving creditor participation with the practical reality of Croatian insolvency proceedings.

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Review article

THE DIRECTIVE ON THE HARMONISATION OF CERTAIN ASPECTS OF INSOLVENCY LAW: TOWARDS A MORE ATTRACTIVE EU CAPITAL MARKET

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ABSTRACT

The European Union has recognised that the that divergences in insolvency proceedings among Member States represent a significant barrier to the further development of the EU Capital Market. Therefore, on 21st April 2026, the Directive on harmonisation of certain aspects of insolvency law (hereinafter: Directive) entered into force. The Directive aims to introduce minimum harmonisation standards for certain aspects of insolvency law to encourage cross-border investments within the EU market and to ensure greater legal certainty, comparability, and transparency across Europe's insolvency regimes. The EU covered 6 key areas of harmonisation: avoidance actions in insolvency proceedings, tracing assets, the pre-pack proceeding, directors' duty, creditors' committee, simplified winding-up proceedings for microenterprises and measures enhancing transparency of national insolvency laws. The deadline for transposing the Directive into national law is 22 January 2029, or 10 July 2029 for the introduction of the BARIS banking account system. Although all of the aforementioned represent very ambi-

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tious goals for the European legislator with significant potential, this paper aims to provide a preliminary assessment of the directive's final text. This paper focuses on a critical analysis of the provisions of the Directive relating to avoidance actions in insolvency proceedings, pre-pack proceedings, directors' duties, the creditors' committee. These provisions are critically compared with the existing provisions of the Croatian Insolvency Act to provide de lege ferenda guidelines to the Croatian legislator for the transposition of the Directive into the domestic legal system. Finally, the paper also analyses potential issues in transposing the Directive into the Croatian legal system, which could result in a paradoxical effect, primarily reduced legal certainty and difficulty in applying the Directive's established objectives in practice.

Keywords: *Avoidance actions, Directors' duty and creditors' committee, The pre-pack proceeding*

1. INTRODUCTION: OVERVIEW AND PURPOSE OF THE DIRECTIVE

Strengthening the competitiveness of the EU capital market through increased transparency and simplification of national insolvency procedures has been one of the EU's main goals in the past few decades. One of the key reasons the EU market lags behind competitive capital markets (USA, UK, Singapore, etc.) is attributable to the lack of harmonised rules governing insolvency procedures at the EU level, i.e., the large discrepancies in national insolvency regimes across EU Member States. At the EU level, insolvency is in competence of the Member States; therefore, we currently have 27 parallel insolvency procedures that differ greatly due to differing historical legal traditions and circumstances across the Member States' national markets.

At the EU level, there are unification and harmonisation documents that regulate certain issues of insolvency law. So we currently have The Recast Insolvency Regulation (Regulation (EU) 2015/848)[1], which has applied from June 26, 2017 and which regulates cross-border issues at the EU level and the Directive on Preventive Restructuring (Directive EU 2019/1023)[2], which Member States were required to transpose by 17 July 2022 and it deals with certain issues of harmonisation of

[1] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), OJ L 141, 5 June 2015. This research was funded by the European Union - NextGenerationEU through the project Green and Digital Transition in the European Union: Legal and Economic Aspects (ZEDEU, ID: 581-UNIOS-89). However, the views and opinions expressed are those of the author(s) only and do not necessarily reflect those of the European Union or the European Commission. Neither the European Union nor the European Commission can be held responsible for them.

[2] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, OJ L 172, 26 June 2019.

insolvency procedures in national law. However, a substantial part of substantive insolvency law remained unharmonized at the EU level; therefore, stakeholders in insolvency proceedings face numerous difficulties and legal uncertainties when participating in national proceedings across the EU single market.

To address the alleged issue, the EC published the Proposal for the Insolvency III Directive on December 7, 2022 (hereinafter: EC Proposal).[3] Since the insolvency law is very extensive, the EC narrowed its proposal to six key points concerning the introduction of minimum harmonisation standards regarding avoidance actions in insolvency proceedings, tracing assets, the pre-pack proceeding, directors' duty, creditors' committee and key information fact sheets (Article 1(1) of the Directive).

In its proposal, the EC states that it has been observed that there are different outcomes when conducting insolvency proceedings depending on the Member State in which they are conducted, which consequently leads to large differences in terms of the time of completion of the procedure itself, as well as the very solvency of the actors participating in the proceedings in question. As the Commission noted, the duration of the procedures and the low level of collection are key factors for the creditor's decision to be included in insolvency proceedings, but they also represent the backbone for the investor's and creditor's decision, which all consequently leads to the unavailability of sources of financing for entrepreneurs and their possible demise or expansion of activities.[4]

Following the aforementioned EC Proposal, the Council of the European Union reached a general approach on 23 May 2025 (hereinafter: General approach)[5] which was subsequently submitted for further consideration and negotiations with the European Parliament. On July 1 2025, the European Parliament adopted its position as another step in the legislative process of adopting the directive in question, which, in principle, takes a flexible position and, on many issues, leaves it to the Member States to change or tighten the existing rules in national legislative systems with minimal harmonisation (hereinafter: Report).[6] This Directive shall take effect 20 days following its publication in the Official Journal of the European Union. Member States are required to implement it into their national leg-

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3 European Commission, *Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law*, COM(2022) 702 final, 2022/0408 (COD), 7 December 2022.

4 *Ibid.,* Explanatory Memorandum, para. 3.

5 Council of the European Union, *Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law – General approach*, 9257/25, 23 May 2025.

6 European Parliament, Committee on Legal Affairs, *Report on the proposal for a directive of the European Parliament and of the Council harmonising certain aspects of insolvency law*, COM(2022) 702 final, A10-0126/2025, 1 July 2025.

islation by 22 January 2027. The rules related to the establishment of the BARIS bank account system will become applicable as of 10 July 2029.

2. OBJECTIVES, STRUCTURE AND SCOPE OF APPLICATION

One of the Directive's main objectives is to mitigate barriers arising from fragmentation of national insolvency laws.[7] The Directive's aim is to introduce a minimum set of harmonised rules into the Member States' cross-border and domestic insolvency proceedings.[8] The process leading to the final version of the Directive was long and complex, and the original EC Proposal from December 2022 was significantly narrowed in the final version published on April 1, 2026.[9]

As already stated in the introduction, the subject matter in accordance with Article 1(1) of the Directive refers to avoidance actions in insolvency proceedings, tracing assets, the pre-pack proceeding, directors' duty, creditors' committee and key information fact sheets.[10]

The rules on avoidance actions exclude collective proceedings that fall under insolvency law, except for preventive restructuring procedures and interim proceedings.[11] Titles on pre-pack proceedings creditors' committees apply only to legal persons as debtors.[12]

Pursuant to Article 1(3) of the Directive, its scope excludes entities listed in Article 1(1), first subparagraph of Directive 2014/59/EU of the European Parliament and of the Council[13], debtors that are reinsurance or insurance undertakings, investment firms or collective investment undertakings, credit institutions, central securities depositories, public bodies under national law and non-entrepreneurial natural persons.[14]

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7 Recital (1) of the Directive.

8 Freshfields Bruckhaus Deringer, *EU Insolvency Law Harmonisation: Approaches Reach the Finish Line*, Freshfields, Available at: [https://www.freshfields.com/globalassets/noindex/documents/eu-insolvency-law-harmonisation-approaches-the-finish-line-v8.pdf], Accessed 14 April 2026, p. 1.

9 Compare the EC Proposal with the final text published in OJ from 1 April 2026.

10 Article 1(1) of the Directive.

11 Article 1(2) of the Directive.

12 Article 1(4) of the Directive.

13 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, OJ L 173, 12 June 2014.

14 Article 1(3) of the Directive.

3. TRANSPOSITION INTO NATIONAL LAW

3.1. Avoidance actions

Provisions on avoidance actions serve to protect creditors and act in their favour, but also ensure that the result is the return of property alienated by the refutable legal action to the insolvency estate.[15] Although the Directive Title II regulates several issues and institutes of avoidance actions, this paper is based only on some of the institutes that have been the most discussed in the legislative procedure or on which the national legislator should intervene in the existing text of the Bankruptcy Act.

The rules on avoiding the debtor's legal acts were designed as a minimum standard, leaving Member States free to retain, strengthen, or introduce provisions ensuring greater creditor protection[16]. In this regard, one of the Commission's proposals was to establish special conditions for avoidance actions, under which the European Commission distinguishes between situations involving legal actions from which creditors benefit by satisfaction or collateralisation and situations in which a creditor's valid claim is satisfied or guaranteed to the detriment of others [17].

The condition that must be met in both situations, according to the EC Proposal, is that the detrimental act was committed within three months prior to the filing of the application for insolvency proceedings, or within three months after the filing of such an application and debtor's inability to pay its debt existed. However, in a situation where a due claim has been satisfied or secured to the detriment of the creditor, an additional condition is that such an act may be void, voidable or unenforceable if the creditor knew or should have known about the debtor's inability to pay his due debts or that an application for the initiation had been filed, while such knowledge is not required in a situation where legal acts from which creditors benefit by satisfaction or collateralisation are contested.[18]

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[15] For more on avoidance actions in domestic literature, see: Čuveljak, J., *Time Limits for Bringing Actions to Challenge Legal Acts in Insolvency Proceedings*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 43, No. 2, 2006, pp. 115–128; Bilić, A.; Bratković, M., *Avoidability of Intentional Prejudice to Creditors of the Insolvency Debtor*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 71, No. 3–4, 2021, pp. 443–476; Dika, M., *Avoidance of Legal Acts in Insolvency Proceedings*, in: *Treća novela Stečajnog zakona,* Zagreb, Narodne novine, 2003, pp. 145–209; Čuveljak, J., *Avoidance of the Debtor's Legal Acts on the Grounds of Intentional Prejudice to Creditors in Insolvency Proceedings*, Hrvatska pravna revija, Vol. 6, 2010, pp. 74–85; Dika, M., *Avoidance of the Insolvency Debtor's Legal Acts*, in: *Aktualnosti hrvatskog zakonodavstva i pravne prakse*, Zagreb, Organizator, 2000, pp. 217–264; Bilić, A., *Preconditions for the Avoidance of the Debtor's Legal Acts under the Obligations Act and the Insolvency Act*, in: *Zbornik 55. susreta pravnika, Opatija '17,* Zagreb, Hrvatski savez udruga pravnika u gospodarstvu, 2017, pp. 281–344.

[16] Pool, J.M.W.; Boon, J.M.G.J.; Vriesendorp, R.D., *Harmonisation of European Insolvency Law: Operation Patchwork has Commenced, but Where Will it Take Us?*, *TvI*, 2023, No. 11, 16 May 2023, p. 5.

[17] Article 6(2) of the EC Proposal.

[18] Article 8(1)(b) of the EC Proposal.

The General Approach, however, excludes "should have known"[19] as a standard of care from the text, thereby providing a large degree of protection for creditors with whom a potentially detrimental act has been concluded. Parliament endorses this approach and, in its Report through Amendment 89, retains the legal standard of the creditor's "knowledge" of the debtor's inability to meet due obligations, or about the submission of a request, or, where no formal request exists, about the adoption of a decision to open insolvency proceedings.[20] The final text of the directive supports the position of the Council and Parliament and applies only the "knowledge" of the creditor as a legal standard of care, completely omitting the stricter category of "should have known".[21]

The Directive in question, unlike the Bankruptcy Act, does not separately regulate congruent and incongruent coverage, although it mentions and clearly distinguishes between them in its recitals[22]. The Bankruptcy Act, both in the provisions of Article 199, which regulates congruent coverage[23], and in the provisions of Article 200, which regulates incongruent coverage[24], regulates the presumption of knowledge of the creditor, the realisation of which is necessary for such a legal action to be successfully avoided. In the remainder of the text, the authors of this article will analyse the need to implement Article 7(1) of the Directive[25] and Article 7(2) of the Directive[26] into the text of the Bankruptcy Act regarding the provisions of congruent and incongruent coverage.

In cases of congruent coverage under the Bankruptcy Act, a legal act can be set aside if it took place within three months before the initiation of bankruptcy proceedings, the debtor was insolvent, and the creditor knew of that insolvency.[27] In other words, the Bankruptcy Act allows the avoidance of the legal act that is in accordance with the content of the creditor's rights if all three prerequisites are cumulatively met, while the Directive, on the other hand, sets the same deadline for the avoidance of a legal act in which creditors benefit from satisfaction or col-

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19 Council of the European Union, *op. cit.,* note 5, p. 66.

20 European Parliament, *Report*, Amendment 89, Art. 6(2), first subparagraph, point (b).

21 Article 7(2)(b) of the Directive.

22 Recital (11) of the Directive.

23 Which represents a method of settlement in which the creditor is provided with or provided with security or settlement that is in accordance with the content of his right.

24 What constitutes a method of settlement in which the creditor is provided with or given secured or settlement that is not in accordance with the content of his right.

25 Which regulates the avoidance of detrimental legal acts that benefit a creditor or a group of creditors through satisfaction or collateralisation.

26 Which provision governs the avoidance of detrimental legal acts in cases where a creditor's due claim has been satisfied or secured as owed.

27 Article 199(1) of the Bankruptcy act Official Gazette No. 71/2015, 104/2017, 36/2022, 27/2024.

lateralisation (three months before the filing of the proposal), and also regulates the condition of the debtor's inability to pay debts, but in this case, it does not set the condition of the creditor's knowledge of such inability. Based on the above, the authors of this article conclude that the domestic legislator is faced with the challenge of amending the provision of Article 199, Paragraph 1 of the Bankruptcy Act, given that the additional requirement of creditor knowledge constitutes an aggravating circumstance for actively legitimized persons in proving and subsequently successfully avoiding a legal act committed to the detriment of the creditor, when it comes to congruent settlement.

Reflecting the aim and spirit of the Directive, which permits Member States to adopt requirements or presumptions that ease the burden of proof for the party alleging that a such an act is void, voidable or unenforceable[28], it is yet to be determined whether the national legislator will acknowledge the need to amend the Article as outlined above. The situation is different with the regulation of the institute of incongruent coverage, given that the provision of Article 200, Paragraph 1, Point 2 of the Bankruptcy Act already contains the possibility of challenging a legal act that was undertaken within three months before the submission of the proposal, and the debtor was unable to pay[29], while other cases only represent a greater level of creditor's protection than it is provided by the Directive in the provision of Article 7, Paragraph 1.

With regard to the situation previously mentioned, where the Directive allows for the possibility of avoidance a legal act in the case of a due creditor's claim that has been satisfied or collateralized if all three prerequisites are met (i.e. it was committed within three months before the submission of the proposal and in that time the inability of the debtor to pay its due debts existed, and the creditor knew of the inability or of submitting the proposal or decision)[30], the domestic legislator, in accordance with the author's position, should not make changes to the provisions governing congruent coverage, given that such a situation is already prescribed by the first paragraph of Article 199 of the Bankruptcy Act. The same applies to incongruent coverage, given that the Bankruptcy Act does not provide in any provision of Article 200 that all three prerequisites must be met in order for a legal, that is not in accordance with the content of the rights of the creditor whose due claim has been settled and secured to be challenged, to be avoidant, but rather provides more possibilities for challenging such a legal act than the Directive does.

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28 Recital (8) of the Directive.

29 Article 200(1)(2) of the Bankruptcy act.

30 Article 7(2) of the Directive.

Therefore, given that the Directive sets a baseline for avoidance actions and allows Member States to adopt or retain rules that better protect creditors, it is anticipated that the domestic legislator will not modify the existing provisions of the Bankruptcy Act in this regard.

A major difference between the EC Proposal and the General Approach is also reflected in the reduction of the time limits for challenging actions that were intentionally taken to the detriment of creditors. Article 8 of the EC Proposal regulates that Member States ensures that legal actions that were intentionally taken to the detriment of creditors can be challenged in the event of cumulative fulfillment of the conditions, including that such act was perfected within four years before the application to initiate proceedings was filed or after it was filed, and the counterparty knew or should have known about such a harmful intention of the debtor[31]. The General Approach shortens the time limit in question by half and requires, as a standard of care, only that the counterparty with whom the legal act was taken knew about the intention of the debtor, in which text the standard "should have known"[32] is omitted.

The Parliament, on the other hand, strikes a balance between the Commission and the Council, providing for such a time limit of three years[33], but, just like the Council, it omits the legal standard "should have known"[34]. Although the European Parliament accepts the Commission's proposal that knowledge is presumed if the counterparty was related to the debtor, in its amendment it relativizes the aforementioned provision and emphasizes that such a presumption must be rebuttable, which allows passively legitimized persons who are related closely to the debtor to prove before the court, in the procedure provided for that purpose, that they were unaware of such intention of the debtor.[35]

With regard to the establishment of rules on legal acts intentionally taken to the detriment of creditors, the final text of the Directive provides that two conditions must be met cumulatively for such a legal act to be avoidable. The first condition requires that the legal act was taken within two years before the request to open proceedings was filed, and if there is no such request, then within two years before the court's decision, or after the request or decision was filed and before the open-

31 Article 8(2) of the EC Proposal.

32 Council of the European Union, *op. cit.*, note 5, p. 68.

33 European Parliament, *Report*, Amendment 89, Art. 8(1), first subparagraph, point (a).

34 European Parliament, *Report*, Amendment 99, Art. 8(1), first subparagraph, point (b).

35 European Parliament, *Report* Amendment 100, Art. 8(1), second subparagraph.

ing of insolvency proceedings. The second condition is the other person's knowledge of the debtor's intention to cause harm to the creditors.[36]

Legal acts intentionally detrimental to creditors are recognized by the domestic legislator as the most severe, which is why they can be avoided within the longest time limits.[37] Considering that the intention to cause detriment is a key element in this type of avoidance, it is not required that the debtor was insolvent in the moment legal act was carried out.[38]

Unlike the two-year period before filing a request for opening the insolvency proceedings imposed by the Directive, the Bankruptcy Act, by the provision of Article 202, paragraph 1, regulates that an action that was intentionally taken to the detriment of a creditor may be avoided if it was taken in the last ten years before filing a request for opening the proceedings or thereafter, if, at the time the legal act was concluded, the other party was aware of the debtor's intention.[39] Given that the domestic legislator undoubtedly ensures greater protection of creditors and the bankruptcy estate by prescribing such a long period for taking legal action that was done with the intention of detriment creditors, and the Directive is intended to provide a baseline level of protection with regard to rebuttable actions that are detrimental to creditors, it can be assumed that the provision in question will not be subject to amendments by the domestic legislator.

However, the difference between the Directive and the Bankruptcy Act is also reflected in how they regulate the other party's presumed knowledge of the debtor's intention. According to the Directive's final text, the presumption applies only to a person considered to be related to the debtor.[40] Conversely, the Bankruptcy Act assumes knowledge of intent if the other party knew about the impending insolvency and that creditors would be harmed by such an action.[41] In the very next provision, the domestic legislator also introduces a presumption of knowledge of the impending insolvency and that creditors would be harmed by such an action if the creditor was aware, or ought to have been aware, of circumstances indicating the debtor's inability to meet its obligations and that the act would prejudice other creditors.[42] Just as in the above example, by prescribing further presump-

36 Article 9(1) of the Directive.

37 Čuveljak, J., *Komentar Stečajnog zakona*, Zagreb, Narodne novine, 2018, p. 653.

38 N.B. Pannevis, *The European harmonisation of avoidance rules, a Dutch perspective on reshaping an age-old instrument*, TvI 2023/12, 16 May 2023, p. 6.

39 Article 202(1) of the Bankruptcy act.

40 Article 8(1) of the Directive.

41 Article 202(1) of the Bankruptcy act.

42 Article 202(2) of the Bankruptcy act.

tions of knowledge of creditors, the domestic legislator provides a greater scope of protection for the bankruptcy estate than is provided by the provisions of the Directive; therefore, in this respect, no intervention by the legislator in the existing provisions of the article regulating acts intentionally detrimental to creditors is expected.

The Directive further sets out provisions concerning transactions made without consideration or for clearly insufficient consideration, as also regulated under the Bankruptcy Act [43], but unlike the domestic legislator who provides that such actions must be taken within a four year period prior to submission of the request to open proceedings, the European legislator provides that such actions must be taken within a period twelve months before the request was filed, and in the absence of such a request, within the twelve months preceding the decision to commence insolvency proceedings, or in the period following the submission of the request or the adoption of the decision and prior to the opening of proceedings.[44] The provision in question does not contain subjective conditions, since such transactions do not deserve special legal protection if the other party gains a benefit without appropriate compensation or counter-performance[45], and at the same time, such actions may also constitute act intentionally detrimental to creditors because the lack of appropriate counter-performance implies that there was an intention on the part of the bankruptcy debtor and there was the knowledge of the opponent party of such an intention.[46]

The legislative process also saw debate over the limitation period for claims arising from a void, voidable, or unenforceable legal act. Pursuant to Article 9 of the EC Proposal, avoidance actions must be initiated within three years from the commencement of insolvency proceedings.[47] The General Approach rejects such a proposal entirely, ensuring that Member States themselves determine the limitation periods within which persons with legal standing will be able to bring actions and other legal remedies[48], unlike the Parliament, which this time, for reasons of legal certainty and the aim of minimum harmonisation, aligns with the Commis-

43 Article 203 of the Bankruptcy act.

44 Aricle 8 of the Directive.

45 N.B. Pannevis, *The European harmonisation of avoidance rules, a Dutch perspective on reshaping an age-old instrument*, TvI 2023/12, 16 May 2023, p. 6.

46 Bilić, A.; Bratković, M., *Avoidance of Gratuitous Legal Acts of the Insolvent Debtor*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 43, No. 3, 2022, p. 780.

47 Article 9 of the EC Proposal.

48 Council of the European Union, *op. cit.*, note 5, p. 69.

sion's view and sets a three-year time limit starting from the opening of insolvency proceedings.[49]

As stated above, the Directive establishes minimum standars, allowing Member States to provide for or preserve provisions that offer a greater protection to creditors than those set out therein.[50] By way of exception to the rule above, the Directive sets a limitation period of up to three years for all claims arising from legal acts that are void, voidable, or unenforceable.[51] In national legislation, this period is twoo years and is calculated from the opening of insolvency proceedings[52], so the national legislator is free to amend the provision in question, both as regards the period itself and as regards the start of its calculation, since the provision in question provides the possibility for Member States to regulate that limitation period shall be caltulated from the moment insolvency practitioner became aware of the facts underlying the claim against the other party.[53]

Such a determination, according to the authors, particularly produces the desired effects in more complex insolvency proceedings, which require more time for the insolvency practitioner to become familiar with the debtor's economic situation, including his previous assets and benefits that are no longer a part of insolvency estate at the time of the opening the proceedings. However, taking into account the subjective nature of such a deadline, as it is to be determined from the moment the insolvency practitioner gained knowledge of specific circumstances, the aforementioned determination could create a certain legal uncertainty, given that it is often very difficult to determine the exact day of becoming aware of a legally relevant fact, which in itself depends on the interpretation of the interested party. In addition, it should be noted that the domestic legislator does not prescribe deadlines for the insolvency practitioner to take action, such as reviewing the documentation or acquainting themselves with the debtor's previous business operations.[54]

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49 European Parliament, *Report*, Amendment 105, Article 9(3).

50 Recital 8 of the Directive.

51 Article 10(3) of the Directive.

52 Article 212(2) of the Bankruptcy act.

53 Article 10(3) of the Directive.

54 The provision of Article 89 of the Bankruptcy Act lists only some of the obligations of the insolvency practitioner, including bringing the accounting records in order by the date of opening the bankruptcy proceedings or drawing up the initial balance of assets, which obligations, although not time-bound, are performed in the initial stages of the bankruptcy proceedings. In the practice of bankruptcy administration, there are often cases in which the previous persons authorized to represent the debtor do not act in accordance with the mandatory provision of Article 117 of the Bankruptcy Act, which prescribes the obligation of such persons to submit all necessary data and information to the bankruptcy authorities.

Notwithstanding the above, determining the commencement of the limitation period based on the insolvency practitioner's awareness of legally relevant facts, although it may in itself lead to prolongation of the proceedings, undeniably produces the desired effects in the form of a greater possibility of sanctioning persons who act fraudulently, and, no less importantly, a consequent higher degree of satisfaction of creditors.

With regard to the complete regulation of the institute of avoidance actions, it is important to emphasise a novelty from the Directive that the Bankruptcy Act does not provide for when regulating the said institute. Namely, pursuant to Article 10(5) of the Directive, Member States must guarantee that the party required to restore the benefits obtained to the insolvency estate is not entitled to set off such an obligation with a claim that it would otherwise realise in insolvency proceedings.[55] Although the Bankruptcy Act, in the provision of Article 176, Paragraph 1, Point 4, determines that set-off is not permitted if the possibility of set-off is acquired through an act subject to avoidance[56], the authors point out that such regulation, in accordance with domestic case law[57], represents a situation in which the creditor uses the institute of set-off as a method of settlement when fulfilling a contract that constitutes an act subject to avoidance. In this particular case, the Directive addresses the set-off of a claim realised by the creditor in insolvency proceedings against the obligation arising from the avoidance of a legal act, as the creditor is required to return the benefits received or their monetary value to the insolvency estate.[58]

3.2. Pre Pack Proceedings

The EC Proposal envisages pre-pack proceedings, or rather a mechanism with two consecutive phases, and the General Approach imposes a restriction that such a system should apply only to legal entities. The aforementioned proceedings apply to the sale of a company or part thereof that constitutes a separate economic or business entity, excluding the individual assets sale.[59] According to certain foreign authors, a pre-pack should be the most effective and efficient instrument for achieving the liquidation of insolvent legal entities and the transfer of their busi-

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55 Article 10(5) of the Directive.

56 See more about set-off in bankruptcy: Markovinović, H.; Pušić, M., *Set-off in Insolvency Proceedings*, Pravo u gospodarstvu, Vol. 57, No. 3, 2018, pp. 575–596.

57 Supreme Court of the Republic of Croatia, Revd-1674/2024-2, 9 July 2024., Supreme Court of the Republic of Croatia, Revt 20/13-2, 30 May 2017, Supreme Court of the Republic of Croatia, Revt 78/16-2, 30 May 2017, High Commercial Court of the Republic of Croatia, Pž-818/2021-3, 24 September 2021, High Commercial Court of the Republic of Croatia, Pž-4354/2024-2, 28 January 2025.

58 Article 10(2) of the Directive.

59 Instituto Jurídico, *A Nova Proposta de Diretiva sobre Direito da Insolvência*, Coimbra, 2024, p. 33.

ness as a functional unit (when there is surplus value as a going concern) at the highest available market price.[60]

In the recitals of the Directive, a pre-pack procedure should be considered for the preparation of the transfer of a company or part of a company, under judicial oversight and with the involvement of a monitor, ahead of the commencement of insolvency proceedings.[61]

The Commission envisages, as the first stage, actions that serve only to prepare the debtor for the next stage, which is finding a suitable buyer for business of the debtor or its part. The second phase is organised as a liquidation process, culminating in the sale of all or part of the debtor's business and the distribution of the resulting funds among creditors.[62] In such a two-stage procedure, the key decision would, according to the EC Proposal, be made by an independent body, i.e. the monitor. Parliament emphasises the elements of such independence and stipulates in detail that the monitor must remain independent not only of the debtor but also of the holders of its business shares, creditors, or any other person with any economic or legal interest in the debtor or its business.[63] In its final form, the Directive explicitly stipulates that the monitor must be independent from the debtor and associated persons, but does not accept Parliament's amendment and instead entrusts Member States with setting any additional independence criteria concerning creditors and shareholders.[64]

It is evident from Article 22 of the EC Proposal that the role of the monitor is to document each step of the sale[65], explain the competitiveness, transparency, fairness and satisfaction of market standards[66], and also to recommend the best bidder[67], whose offer is consistent with the best-interest-of-creditors test.[68] All the above duties remained essentially unchanged in the General Approach, although it is evident from further provisions that the role of the monitor as the central body of the pre-pack procedure is significantly reduced, taking into account that

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60 A. Thery, *The pre-pack regulation in the EU Commission proposal for a second insolvency directive*, European Insolvency and Restructuring Journal, 2023, No. 4, p. 3, Vidić, M.; Baće, M.; Soldić, I., *Models of Insolvency Liquidation*, Zbornik radova Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse, No. 21, Mostar, 2024, pp. 281.

61 Recital (31) of the Direcitve.

62 Article 19(1) of the EC Proposal.

63 European Parliament, *Report*, Amendment 148, Art. 22(1), first subparagraph.

64 Article 23(2) of the Directive.

65 Article 22(2)(a) of the Directive.

66 Article 22(2)(b) of the Directive.

67 Article 22(2)(c) of the Directive.

68 Article 22(2)(d) of the Directive.

the General Approach provides greater flexibility for Member States to decide on the mechanisms of sale by public auction or with the approval of creditors[69], which reduces the key role of the monitor as the body whose recommendation of the best bidder is implemented in the said procedure.

The European legislator, in the Directive's final text, introduced the possibility of a stay of enforcement actions to facilitate the objectives of the preparatory phase of the pre-pack procedure.[70] As another means of ensuring the completion of the preparatory phase, the Directive also provides for the suspension of the liquidation phase if a creditor files a request to open insolvency proceedings during the preparatory phase, provided that the opening of the liquidation phase would not be in the interests of all creditors.[71]

The liquidation phase, according to the Directive's final text, commences upon the decision to open insolvency proceedings[72], in which the competent authority should approve the debtor's business sale if such a sale is approved by the creditors or the purchaser is chosen through a public auction, or if the purchaser is proposed by the monitor with an opinion on the fulfillment of the legal requirements or approval of the court on the fulfillment of the legal requirements[73]. Judicial authorisation of the sale of all or part of the debtor's business may not be required where national law allows creditors to approve such a transaction.[74]

The sale of the debtor's entire property is regulated by the Bankruptcy Act, but unlike the Directive, the Bankruptcy Act constitutes such sale rules in greater detail. Pursuant to Article 235, Paragraph 1 of the Bankruptcy Act, the report of the insolvency practitioner or the findings and opinions of a court expert are the basis for the court's decision on the sale.[75] In the aforementioned procedure, which lacks a "preliminary phase", the decision is made by the creditors at a reporting hearing or another creditors' meeting.[76] The Directive, unlike the Bankruptcy Act, provides for the possibility of the court's decision on such a sale being omitted in cases where the domestic legislator provides for the consent of the creditors[77], but the Bankruptcy Act, without exception, provides for a court decision in the form

69 Council of the European Union, *op. cit.*, note 5, p. 5.

70 Article 25(1) of the Directive.

71 Article 26 of the Directive.

72 Article 29(1) of the Directive.

73 *Ibid*.

74 Article 29(2) of the Directive.

75 Article 235(1) of the Bankruptcy act.

76 *Ibid.*

77 Article 29(2) of the Directive.

of a confirmation as a prerequisite for the sale itself, and only where the court is satisfied that such a sale would not leave creditors in a worse position than if the debtor's assets were disposed of individually.[78]

The key difference between the Directive and the provisions of the Bankruptcy Act, according to the authors, is the act of selling a company's assets "that is operating on a permanent basis". It has been observed that the Bankruptcy Act provides for the procedure for the sale of assets as a whole, without regulating the transfer of the business carried out with such assets, while the text of the Directive itself, especially its recitals, shows that the European legislator had in mind to enable the liquidation by selling the company or its part which should, after the sale itself, continue to operate as a "going concern".[79] The domestic legislator does not provide for the continuation of business itself in the provisions relating to the sale of all of the debtor's assets, but focuses exclusively on the sale of the assets themselves.

The above-mentioned difference is also evident in the further provisions of the Directive that regulate executory contracts relating to the debtor's business or its part.

The Commission attempted to regulate the debtor's market restrictively and thus, in Article 27 of the EC Proposal, envisaged the unconditional transfer of existing contracts to the business acquirer, provided that such contracts are crucial for the ongoing operations of the debtor and their suspension would lead to a cessation of activities.[80] Such a limitation of the party autonomy is supported in foreign literature by the argument that the forced takeover of the contract does not have a negative effect on the other contracting party, who did business with a person in financial difficulties and who was certainly threatened with the termination of cooperation, so this approach enables the other contracting party to continue business cooperation with the acquirer of the debtor's business.[81]

The General Approach again softens this formulation by granting Member States the authority to determine whether the other party's consent is required for the transfer of contracts[82], depending on its type, the interests of the business or the nature of the parties[83], and providing for the right to terminate the contract provided that a notice period of no less than three months is observed from the transfer date.[84]

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78 Article 235(6) of the Bankruptcy act.

79 Recital (29) of the Directive.

80 Article 27 (1) of the EC Proposal.

81 Van Zanten, M.R., *Proposal for European rules on pre-pack proceedings should be supported*, TvI, 2023, No. 14, 17 May 2023, p. 8.

82 Council of the European Union, *op. cit.,* note 5, p. 92.

83 *Ibid*.

84 *Ibid.,* p. 93.

The final text of the Directive adopts both approaches and regulates the possibility of transfer without consent, with an exception for competitors of the acquirer[85], and the possibility of transfer with the other party's consent, depending on the contract type, the interests of the business or the nature of the parties[86], with the right to terminate the contract upon giving at least three months' notice, but only if such a transfer would unfairly harm the other party.[87]

In addition to the possibility of termination of the contract by the other contracting parties, the Commission has further provided for the possibility of the court itself terminating executory contracts that are necessary for the debtor to continue its business and whose termination would lead to a standstill in business, where at least one of the following conditions is fulfilled. As the first condition, the Commission suggests that termination of such a contract may be justified in the interest of the debtor's business, whereas the second condition concerns public service contracts in which the acquirer is unable to meet the legal or technical obligations provided for therein.[88]

In its final form, the Directive abandons court regulation of contract termination while allowing Member States to provide that licence agreements for intellectual and industrial property rights, where the debtor is the licensor, may only be terminated with the consent of the licensee.[89]

Regulating the possibility of terminating a contract by a court, especially with the condition of a court interpretation of the usefulness of such termination, according to the authors of this article, would constitute a legal precedent in domestic legislation, which sets the autonomy of the parties' will as the basis for the creation, modification and termination of a legal obligation[90]. Judicial termination as such is provided by the Obligations Act in the part regarding the modification or termination of a contract due to changed circumstances and sufficiently provides protective mechanisms to the contracting parties that would make the fulfilment of its obligations excessively difficult or would cause excessive losses. Nevertheless, the court does not pronounce termination of the contract ex lege; rather, it requires the will of one of the contracting parties to bring such a claim before the court.[91]

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85 Article 30(1) of the Directive.

86 Article 30(2) of the Directive.

87 Article 30(3) of the Directive.

88 Article 27 (2) of the EC Proposal.

89 Article 30(4) of the Directive.

90 The freedom to regulate obligatory relations as a principle is prescribed by Article 2 of the Civil obligations Act.

91 Article 369 of Obligations Act Official Gazette No. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018, 126/2021, 114/2022, 156/2022, 155/2023.

Although the provision of the possibility of judicial termination has been recognized by some foreign authors as an effective mechanism for completing the process of sale[92], the authors of this article believe that the Directive sufficiently provides Member States with the possibility of protecting both the continuation of the business itself and the debtor's other contractual parties, as a result of which leaving the decision on the termination of the contract to the contractual parties themselves stands out as an effective choice of the European legislator, which is in line with other provisions of domestic legislation.

When regulating the second stage of the pre-pack procedure, the European legislator has also provided for the treatment of the debts and obligations of the company whose assets are transferred in their entirety. Thus, Article 31, Paragraph 1 of the Directive provides that Member States guarantee that the acquisition of the debtor's business occurs without any attached debts or obligations, except with the debtor's express consent to assume such debts and obligations.[93] The aforementioned mechanism is not unknown to the Bankruptcy Act, which provides such a possibility only as part of a bankruptcy plan by which the entirety or a portion of the debtor's assets can be transferred to another person, with the exclusion of the rules on joining a debt in the case of the takeover of the entire property.[94]

The rules on joining a debt are established by the Obligations Act, which regulates that the acquirer of a property entity is liable for the obligations arising from such an entity, but only up to the value of its assets, which the contracting parties cannot exclude by their dispositions, and such a provision would not produce effects towards creditors.[95] The most recent example of the application of the provision that allows the transfer of property to the acquirer without debts and obligations relating to such an entity, in domestic legislation and legal practice, is the Settlement[96] reached in the extraordinary administration procedure that was conducted in accordance with the provisions of the Act on the Extraordinary Administration Procedure in Companies of Systemic Importance for the Republic of Croatia.[97] The aforementioned Settlement, among other things, provided for the transfer of the property of 47 unviable companies[98] to newly established acquiring companies, thereby ensuring the continuation of the existing business operations.

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92 Van Zanten, *op. cit.*, note 81, p. 8.

93 Article 31(1) of the Directive.

94 Article 303(2)(2) of the Bankruptcy act.

95 Article 200 of Civil obligations Act.

96 Settlement Proposal (Agrokor), Available at: [https://nagodba.agrokor.hr/storage/2018/06/Prijedlog-Nagodbe-azuriran-25062018.pdf], Accessed 20 April 2026.

97 Act on the Procedure of Extraordinary Administration in Companies of Systemic Importance for the Republic of Croatia, Official Gazette, No. 32/2017.

98 Article 22.1. of the Settlement.

3.3. Creditors' Committee

The committee serves as the body representing creditors during insolvency proceedings pursuant to Article 2(1)(j) of the Directive. In the final text of the Directive, the provisions on the creditors' committee are positioned in title VI. and divided into two chapters from Articles 44 to 50. The six articles on the creditors' committee elaborate on issues concerning the establishment[99], appointment and composition[100], dismissal and replacement of members[101], working methods of the creditors' committee[102], functions, rights and duties of the creditors' committee[103], costs and fees[104], and liability of the members of the creditors' committee[105].

Pursuant to Article 44 of the Directive, Member States must establish a creditors' committee upon the commencement of insolvency proceedings and may, in accordance with national law, allow for its establishment at an earlier stage.[106]

The creditors' committee is not intended as a formal body, but as a real body that represents and protects different groups of creditors by, among other things, supervising the work of insolvency practitioners and and guaranteeing that creditors are provided with information on the progress of the proceedings and the state of the insolvency estate.[107] The intention of the European legislator is to improve the representation of different groups of creditors, especially cross-border and workers' representatives, while maintaining a balance between achieving the stated objective and rationalizing costs.[108] Under the Directive, this is permitted only where it is explicitly provided for in national law, in particular where the insolvency estate is of modest value, the number of creditors is small, or there is a risk that it may negatively affect the debtor's financial position.[109]

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99 Article 44 of the Directive.

100 Article 45 of the Directive.

101 Article 46 of the Directive.

102 Article 47 of the Directive.

103 Article 48 of the Directive.

104 Article 49 of the Directive.

105 Article 50 of the Directive.

106 Article 44(2) of the Directive.

107 Article 48(1) of the Directive.

108 One of the Commission's proposals was the possibility of excluding the creditors' committee in specific cases, namely in the case of micro-entrepreneurs, in the insolvency proceedings there is a small number of creditors or the economic importance of the insolvent estate is small. The Council completely rejected the mentioned cases and provided that the Member States themselves specify the mentioned conditions in national law. However, the Parliament is leaning towards the EC Proposal and makes a minor change, only in the form of the possibility of excluding the creditors' committee taking into account the scope and the nature of the debtor's business, while leaving the other, exhaustively listed cases as proposed by the Commission.

109 Article 44(3) of the Directive.

The aforementioned solution introduced by the Directive is the result of major disputes that occurred during the legislative procedure. Namely, during the legislative process, the Council highlighted the concerns of the Member States that creditors' committee establishment could prolong the procedure or complicate its implementation. Therefore, as a compromise, the Council proposed that the creditors' committee be excluded in cases where establishing it would not yield the benefits envisaged by exercising the function of such a committee. For the abovementioned reasons, the Council, by the provision of Article 1(4) of the Opinion, provided that Member States may apply the title of creditors' committee only to large undertakings within the meaning of Directive 2013/34/EU. The abovementioned implies that for smaller undertakings, Member States may provide for sufficient mechanisms for the protection of creditors' interests under national law without establishing a creditors' committee, and its function may also be performed by the creditors' assembly, or by the creditors themselves in Member States that do not provide for the assembly as a special body of insolvency proceedings.

In the creditors' committee, there must be representatives of the different groups of creditors.[110]

The Directive also introduces the possibility of filing an appeal to contest the decision on the composition of the creditors' committee, if prescribed by national law.[111] Members of the board must be able to be dismissed either intentionally or due to negligence, or if there is a conflict of interest.[112]

The Directive obliges Member States to set out provisions regulating how the creditors' committee operates.[113] It concerns the rules on the voting procedure, quorum, conflicts of interest, recording of attendance, etc.[114]

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110 Article 45(2) of the Directive. As regards the appointment of members of the creditors' committee, the Commission's proposal aimed to establish deadlines for the appointment of its members, to balance the interests of all represented creditors, to ensure the representation of cross-border creditors and creditors whose claims have been provisionally accepted, and to ensure the possibility of challenging the appointment if it has not been carried out in accordance with the applicable provisions of national law. The General Approach focuses exclusively on the structure of the creditors' committee itself, completely rejecting the proposals concerning the deadlines for appointment, and emphasises the possibility of participation of persons other than creditors themselves. Furthermore, the possibility of challenging the appointment of members of the creditors' committee has been abandoned, while the provisions regarding the possibility of replacing or terminating a member of the creditors' committee have been retained to some extent. Article 59 (1) 1-5 of the EC Proposal; Opinion of the Council 121-123.

111 Article 45(4) of the Directive.

112 Article 46(2) of the Directive

113 Article 47 of the Directive.

114 Article 47(1) of the Directive.

Creditors' committee members can also receive compensation for their work, but only if it is proportional to their function.[115] Article 50 of the Directive prescribes the exemption from liability of members of the creditors' committee, except in cases of intent or gross negligence in relation to the interests of creditors.

In terms of the implementation of individual provisions into Croatian national law, it is worth emphasizing that the transposition of the rules governing creditors' committees will proceed without major tectonic changes, as the provisions of the Croatian Bankruptcy Act already have detailed provisions on the creditors' committee. Therefore, it is to be assumed that the Croatian legislator will decide to introduce a greater degree of harmonisation than the minimum prescribed by the Directive.[116]

3.4 Director's Duty To Request the Opening of Insolvency Proceedings and Civil Liability

Directors are required to initiate insolvency proceedings within a set timeframe in order to prevent the continued erosion of assets and the unequal treatment of creditors through individual satisfaction, all of which should lead to a greater and proportionate satisfaction of all creditors.[117]

The provision most extensively modified by the Council deals with the directors' obligation to file for the opening of insolvency proceedings, for which the Commission proposed a deadline not exceeding three months from the point at which the directors became, or could reasonably have become, aware of the debtor's insolvency under national law.[118] In addition to the above, the Commission also provided for civil liability of directors for damage to creditors resulting from failure to fulfil such an obligation, which does not call into question the stricter rules on civil liability prescribed by the provisions of national law.[119] At the same time, the Council adds a new article which provides exemptions from the obligation in question for directors who are responsible for the debts of the company or who are natural persons, and with additional items provides for the possibility of

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115 Article 49 of the Directive.

116 Freshfields Bruckhaus Deringer, *EU Insolvency Law Harmonisation: Approaches Reach the Finish Line*, Freshfields, Available at: [https://www.freshfields.com/globalassets/noindex/documents/eu-insolvency-law-harmonisation-approaches-the-finish-line-v8.pdf], Accessed 14 April 2026, p. 4; van Galen, R. J., *The creditors' committee under the Proposal*, TvI 2023/16, pp. 1–2.

117 Radić, I. M., *Directors' Duty to Consider the Interests of Creditors and Other Stakeholders When There Is a Likelihood of Insolvency*, Strani pravni život, 2021, No. 1, p. 147.

118 Article 36(1) of the EC Proposal.

119 *Ibid.*

Member States to provide that such an obligation may be fulfilled by making the company's insolvency public through publication in a public register within the same prescribed period, thereby making sure that creditors may themselves seek the opening of insolvency proceedings themselves.[120]

The Council also puts forward that Member States may allow the duty to request the opening of insolvency proceedings to be suspended where directors implement appropriate measures to safeguard creditors and ensure protection for the general body of creditors at a level comparable to that established by the provision. In addition, the Council entirely omits the Commission's proposal for a rule without prejudice to stricter national provisions on civil liability.[121] On the other hand, Parliament concentrates its amendments on directors' overarching duties from the stage where a company is likely to become insolvent, imposing an obligation to prevent insolvency and, failing that, to take steps to avert bankruptcy.[122]

Furthermore, the Council stipulates that, in the exercise of such duties, directors must have regard to the interests of creditors and refrain from any intentional or grossly negligent conduct that may endanger the company's viability. Ultimately, Parliament highlights that Member States must ensure directors act without unnecessary delay in seeking the opening of insolvency proceedings once they know, or ought to know, of the entity's insolvency.[123]

Despite many amendments and proposals by the Council and Parliament, the final text of the Directive regarding the duty of directors to submit a proposal to initiate insolvency proceedings is only formulated in two short articles, which makes it evident that there is still no desire, at least at the European level, to encroach too restrictively on the liability of natural persons.

In its final form, the Directive stipulates that directors are required to commence insolvency proceedings within three months from the point at which they knew, or ought reasonably to have known, of the entity's insolvency.[124] The domestic legislator, in Article 110, paragraph 2 of the Bankruptcy Act, sets a very short deadline for submitting a proposal to initiate bankruptcy proceedings, namely, 21 days from the occurrence of the bankruptcy grounds.[125] The duty of directors

120 Council of the European Union, *op. cit.*, note 5, p. 102.

121 *Ibid.*

122 European Parliament, *Report*, Amendment 47, Article 36(1).

123 *Ibid.*

124 Article 36 of the Directive.

125 The grounds for bankruptcy are regulated by the provisions of Article 5 of the Bankruptcy Act and are referred to by the law as insolvency and over-indebtedness. Insolvency, in accordance with the provisions of Article 6, paragraph 1, exists if the debtor is no longer able to meet his due financial

in question is not only provided in the Bankruptcy Act, but also in the Companies Act, which, in the provision of Article 251, paragraph 2, stipulates that the management of the company is obliged, without delay and no later than three weeks after the occurrence of the bankruptcy grounds, to request the initiation of bankruptcy proceedings.[126]

Although certain legislation provides for different deadlines for fulfilling the duties of a director depending on the bankruptcy grounds in a specific case[127], foreign literature has noted criticism of the European legislator for leaving it to the Member States to define the bankruptcy grounds in the context of prescribing such a director's obligation, given that it could lead to significant differences in the application of this obligation, which calls into question the goal of harmonizing such provisions.[128] As in previous examples, the Bankruptcy Act provides for stricter rules, i.e., shorter deadlines for initiating bankruptcy proceedings, as a result of which no significant intervention by the domestic legislator in the articles in question is expected.

Both the Directive[129] and the Bankruptcy Act[130] provide for the civil liability of directors for damage caused to creditors due to a breach of this obligation, while the Bankruptcy Act also regulates the obligation of directors to pay the advance payment to cover bankruptcy proceedings costs, if they have acted contrary to the obligation to initiate bankruptcy proceedings within the time limit.[131] Although, during the legislative process, taking into account the proposals of the Council and Parliament, it was expected that the provision in question would also cover further duties of directors, at least in the form of preparatory actions, i.e. actions and measures reasonably necessary to prevent the occurrence of bankruptcy grounds and the subsequent initiation of bankruptcy proceedings, the aforementioned regulation has not been implemented in any respect.

The authors of this article point out that in practice, there are few cases in which directors initiate bankruptcy proceedings within the prescribed period, which is

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obligations, while over-indebtedness is considered a situation in which the debtor's assets are less than his existing obligations, as regulated by the provisions of Article 7, paragraph 1 of the Bankruptcy Act.

126 Article 251(2) of the Companies Act.

127 Germany and Austria define insolvency on the basis of the liquidity test (which represents the inability to meet the obligations due), and the balance test ("liabilities exceed assets" or Überschuldung). Also: A. Karapetian and L. Lennarts, *The Directors' Duty to File for Insolvency Proceedings in the European Commission's Proposal for Harmonising Insolvency Law: the Dutch Perspective*, TvI 2023/15, 17 May 2023, p. 4.

128 *Ibid.*

129 Article 37(1) of the Directive.

130 Article 110(3) of the Bankruptcy act.

131 Article 113(1) of the Bankruptcy act.

precisely why the domestic legislator, in the 2015 Amendment to the Bankruptcy Act[132], provided for the duty of the Financial Agency to file a request to initiate bankruptcy proceedings if the debtor has in the register of the order of payment any unfulfilled basis for more than 120 days.[133] Similarly, there are a few court proceedings in which the subject of the dispute is the civil liability of directors for failure to initiate bankruptcy proceedings within the prescribed period, taking into account the difficulty of proving assumptions for damage in such cases.[134]

A specific obstacle (apart from the amount of provable damage), in the authors' view, lies in causation itself, namely the fact that the creditor suffered damage as a consequence of the director's failure to commence insolvency proceedings; in other words, that, in the ordinary course of events, had the application for the opening of insolvency proceedings been filed in due time, the creditor would have been able to recover its claim in the amount sought in the action. To succeed in court proceedings with such a request, the creditor should specify, among other things, what changes occurred in assets of the debtor in the period when bankruptcy proceedings were not yet opened, although they should have been, and what led to the inability to collect his claim in the amount claimed, and what amount of settlement he would have achieved if bankruptcy proceedings had been opened on time.

Of particular interest is also the issue of the liability of the directors towards creditors who entered into a business relationship with the debtor after the prerequisites for opening insolvency proceedings have occurred, or after the deadline within which the directors are obliged to initiate such proceedings has expired. Namely, if the directors had fulfilled their duties in a timely manner and taken appropriate measures to protect the interests of creditors, or had initiated insolvency proceedings at the time when the legal requirements were met, such creditors would most likely not have entered into a business relationship with the debtor.

In such circumstances, creditors make business decisions based on the assumption that the company is capable of properly fulfilling its obligations. By postponing the initiation of proceedings, directors enable the creation of an illusion of the company's financial stability, which may lead third parties to conclude contracts, deliver goods or provide services that they would not otherwise undertake if they were to become familiar with the debtor's real financial situation.

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132 See more about this: Garašić, J., *The Most Significant Amendments to the Insolvency Act of 2015*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 38, No. 1, 2017, pp. 152, also: Čuveljak, J., *Proposal of the European Directive on the Harmonisation of Certain Aspects of Insolvency Law*, Aktualnosti građanskog procesnog prava – nacionalna i usporedna pravnoteorijska i praktična dostignuća, 2023, p. 288.

133 Article 110(2) of the Bankruptcy act., also: Čuveljak, Jelena, Komentar Stečajnog zakona, Narodne Novine, Zagreb, 2018., p. 352.

134 Also: Čuveljak, J., *Komentar Stečajnog zakona*, Narodne Novine, Zagreb, 2018., p. 352.

Therefore, it can be argued that the damage suffered by such creditors is not solely a consequence of the company's insolvency, but also of the members' failure to react in a timely manner to the company's financial difficulties. This is precisely where the importance of directors' duties in a period of impending insolvency is evident. The director's duty is not only to preserve the value of the company's assets, but also to protect potential new creditors from entering into legal relationships that are burdened with a high risk of default from the very beginning of the business relationship.

The authors of this paper take the position that the European legislator has not regulated the provisions on directors' liability in a sufficiently systematic and developed manner to, at least in a deterrent manner, deter directors from failing to fulfil their legally prescribed obligations. Therefore, it is up to the domestic legislator, following the objectives and spirit of the Directive in question, which encourages this, to provide mechanisms to ensure an enhanced level of legal clarity and certainty and discipline in the actions of persons required to submit a request to open bankruptcy proceedings.

4. CONCLUSION

The ambitious plan of the European legislator to harmonize certain substantive aspects of insolvency law began with the publication of the EC Proposal in December 2022. The final text of the Directive, after an extensive legislative procedure, was published on April 1, 2026 and consists of VIII titles which, among other things, introduce rules for minimum harmonization: avoidance actions in insolvency proceedings, tracing assets, the pre-pack proceeding, directors' duty, creditors' committee and key information factsheets (Article 1 of the Directive).

The analysis in the paper established that in the legislative procedure, under the pressure of the Member States, the EC Proposal was narrowed down and that the compromise solution in the final version of the Directive is largely a consequence of different legal historical national systems.

This paper is limited to the analysis of the Directive's provisions relating to avoidance actions in insolvency proceedings, the pre-pack proceeding, the creditors' committee, and directors' duties.

In terms of avoidance of actions, it was found that, even though the European legislator sets only a baseline level of protection for creditors, giving the opportunity to Member States to leave or enact provisions that guarantee a greater level of protection for creditors, it is up to the domestic legislator to recognize the need to improve the possibilities for challenging the debtor's legal acts and ultimately

maximize the value of the insolvency estate. In this regard, the Directive provides solid ground for the legislator to make appropriate amendments to protect and preserve the rights of creditors and restore benefits to the insolvency estate, so it remains to be seen whether the legislator will recognize the need to amend the existing provisions of the Bankruptcy Act in the manner proposed in this article.

Regarding the pre-pack proceedings, it was concluded that the European legislator provides another institute that should be an effective and efficient instrument for achieving the liquidation of insolvent legal entities and the transfer of their business as a functional unit at the highest market price to the acquirers who continue the business or its part, and it remains to be seen how the domestic legislator will implement this institute into the national legal system, especially in terms of its harmonisation with the existing bankruptcy rules, while at the same time preserving its fundamental purpose, which is efficient liquidation through the transfer of business as a functional unit.

With regard to the creditors' committee, it was concluded that Croatian law already has detailed provisions on the creditors' committee, and no major issues are expected during the transposition of these provisions into Croatian national law.

Regarding directors' duties, the European legislator has not regulated directors' responsibilities clearly and systematically enough, in particular with regard to creating a deterrent effect on persons authorised to represent in order to prevent them from failing to fulfil their legal obligations. It is therefore up to the national legislator, in accordance with the objectives and spirit of this Directive, to establish appropriate mechanisms that will contribute to greater legal certainty and more responsible conduct of persons obliged to submit a request for the opening of insolvency proceedings.

The deadline for transposing the Directive into national law is 22 January 2029, or 10 July 2029 for the introduction of the BARIS banking account system. Despite everything, it remains to be seen how things will come together and whether the EU will finally strengthen its position in global capital markets.

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Chapter 4

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Review article

JUDICIALIZATION AND THE ROLE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN EU EXTERNAL HUMAN RIGHTS POLICY

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ABSTRACT

This article examines the growing judicialization of fundamental rights protection in the European Union's external action. Once largely confined to the political and diplomatic sphere, this domain has increasingly come under legal scrutiny, with the Court of Justice of the European Union (CJEU) playing a central role in shaping and constraining EU policy through judicial review. This development raises broader constitutional questions concerning the balance between political discretion and judicial oversight, the limits of EU competences, and the relationship between the EU legal order and the European Convention on Human Rights (ECHR), particularly in areas such as the Common Foreign and Security Policy (CFSP), which has traditionally been shielded from judicial control.

Adopting a doctrinal methodology, the article analyses key strands of CJEU case law in light of the principles of autonomy and effective judicial protection, situating these developments within the EU's constitutional framework on external action and fundamental rights. It traces how the Court has progressively expanded its role through a series of incremental steps, including narrowing the CFSP jurisdictional exception, extending rights protection beyond EU territory, and developing remedial avenues such as damages liability, while also engaging with the implications of EU accession to the ECHR.

The article argues that judicialization has become a significant, though uneven, mechanism for integrating fundamental rights into EU external action. While judicial protection is relatively well developed in areas directly affecting individuals, such as restrictive measures, it remains more limited in fields marked by broad political discretion. The analysis thus highlights both the expanding role of the Court and the structural constraints that continue to shape judicial oversight in this domain.

Keywords*: Common Foreign and Security Policy (CFSP), Court of Justice of the European Union (CJEU), Effective judicial protection, EU external action, Fundamental rights, Effective judicial protection*

1. INTRODUCTION

The protection of fundamental rights has become an increasingly visible part of the European Union's external action. What was once largely a political and diplomatic domain is now subject to growing legal scrutiny. This reflects a broader process of judicialization, in which courts, most notably the Court of Justice of the European Union (CJEU), play a more active role in shaping, constraining, and legitimizing policy through legal review.

In this context, judicialization raises several constitutional questions. These relate to the balance between political discretion and judicial oversight, the limits of EU competences, and the relationship between the EU legal order and the wider international human rights system, particularly under the European Convention on Human Rights (ECHR). Such questions are especially pronounced in sensitive areas such as the Common Foreign and Security Policy (CFSP), which has traditionally been relatively insulated from judicial oversight.

Methodologically, the paper adopts a doctrinal approach grounded in the systematic analysis of EU law, with a particular focus on the case law of the Court of Justice. The analysis is centred on selected landmark judgments, read in terms of their reasoning on the autonomy of the EU legal order and the principle of effective judicial protection. These judicial developments are situated within the broader constitutional framework of the EU Treaties, in particular their provisions on external action and fundamental rights.

Against this background, the article examines how judicialization unfolds in the human rights dimension of EU external action. It traces key strands of case law in which the CJEU has progressively defined and expanded its role, including the use of autonomy as a constitutional safeguard, the gradual narrowing of the CFSP jurisdictional exception, the extension of rights protection beyond EU territory, and the development of judicial remedies, including liability. It also considers recent developments concerning EU accession to the ECHR and their implications for the future of judicial oversight.

Overall, the article argues that judicialization has become an important, though uneven, mechanism for integrating fundamental rights into EU external action. Judicial control is most developed in areas such as restrictive measures, where individual rights are directly affected, while remaining more limited in broader fields of foreign policy, where political discretion continues to play a central role. In this way, the analysis highlights both the Court's expanding role and the constitutional constraints within which it operates.

2. LEGAL FOUNDATIONS AND DYNAMICS OF JUDICIALIZATION IN EU EXTERNAL ACTION

From a legal perspective, the EU's external human rights policy is firmly grounded in *primary law* rather than mere political aspiration. Article 2 TEU establishes human rights and the rule of law as foundational values of the Union. This internal commitment is complemented by an external dimension: under Article 3(5) TEU, the Union is required, in its relations with the wider world, to uphold and promote its values and interests and to contribute to the protection of its citizens. These obligations are further specified in Article 21 TEU, which governs EU external action, and Article 205 TFEU. In addition, the Charter of Fundamental Rights applies whenever EU institutions act within the scope of EU law, including in external contexts, insofar as they exercise Union competences. Taken together, these provisions impose a legal duty on the EU to respect and promote fundamental rights externally.[1] Alongside the binding law, the EU Action Plan on Human Rights and Democracy[2] provides a strategic, though non-binding, framework guiding the Union's external human rights policy.

The Treaty of Lisbon integrated the Common Foreign and Security Policy into the EU's constitutional framework, while maintaining its distinct character as a policy area governed by *special rules and procedures*. Taken together, Articles 24 TEU, 40 TEU, and 275 TFEU establish a system in which the CFSP is largely shielded from judicial review, while preserving a limited but essential role for the Court of Justice of the European Union. In particular, Article 24 TEU sets out the general exclusion of jurisdiction, Article 40 TEU safeguards the constitutional boundaries between CFSP and other EU competences, and Article 275 TFEU enables the Court to review compliance with those boundaries and to protect individual rights through the judicial review of restrictive measures.

The promotion and protection of human rights in EU external action is carried out by a *range of institutional actors* using diverse methods and instruments. The European External Action Service (EEAS) oversees EU Delegations worldwide, monitoring human rights conditions and engaging with local authorities and civil society.[3]

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1 Charter of Fundamental Rights of the European Union, 2012/C 326/02, Article 51.

2 See European External Action Service, *EU Action Plan on Human Rights and Democracy 2020–2027*, 2024, Available at:
[https://www.eeas.europa.eu/sites/default/files/documents/2024/Action-Plan-EN_2020-2027.pdf], Accessed 12 April 2026.
[https://www.consilium.europa.eu/media/03fdbrg2/action-plan-en_2020-2027.pdf], Accessed 12 April 2026.

3 See European External Action Service. (n.d.). *Human Rights & Democracy*, [https://www.eeas.europa.eu/eeas/human-rights-and-democracy-core-eu-external-action_en], Accessed 12 April 2026.

Complementing this work, the EU Special Representative (EUSR) for Human Rights was established to enhance the effectiveness and visibility of EU human rights policy. The EUSR has a broad and flexible mandate, allowing adaptation to evolving geopolitical circumstances, and works closely with the EEAS to conduct diplomatic outreach, represent the Union in international forums, and engage with third countries on human rights issues.[4]

The High Representative for Foreign Affairs and Security Policy (HR/VP) ensures coherence between the EU institutions and Member States in the formulation and implementation of external human rights policy. The European Commission contributes by integrating human rights considerations into development cooperation, trade, neighbourhood policy, and humanitarian aid, and by managing dedicated funding instruments such as the NDICI programme for Human Rights and Democracy, which has a budget of €1.5 billion for 2021–2027 and succeeds the European Instrument for Democracy and Human Rights (EIDHR).[5] The Commission also negotiates trade agreements containing human rights clauses.

The European Parliament acts as a global advocate for human rights, for example, through initiatives such as the Sakharov Prize for Freedom of Thought, while exercising democratic oversight over EU external action.[6] The Council of the European Union adopts human rights guidelines, sanctions, and common positions, and approves the EU Action Plan on Human Rights and Democracy. Finally, EU Member States implement these positions in international organizations, including the United Nations, OSCE, and Council of Europe, and coordinate their national foreign policies with EU-level commitments.[7]

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4 See EU Special Representative, Available at: [https://www.gilmore.ie/eu-special-representative/] and Council Decision (CFSP) 2019/346 of 28 February 2019 appointing the European Union Special Representative for Human Rights, Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019D0346&from=EN], Accessed 12 April 2026.

5 See European External Action Service, *Human Rights and Democracy at the Core of EU External Action*, Available at: [https://www.eeas.europa.eu/eeas/human-rights-and-democracy-core-eu-external-action_en. Neighbourhood], Accessed 12 April 2026; Development and International Cooperation Instrument – Global Europe, Available at: [https://www.eib.org/en/products/mandates-partnerships/ndici/index], Accessed 12 April 2026; [https://enlargement.ec.europa.eu/funding-technical-assistance/neighbourhood-development-and-international-cooperation-instrument-global-europe-ndici-global-europe_en], Accessed 12 April 2026

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7 See Council of the European Union, *EU Action Plan on Human Rights and Democracy 2020–2027*, Available at:

The European Union promotes human rights in non-EU countries through *a combination of positive incentives, or "carrots," and negative measures, or "sticks"*. Positive incentives include financial assistance and dedicated funding programmes, such as the NDICI, as well as political and human rights dialogues.[8] The EU maintains regular consultations with third countries, issues demarches, and publishes public statements addressing human rights violations. These dialogues are often guided by the EU Action Plan on Human Rights and Democracy (2020–2027).[9]

The EU also links trade benefits to human rights compliance. Under the Generalised Scheme of Preferences Plus (GSP+), beneficiary countries must ratify and effectively implement 27 international conventions covering human rights, labour rights, environmental protection, climate change, and good governance, as set out in the GSP Regulation.[10] Human rights clauses are further embedded in association agreements, partnership agreements, and trade agreements, such as the Cotonou Agreement[11] and the EU–Ukraine Association Agreement,[12] where human rights are treated as an essential element of cooperation. Additional positive measures include the deployment of election observation missions[13] and support for human rights defenders.[14]

[https://www.consilium.europa.eu/media/03fdbrg2/action-plan-en_2020-2027.pdf], Accessed 12 April 2026.

8 E.g. EU–Central Asia Human Rights Dialogues, Availabe at: [https://www.eeas.europa.eu/sites/default/files/eu_human_rights_dialogues_in_central_asia.pdf], Accessed 12 April 2026.

9 See e.g. European Centre of Excellence for Civilian Crisis Management, *EEAS: EU Action Plan on Human Rights and Democracy 2020–2027*, Available at: [https://www.coe-civ.eu/kh/eu-action-plan-on-human-rights-and-democracy-2020-2027], Accessed 12 April 2026.

10 See Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, 2012 OJ L 303/1, Available at: [https://gsphub.eu/about-gsp and https://gsphub.eu/about-gsp/gsp-plus], Accessed 12 April 2026.

11 See e.g. Article 9 (Essential Elements and Fundamental Element) and Article 96 (Essential elements: consultation procedure and appropriate measures as regards human rights, democratic principles and the rule of law) of the 2000/483/EC: Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, Available at: [https://eur-lex.europa.eu/eli/agree_internation/2003/159/oj/eng], Accessed 12 April 2026.

12 See Articles 2 and 3 of the EU–Ukraine Association Agreement, [2014] OJ L161/3, Available at [https://publications.europa.eu/resource/cellar/4589a50c-e6e3-11e3-8cd4-01aa75ed71a1.0006.03/DOC_1], Accessed 12 April 2026.

13 See the EU Database on Election Missions, Available at: [https://ec.europa.eu/info/strategy/relations-non-eu-countries/types-relations-and-partnerships/election-observation/mission-recommendations-repository/home], Accessed 12 April 2026

14 See EU Guidelines on Human Rights Defenders, 2008, Available at: [https://www.eeas.europa.eu/eeas/eu-guidelines-human-rights-defenders_en] and [https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/739386/EPRS_ATA(2023)739386_EN.pdf], Accessed 12 April 2026.

Negative measures are used to respond to serious human rights violations. Beyond advocacy and diplomatic actions, such as statements, campaigns, diplomatic protests, the suspension of political dialogues, and active engagement in multilateral forums, including the UN Human Rights Council, UN General Assembly, OSCE, and Council of Europe, the EU may impose targeted sanctions under the EU Global Human Rights Sanctions Regime.[15] These sanctions can target specific individuals, entities, or, in some cases, entire countries. Agreements may be suspended,[16] trade benefits may be withdrawn or threatened, and arms exports may be prohibited when States commit serious human rights abuses.[17]

Having outlined the institutional actors and the incentives shaping their behaviour, it is now necessary to clarify what is meant by '*judicialization*' in this context. In the European Union, judicialization generally refers to the expanding role of the Court of Justice in shaping both legal and, increasingly, political decision-making. It denotes a shift whereby issues that were once resolved primarily through political negotiation between institutions or Member States are increasingly subject to judicial interpretation and control. This development has been driven in part by structural features of the EU legal order, most notably the principles of supremacy and direct effect, which enable individuals and companies to challenge EU acts before the Court and to invoke EU law before national courts. As a result, the Court's case law has played a central role in the development and consolidation of EU law.[18]

Judicialization is not limited to the EU's internal sphere. The Court has become increasingly involved in reviewing and shaping the Union's external action, a sphere traditionally dominated by political institutions such as the European Council and the Council. In this context, judicialization manifests itself in several ways. First, the Court plays a key role in clarifying the division of competences between the

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15 See, Council of the European Union, *Sanctions against Human Rights Violations*. Available at: [https://www.consilium.europa.eu/en/policies/sanctions-human-rights-abuses/], Accessed 12 April 2026.

16 Article 96 of the Cotonou Agreement provides that if a party violates obligations concerning human rights, democratic principles, or the rule of law, the parties must first attempt to resolve the issue through consultations and political dialogue. If consultations fail or in urgent situations, appropriate and proportionate measures may be adopted in accordance with international law. Suspension of the agreement is a last resort, and any measures must be lifted once the violation has been addressed.

17 See e.g. the ban on exports to Russia of dual-use goods and technology for military use, drone engines, arms and civilian firearms, ammunition, military vehicles and paramilitary equipment, etc., Available at: [https://www.consilium.europa.eu/en/policies/sanctions-against-russia/], Accessed 12 April 2026.

18 See e.g. Weiler, J.H.H., *The Transformation of Europe*, Yale Law Journal Vol. 100, 1991, pp. 2403–2483, or Stone Sweet, A., *The Judicial Construction of Europe*, Oxford: Oxford University Press, 2004, esp. Chapter I (The European Court and Integration).

EU and its Member States in external relations.[19] Second, under Article 218(11) TFEU, it may assess the compatibility of envisaged international agreements with EU law prior to their conclusion, thereby preventing potential conflicts, as illustrated by its opinion practice.[20] Third, the Court exercises judicial review over EU sanctions, allowing individuals and companies subject to restrictive measures, such as asset freezes or travel bans, to challenge their legality.[21]

Beyond sanctions, the Court's role also extends to the broader protection of fundamental rights in EU external action. Even when acting internationally, EU institutions remain bound by the Charter of Fundamental Rights and the general principles of EU law, which set limits on foreign and security policy measures. While sanctions litigation often centres on procedural guarantees, the Court's fundamental rights review has a wider reach, encompassing areas such as international agreements and data transfer regimes. This is evident in landmark judgments such as *Kadi* and *Schrems*, where the Court demonstrated its willingness to subject external action to constitutional standards of rights protection.[22]

This evolving role of the Court of Justice of the European Union is most clearly illustrated in its case law. The following section, therefore, examines key judgments through which the Court has progressively shaped, and at times expanded, the judicial control of human rights in EU external action.

3. CASE LAW: HOW THE CJEU JUDICIALIZES EXTERNAL HUMAN RIGHTS POLICY

The main body of this paper follows a *temporal-doctrinal* narrative: first, it explores how the Court used the concept of autonomy of EU law as a constitutional shield (*Kadi*, *Opinion 2/13*), then it goes on to investigate how the Court has broke the CFSP exception (*Rosneft*, *KS and KD*), to be followed by the brief analysis of the *Front Polisario* case where Luxembourg had to address issues of territoriality, sovereignty and the protection of rights (self-determination) beyond the borders of

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19 See e.g. *Opinion 1/76* (Draft Agreement establishing a European laying-up fund for inland waterway vessels), ECLI:EU:C:1977:63; *Opinion 1/94* (Competence of the Community to conclude international agreements concerning services and the protection of intellectual property), ECLI:EU:C:1994:384; *Opinion 2/15* (Free Trade Agreement between the European Union and the Republic of Singapore), ECLI:EU:C:2017:376.

20 See e.g. *Opinion 2/13* (Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms), ECLI:EU:C:2014:2454.

21 See below in Section 3.

22 See e.g. Case C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council and Commission* [on UN Security Council sanctions] [2008] ECLI:EU:C:2008:461, or Case C-362/14 *Schrems v Data Protection Commissioner* [on EU-US Safe Harbour agreement] [2015] ECLI:EU:C:2015:650.

the EU. Later, through *Bank Refah*, and *KS and KD*,[23] the section investigates the rise of EU liability in external action. Finally, it turns to the most recent developments by focusing on the newly proposed draft of EU accession to the ECHR, considering its possible implications for the future shape of judicial control, while acknowledging that any assessment at this stage remains necessarily tentative in the absence of the Court's final opinion.

3.1. Autonomy First: Fundamental Rights as Internal Constitutional Limits on External Action

A useful starting point for understanding judicialization in EU external action is the tension between the EU's involvement in broader international frameworks, such as the United Nations and the ECHR system, and the Court of Justice's consistent emphasis on preserving the autonomy of the EU legal order. From this perspective, judicialization is not simply about expanding human rights protection, but reflects a more basic constitutional concern: fundamental rights primarily operate as internal limits on the Union's external action.

This dynamic is most clearly illustrated in the *Kadi* litigation and in *Opinion 2/13*. Both concern sensitive areas of external action, UN-linked counter-terrorism sanctions and the EU's accession to the European Convention on Human Rights, yet in both instances the Court prioritised the preservation of its constitutional framework.

The facts of the *Kadi* saga are well known. Following the 9/11 attacks, the UN Security Council adopted Resolution 1267 and subsequent measures establishing a sanctions regime targeting individuals associated with Al-Qaida and the Taliban. The EU implemented these obligations through a Regulation freezing the assets of listed persons, including Yassin Abdullah Kadi and the Al Barakaat Foundation. The applicants challenged the measures, arguing that they violated fundamental rights, including the rights to property, to defence, and to effective judicial protection.

At first instance, the General Court upheld the Regulation, effectively giving precedence to UN obligations and limiting its review to possible violations of *jus cogens*.[24] On appeal, however, the Court of Justice took a markedly different approach.[25] While confirming that the EU had competence to implement UN

[23] *KS and KD* will be examined in two respects: first, as illustrating the Court's expansion of its jurisdiction over certain CFSP-related external actions, and second, as clarifying the availability of remedies, in particular the EU's non-contractual liability.

[24] Case T-315/01 *Kadi v Council and Commission* and Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECLI:EU:T:2005:332.

[25] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECLI:EU:C:2008:461.

sanctions, it held that such implementation must comply with the constitutional principles of the EU legal order, including fundamental rights. The Court rejected the idea that UN law enjoys automatic primacy within the EU and insisted on full judicial review of EU implementing measures.[26]

In doing so, the Court required that individuals subject to sanctions be afforded procedural safeguards, such as the right to be heard, access to reasons, and effective judicial protection. The judgment thus established that, even where the EU implements binding UN Security Council resolutions, the resulting EU acts remain subject to full review under EU fundamental rights standards, rather than being limited to a review confined to *jus cogens* norms.[27] In this way, *Kadi I* effectively constitutionalised due process guarantees in the context of external sanctions.

This approach was confirmed and strengthened in *Kadi II*. After Kadi had been removed from the UN list, he was re-listed under a subsequent EU regulation implementing updated UN measures. The General Court annulled the re-listing, finding that the reasons provided were not supported by sufficient evidence,[28] and the Court of Justice upheld that judgment on appeal.[29] It emphasised that the EU cannot rely uncritically on UN determinations but must itself ensure that listings are adequately substantiated and compatible with fundamental rights. In particular, the Court insisted on a rigorous standard of review, requiring that the reasons for listing be sufficiently clear and supported by evidence to enable effective judicial scrutiny.[30]

Taken together, the *Kadi* judgments illustrate the first stage of judicialization in EU external action: the assertion of constitutional autonomy as a prerequisite for meaningful protection of fundamental rights. Rather than deferring to international frameworks, the Court made clear that external commitments must be mediated through the EU's internal constitutional order, with the consequence that EU-implemented sanctions must comply with fundamental rights guarantees

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26 Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] paras. 282-286.

27 Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] paras. 326-327.

28 Case T-85/09 *Yassin Abdullah Kadi v European Commission*, [2010], ECLI:EU:T:2010:418; see esp. paras. 165–171, 181-184 and 192-193. The GC refused to rely on confidential information not disclosed to the applicant, and found that allegations (association with Al-Qaeda, financial support) were not supported by evidence.

29 Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission and Others v Yassin Abdullah Kadi* [2013] ECLI:EU:C:2013:518.

30 See especially paras. 111-114 and 130-134.

and be supported by sufficiently clear and evidence-based reasons to allow for effective judicial review.

The limits of this autonomy came into sharper focus in the context of the EU's relationship with the European Convention on Human Rights. The EU's proposed accession to the Convention is one of the most controversial episodes in its external judicial politics. Under the Treaty of Lisbon, the EU was empowered to accede to the ECHR, leading the Commission, the Council, and the European Parliament to negotiate a draft accession agreement. In 2010, the Commission requested the Court to assess its compatibility with EU law. In 2014, the CJEU issued *Opinion 2/13*,[31] rejecting the agreement. The Court argued that even with safeguards, accession could allow the European Court of Human Rights to issue judgments affecting the allocation of competences, potentially undermining the CJEU's interpretive monopoly and the internal balance of EU law.

Central to the Court's reasoning is the principle of autonomy. EU law's *sui generis* nature requires protecting both the Union's competences and the CJEU's exclusive interpretive authority. Opinion 2/13 reflects this concern in the context of the Common Foreign and Security Policy, where the Court has limited jurisdiction. Allowing the ECtHR to review CFSP acts could subject the EU to external judgments without prior CJEU interpretation, a risk the Court viewed as constitutionally unacceptable.[32] As Jean-Paul Jacqué notes, this would effectively submit control of EU policies to a non-EU body.[33]

The case law shows that judicialization in the EU is, in many ways, double-edged. The principle of autonomy has been used both to strengthen and to limit human rights protection. On the one hand, cases such as *Kadi* demonstrate how autonomy can reinforce internal review by requiring that external measures comply with fundamental rights and be subject to effective judicial scrutiny. On the other hand, *Opinion 2/13* illustrates how the same principle can be invoked to resist external oversight, effectively shielding sensitive areas such as CFSP and the Area of

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31 *Opinion 2/13* (Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms), ECLI:EU:C:2014:2454.

32 Douglas-Scott, S., *Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice*, VerfBlog, 2014/12/24, Available at: [https://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/], Accessed 12 April 2026.

33 Jacqué, J.P., *What next after Opinion 2/13 of the Court of Justice on the accession of the EU to the ECHR?*, European Union, 2016, Available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556975/IPOL_STU(2016)556975_EN.pdf], Accessed 12 April 2026.

Freedom, Security, and Justice (AFSJ) from review by the ECtHR and contributing to a more self-contained system of rights protection.[34]

3.2. Proceduralization through Sanctions Jurisprudence

For a long time, CFSP was a "no-go zone" for judicial review, with the CJEU limiting its jurisdiction over politically sensitive measures. This began to change with *Rosneft* and *KS and KD v Council*, which opened the door to scrutiny of CFSP-related restrictive measures and CSDP missions. *Rosneft* allowed judicial review of sanctions through annulment action[35] and preliminary reference,[36] while *KS and KD*[37] extended attention to human rights implications, including the rights of defence and proportionality. These cases dismantled the immunity shield surrounding foreign policy instruments and laid the doctrinal foundation for routine sanctions litigation. The subsequent so-called Russian sanctions cases mark the consolidation phase, operationalising the framework established in *Rosneft* and further proceduralising judicial oversight. Together, these developments illustrate a broader trend toward the judicialization of the EU's external action, showing that even politically sensitive measures can be subject to structured legal scrutiny.

The *Rosneft* case concerned EU sanctions imposed in 2014 on Rosneft, Russia's largest oil and gas company, in response to the annexation of Crimea and the destabilization of eastern Ukraine. The sanctions were adopted under CFSP and implemented domestically by the United Kingdom. Rosneft challenged both the validity of the Council decision[38] and the UK implementing measures before UK courts, which subsequently referred questions to the CJEU for a preliminary ruling. The case raised key issues regarding the Court's jurisdiction over CFSP acts, the lawfulness of restrictive measures, and the ability of national courts to seek review of such decisions under Article 267 TFEU.

The Court confirmed that it has jurisdiction to give preliminary rulings on acts adopted under the CFSP,[39] particularly where the reference concerns the legality of

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34 Douglas-Scott, *op. cit.*, note 34. See also Basedow, J. R., *A theory of external judicial politics: the ECJ as cautious gatekeeper in external relations*, West European Politics, Vol. 46 No. 3, 2023, pp. 550–572.

35 Case T-715/14 *Rosneft and Others v Council* [2018] ECLI:EU:T:2018:544.

36 Case C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* [2017] ECLI:EU:C:2017:236.

37 Joined Cases C-29/22 P, *KS and KD v Council and Others* and C-44/22 P, *Commission v KS and Others* [2024] ECLI:EU:C:2024:725.

38 This action was dismissed, see Case T-715/14.

39 Van Elsuwege, P., *Judicial review and the common foreign and security policy : limits to the gap-filling role of the Court of Justice*. Common Market Law Review, Vol. 58 No. 6, 2021, pp. 1731–1760, 1743.

restrictive measures targeting natural or legal persons, or the broader relationship between CFSP measures and other Union policies under Article 40 TEU. The Court emphasized the principle of effective judicial protection enshrined in Article 47 of the Charter of Fundamental Rights, noting that individuals whose rights are affected by CFSP-linked measures must have access to review and remedies before courts.[40] While the Court ultimately upheld the sanctions against Rosneft, it emphasised that such measures must comply with the principle of proportionality and respect fundamental rights.

The doctrinal significance of *Rosneft* is that it opened the door to judicial review in an area where courts had mostly stayed away. The Court made clear that some CFSP-linked restrictive measures can be examined for legality and compliance with fundamental rights, without questioning the wider political choices behind CFSP decisions. In that sense, it created a way for courts to review sanctions while leaving the broader foreign policy decisions largely untouched. This was the first real "crack" in the CFSP immunity shield and set the stage for later cases where judicial oversight of sanctions and other external action measures became more routine.[41]

The *KS and KD* litigation arose in the context of the EU's CSDP mission in Kosovo (EULEX), where the applicants, relatives of individuals who disappeared during the 1999 Kosovo conflict, alleged serious human rights violations stemming from failures in the mission's investigative capacity. They argued that the lack of effective investigations, linked in part to structural deficiencies and insufficient staffing, violated their fundamental rights, in particular the right to life, the prohibition of inhuman or degrading treatment, and the rights to a fair trial and an effective remedy under both the EU Charter and the ECHR. After a Human Rights Review Panel had already identified violations, the applicants brought an action for damages before the General Court under Articles 268 and 340 TFEU.

Procedurally, the case followed a complex trajectory. In 2021, the General Court dismissed the action as inadmissible, holding that it lacked jurisdiction due to the CFSP carve-out in Articles 24 TEU and 275(1) TFEU.[42] On appeal, however, the

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40 Case C-72/15, see e.g. paras 69, 73 and 76.

41 See e.g. Poli, S., *The Common Foreign Security Policy after Rosneft: Still imperfect but gradually subject to the rule of law*, Common Market Law Review, Vol. 54, No. 6, 2017, p. 1799-1834; Elsuwege, P., *Judicial Review of the EU's Common Foreign and Security Policy: Lessons from the Rosneft case,* VerfBlog, 2017/4/06, Available at: [https://verfassungsblog.de/judicial-review-of-the-eus-common-foreign-and-security-policy-lessons-from-the-rosneft-case/], Accessed 12 April 2026; Lonardo, L., *An Assessment of the Reasoning by Implied Hierarchy in the Case Law of the Court of Justice in Common Foreign and Security Policy*, in Lonardo, L.; Loxa, A. (eds), *The Reasoning of the Court of Justice of the EU: A Normative Assessment*, Oxford, 2026, pp. 160-186.

42 Order of the General Court of 10 November 2021 in Case T-771/20, *KS and KD v Council and Others* [2021] ECLI:EU:T:2021:79.

Court of Justice, in the joined cases *KS and KD v Council and Others*,[43] adopted a more nuanced approach. It found that the General Court had erred by treating a range of administrative and operational issues as falling within the political sphere. The Court of Justice therefore partially set aside the judgment and clarified that EU courts may exercise jurisdiction over certain CFSP-related acts or omissions. The case was subsequently remitted to the General Court, which in 2025 again dismissed the claims, this time on more specific grounds, including questions of attribution and insufficient substantiation against the named defendants.[44]

The central contribution of the Court of Justice lies in its clarification of the scope of the CFSP jurisdictional limitation. It reaffirmed that, although CFSP remains subject to specific restrictions, it does not constitute a "law-free" zone. The decisive criterion is whether the contested conduct is directly linked to *political or strategic choices*. Only such high-level decisions, such as the definition or continuation of a mission's mandate or the allocation of resources, fall outside judicial review.[45] By contrast, *operational and administrative matters*, including the day-to-day management of EULEX, staffing decisions, procedural arrangements, and the availability of review and remedy mechanisms, remain in principle justiciable.[46] In particular, alleged failures to investigate crimes or to ensure accountability mechanisms may be assessed for compliance with fundamental rights.[47]

In this respect, the judgment marks a significant doctrinal development. By explicitly recognising that conduct linked to a CSDP mission may be reviewed in light of fundamental rights, drawing on both the Charter (notably Articles 2 and 4) and the ECHR (Articles 6 and 13), the Court extended the logic previously suggested in *Rosneft* to the context of EU external missions. At the same time, it preserved a residual sphere of non-reviewable political discretion.

Overall, the *KS and KD* case represents a cautious but important step in integrating CFSP action into the EU's broader system of judicial protection. It narrows, though does not eliminate, the gap in effective remedies in the field of EU external action, by allowing a more fine-grained distinction between non-reviewable stra-

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43 Joined Cases C-29/22 P and C-44/22 P *KS and others v Council and Others* [2024] ECLI:EU:C:2024:725.

44 Case T-771/20 RENV, Order of the General Court of 25 September 2025, *KS and KD v Council and Others*.

45 Joined Cases C-29/22 P and C-44/22 P, paras. 118-121.

46 *Ibid.*, paras 122–130.

47 Lonardo, L., *Judicial Protection Clashes with the Principles of Conferral and Institutional Balance. Joined Cases C-29/22 P and C-44/22 P KS and KD*, European Papers Vol. 9, No 2, 2024, pp. 830-844. Available at:
[https://www.europeanpapers.eu/system/files/pdf_version/EP_EF_2024_I_017_Luigi_Lonardo_00786.pdf], esp. pp. 841-843.Accessed 12 April 2026, esp. pp. 841-843.

tegic decisions and reviewable operational conduct where individual rights are at stake.[48]

3.2.1. The Normalisation of Sanctions Litigation: The Russian Cases

Building on this development, EU case law soon witnessed a significant expansion in sanctions litigation, particularly following the 2014 annexation of Crimea and, more prominently, the 2022 invasion of Ukraine.[49] The expansion of restrictive measures, especially asset freezes and travel bans targeting listed individuals and entities, brought a steady flow of cases before the EU courts. What had previously been a relatively limited body of case law thus developed into a sustained stream of disputes, many centred on fundamental rights such as effective judicial protection and the right to a fair trial. In response, the courts have annulled measures where reasoning or evidence proved insufficient, thereby reinforcing procedural safeguards.[50]

This growing body of sanctions litigation has strengthened the role of fundamental rights in EU external action, though mainly in procedural terms. Rather than directly limiting foreign policy choices, the Court focuses on how sanctions are adopted and applied, requiring clear reasoning, sufficiently specific evidence, and

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48 See further e.g. Kleinlein, T., *'Normalising' the Common Foreign and Security Policy: Human Rights, Political Questions, and the Court of Justice's Jurisdiction*, European Constitutional Law Review, Vol. 21, No. 4, 2025, pp. 685-704; Butler, G., *From search to discovery of the political question doctrine in EU law*, European Law Review 2025, Vol. 50, No. 6, pp. 761-774; Verellen, T., *Case note: Order of the General Court of 25 September 2025 in KS & KD, T-771/20 RENV*, Review of European Litigation, 3/2025, Available at: [https://europeanlitigation.eu/en/2025/12/03/case-note-order-of-the-general-court-of-25-september-2025-in-ks-kd-t-771-20-renv-2/], Accessed 12 April 2026; Cantraine, E., *Effective Remedies or Empty Promises? The General Court's Order in KS and KD and the Limits of Judicial Protection in the Common Foreign and Security Policy*, European Law Blog, December 2025, available at [https://www.europeanlawblog.eu/pub/x6bjk05z/release/2], accessed 12 April 2026; Verellen, T., *Effective judicial protection in the CFSP after KS and KD*, Maastricht Journal of European and Comparative Law, Vol. 33 Issue 1, 2026,, pp. 14-31 Available at: [https://journals.sagepub.com/doi/10.1177/1023263X251411828], Accessed 12 April 2026.

49 See e.g. European Parliamentary Research Service, *Timeline of EU sanctions*, 2023, Available at: [https://epthinktank.eu/2023/03/13/eu-sanctions-on-russia-overview-impact-challenges/timeline-of-eu-sanctions/] and European Parliamentary Research Service, *EU sanctions against Russia timeline V7_standalone*, 2025, Available at: [https://epthinktank.eu/2025/02/20/eu-sanctions-against-russia-2025-state-of-play-perspectives-and-challenges/eu-sanctions-against-russia-timeline-v7_standalone/], Accessed 12 April 2026.

50 See e.g. Case T-271/23 *Alfa-Bank JSC v Council* [2025] ECLI:EU:T:2025:559; Case T-273/24 *Pavel Ezubov v Council* [2025] ECLI:EU:T:2025:628; Case C-703/23 P *Elena Petrovna Timchenko v Council* [2025] ECLI:EU:C:2025:608; Case T-573/23 *Positive Group PAO v Council*, ECLI:EU:T:2025:867; Joined Cases C-696/23 P, C-704/23 P, C-711/23 P, C-35/24 P and C-111/24 P *Dmitry Alexandrovich Pumpyanskiy and Others v Council* [2026] ECLI:EU:C:2026:245.

respect for due process. This has encouraged a more individualised, evidence-based approach to listings, with less reliance on broad or associative justifications.[51] As a result, restrictive measures are now subject to a more regularised, rights-based form of review, increasingly resembling administrative law in both structure and practice.[52]

Against this background of increasingly structured judicial review in CFSP sanctions, similar questions begin to arise in a different, yet related, context: the EU's external agreements. The *Front Polisario* litigation brings these issues into focus, shifting attention to the territorial reach of EU law and the role of human rights in the judicial scrutiny of external trade and association agreements.

3.3. Judicial Control of EU External Agreements: Territorial Scope and Human Rights

The "Polisario saga" refers to a series of judgments by the Court of Justice of the European Union concerning the EU's trade and fisheries agreements with Morocco and their application to Western Sahara, a non-self-governing territory whose status is disputed and whose people are internationally represented by Front Polisario. For years, the EU had treated Western Sahara in practice as falling within the territorial scope of its agreements with Morocco, despite its distinct status under international law. This practice was challenged in 2012, when Front Polisario initiated litigation, arguing that such agreements violated the Sahrawi people's right to self-determination and their sovereignty over natural resources.

The first wave of litigation culminated in the 2015 General Court judgment (*Front Polisario I*),[53] which recognised Front Polisario's standing and annulled the agreement insofar as it applied to Western Sahara. On appeal, however, the Court of Justice in 2016[54] avoided directly ruling on standing and instead adopted a doctrinally cleaner approach: it held that the EU-Morocco agreement did not apply to Western Sahara at all. Relying on the principle of *pacta tertiis*[55] and the "separate

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51 Challet, C., *Reflections on Judicial Review of EU Sanctions Following the Crisis in Ukraine by the Court of Justice of the European Union*. College of Europe, 2020, Available at: [https://www.coleurope.eu/sites/default/files/research-paper/researchpaper_4_2020_celia_challet_0.pdf], Accessed 12 April 2026.

52 See Luigi, L., *Challenging EU Sanctions against Russia: The Role of the Court, Judicial Protection, and Common Foreign and Security Policy*, Cambridge Yearbook of European Legal Studies Vol. 25, 2023, pp. 40–63.

53 Case T-512/12 *Front Polisario v Council* [2015] ECLI:EU:T:2015:953.

54 Case C-104/16 P *Council v Front Polisario*, [2016] ECLI:EU:C:2016:973.

55 Article 34 of the Vienna Convention on the Law of Treaties (1969), General rule regarding third States: "A treaty does not create either obligations or rights for a third State without its consent.".

and distinct status" of the territory, the Court reasoned that Morocco could not consent on behalf of Western Sahara, with the result that there was legally nothing to annul.[56] This move simultaneously depoliticized the dispute and embedded key principles of international law into EU external relations.

Following this ruling, the EU renegotiated its agreements with Morocco to explicitly include Western Sahara, claiming that consultations with local actors satisfied the consent requirement. This triggered a second wave of litigation (*Front Polisario II*), in which the General Court in 2021,[57] and subsequently the Court of Justice,[58] clarified and tightened the legal framework. The Court confirmed that Western Sahara must be regarded as a territory separate and distinct, with the consequence that EU agreements cannot automatically extend to it. Any such extension requires a separate legal basis, grounded in the right to self-determination of the territory.[59]

The Court also clarified who is entitled to express that right.[60] It emphasized that the relevant right-holder is the "people" of Western Sahara, not merely the "population" currently residing in the territory. This distinction is crucial, as it shifts the focus away from actors present on the ground, particularly those linked to Moroccan administration, and toward the collective entitled to self-determination.[61] In this context, the Court acknowledged the representative role of Front Polisario, thereby identifying a legitimate interlocutor capable of expressing the will of the Sahrawi people.[62]

Finally, the Court drew a clear line between consultation and consent, insisting that the former cannot substitute for the latter.[63] Consultation processes, especially those involving primarily locally present or Moroccan-affiliated actors, do not meet the legal standard required for the valid extension of EU agreements. At the same time, the Court elaborated on the conditions under which consent may be

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56 Case C-104/16 P, paras. 92 and 107.

57 Joined Cases T-344/19 and T-356/19 *Front Polisario v Council* [2021] ECLI:EU:T:2021:640.

58 Joined cases C-779/21 P and C-799/21 P *Commission and Council v Front Polisario* [2024] ECLI:EU:C:2024:835.

59 Joined cases C-779/21 P and C-799/21 P, para. 134.

60 Odermatt, J., *Whose Consent?: On the Joined Cases C-779/21 P, Commission v Front Polisario and C-799/21 P, Council v Front Polisario,* VerfBlog, 2024/10/05, Available at: [https://verfassungsblog.de/commission-v-front-polisario/], Accessed 12 April 2026.

61 Joined cases C-779/21 P and C-799/21 P, paras. 127 to 130.

62 Joined cases C-779/21 P and C-799/21 P, paras. 89-90.

63 Istrefi K.; Cebulak P., *European Commission and Council of the European Union v. Front populaire pour la libération de la Saguia el-Hamra et du Rio de oro (Front Polisario)*, American Journal of International Law, Vol. 119, No. 4, 2025, pp. 651-659, at p. 655.

established. While it did not entirely exclude the possibility of presumed (implicit) consent, it subjected it to strict safeguards: agreements must not impose obligations on the Sahrawi people, must ensure tangible and verifiable benefits proportionate to the resources exploited, and must include mechanisms for sustainability and effective monitoring.[64] Even where these conditions are met, such presumed consent remains open to challenge if the people's representatives demonstrate that they are not in fact satisfied.[65]

From the perspective of the judicialization of EU external relations, the *Front Polisario* case law marks a significant expansion of judicial control over the Union's external action. Most notably, the Court of Justice transformed the principle of self-determination from a largely political or rhetorical commitment into a justiciable legal constraint. By recognizing the standing of Front Polisario and linking it to the collective right of the Sahrawi people,[66] the Court effectively opened the EU legal order to claims brought on behalf of non-EU populations affected by EU agreements.

A second important dimension concerns the Court's proceduralization of human rights, in particular, how it clarifies who actually holds the right to consent. Consent is no longer treated as a broad political idea, but as a legal entitlement belonging to a specific collective: the "people" entitled to self-determination. In this light, the Court's distinction between "people" and "population" becomes especially significant. It makes clear that it is not enough to involve those living in the territory if they do not genuinely represent the will of the rights-holder.[67] Seen this way, representation, participation, and consent are not just formalities: they serve as procedural safeguards to ensure that the will expressed is truly that of the people concerned.

Third, the judgments bring consent to the centre of the legal framework governing the exploitation of natural resources in disputed territories. By linking self-determination to permanent sovereignty over natural resources, the Court makes consent a necessary condition for the inclusion of such territories in EU agreements. Finally, the Court clearly rejects the idea that consent can be presumed or substituted, even where agreements appear to produce positive economic outcomes. This is perhaps the clearest indication of the normative shift brought about by the *Front Polisario* case law. Consent cannot simply be inferred or replaced by an assessment of benefits. Instead, the right to self-determination acts as a real con-

64 Joined cases C-779/21 P and C-799/21 P, paras. 152-153.

65 *Ibid*., para. 156.

66 *Ibid*., para. 90.

67 *Ibid*., paras. 128 to 130.

straint on EU external action. In practical terms, this means that EU agreements with third States cannot be extended to disputed territories without the consent of the people concerned.

The *Front Polisario* case law thus clarifies the substantive and procedural limits governing EU external action. The next question, however, is what follows when those limits are breached, bringing into focus the role of remedies and, in particular, the evolution from annulment to compensation.

3.4. Completing the System of Remedies: From Annulment to Compensation

This section traces the evolution of the EU system of remedies from a primary focus on annulment toward a more complete framework that includes actions for damages. Through the case law in *Bank Refah* and *KS and KD*, it shows how compensation has emerged as a necessary complement to judicial review in ensuring effective protection of rights.

The judgment in *Bank Refah Kargaran v Council* is often presented as a turning point in translating judicial review in EU external relations into tangible consequences. Building on earlier case law such as *Rosneft*, the Court grounded its reasoning in the need for coherence of judicial protection: if individuals can challenge the validity of restrictive measures, that protection would be incomplete without the possibility of obtaining compensation for harm suffered. In that sense, the Court confirmed that EU external action, here, financial sanctions adopted under the CFSP, may give rise to non-contractual liability where sufficiently serious breaches of rights occur. This step is central to the broader "judicialization" narrative, as it moves beyond symbolic annulment toward remedies with material effect.

The background to the case illustrates this development. In Case T-24/11, the General Court annulled the inclusion of Bank Refah on the sanctions list due to an inadequate statement of reasons and ordered its removal.[68] The applicant subsequently sought damages for losses allegedly caused by the listing. While the General Court accepted that it had jurisdiction, it dismissed the claim, holding that a mere breach of the duty to state reasons was not, in itself, sufficient to establish non-contractual liability.[69]

[68] Case T-24/11 *Bank Refah Kargaran v Council* [2013] ECLI:EU:T:2013:403.

[69] Case T-65/14 *Bank Refah Kargaran v Council* [2016] ECLI:EU:T:2016:692.

On appeal, however, the Court of Justice clarified the jurisdictional framework.[70] It held that the principle of effective judicial protection requires the EU courts to rule on actions for damages brought by persons affected by CFSP restrictive measures. To deny such jurisdiction would undermine the coherence of the system of remedies.[71] In doing so, the Court effectively extended its reach beyond the traditionally narrow limits associated with CFSP under Article 275 TFEU, confirming that damages actions are available in this field.

At the same time, the Court upheld the General Court's assessment on the substance. It agreed that the inadequacy of the statement of reasons, contrary to Article 296 TFEU, does not automatically constitute a sufficiently serious breach capable of triggering EU liability. In line with the established conditions for non-contractual liability, there must be a rule of law conferring rights on individuals and a sufficiently serious violation of that rule. Since those conditions were not met, the damages claim ultimately failed.[72]

While *Bank Refah* established that damages may complement annulment within the EU system of remedies, *KS and KD* tests the limits of that logic in the more complex setting of CSDP missions. The case concerns claims for EU non-contractual liability arising from the operational conduct of EULEX Kosovo. As outlined above, the applicants sought damages for alleged investigative failures, invoking fundamental rights under the Charter and the ECHR. The General Court initially declined jurisdiction, relying on the CFSP carve-out.[73] On appeal, however, the Court of Justice clarified that this exclusion does not extend to all CFSP-related conduct: acts or omissions of an operational nature may, in principle, be subject to

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70 Case C-134/19 P *Bank Refah Kargaran v Council* [2020] ECLI:EU:C:2020:793. See Eckes, C., *Constitutionalising the EU Foreign and Security Policy: The ECJ accepts jurisdiction over claims for damages under the Common Foreign and Security Policy (CFSP),* VerfBlog, 2020/10/18, Available at: [https://verfassungsblog.de/constitutionalising-the-eu-foreign-and-security-policy/], Accessed 12 April 2026.

71 Case C-134/19 P, paras. 39 and 43.

72 See further e.g. Bartoloni, M.E., *'Restrictive Measures' Under Article 215 TFEU: Towards a Unitary Legal Regime? Brief Reflections on the Bank Refah Judgment*, European Papers, Vol. 5, No 3, 2020, pp. 1359-1369; Van Elsuwege, P.; De Coninck, J., *Action for damages in relation to CFSP decisions pertaining to restrictive measures: A revolutionary move by the Court of Justice in Bank Refah Kargaran*? EU Law Analysis, 9 October 2020, Available at: [https://eulawanalysis.blogspot.com/2020/10/action-for-damages-in-relation-to-cfsp.html], Accessed 12 April 2026; Verellen, T., *In the Name of the Rule of Law? CJEU Further Extends Jurisdiction in CFSP* (*Bank Refah Kargaran*), European Papers, Vol. 6, No 1, 2021, pp. 17-24; Breitler, C., *Jurisdiction in CFSP Matters – Conquering the Gallic Village One Case at a Time?,* European Law Blog, 13 October 2022. [https://doi.org/10.21428/9885764c.ac0f3540], Accessed 12 April 2026.

73 Order of the General Court of 10 November 2021 in Case T-771/20, *KS and KD v Council and Others* (not published, EU:T:2021:798).

judicial review.[74] Following remittal, the General Court nevertheless dismissed the claims on narrower grounds, including attribution and insufficient substantiation.

The main contribution of the judgment lies in this jurisdictional clarification (Joined Cases C-29/22 P and C-44/22 P), but it also confirms that EU non-contractual liability can, in principle, arise in the context of crisis-management missions. At the same time, the Court leaves the substantive threshold untouched. Liability remains subject to the settled conditions: a sufficiently serious breach of a rule conferring rights on individuals, actual damage, and a direct causal link.[75]

In *KS and KD*, these requirements were not met. The significance of the case therefore lies not in lowering the standard of liability, but in confirming that the existing framework applies to CSDP-related conduct, provided it does not fall within protected political or strategic choices. The judgment thus marks a limited but meaningful development: it brings operational conduct within the scope of potential review for damages, without altering the underlying constraints. In this way, it reduces the risk that alleged wrongdoing in EU external missions is shielded from scrutiny solely by virtue of its CFSP context.[76]

Against this background, the question of external judicial control re-emerges in the renewed effort to secure EU accession to the ECHR, as reflected in the 2023 Draft Accession Agreement and the Court's evolving position.

3.5. Revisiting Strasbourg? External Oversight and EU Autonomy

The revised Draft Agreement on the Accession of the European Union to the European Convention on Human Rights (2023)[77] represents the latest attempt to enable the EU to accede to the ECHR and submit to the jurisdiction of the Strasbourg Court. It is the outcome of renewed negotiations (2020–2023) within the "46+1 Group", following the impasse created by *Opinion 2/13*, and is currently pending before the Court of Justice under *Opinion 1/25*, requested by the

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74 Joined Cases C-29/22 P and C-44/22 P *KS and Others v Council and Others* [2024] ECLI:EU:C:2024:725.

75 See e.g. Case T-600/21 *WS v European Border and Coast Guard Agency (Frontex)* [2023] ECLI:EU:T:2023:492, para. 52.

76 See further e.g. Kleinlein, *op. cit.,* note 48, pp. 697-702; Butler, G., *op. cit.,* note 48; Verellen, T., Case note ..., *op. cit.,* note 48.; Cantraine, E., *op. cit.,* note 48; Verellen, T., Effective judicial protection ..., *op. cit.,* note 48, p. 24.

77 Council of Europe Steering Committee for Human Rights (CDDH), CDDH Ad Hoc Negotiation Group ("46+1") on the Accession of the European Union to the European Convention On Human Rights, 30 March 2023, 46+1(2023)35FINAL, Available at: [https://rm.coe.int/report-to-the-cddh/1680aa9816], Accessed 12 April 2026.

Commission in November 2025. Accordingly, the following assessment remains necessarily tentative.

A central unresolved issue concerns the extension of external judicial review to CFSP acts. In *Opinion 2/13*, the Court rejected arrangements that would confer exclusive jurisdiction on the Strasbourg Court in areas where its own jurisdiction is limited, finding them incompatible with the autonomy of EU law.[78] While the 2023 Draft Accession Agreement does not explicitly resolve this tension, its mechanisms, notably attribution rules and the co-respondent procedure, suggest that at least some CFSP-related conduct could fall within Strasbourg review, albeit in an uncertain and implicit manner.[79]

Recent case law, in particular *KS and KD*, may be read as a partial internal response, as the Court of Justice narrows the jurisdictional gap by distinguishing between non-reviewable political choices and reviewable acts affecting individual rights. On this basis, a tentative model emerges in which applicants must first exhaust remedies within the EU legal order, with Luxembourg exercising review where possible, before the Strasbourg Court intervenes, potentially with the EU participating as a co-respondent.[80]

Yet important uncertainties remain, especially where the Court of Justice declines jurisdiction on "political or strategic" grounds. Whether, and to what extent, the Strasbourg Court would defer in such situations is unclear. Overall, the 2023 Draft Accession Agreement appears as a pragmatic but incomplete compromise, leaving the precise balance between EU autonomy and external human rights oversight only partially settled.

Johansen argues that the CFSP gap could, in principle, be addressed by granting the Court of Justice limited jurisdiction over fundamental rights violations in CFSP through a Treaty amendment, but this route is politically and procedurally difficult. As an alternative, some propose extending the Court's jurisdiction via an international agreement (such as the accession agreement itself), yet this remains

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78 Johansen, S.O., *The (Im)possibility of a CFSP "Internal Solution"*, European Papers, Vol. 9, No 2, 2024, pp. 783-800, Available at: [https://www.europeanpapers.eu/system/files/pdf_version/EP_eJ_2024_2_SS2_10_Stian_Obi_Johansen_00783.pdf], p. 784, Accessed 12 April 2026.

79 See Article 1 (esp. paras. 3 and 4), and Article 3 (co-respondent mechanism) of DAA 2023,

80 Parodi, M., *Between lights and shadows. Towards a new Opinion of the Court of Justice on the accession of the Union to the ECHR*, Eurojus.it rivista, 2 March 2026, Available at: [https://rivista.eurojus.it/between-lights-and-shadows-towards-a-new-opinion-of-the-court-of-justice-on-the-accession-of-the-union-to-the-echr/?generate_pdf=10991], at p. 16; Lock, T., *Implications of the Revised Draft EU Accession Agreement for the ECHR*, European Convention on Human Rights Law Review, 2025, pp. 1–37, p. 26; and Johansen, S.O., *op. cit.*, note 80, p. 785.

legally contentious and politically sensitive, as it may be seen as circumventing the formal Treaty revision process.[81]

In this light, the 2023 Draft Accession Agreement offers a cautious and still incomplete pathway toward external human rights oversight, contingent on both judicial interpretation and political acceptance. Whether it ultimately reconciles EU autonomy with effective Strasbourg control remains an open question.[82]

4. CONCLUSIONS

Taken together, the case law points to a gradual but clear development: judicialization in EU external action has shifted from an initial focus on constitutional autonomy to a more practical, rights-based system of review. Early judgments, such as *Kadi*, established that external action must comply with internal constitutional standards, making fundamental rights enforceable limits. At the same time, *Opinion 2/13* showed that this autonomy cuts both ways, strengthening internal review while limiting external control and reinforcing a largely self-contained system.

Later case law develops this framework in a more incremental way. In *Rosneft* and *KS and KD*, the Court opens parts of CFSP to judicial review, especially where individual rights are concerned, while still leaving room for political discretion. The sanctions cases, including those linked to Russia, suggest that review in this area is becoming more routine and structured. At the same time, the *Front Polisario* judgments extend the reach of fundamental rights beyond EU territory, treating self-determination and consent as concrete legal constraints rather than abstract principles.

The case law on remedies, particularly *Bank Refah*, further strengthens this trend by confirming that effective judicial protection requires not only annulment but also the possibility of compensation. This helps close some of the earlier gaps in CFSP, even if not completely. Still, the broader picture remains incomplete. The 2023 Draft Accession Agreement, now pending in *Opinion 1/25*, shows that the relationship between EU judicial review, CFSP, and Strasbourg oversight is not

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81 Johansen, *op. cit.,* note 80, at pp. 799-800.

82 See further Jörg Polakiewicz and Irene Suominen-Picht, *A Council of Europe Perspective on the European Union's Accession to the European Convention on Human Rights*, European Papers, Vol. 9, 2024, No 2, pp. 729-744, Available at: [https://www.europeanpapers.eu/system/files/pdf_version/EP_eJ_2024_2_14_SS2_7_J%C3%B6rg_Polakiewicz_Irene_Suominen-Picht_00780.pdf]; Krommendijk, J., One step closer after KS and KD: EU accession to the ECHR, Realaw blog (Review of European Administrative Law), 1 Oct 2024, Available at: [https://realaw.blog/2024/10/01/one-step-closer-after-ks-and-kd-eu-accession-to-the-echr-by-jasper-krommendijk/].

fully settled. Judicialization has clearly advanced, but it remains uneven and continues to be shaped by ongoing constitutional constraints.

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Review article

EUROPEAN UNION AS A GLOBAL PLAYER IN ITS RELATIONS WITH THE INTER NATIONAL CRIMINAL COURT

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ABSTRACT

This article examines the role of the European Union as a global actor in its relations with the International Criminal Court (ICC), arguing that the EU has utilised its character as a distinct legal and political entity to gradually develop one of the most comprehensive institutional frameworks for cooperation with the ICC.

Employing a combined legal and political analysis grounded in realpolitik, this article adopts a contextual and analytical approach to assess the role of the EU in relation to the ICC in contemporary international affairs, with the aim of situating the discussion within the broader scholarly discourse on the role of law in political processes. Particular emphasis is placed on the established institutional mechanisms that enable the EU to act as a global actor in its engagement with the ICC.

The relationship between the EU and the ICC constitutes a matter of strategic importance for the EU, being fully consistent with the aims and principles of the United Nations Charter and conferring a degree of legitimacy that is not easily contested. In this context, the analysis encompasses the EU's unique legal and political framework for cooperation with the ICC, as well as its principal objectives, namely: coordination of the activities of various EU institutions, bodies, and Member States, safeguarding the independence and effective functioning of the ICC, promoting the universality and integrity of the Rome Statute and implementing the principle of complementarity.

The article further addresses the contested issue of immunities of high-ranking officials of States not parties to the Rome Statute and also provides a brief analysis of the immunity of EU officials, arguing that the EU, through its Cooperation Agreement with the ICC, has effectively conditioned the exercise of ICC jurisdiction over its officials and agents (and potentially other persons enjoying immunities under EU law and international law) on its internal decision-making processes.

***Keywords**: European union, Foreign policy, International Criminal Court, Jurisdiction, Universality, Judicial Immunity*

1. INTRODUCTION

The International Criminal Court (ICC) is an unprecedented international judicial institution, whose jurisdiction has been accepted by 125 States,[1] endowed with broad and far-reaching competencies within an inherently politicized international system. Although the ICC does not enjoy universal jurisdictional acceptance, it has nevertheless emerged as a factor that cannot be disregarded in the formulation and implementation of both foreign and domestic policy, including by States that are not parties to the Rome Statute.[2] It has become embedded in the realpolitik of contemporary international relations.[3] However, the ICC, as an international judicial institution, lacks its own enforcement powers and is therefore dependent on external support for the effective exercise of its functions.[4]

From an institutional and normative perspective, the ICC possesses all the characteristics of a judicial institution, and prosecutors have emphasized its "objectivity and independence" and "noninvolvement in political considerations."[5] However, the ICC remains an international judicial institution created through a complex

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1 Rome Statute of the International Criminal Court, United Nations Treaty Series, Vol. 2187, No. 38544. Hungary had initiated the process of withdrawal from the Rome Statute. However, on 25 May 2026, the newly formed Government of Hungary announced that it would discontinue that process and maintain Hungary's status as a State Party to the Statute. The Presidency of the Assembly of States Parties welcomed Hungary's decision to remain a State Party to the Rome Statute, Press release, The Hague, 25 May 2026, Available at:
[https://www.icc-cpi.int/news/presidency-assembly-states-parties-welcomes-hungarys-decision-remain-state-party-rome-statute], Accessed 25 May 2026.

2 Gajić, A., *International Criminal Court as Judicial and Political Actor*, in: M. Škulić; I. Miljuš; A. Škundrić (eds.), Challenges of International Criminal Law and Criminal Law (Izazovi međunarodnog krivičnog prava i krivičnog prava), International Criminal Law Association, Palić, 2025, p. 334.

3 "Realpolitik is a system of politics based on concrete, practical goals, rather than on morality or abstract ideals." Realpolitik, Political Dictionary, [https://politicaldictionary.com/words/realpolitik/], Accessed 10 April 2026; H. Kissinger wrote: "No serious realist should claim that power is its own justification. No idealist should imply that power is irrelevant to the spread of ideals. The real issue is to establish a sense of proportion between these two essential elements of policy. Overemphasis of either leads to stagnation or overextension." Kissinger, H., *Implementing Bush's Vision*, Washington Post, 16 May 2005, Available at:
[https://www.washingtonpost.com/wp-dyn/content/article/2005/05/15/AR2005051500811.html], Accessed 10 April 2026; "…there can be no purity in either political realism or political idealism. A foreign policy guided by cynical realism alone would be as unjust and deadly as one guided by naïve idealism alone." Schuett, R., *Political Realism and Political* Idealism, 2026, Global Policy, 08. December 2025, Available at:
[https://www.globalpolicyjournal.com/blog/08/12/2025/political-realism-and-political-idealism-2026], Accessed 10 April 2026.

4 See in particular: Damaška, M., *International Criminal Court between Aspiration and Achievement*, UCLA Journal of International Law and Foreign Affairs, Vol. 19, 2009, p. 20

5 Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation', 2 March 2022, Available at:

political process and by a political decision, operating in dependence on States and international organizations, with significant potential for its actions and inactions to have repercussions on international relations. Therefore, the ICC is not only a judicial institution but also a distinct and differentiated political actor in contemporary international society.[6]

In this context, the European Union (the EU) has emerged as the most consistent and influential supporter of the ICC, despite (and in part because of) the fact that it is not and cannot be a party to the Rome Statute. By promoting the universality of the ICC, establishing comprehensive legally regulated relations with the ICC, providing operational support and influencing and supporting its policies through a wide range of activities, the EU has strengthened its role as a global actor, thereby enhancing its influence in international law and politics.

A legal and political analysis of the role of the EU with respect to the ICC would be analytically deficient without taking into account the current crisis, which can be characterized as a "seismic shift in geopolitics" with the potential to have "tremendous repercussions for the Court."[7] Taking into account EU activities in the preceding period, which have been extensively presented in a number of books and articles,[8] this article focuses on the role of the EU in relation to the ICC, particularly in the context of the present crisis in international relations. This crisis involves, *inter alia*, significant activities of the ICC concerning the *Situation in*

[https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukrainereceipt-referrals-39-states], Accessed 10 April 2026.

6 "Like all international organizations, the ICC is nested in global politics. International criminal law has been deeply affected by politics from the beginning." Steinberg, R., *Politics and Justice at the International Criminal Court,* Israel Law Review, Vol. 57, 2024, pp. 308-350; See also: Gajić, A., Napomene *o kontroli međunarodnih sudova i tribunala (Remarks on the Issue of Control over International Courts and Tribunals)*, in: S. Nogo (ed.), Suverenitet i rad međunarodnih sudova, International Criminal Law Association, Tara, 2018, pp. 134-146.

7 ICC General Debate 2025, National Statement by Germany delivered at the 23rd Session of the Assembly of States Parties of the Rome Statute, Available at: [https://asp.icc-cpi.int/sites/default/files/asp_docs/ASP24-GD-GER-5-12-ENG.pdf], Accessed 10 April 2026.

8 See as illustrative contributions to this topic: Antoniadis, A.; Bekou, O., *The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times*, International Criminal Law Review, Vol. 7, No. 4, 2007, pp. 621-655; Bekou, O., *The role of the ICC since its foundation and possible scenarios for the future: political support and cooperation by states, Workshop Envisioning International Justice: what role for the ICC?,* European Parliament, October 2021; Bekou, O., *Mainstreaming Support for the ICC in the EU's Policies*, European Parliament and Directorate-General for External Policies of the Union- Policy Department study, European Parliament, 2014; Strapatsas, N., *The European Union and Its Contribution to the Development of the International Criminal Court*, Revue de Droit de l'Universite de Sherbrooke, Vol. 33, 2002-2003, pp. 399-424.

Ukraine,[9] in respect of which the EU has expressed strong support, and which has led to issuance of arrest warrants against the President of the Russian Federation, Vladimir Putin, and the *Situation in Palestine,*[10] which has resulted in the issuance of an arrest warrant against, *inter alia,* the Prime Minister of Israel, Benjamin Netanyahu. Those two "situations" place the activities of the ICC at the center of contemporary international affairs. The State of Israel and the Russian Federation are not parties to the Rome Statute, and these developments raise, *inter alia,* complex issues concerning the judicial immunities of high-ranking State officials from non-party States and have significant potential to shape the future understanding of the role of the ICC.

The prosecution of individuals for core crimes (war crimes, genocide, and crimes against humanity and aggression), was historically dependent on the will of the territorial State, and "states generally have been reluctant to punish their leaders or former leaders."[11] States, as well as the EU, remain extremely cautious about being exposed to the jurisdiction of the ICC. The primary consideration in accepting the jurisdiction of the ICC and determining cooperation with the ICC is often the establishment of mechanisms through which such jurisdiction may be avoided. This article introduces a novel argument, advancing the hypothesis that the EU, like any global power, has made a sophisticated effort to avoid possible unwanted exposure to ICC jurisdiction.

This article argues that without strong EU support, the ICC would risk becoming "a dead letter on paper."[12] Conversely, where such support exists, it emerges as an institution that cannot be disregarded in the formulation of foreign policy decisions, even by the most powerful states that have not accepted ICC jurisdiction. While it is not feasible to exhaustively enumerate all EU activities relating to the ICC within a single written contribution, this article highlights the main positions and activities of the EU that make the EU "a global player" with respect to the ICC.[13]

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9 Situation in Ukraine, ICC-01/22, Available at: [https://www.icc-cpi.int/situations/ukraine], Accessed 10 April 2026.

10 Situation in the State of Palestine, ICC-01/18, Available at: [https://www.icc-cpi.int/palestine], Accessed 10 April 2026.

11 Posner, E.; Yoo, J. C., *Judicial Independence in International Tribunals*, California Law Review, vol. 91 no. 1., January 2005, p. 67.

12 "Something that has lost its force or authority without being formally abolished." Merriam Webster Dictionary, [https://www.merriam-webster.com/dictionary/dead%20letter], Accessed 10 April 2026.

13 The EU identifies itself as a "staunch supporter of the International Criminal Court." *The European Union and the International Criminal Court*, General Secretariat of the Council of the European Union, European Union, May 2010.

Employing a combined legal and political analysis[14] of the relationship between the EU and the ICC, this article is based primarily on the examination of relevant international and EU legal instruments, official documents, official statements, and international practice, as well as relevant academic contributions. A contextual and analytical approach is applied to assess the relationship between the EU and the ICC in contemporary international affairs, thereby contributing to the broader discussion on the role of law in the political process. The emphasis is placed on the established institutional mechanisms that enable the EU to act a global actor in relation to the ICC.

The remaining parts of this article are structured as follows. First, it examines the context in which the EU has taken advantage of the contested jurisdiction of the ICC, enabling it to emerge as a key actor in relation to the Court and in global politics, together with an analysis of the legal and institutional framework governing cooperation with the ICC. It then examines the institutional division of tasks between EU Member States and EU institutions in the implementation of EU policy towards the ICC. Subsequently, separate sections address the key areas of EU policy towards the ICC, namely the promotion of the universality of the Court, the attainment of institutional influence through the election of judges and other ICC officials, the financing of the ICC, and the implementation of the principle of complementarity. The issue of immunities is addressed as a central topic in contemporary discussions relating to the ICC, introducing a novel issue that, to our knowledge, has not yet been addressed in academic literature, namely the immunities of EU officials from ICC jurisdiction. The concluding part presents several notes and proposals in addition to the concluding remarks of the study.

2. POSITIONING OF THE EU IN RELATION TO THE ICC: TAKING ADVANTAGE OF "CONTESTED JURISDICTION"

The role of the EU as a global actor in the field of international criminal adjudication cannot be fully understood without reference to certain historical and theoretical considerations and the foundational principles of the EU as expressed in its constitutive treaties, particularly the aims of the Union. Article 3(5) of the Treaty on EU provides that:

"In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall con-

[14] Schwarzenberger noted long ago that the view that legal elements must be isolated from other aspects of international relations is rapidly losing its ground. Schwarzenberger, G., The *Inductive Approach to International Law*, Stevens & Sons, London, 1965, p. 56.

tribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."[15]

In line with this constitutional framework, the position of the EU has been, since the establishment of the ICC, that "the principles of the Rome Statute, as well as those governing its functioning, are fully in line with the principles and objectives of the Union."[16] This formulation may be interpreted as providing a normative basis for the projection of EU influence and its articulation as a "normative power" in the context of strategic engagement with the Court, thereby facilitating the development of institutionalized forms of external action in international criminal justice.

Although the ICC is not an organ of the UN, it was established under its auspices and operates within a framework of institutional cooperation with the UN, as reflected in the Rome Statute[17] and the Relationship Agreement between the UN and the ICC.[18] The UN assumed a "general obligation to refrain from any action that would frustrate the activities of the Court and its various organs, including the Prosecutor, or undermine the authority of their decisions."[19]

Against this background, the historical development of the project of international criminal adjudication is relevant insofar as it explains the legal and political space in which the EU subsequently positioned itself as a principal supporter of the ICC.

Proposals for the creation of an international criminal court of universal jurisdiction emerged as early as the interwar period.[20] The Advisory Committee of Jurists

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15 Consolidated version of the Treaty on European Union [2012] OJ C 326/13; See: Kassoti, E.; Wessel, R., *The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union*, in: F. Barbero (ed.), Interacciones entre el Derecho de la Unión Europea y el Derecho Internacional Público, Tirant lo Blanch, 2023, p. 20.

16 Council Common Position of 11 June 2001 on the International Criminal Court, [2001] OJ L 155.19, para. 3.

17 The Rome Statute contains 35 references to the UN.

18 The Relationship Agreement between the United Nations and the International Criminal Court of 4 October 2004, United Nations Treaty Series No. 1272.

19 Best Practices Manuel for United Nation's – International Criminal Court Cooperation pursuant to the Relationship Agreement between the United Nations and the Internaitonal Criminal Court, United Nations, 26 September 2016, p. 8; One of the most important obligations is to avoid unnecessary contacts. "The presence of United Nations officials at any ceremonial or similar occasion that is attended by a person who is the subject of an ICC arrest warrant should be avoided and standard courtesy calls should not be made." *Ibid.,* p. 9.

20 Bassiouni, M., *Establishing an International Criminal Court: Historical Survey*, Military Law Review, Vol. 149, 1995, pp. 49-63; McCormak, T., *Selective Reaction to Atrocity: War Crimes and the Develop-*

established by the Council of the League of Nations was tasked, *inter alia*, with drafting the Statute of the Permanent Court of International Justice and considering the establishment of a High Court of International Justice. The Belgian delegate Baron Descamps advocated the creation of a court to try "crimes against international public order and against universal law of nations" and, by its creation, "to avoid the problems associated with the creation of institutions *ex post facto*."[21] Strong opposition to the establishment of an international criminal court was diplomatically justified on the grounds that the realization of such an institutional project was considered "premature."

Without engaging in a full historical account, it is important to note that the Nuremberg trials gave rise to questions concerning the establishment of an international criminal code and the creation of an international criminal court. The UN General Assembly has been seized of this issue since 1946.[22] The International Law Commission (ILC) was tasked with drafting the Draft Code of Crimes Against Peace and Security of Mankind.[23] However, it was only in 1996 that the General Assembly adopted Resolution 51/207, deciding to convene a diplomatic conference of plenipotentiaries in 1998, "with a view to finalizing and adopting a convention on the establishment of an international criminal court."[24]

At the Rome Conference, thirteen EU Member States were part of the "Like-Minded Group" of States and non-governmental organizations advocating the creation of the ICC.[25] Prior to the Conference, no common position had been developed within the EU on several contentious issues, including the Prosecutor's authority to initiate investigations proprio motu, the role of the United Nations Security Council, and the scope of the jurisdiction of the ICC. The United Kingdom and France, as permanent members of the Security Council, were aligned with the positions of the other permanent members of the Security Council.

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ment of International Criminal Law, Albany Law Review, Vol. 60, No. 3, 1997, pp. 698-713.

21 Bassiouni, M., *op. cit.*, note 20, p. 60.

22 General Assembly Resolution "Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal," UN Doc. A/Res/1/95 of 11 December 1946.

23 Draft code of crimes against the peace and security of mankind (Part II) — including the draft statute for an international criminal court, UN, International Law Commission, Available at: [https://legal.un.org/ilc/texts/7_4.shtml], Accessed 10 April 2026.

24 Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 17 July 1998, UN Doc. A/CONF.183/10.

25 Groenleer, M., and Van Schaik, L., *United We Stand: The European Union's International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol*, Journal of Common Market Studies, vol. 45, no. 5, December 2007, p. 977.

The EU, acting as an observer at the Rome Conference, emerged as a strong supporter of the establishment of the ICC, with jurisdiction over the core crimes of genocide, war crimes, and crimes against humanity (aggression not being included at that stage), advocating an ICC characterized by a "considerable relationship with the Security Council and other international institutions," as well as the establishment of a "strong, effective, highly qualified Prosecutor independent of Governments."[26] All EU Member States ultimately voted in favor of the adoption of the Rome Statute, which largely accepted the position of the Like-Minded Group. This position stood in sharp contrast to that of other major powers, in particular the permanent members of the UN Security Council—the United States of America, the Russian Federation, and the People's Republic of China—which advocated a more limited jurisdiction of the ICC, a stronger role for the Security Council, and a less independent Prosecutor.[27]

Immediately after the Rome Conference, and while the entry into force of the Rome Statute remained uncertain, the Sixth (Legal) Committee of the UN General Assembly (1998), in its discussion on the ICC, heard a statement delivered by the Austrian delegate (Mr. Sucharipa) on behalf of the EU (and associated States not yet members of the EU), presenting the common position of the EU, [28] as follows:

"The European Union had consistently and strongly supported the idea of creating the Court … For the Court to succeed in its task it needed the widest support of the international community, and he hoped that all States, whether or not they voted for the adoption of the Statute, would recognize the benefits of a universal criminal court."[29]

This position has subsequently remained a constant element of EU external action in the field of international criminal justice, including in its statements before UN bodies and the Assembly of States Parties to the Rome Statute.

The fact that certain "major powers" are not parties to the Rome Statute may significantly affect the effectiveness of ICC jurisdiction. Even if not fully effective,

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[26] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June -1 7 July 1998, Official Records Vol. I, Final Documents, Annex III. Of the Final Act, p. 76; See also: Vol. II, p. 80 and Vol. III, p. 13.

[27] Groenleer, M., *The United States, the European Union and the International Criminal Court: Similar values, different interests?*, International Journal of Constitutional Law, Vol. 14, No. 4, 2015, pp. 932-944.

[28] Official Records of the General Assembly of the United Nations, Sixth Committee, 4. November 1998, Agenda item 153: Establishment of an international criminal court, UN Doc. A/53/189 and 387, p. 4.

[29] *Ibidem,* p. 2.

however, the Court remains relevant from a political standpoint. Some authors argue that international organizations are a "product of major power interests … in a way that induces weaker states to participate."[30] However, formation of an international judicial institution whose jurisdiction is accepted by a large number of states cannot be ignored, because as Abot and Sindal argue:

"Independence enables international organizations to shape understandings, influence the terms of state interactions, elaborate norms, and mediate or resolve member states' disputes. The acts of independent international organizations may be accorded special legitimacy, and they affect the legitimacy of members' actions. Even centralization, seemingly more mechanical, can alter states' perceptions and the context of their interactions."[31]

EU policy towards the ICC appears to have been constructed around multiple foreign policy objectives, even if not always explicitly articulated, enabling the EU to assume a leadership position in this significant area of international relations. These objectives include the promotion of effective multilateralism, the maintenance of coherent legal relations among its Member States, the aim of ensuring that any attack affecting the EU falls within the framework of the Rome Statute, and the capacity to rely on the ICC in the conduct of its external action. In this way, the EU contributes to the establishment of both legal and political parameters that cannot be disregarded even by non-members of the ICC.

This suggests that support for the enforcement of ICC jurisdiction constitutes a matter of strategic importance for the EU, fully consistent with the aims and principles of the UN Charter and conferring a degree of legitimacy that cannot be easily contested even by "great powers."

3. UNIQUE POSITION OF THE EU - LEGAL AND POLITICAL FRAMEWORK

It appears that the EU (which is neither a State, nor simply a group of States or a mere union of states, and not a classical international organization)[32] has, in its relations with the ICC, made strategic use of its character as a distinct legal and

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30 Bosco, D., *Rough Justice – The International Criminal Court in the World of Power Politics*, Oxford University Press, New York, 2014, p. 72; Abbott, K.; Snidal, D., *Why States Act Through Formal International Organizations*, The Journal of Conflict Resolution, Vol. 42, No. 1, 1998, p. 3.

31 Abbott, K. W.; Snidal, D., *Why States Act Through Formal International Organizations*, The Journal of Conflict Resolution, Vol. 42, No. 1, 1998, p. 9.

32 Von Bogdandy, A., *Neither an International Organization Nor a Nation State, The EU as a Supranational Federation*, in: Jones E.; Menon, A.; Weatherill S. (eds.), The Oxford Handbook of the European Union, Oxford, 2013, pp. 761-776.

political entity.[33] Only States may become parties to the ICC; accordingly, the position of the EU vis-à-vis the Court is distinct both institutionally and legally. An analysis confined solely or predominantly to inter-State cooperation, without considering the EU's institutional capacities in relation to the ICC, would lead to a distorted and incomplete understanding of the ICC's position and functioning. The framework for cooperation between the EU and the ICC is of *sui generis nature,* unprecedented in the contemporary international legal and political order. The EU's specific institutional structure and distinct legal personality endow it with opportunities, as well as challenges, that go beyond those available to any individual State.

The first Common Position of the Council of the EU with respect to the ICC[34] was adopted on 11 June 2001, before the ICC became operational, [35] establishing a comprehensive framework for cooperation with and support for the ICC, as well as for the implementation of the Rome Statute. [36] Beyond strong political and diplomatic engagement,[37] the EU has progressively developed its political, institutional, and legal framework governing its relationship with the ICC.

The main normative framework governing the relations between the EU and the ICC is the Agreement between the EU and the ICC on Cooperation and Assistance, concluded on 10 April 2006 (the Agreement). This Agreement established the parameters of cooperation in a comprehensive manner. It has been further supplemented by, *inter alia*, the Letter of Understanding between Eurojust and the International Criminal Court of 10 April 2007, the Security Arrangements for the protection of classified information exchanged between the EU and the ICC of 15 April 2008, and the Working Arrangement establishing cooperative rela-

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33 On the issue of identity of the EU see: Gajić, A. *Self-Determination of the European Union,* in: Petrašević, T.; Duić, D.; Novokmet, A. (eds.), EU and Comparative Law Issues and Challenges Series (ECLIC), EU at the Crossroads - Ways to Preserve Democracy and Rule of Law, Vol. 8, 2024., pp. 567-576.

34 Council Common Position of 11 June 2001 on the International Criminal Court (2001/443/CFSP), [2001] OJ L 155/19; replaced by Council Common Position of 16 June 2013 on the International Criminal Court, [2013] OJ L 150, p. 67.

35 The ICC became operational on 1 July 2002, when the Rome Statute entered into force.

36 This is fully in line with the statement of Romano Prodi: "We must aim to become a global civil power at the service of sustainable global development. After all, only by ensuring sustainable global development can Europe guarantee its own strategic security." Shaping the new Europe, Presentation to the European Parliament by President Romano Prodi, Strasbourg, 15 February 2000, Available at: [https://aei.pitt.edu/66298/1/1.2000.pdf], Accessed 10 April 2026; See also: Manners, I., *Normative Power Europe: A Contradiction in Terms*, Journal of Common Market Studies, Vol. 40, No 2, 2002, pp. 235-258.

37 "Beyond the grand rhetoric surrounding the EU-ICC relations, the EU has undoubtedly committed substantial diplomatic capital and resources to the ICC cause." Antoniadis, A.; Bekou, O., *op. cit*., note 8, p. 621.

tions between the International Criminal Court and the European Union Agency for Law Enforcement Cooperation (Europol) of 25 April 2023.

Under the Agreement, "with a view to facilitating the effective discharge of their respective responsibilities", the ICC and the EU are committed to "cooperate closely, as appropriate, with each other and consult each other on matters of mutual interest … while fully respecting the respective provisions of the EU Treaty and the Statute."[38] It is provided that "in order to facilitate this obligation of cooperation and assistance, the Parties agree on the establishment of appropriate regular contacts between the Court and the EU Focal Point for the Court."

To this end, the Agreement provides for the attendance of representatives of the ICC at relevant meetings and conferences organised under the auspices of the EU. It further provides for extensive cooperation, including the exchange of information and documents, arrangements concerning confidentiality and classified material, and rules governing the testimony of EU officials and staff, where relevant.[39]

The Agreement also contains detailed provisions on cooperation between the EU and the Prosecutor of the ICC, as well as provisions establishing the obligation of the Secretary-General/High Representative to respond to requests within one month. A separate provision governs privileges and immunities (addressed in more detail below), while particular emphasis is placed on operational cooperation through the conclusion of "personal arrangements."[40]

It also provides for possible operational support by the EU, including the provision of expertise, services and facilities, subject to availability and to supplementary arrangements where required. It further envisages EU support for training and assistance programmes for judges, prosecutors, officials and counsel engaged in activities related to the Court, thereby confirming the operational and capacity-building dimension of EU–ICC cooperation.[41]

A particularly advanced form of operational cooperation is reflected in the Working Arrangement establishing cooperative relations between the ICC and the European Union Agency for Law Enforcement Cooperation (EUROPOL), concluded on 25 April 2023. This Arrangement provides, inter alia, a legal basis for the transfer of personal data by Europol and defines the scope of cooperation, which includes, among other matters, the exchange of specialist knowledge, support for

38 Article 4 of the Agreement.

39 Articles 7 and 9 of the Agreement.

40 Article 13 of the Agreement.

41 Article 17 of the Agreement.

evidence-gathering activities, strategic analysis, information on criminal investigation procedures, training activities, and operational support in individual criminal investigations. It also establishes detailed modalities for cooperation, including points of contact, liaison arrangements, secure communication channels, and safeguards for the processing and protection of information.

In comparative terms, this framework appears significantly more detailed and operationally oriented than that provided by the Cooperation Agreement between the Office of the Prosecutor of the International Criminal Court and the International Criminal Police Organization (INTERPOL).

For the first time, following the situation in Ukraine, a Joint Investigation Team (JIT) has been established between certain EU Member States and the ICC, with the support of the European Union Agency for Criminal Justice Cooperation (Eurojust), providing legal, logistical, financial, and analytical support.[42] On 5 October 2023, Europol became a participant in the JIT in Ukraine. One of the key outcomes of this cooperation is the establishment of the Core International Crimes Evidence Database (CICED), representing a significant development in the systematic collection and preservation of evidence. [43]

The legal basis for the actions of EU in relation to the ICC, in addition to the above-mentioned agreements and arrangements, is provided by Council Decision 2011/168/CFSP of 21 March 2011 on the ICC, which repealed Common Position 2003/444/CFSP (the Decision). It provided the foundation for the amended Action Plan adopted by the Council of the EU to follow up on the Decision (Action Plan).[44]

It is evident that the EU's foreign policy objectives are most effectively implemented through legally binding instruments and thus acquire not merely a policy dimension, but a legal one. Unlike common positions, the Decision is legally binding.

The Decision and the Action Plan structure EU action around five principal objectives: coordination of activities, promotion of the universality and integrity of the Rome Statute, safeguarding the independence and effective functioning of the Court, strengthening cooperation with the ICC, and implementation of the

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42 Suhong, Y.; Tan, Y., *The Joint Investigation Team in Ukraine: Challenges and Opportunities for the International Criminal Court*, European Papers, Vol. 8, No. 3, 2023, pp. 1121-1124.

43 Core International Crimes Evidence Database (CICED), Eurojust, 11. December 2023, Available at: [https://www.eurojust.europa.eu/publication/core-international-crimes-evidence-database-ciced], Accessed 10 April 2026.

44 Action Plan to follow-up on the Decision on the International Criminal Court, Council of the European Union, 12 July 2011.

principle of complementarity. These objectives are operationalized through a detailed allocation of tasks between EU institutions and Member States and a set of implementing measures, thereby enhancing coherence in EU external action.

4. COORDINATION OF THE EU ACTIVITIES: DIVISION OF TASKS

The institutional and operational architecture of the EU constitutes one of the most developed and coherent systems of support for an international judicial body.[45] The Decision and the Action Plan provide the basis for the division of competences and the establishment of coordination mechanisms among the EU institutions (Council of the EU, High Representative of the Union for Foreign Affairs and Security Policy, European Commission, European Parliament, European External Action Service, and the Working Party on Public International Law (COJUR–ICC)), which are primarily responsible for the development and implementation of the EU policy towards the ICC.

The Decision[46] entrusts the Council and the High Representative with "the task of coordinating measures, where appropriate, by the EU and its Member States, for the implementation of the five principal objectives.[47] It is the obligation of the EU to "ensure consistency and coherence between its instruments and policies across all areas of its external and internal action in relation to the most serious international crimes referred to in the Rome Statute."[48]

The COJUR–ICC is tasked with facilitating of regular consultations, exchanges with relevant actors, and preparatory coordination ahead of sessions of the Assembly of States Parties. This institutional framework is complemented by a structured system of focal points, including an EU Focal Point within the European External Action Service (EEAS) and corresponding national focal points in Member States, thereby enhancing the flow of information and operational coordination.

A key method for the implementation of EU policy on the ICC is the coordination of Member States' activities.[49] In order to ensure effective cooperation and policy coherence, Member States are required to "to have an expert in their em-

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45 O. Bekou, *op. cit.*, note 8, pp. 19-23.

46 Article 6 of the Decision.

47 Universality of the Rome Statute (Article 2), support for the independence of the ICC (Article 3), cooperation with the ICC (Article 4), and the implementation of the principle of complementarity (Article 5).

48 Article 8 of the Decision.

49 Action Plan, note 39, para. 2.4.

bassies in The Hague and in their mission in New York dealing also with specific ICC matters."

The Action Plan assigns a prominent role to the European External Action Service (EEAS), [50] which is tasked with mainstreaming ICC-related issues across its departments, including geographical and thematic divisions, crisis management structures, and Common Security and Defence Policy missions and operations. The EEAS is further responsible for ensuring coordination with the European Commission and for facilitating access of EU delegations to ICC and international justice experts, particularly in relation to situation countries and those under investigation or preliminary examination.

EU delegations also monitor relevant developments on the ground and share information through the network of focal points, while training of EU and Member State officials on ICC-related matters further contributes to the professionalism, sustainability and effectiveness of EU engagement.

The European Commission contributes to ensuring consistency between EU policies and financial instruments in relation to the most serious international crimes, while the European Parliament is regularly informed of significant ICC-related developments and may express views to be taken into account where appropriate.

A decade after the adoption of the Decision and the Action Plan, and in the context of their implementation, following the outbreak of the war between the Russian Federation and Ukraine the cooperation with the ICC is further enhanced through the attribution of specific tasks to Eurojust[51] and Europol. [52]

5. PROMOTING UNIVERSALITY OF ICC JURISDICTION AS A STRATEGIC TASK OF THE EU

The EU is a strong promoter of the universality of the ICC jurisdiction, a position that finds affirmation in the resolutions of the UN General Assembly[53] and the

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50 *Ibid.*, para. 2.5.

51 Regulation (EU) 2022/838 of the European Parliament and of the Council of 30 May 2022 amending Regulation (EU) 2018/1727 as regards the preservation, analysis and storage at Eurojust of evidence relating to genocide, crimes against humanity, war crimes and related criminal offences, [2022] OJ L 148.

52 For details see: Caeioniello, M., *The Role of the EU in the Investigation of Serious International Crimes Committed in Ukraine. Towards a New Model of Cooperation?,* European Journal of Crime, Criminal Law and Criminal Justice, Vol. 30, 2022, pp. pp. 229-230.

53 See: United Nations General Assembly Resolution adopted on 29 October 2024 (Report of the International Criminal Court), UN Doc. A/RES/79/6, para. 2.

Assembly of States Parties. [54] In the quest for universality, as provided in the Action Plan, "the primary objective with regard to third countries is to maximize their political will for the ratification, accession and implementation of the Statute in order to achieve the desired universality." U diplomatic engagement has accordingly supported resolutions and initiatives aimed at encouraging wider acceptance of the Rome Statute by third States.[55] In the Action Plan, it is provided that the objectives with respect to the universality of the Rome Statute "will continue to be relevant until universal participation in the Rome Statute is attained."

EU officials and those of its Member States understand the aim of universality is difficult to achieve. As argued by Bosco:

"As a result of design choices, the ICC was born with a weak connection to major powers whose support it needs. Those major powers who are court members—the United Kingdom, France, Germany, Japan, and Brazil—are accorded no special powers or privileged place in the institution…Those states outside the court include the world's uncontested superpower, the United States, and its most rapidly growing power, China. Nuclear-armed giants Russia and India have not joined the court. Regional powers including Turkey, Egypt, Israel, Saudi Arabia, Pakistan, and Indonesia have also kept their distance. Together, nonmembers account for two-thirds of the world's population and almost three-quarters of its armed forces."[56]

The issue of universality cannot be separated from that of effectiveness. As Posner and Yoo observe, "we predict that the ICC will not be an effective tribunal. Although the Rome Statute is aimed at individual defendants, the ICC's jurisdiction strikes at the heart of state interests."[57] They further argue that "states with military forces operating abroad will fear that soldiers and their commanders, including the highest political authorities responsible for military activities, may be brought before an international court for war crimes prosecution and will, at a minimum, be inconvenienced and embarrassed."[58]

Since the ICC issued arrest warrants against senior officials of non-States Parties, and particularly in connection with the *Situation in Palestine*, divergent positions have emerged among EU Member States regarding the obligation to execute such warrants. Officials of certain members of the EU provided statements that they

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54 Strengthening the International Criminal Court and the Assembly of States Parties, Special Section, Universality of the Rome Statute, ICC-ASP/24/Res.6, 05. December 2025.

55 See: Section 3 of the Action Plan.

56 Bosco, D., *op. cit.*, note 30, p. 5.

57 Posner, E.; Yoo, J., *Judicial Independence in International Tribunals*, California Law Review, Vol. 91, No. 1, 2005, p. 69.

58 *Ibid*.

will not execute the arrest warrant against Israeli Prime Minister Netanyahu.[59] However, this has not prevented the EU from continuing, at least at the diplomatic level, to promote the universality and authority of the Rome Statute system. At the 24th (2025) session of the Assembly of States Parties, in the statement provided on behalf of the EU and all Member States except Hungary, it is stated:

"We also call on all States Parties to live up to their obligations and refrain from any action that would frustrate the activities of the Court or undermine its decisions. We note that a lack of cooperation may affect the Court's ability to carry out its responsibilities. We call on all States Parties to redouble efforts to identify new avenues for strengthened cooperation with the Court and thank all those who are already doing so."[60]

This situation may be understood in light of Abbott and Snidal's conclusion:

"In emphasizing the possibilities for formal organizations, we should not ignore the difficulty and even impossibility of some of the tasks that are presented to them. Despite these severe limitations, the fact that international organizations have not been abandoned by states is testimony to both their actual value and their perhaps greater potential."[61]

Through its active promotion of the universality of the Rome Statute, as the only "major power" consistently supporting its jurisdiction, the EU contributes to a dynamic aptly captured by Posner and Yoo in the following terms:

"The conventional wisdom holds that independent tribunals led to political unification. We argue that political unification makes independent tribunals possible. In the international realm, where there is no political unification, international tribunals cannot be both independent and effective. This is not to claim, as some have, that international tribunals serve no useful purpose…[I]nternational tribunals can help states resolve disputes by providing information on the facts or rules of conduct. But they must act consistently with the interests of the states that create them."[62]

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59 *European leaders divided on ICC arrest warrant bid for Netanyahu*, Politico, 20 May 2024, Available at: [https://www.politico.eu/article/european-leaders-divided-icc-arrest-warrant-bid-for-israeli-hamas-officials-benjamin-netanyahu-yahya-sinwar-karim-khan-war-crimes-crimes-against-humanity/], Accessed 10 April 2026.

60 Statement of Denmark on behalf of the European Union, Assembly of State Partis, December 2025, Available at: [https://asp.icc-cpi.int/sites/default/files/asp_docs/ASP24-GD-DNK-EU-1-12-ENG.pdf], Accessed 10 April 2026.

61 Abbott, K.; Snidal, D., *op. cit.,* note 31, p. 29.

62 Posner, E.; Yoo, J., *op. cit.*, note 53, p. 72.

6. ELECTION OF THE PROSECUTOR, JUDGES AND STAFF OF THE ICC AND FINANCING THE ICC

In operational terms, the issue of preserving integrity arises most prominently in the processes governing the election of judges, the Prosecutor, and the ICC's officials and staff, as well as in relation to the development of the legal foundations of the ICC. The Rome Statute establishes stringent criteria and procedures for the nomination and election of judges and senior officials. The candidacy procedure, [63] followed by the requirement of a two-thirds majority of members present and voting for election,[64] underscores the rigor of this system. The collective weight of the EU Member States, combined with established practices of coordination, enables the EU to play a decisive role in shaping the composition of the Court's judiciary and prosecutorial structures.

Moreover, effective functioning of the ICC is highly dependent on the financial resources available to the Court. As noted by Bekou, "the EU developed as one of the staunchest supporters of the ICC, not only in terms of its overall policy, but also in terms of generous financial support provided to the Court."[65] The EU Member States provide approximately half of the regular budget of the ICC, and in addition, the EU is a strong financial supporter of, *inter alia,* outreach activities, numerous non-governmental organizations engaged with the ICC, training programs, internship and visiting professional programmes, and technical events. [66]

7. COMPLEMENTARITY

The principle of complementarity constitutes one of the foundational elements of the Rome Statute.[67] On the one hand, it operates as a limitation of the ICC jurisdiction, precluding its exercise where national authorities are willing and able to prosecute. On the other, it is an indispensable functional principle, given that the Court lacks the capacity to conduct large-scale prosecutions. Accordingly, the

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63 Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court, ICC-ASP/3/Res.6.

64 Article36 (6) of the Rome Statute.

65 Bekou, O., *op. cit.*, note 8, p. 3; See also: Wiebelhaus-Brahm, E.; Ainley, K., *The evolution of funding for the International Criminal Court: Budgets, donors and gender justice*, Journal of Human Rights, Vol. 22, No. 1, 2023, pp. 31–46.

66 Bekou, O., *The role of the ICC since its foundation and possible scenarios for the future: political support and cooperation by states, Workshop Envisioning International Justice: what role for the ICC?,* European Parliament, October 2021, p. 10.

67 Škulić, M., *Međunarodno krivično pravo*, Univerzitet u Beogradu – Pravni fakultet, Beograd, 2020, pp. 36–39; Škundrić, A., *Nadležnost međunarodnih krivičnih sudova i tribunala*, Univerzitet u Beogradu – Pravni fakultet, Beograd, 2021, pp. 120–124.

primary responsibility for the investigation and prosecution of core international crimes remains with States, which are under an obligation to implement the Rome Statute within their domestic legal systems.

The EU, through its Action Plan and its implementation, has developed a structured approach to the implementation of complementarity. This includes obligations for Member States to adopt the necessary implementing legislation, to exchange relevant information, and to promote the effective application of the Rome Statute. In addition, the EU provides both logistical and technical support to third States lacking the capacity to investigate and prosecute crimes falling within the jurisdiction of the Court, thereby reinforcing domestic accountability mechanisms.

In addition to the enhanced role of Eurojust and Europol, one of the most significant measures in this regard is the commitment to establish ad hoc expert teams composed of judges, prosecutors, legal advisers, investigators, analysts and forensic specialists. These teams are designed to be rapidly deployable, in the short or medium term, on a case-by-case basis, with sufficient operational capacity to assist national authorities. Furthermore, the EU and its Member States support existing initiatives, such as Justice Rapid Response, thereby contributing to a broader system of international criminal justice assistance. Through these mechanisms, the EU not only supports the functioning of the ICC, but also actively strengthens the domestic dimension of complementarity, which remains essential for the overall effectiveness of the Rome Statute system.

8. THE ISSUE OF JUDICIAL IMMUNITIES AT STAKE

The principal issue dividing States in their support for the ICC is, undoubtedly, the question of immunities of State officials from non-States Parties to the Rome Statute. International criminal courts are not designed as forums for mass trials substituting national jurisdictions; rather, they focus on high-ranking military and political figures, whose conduct is, almost by definition, attributable to the State or to a party to an armed conflict. [68] In this context, a central concern of States is to ensure that such officials remain beyond the reach of international criminal jurisdiction. [69]

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[68] Gajić A., *op. cit.*, note 2, p. 346.

[69] The most recently declassified files of the UK „make clear that Britain only signed up the ICC when it became clear that UK nationals would not be able to be prosecuted by it" as well as concerns about the use of nuclear weapon. *UK backs International Criminal Court since it can't prosecute Britons,* Declassified UK, 30. December 2025, Available:

The prosecution of political and military leaders after the end of a conflict is one matter, whereas their investigation and the issuance of arrest warrants during an ongoing situation constitute "a mission with high political bets."[70] In this context, the principle of complementarity may not always operate as a sufficient safeguard against the exercise of the ICC's jurisdiction.

While, in the case of the investigation concerning the President and high-ranking officials of the Russian Federation with respect to the *Situation in Ukraine*,[71] the EU expressed unwavering support, the case of issuance of arrest warrants against Netanyahu and Gallant[72] presents a different picture. In relation to the *Situation in Ukraine*, the ICC Prosecutor was supported even by the United States, but in connection with the Situation in Palestine, certain ICC officials, including the Prosecutor Karim Khan was imposed to US Sanctions.[73]

Article 27 (2) of the Rome Statute reads as follows:

"Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

This is the most disputed jurisdictional clause in contemporary international affairs since the ICC can establish jurisdiction of persons who are citizens or high officials of states not parties to the Statute.[74] It cannot be read in isolation of Article 98 of the Rome Statute that provides that:

"The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or

[https://www.declassifieduk.org/uk-agreed-to-international-criminal-court-because-it-cant-prosecute-britons/], Accessed 10 April 2026.

70 *Ibid.*, p. 346.

71 The Pretrial Chamber in relation to the Situation in Ukraine issued arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova Belova, since 2023; and Sergei Ivanovich Kobylash, Viktor Nikolayevich Sokolov, Sergei Kuzhugetovich Shoigu and Valery Vasilyevich Gerasimov, since 2024. Report of the International Criminal Court on its activities in 2024/25, UN Doc. A/80/342, 18 August 2025.

72 Up to date the ICC issued arrest warrants against "Benjamin Netanyahu and Yoav Gallant, since 2024" On 9 August and 25 October 2024, Pre-Trial Chamber I of the ICC "terminated the proceedings in relation to Ismail Haniyeh and Yahya Sinwar, respectively, following the withdrawal of the Prosecution's warrant of arrest application because of their deaths." *Ibid.*

73 For details: Gajić, A., *op. cit.*, note 2, p. 351.

74 See: Gajić, A., *Head of States Immunity in the Context of the Jurisdiction of the International Criminal Court*, in: Škulić. M; Miljuš I.; Škundrić A. (eds.), Raskršća međunarodnog krivičnog i krivičnog prava, Udruženje za međunarodno krivično pravo, Palić, 2023, pp. 60-68.

property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity."

Article 98 does not address the authority of the ICC to investigate or to issue arrest warrants. The authorization to indict is separated from the conditions for cooperation, including the execution of arrest warrants.

The position of the United States, the Russian Federation and China (as well as certain other states) are that high-ranking officials of states not parties to the Rome Statute enjoy immunities from the jurisdiction of the ICC. The common position is well summarized by the delegate of the China in delivering its statement at the Assembly of States Parties (2024) arguing that under international law, heads of States and Government, ministers for foreign affairs "enjoy absolute immunity from criminal jurisdiction and inviolability" as well as, that in accordance with the international treaty law the Rome Statute cannot create obligations "for a third State without its consent." It further claimed that:

"[I]n accordance with Article 98 of the Statute, the Court may not proceed with a request for cooperation that might result in a breach by the requested State of its obligations to a third State. It is our consistent view that the Court should act in strict compliance with the Rome Statute and may not exercise its jurisdiction over acts committed by nationals of non-State parties on the territory of non-State parties, unless referred by the UN Security Council."[75]

Article 27(2) of the Rome Statute binds States Parties and represents a treaty-based approach to immunity, excluding procedural bars based on official capacity. It is, however, in tension with the dispositive rules of customary international law on immunities. However, the EU is not a party to the Rome Statute, and it established a distinct regime concerning the immunities of its officials and servants.

While all EU Member States are parties to the ICC, EU officials (such as High Representatives, members of the Commission, other officials and servants) have a special status and enjoy immunity from criminal prosecution by virtue of their official functions.[76] In addition, nationals of Member States may act in a dual capac-

[75] Statement by the observer delegation of China to the 23rd Assembly of States Parties to the Rome Statute of the International Criminal Court, Assembly of States Parties to the International Criminal Court, Available at: [https://asp.icc-cpi.int/sites/default/files/asp_docs/ASP23-GD-CHN-3-12-ENG.pdf], Accessed 10 April 2026.

[76] See: Protocol (No 7) On the Privileges and Immunities of the European Union. Document 12012E/PRO/07 [2012] OJ C 326.

ity—as State officials and as members of EU institutions (for example, as members of the European Council or the Council of the European Union).[77]

In the Cooperation Agreement, Article 12 (Privileges and Immunities) provides as follows:

"If the Court seeks to exercise its jurisdiction over a person who is alleged to be criminally responsible for a crime within the jurisdiction of the Court and if such person enjoys, according to the relevant rules of international law, any privileges and immunities, the relevant institution of the EU undertakes to cooperate fully with the Court and, with due regard to its responsibilities and competencies under the EU Treaty and the relevant rules thereunder, to take all necessary measures to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities in accordance with all relevant rules of international law."

This provision differs fundamentally from Article 27 (2) of the Rome Statute. While officials of States Parties to the Rome Statute do not enjoy immunity from criminal prosecution before the ICC,[78] persons covered by Article 12 of the Agreement still enjoy such immunities until they are waived by the competent EU institution, in accordance with international law.[79]

This provision does not define precisely to whom it applies, referring only to persons who "enjoy, according to the relevant rules of international law, privileges and immunities." It may therefore be construed that it applies not only to EU officials and servants but also to individuals who simultaneously function as State officials and as participants in EU institutional structures.

While Article 12 of the Cooperation Agreement is, *prima facie*, framed in terms favourable to the exercise of the ICC's jurisdiction, particularly through the obligation "to take all necessary measures to allow the Court to exercise its jurisdiction", it also makes clear that such exercise of jurisdiction depends on the prior waiver of privileges and immunities by the competent EU institution. Under international law, such a waiver remains discretionary in nature.

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77 In accordance with the Article 11 of the Protocol on privileges and immunities "Representatives of Member States taking part in the work of the institutions of the Communities, their advisers and technical experts shall, in the performance of their duties and during their travel to and from the place of meeting, enjoy the customary privileges, immunities and facilities.".

78 This provision of the Rome Statute "constitutes a treaty waiver of immunity ratione personae" Akande, D., *International Law Immunities and the International Criminal Court*, The American Journal of International Law, Vol. 98, No. 3, 2004, note. 11 at p. 838.

79 Similar provision is contained in Article 19 (Rules concerning United Nations privileges and immunities) of the Relationship agreement between the ICC and the UN.

Accordingly, although Article 12 appears at first sight to be consistent with the overall framework of cooperation established by the Rome Statute, it operates in a legally distinct manner. By making the exercise of ICC jurisdiction over EU officials and servants, as well as over other persons enjoying privileges and immunities under EU law, dependent on an internal EU decision to waive immunity, the Cooperation Agreement preserves a significant degree of institutional control by the EU over potential exposure to ICC jurisdiction. Had the drafters intended to exclude such immunities altogether, they could have introduced an express treaty-based waiver comparable to Article 27 of the Rome Statute.

9. INSTEAD OF CONCLUSION

This article is being finalized at a time when the Russia–Ukraine and Israeli–Palestinian conflicts are still ongoing, as well as during the broader crisis in the Middle East, involving the conflict between the United States and Israel, on the one hand, and Iran, on the other. At the time of submission of this article, the ICC has not issued any statement regarding these situations. The principal actors involved—including the United States, the United Arab Emirates, Israel, Iran, Lebanon, Kuwait, and Qatar—are not parties to the Rome Statute. Certain States Parties to the Rome Statute (Australia, Italy, Germany, the Netherlands, Spain, and Japan) have issued official statements refraining from direct participation in the conflict, relying, inter alia, on their international legal obligations.[80] While it cannot be claimed that their actions are solely due to obligations under the Rome Statute, it should not be overlooked that their foreign policy decisions are made or explained with awareness of their international legal commitments and possible exposure to ICC jurisdiction.

Within an inherently politicized international system, the EU, using its position as a distinct political and legal entity, has since the establishment of the ICC gradually developed one of the most comprehensive and coherent systems for cooperation with, support for, and promotion of the ICC in a manner that is neither purely idealistic nor devoid of strategic considerations. The EU's institutional and operational architecture for cooperation with the ICC, including cooperation with Eurojust and Europol, constitutes one of the most developed and coherent systems of support for an international judicial body, making the effectiveness of

[80] *Why countries are rejecting Trump's call to send ships to Strait of Hormuz*, Independent, 17 March 2026, Available at: [https://www.independent.co.uk/news/world/middle-east/trump-strait-of-hormuz-iran-nato-japan-australia-uk-b2939916.html], Accessed 10 April 2026.

the ICC significantly dependent upon EU support. For the work of the ICC, the EU is thus not merely important, but in many respects functionally indispensable.

In the Rome Statute system, which formally rejects a privileged role for "great powers," the EU has positioned itself as a central and highly organized actor in the functioning and promotion of the ICC. However, an important question for further research is whether the EU merely supports the ICC's independent mandate or whether the ICC increasingly operates within the parameters of EU foreign policy objectives. This article suggests that EU support is not only politically relevant but also structurally significant for the existence, functioning and practical effectiveness of the ICC. Nevertheless, it seems clear that the EU sees the ICC as an institution that contributes to safeguarding the EU's strategic interests even in scenarios in which the Court's effectiveness remains incomplete or contested.

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Review article

WORKPLACE SURVEILLANCE, HUMAN RIGHTS DUE DILIGENCE, AND PRIVACY BY DESIGN: A CASE STUDY ANALYSIS

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ABSTRACT

The rise of surveillance technologies in workplaces has dramatically expanded in recent years. While such technologies promise efficiency gains, they create an atmosphere of "digital panopticism", thereat posing complex challenges for protecting employees' privacy. Several complaints have emerged declaring that companies' algorithmic practices have violated privacy rights and data protection laws. This article critically examines and analyses H&M case, highlighting how failures in Human Rights Due Diligence (HRDD) and Privacy by Design (PbD) have led to significant legal, reputational, and operational risks. Identifying patterns of shortcomings, the author proposes holistic approach, integrating both Human Rights Due Diligence (HRDD) and Privacy by Design (PbD). This approach mitigates the adverse effects of surveillance while prioritizing employee rights, thereby fostering a healthier work environment that enhances mutual trust, respect for employee privacy, and organizational productivity. In the framework of this approach that can create a comprehensive privacy protection system the author proposes best practices for responsible monitoring that respects both human dignity and data protection requirements.

Keywords: *Employee privacy protection, H&M case, Human rights due diligence, Privacy by design, Surveillance technologies*

1. INTRODUCTION

In the last several decades we have witnessed increased use of digital technologies by the employers in the workplace to monitor their employees, capture and analyse employee data and manage them using algorithms.[1] The revolution in big data

[1] Kellogg, K. C.; Valentine, M. A.; Christin, A., *Algorithms at work: The new contested terrain of control*, Academy of Management Annals, Vol. 14, No. 1, 2020, pp. 366–410; Bailey Diane E, *Emerging tech-*

and artificial intelligence has brought an array of new tools employer use in their business models and methods to control their employees which even have the potential to substantially affect employee's outcome.[2] The way employers use those technologies, enabling them different types of monitoring,[3] is often unclear, not only to employees, but also to policy makers. They are either still operating in the legal vacuum or within legislation that reinforce managerial prerogatives or reflect distrust in employees and indirectly harm them. Some of this harm stem from technology design decision, but more often derive from employers' bad decisions regarding when, why, where and how to use this technology.[4] Bad decision could, beside the danger of the intrusion into the privacy[5], lead to other common harms for employees such as: work intensification[6], health and safety harms[7], de-skilling[8],

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nologies at work: Policy ideas to address negative consequences for work, employees, and society, ILR Review, Vol. 75, No. 3, 2022, pp. 527–551.

2 Zuboff, S., *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, New York: PublicAffairs, an imprint of Perseus Books, 2019.

3 Types of monitoring companies mostly use are: websites and application usage, time tracking, e mail and Internet monitoring, keystroke logging, screen capture, behavioral abalysis and so on.

4 Cappelli, P., *Stop overengineering people management,* Harvard Business Review, 2020., September–October. Available at:
[https://hbr.org/2020/09/stop-overengineering-people-management], Accessed 8 April 2026.

5 Segal, E., *How productivity and surveillance Technology can create a Crisis for Businesses*, Forbes, 18. August 2022; Stanley, J., *The Nightmarish loss of workplace Privacy*, ACLU, 26. August 2022; Roemmich, K.; Schaub, F.; Andalibi, N., E*motion AI at Work: Implications for Workplace Surveillance, Emotional Labor, and Emotional Privacy*, Proceedings of the 2023 CHI Conference on Human Factors in Computing Systems (CHI '23), April 23–28, 2023, Hamburg, Germany. ACM, New York, NY, USA 20 Pages, Available at:
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6 Schaupp, S., *Cybernetic proletarianization: Spirals of devaluation and conflict in digitalized production*, Capital & Class, Vol. 46, No. 1, pp. 11–31, Available at:
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7 Ravid, D. M. *et al., A meta-analysis of the effects of electronic performance monitoring on work outcomes. Personnel Psychology*, 2022, Advance online publication, Available at:
[https://doi.org/10.1111/peps.12514]; O'Brady, S.; Doellgast, V., *Collective voice and employee well-being: Union influence on performance monitoring and emotional exhaustion in call centres*, Industrial Relations: A Journal of Economy and Society, Vol. 60, No. 3, 2021, pp. 307–337; Gordon, J.L., *Under pressure: Addressing warehouse productivity quotas and the rise in injuries,* Fordham Urban Law Journal, Vol. 49, No. 1, 2021, pp. 149–189, Available at:
[https://link.gale .com/apps/doc/A688295640/AONE?u=irv3447&sid=ebsco&xid=4ac809b7], Accessed 8 April 2026.

8 Levy, K.; Solon, B., *Refractive surveillance: Monitoring customers to manage employees*, International Journal of Communication 12, 2018, pp. 1166–1188, Available at:
[https://ijoc.org/index.php/ijoc/article/viewFile/7041/2302].

job loss[9], bias, discrimination[10], suppression of the right to organise[11]and loss of autonomy and dignity[12]. The extent to which management can now monitor employees' behaviour, both, on-site and remote using advanced surveillance technologies has dramatically increased creating a scenario of panoptic power management (digital panopticism). This phenomenon mirrors Michel Foucault's concept of the "Panopticon"—a structure of control wherein subjects self-regulate under the possibility of constant observation.[13] In the corporate realm, digital panopticism raises ethical and legal issues around autonomy, privacy, and power asymmetry. Namely, the collection of personal data through various digital means (e.g., emails, productivity software) raises concerns about how this data is stored, used, and shared, potentially causing significant harm to employees' privacy issues and creating the culture of mistrust. Furthermore, organizations may face legal challenges if they fail to comply with privacy regulations leading to financial and repu-

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9 Kuang-Hsien Wang, K. H.; Lu, W. C., *AI-induced job impact: Complementary or substitution? Empirical insights and sustainable technology considerations,* Sustainable Technology and Entrepreneurship, Vol. 4, Issue 1, 2025; Soueidan, M. H.; Rodwan, S., *The Impact of Artificial Intelligence on Job Loss: Risks for Governments*, Technium Social Sciences Journal, 2024.

10 Rosenblat, A.; Barocas, S.; Levy, K.; Hwang, T., *Discriminating tastes: Customer ratings as vehicles for bias,* 2016, Data & Society: Intelligence and Autonomy, Available at: [https://datasociety.net/pubs/ia/Discriminating_Tastes_Customer_Ratings_as_Vehicles_for_Bias.pdf], Accessed 8 April 2026.

11 Kessler, S., *Companies are using employee survey data to predict—and squash—union organizing*, One Zero, 30 July 2020, Available at: [https://onezero.medium.com/companies-are-using-employee-survey-data-to-predict-and-squash-union-organizing-a7e28a8c2158], Accessed 29 January 2025.

12 Groves, K. S.; Margolis, J.; Gibson, C., *Cultivating the experience of dignity at work during digital transformation: Protective & proactive strategies for leaders and organizations*, Organizational Dynamics, 2024.

13 Panopticon was elaborated by Jeremy Bentham at the end of the eighteen century and later on Michel Foucault used it as a symbol of disciplinary power. The simple idea of Bentham can be described as follows: a circular building with the cells of the prisoners located in the circumference and, separated by an empty space, the tower of the inspector located in the centre. The side of each cell facing outwards would be occupied by a large window and the inner one by a thin iron grating in order to make the whole room perfectly visible from the tower, while also contributing to let sunlight inside the Panopticon. The Panopticon is an image for this discipline: in Foucault's opinion its objective is to improve the exercise of power, making it faster, lighter and more effective. The individual in the Panopticon, being subjected to a regime of constant visibility, is caught in a power relationship within which he becomes the principle of his own subjection. Botan, C., Communication work and electronic surveillance: A model for predicting panoptic effects. Communication Monographs, 1996., Vol. 63, No. 4, pp. 293–313. [https://doi.org/10.1080/03637759609376396]; Foucault, M., *Panopticism" from "Discipline & Punish: The Birth of the Prison.,* Race/Ethnicity: Multidisciplinary Global Contexts, 1996., Vol. 2, No. 1, pp. 1–12, Available at: [http://www.jstor.org/stable/25594995], Accessed 29 January 2026.

tational damages. Although there is established legal framework[14] for the privacy protection, as well as principles derived from ECHR case law[15] the current legal framework has not full potential to resolve conflict of interest between employees' right to privacy and employer's right to protect business interests. This is evident from existing national and European privacy litigations. Bridging this gap requires integration of human rights due diligence (HRDD) and privacy by design (PbD) frameworks into corporate employee privacy system protection which can offer both normative and technical guidance for ethical workplace surveillance.

In the following text, the article examines the publicly documented H&M case through a review of regulatory findings, official reports, academic literature, and secondary legal sources. Rather than presenting an original empirical case study, the article provides a doctrinal and literature-based analysis of a previously reported case in order to identify practical shortcomings in workplace surveillance and employee data protection practices.

The H&M case serves as an illustrative example of how failures in Human Rights Due Diligence (HRDD) and Privacy by Design (PbD) can result in significant legal, reputational, and operational risks for organizations. The purpose of examining this case is not to provide new factual findings or original legal determinations, but rather to identify common patterns of inadequate employee privacy protection and to derive recommendations for improved workplace data governance.

The article further proposes best practices for responsible monitoring that respect both human dignity and data protection requirements. The core objective of this research is to assist employers in incorporating Privacy by Design and Human Rights Due Diligence frameworks into corporate data practices. Beyond constituting a legal obligation, such integration represents a strategic necessity for fostering employee trust and ethical data governance, enabling organizations to build resilient and rights-respecting data ecosystems that safeguard employee dignity in an age of algorithmic management and digital surveillance.

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[14] European Convention on Human Rights (1953), the EU Charter of Fundamental Rights (2012), the EU General Data Protection Regulation (GDPR, 2016), EU Directive (EU) 2019/1152, Recommendation CM/Rec (2015)5 of the Committee of Ministers to Member States on the processing of personal data in the context of employment, as well as Opinion 8/2001 on the processing of personal data in the employment context (WP48), the Working Document on the surveillance of electronic communications in the workplace (WP55), and Opinion 2/2017 on data processing at work, ILO Code of Practice on the Protection of Workers' Personal Data (1997).

[15] These principles include: reasonable expectation of privacy, the principle of necessity and proportionality; the principle of legitimacy; the principle of transparency; the principle of finality; the principle of information and consultation.

2. PRIVACY BY DESIGN AT THE WORKPLACE: A PROACTIVE APPROACH TO EMPLOYEE DATA PROTECTION

Implementing Privacy by Design principles in the workplace is essential for safeguarding employee privacy in an increasingly digital environment, building the trust between employers and employees, comply with legal requirements, and mitigate risks associated with data breaches. Privacy by Design is a holistic approach to privacy that encompasses several foundational principles.[16] There are several benefits from incorporating privacy protection into the design of systems and processes from the outset: ensures that risks to employee data are identified and mitigated proactively (e.g., surveillance, productivity tracking, biometric systems); enforces key principles such as data minimization and purpose limitation (e.g., payroll, compliance, safety); fosters transparency and trust within the employment relationship by requiring clear communication about data use and promoting tools such as privacy notices consent mechanisms (where appropriate), and internal data governance policies; due to its alignment with legal obligations laid down in labor laws and fundamental rights protections under EU and international human rights law helps employers regarding lawful processing, fairness, and design-based safeguards; encourage a culture of responsibility and ethical decision-making regarding employee data enhancing organizational accountability; facilitates compliance and promotes ethical, sustainable data practices that protect the fundamental rights of employees.

Design-based approaches are not only popular in the tech industry[17] but have increasingly found their way into legal frameworks[18] and ECHR case law[19]. However, several potential shortcomings in design-based approaches have been identified, particularly regarding the adequate protection of privacy in the contemporary workplace:[20] struggles to adequately incorporate the principle of proportionality; cannot ex ante balance the competing interests at the moment of decision-making; difficulty to translate ambiguous legal terminology into code;[21] gaps in

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16 Proactive, not reactive; Preventative, not remedial; Privacy as the default setting; Privacy embedded into design; Full functionality – Positive-sum, not Zero-sum; End-to-end security – Lifecycle protection; Visibility and transparency – Keep it open; Respect for user privacy – Keep it user-centric. See: Cavoukian, A., **Privacy by Design: The 7 Foundational Principles**, Information and Privacy Commissioner of Ontario.

17 E.g. Microsoft, Apple, Google, IBM, Salesforce, Cisco, Adobe, SAP, Facebook.

18 Protection by design is an 'appropriate measure' to comply with data protection law (GDPR, Art. 25 para. 1).

19 European Court of Human Rights, *I v. Finland*, App. No. 20511/03, 17 July 2008.

20 More detailed: Ebert, I.; Wildhaber, I.; Adams-Prassl, J., *Big Data in the workplace: Privacy Due Diligence as a human rights-based approach to employee privacy protection,* Big Data & Society, Vol. 8 /1, 00, pp. 1-14, p. 5-6.

21 Kroener, I.; Wright, D., *A strategy for operationalizing PbD,* The Information Society, Vol. 30, No. 5, 2013, pp. 355–365.

protection are ubiquitous; due to the technological evolution[22]; implementation complexity and inconsistent application[23], developing privacy-centric systems can be challenging for smaller organizations due to cost implications; resistance of employees and management to changes especially if they perceive these changes as hindrances to productivity; superficial implementation of privacy measures (PbD approach may sometimes prioritize compliance with legal requirements rather than fostering a culture of privacy within the organization).

In summary, while design-based approaches can enhance employee privacy protection, they also face several challenges. In order to be effective, these approaches must be integrated within broader organizational practices, ongoing training, and a commitment to fostering a culture of privacy. Furthermore, data-driven models that weight human behaviour are not immune to errors or false conclusions about human interaction.[24] So, a broader privacy approach is of utmost importance—one that also incorporates ethical expectations by management in decisions about workplace monitoring measures.[25] Representatives from all affected stakeholder groups should be strategically involved. All of this brings us to the potential need for the implementation of corporate sustainability due diligence and corporate liability in the legal framework on employee privacy protection.

3. CORPORATE SUSTAINABILITY DUE DILIGENCE AND CORPORATE LIABILITY IN THE EMPLOYEES' PRIVACY PROTECTION

Due diligence' has traditionally been used in national legal frameworks as a standard of care in tort law and comparable concepts in civil law. However, it was not until the last decade that it has emerged as a key mechanism for addressing human rights abuses by businesses. In this context, the notion of prevention is critical, relating to efforts to prevent businesses from causing, contributing to, or being linked to adverse human rights impacts globally.[26] HRDD is defined as a compre-

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22 Montjoye, Y. *et al., Unique in the crowd: The privacy bounds of human mobility*, 2013, Scientific Reports 3: 1376, Available at:
[https://doi.org/10.1038/ srep01376].

23 Dix, A., *Built-in privacy– No panacea, but a necessary condition for effective privacy protection*, Identity in the Information Society 3, pp. 257–265.

24 Nagy, P.; Neff, G., *Imagined affordance: Reconstructing a keyword for communication theory*, Social MediaþSociety1(2), 2015, Available at:
[DOI:10.1177/2056305115603385].

25 Ebert, I.; Wildhaber, I.; Adams-Prassl, J., *Big Data in the workplace: Privacy Due Diligence as a human rights-based approach to employee privacy protection*, o .c., p. 6.

26 Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework: Report of the Special Representative of the

hensive, proactive effort to identify both actual and potential human rights risks over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks[27].[28] Integrating HRDD into boardroom decision-making fosters long-term value creation, risk mitigation, and stakeholder trust. [29]

3.1. Legal framework for corporate sustainability human rights due diligence

While initially introduced as a voluntary standard, HRDD is increasingly being incorporated into binding national legislation[30] and supranational regulations. These developments mark a shift toward mandatory HRDD, transforming corporate accountability from a model of soft governance into one of enforceable legal obligations. [31] At this point, we shall provide an analysis of the non-binding United Nations Guiding Principles on Business and Human Rights, alongside the binding Directive (EU) 2024/1760 (Corporate Sustainability Due Diligence Directive – CSDDD[32].

Although the UNGPs are not legally binding and suffer from weak accountability and enforcement mechanisms[33], inconsistent implementation[34], and a limited fo-

Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises', UN Doc. A/HRC/17/31, 21 March 2011 ('UNGPs'), Guiding Principle 13.

27 Deva, S., *Regulating corporate human rights violations: Humanizing business*, 2012, Routledge.

28 Human Rights Council, Business and Human Rights: 'Towards Operationalizing the "Protect, Respect and Remedy" Framework', A/HRC/11/13, 22 April 2009, para. 71. See also the UN Working Group on Business and Human Rights, 'The report of the Working Group on the issue of human rights and transnational corporations and other business enterprises', UN Doc. A/73/163, 16 July 2018, para. 10, and OECD, OECD-Due-Diligence Guidance for Responsible Business Conduct (2018), para. 16 ('OECD RBC Guidance').

29 Nolan, J., *The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?,* in: Backer, L. C. (ed.), Law and Society, 2021, Edward Elgar Publishing.

30 French Duty of Vigilance Law (2017) mandates large companies to implement vigilance plans to prevent human rights and environmental violations and German Supply Chain Due Diligence Act (2021) requires companies to conduct due diligence on human rights and environmental risks across their supply chains.

31 Bright, C., *et al., Towards a corporate duty for lead companies to respect human rights in their global value chains?* Business and Politics, Vol. 22, No. 4, 2020, pp. 667–697. Available at: [https://doi.org/10.1017/bap.2020.19].

32 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 (Text with EEA relevance), OJ L, 2024/1760, 5 June 2024*, ELI:,* Available at: [http://data.europa.eu/eli/dir/2024/1760/oj].

33 Wettstein, F., *Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment,* Journal of Human Rights, Vol. 14, No. 2, 2015, pp. 162–182.

34 Knudsen, J. S.; Moon, J., *Visible Hands: Government Regulation and International Business Responsibility*, Cambridge Journal of Economics, Vol. 41, No. 2, 2017, pp. 383–409.

cus on power asymmetries[35], they are nonetheless regarded as the "global authoritative standard on business and human rights."[36] Their strength lies in their normative clarity and structure[37], global legitimacy and endorsement[38], its function of catalysing legal and policy reform[39] and soft law flexibility[40]. Owing to these strengths, the UNGPs have influenced the incorporation of HRDD into other international standards, national legislation[41], and domestic court decisions[42]. They have also been adopted or referenced by subsequent international instruments.[43]

Under the CSDDD, member states are obliged to ensure that relevant companies (applies to very large EU companies employing more than 1,000 employees and generating a net worldwide annual turnover of over EUR 450 million, regardless of the sector in which they operate[44]) conduct due diligence[45] In the context of privacy protection this means that those companies must integrate due diligence into their privacy policies in a way to: identify, prevent, mitigate and end actual or potential adverse impacts on employees' privacy; on employees' privacy;

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35 Bhatt, R., *Human Rights Due Diligence in Global Supply Chains: Corporate Compliance or Meaningful Accountability?,* Business and Human Rights Journal, Vol. 5, No. 2, 2020, pp. 65–287.

36 International Bar Association, IBA Practical Guide on Business and Human Rights for Business Lawyers, 28 May 2016, Available at: [https://www.ibanet.org/MediaHandler?id=d6306c84-e2f8-4c82-a86f-93940d6736c4], Accessed 28 May 2026, p. 13.

37 Ruggie, J. G., *Just Business: Multinational Corporations and Human Rights*, 2013, W. W. Norton & Company.

38 Deva, S.; Bilchitz, D. (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* Cambridge University Press, 2013.

39 Backer, L. C., *Rights and Accountability in Development: Global Value Chains and Human Rights,* Northwestern Journal of International Law & Business, 2015, 35(3), pp. 387–440; Scheper, C., *From Naming and Shaming to Legal Accountability? The Politics of Human Rights Due Diligence*, Globalizations, 2015, Vol. 18, No. 3., pp. 396–412.

40 Kobrin, S. J., *Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms, and Human Rights*, Business Ethics Quarterly, 2019, Vol. 19, No. 3., 349–374.

41 These are the French Duty of Vigilance Act 2017 (Devoir de Vigilance Loi), the Dutch Child Labour Due Diligence Act 2019, the German Corporate Due Diligence in Supply Chains Act 2021, Norwegian Transparency Act 2021., Australian Illegal Logging Prohibition Act 2012, the UK Modern Slavery Act 2015 and the Australian Modern Slavery Act 2018.

42 Milieudefensie v Royal Dutch Shell, District Court of the Hague, 26 May 2021, ECLI:NL:RBDHA:2021:5339, available at https://uitspraken. rechtspraak.nl/inziendocument?id=ECLI: NL:RBDHA:2021:5339, especially para. 4.4.11.

43 OECD Guidelines for Multinational Enterprises (2011); the International Labour Organization's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2017); the International Finance Corporation's Performance Standards (2012); the 2030 Agenda for Sustainable Development; and most recently, Directive (EU) 2024/1760 (Corporate Sustainability Due Diligence Directive – CSDDD) of the European Parliament and of the Council of 13 June 2024, which also amends Directive (EU) 2019/1937 and Regulation (EU) 2023/2859.

44 CSDDD art 2(2).

45 CSDDD art. 7.

take 'appropriate measures' and take into account specific factors when designing them[46]; establish and maintain a notification and complaints procedure; monitor the effectiveness of their due diligence policy and measures; publicly communicate on due diligence and obligation to conduct meaningful consultation with stakeholders at the different stages of the due diligence process[47]. Stakeholders are widely defined and include companies' employees, employees of its subsidiaries, trade unions and workers' representatives, consumers and other affected individuals, groups and communities but also national human rights and environmental institutions or civil society organisations whose purpose includes environmental protection. The CSDDD requires that a company's due diligence covers not only a company's operations and the operations of its subsidiaries, but also that of its business partners in its so-called 'chain of activities'.[48]

The CSDDD is the first mandatory due diligence instrument that introduces two complementary enforcement mechanisms.[49] The Directive establishes a mixed public and private enforcement regime, involving both public supervisory authorities and a civil liability provision.

As previously noted, due to the limited personal scope of the CSDDD, certain industries and smaller companies are not subject to its obligations and therefore are not required to adopt a human rights due diligence approach to privacy protection in the workplace. In such cases, it becomes essential for companies to adopt internal privacy protection policies that incorporate core data protection principles, such as purpose specification and limitation, prior informed consent, data minimization, use limitation, and, importantly, ethical considerations in order to avoid costly litigation processes. Also, several other shortcomings can be identified with regard to employee privacy protection: lack of specific privacy guidelines,

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46 CSDDD art. 8.

47 CSDDD art 13(3)

48 Chain of activities' means: „activities of a company's upstream business partners related to the production of goods or the provision of services by that company, including the design, extraction, sourcing, manufacture, transport, storage and supply of raw materials, products or parts of products and the development of the product or the service; and (ii) activities of a company's downstream business partners related to the distribution, transport and storage of a product of that company, where the business partners carry out those activities for the company or on behalf of the company, and excluding the distribution, transport and storage of a product that is subject to export controls under regulation (EU) 2021/821 or to the export controls relating to weapons, munitions or war materials, once the export of the product is authorised;" (Art 3(1)(g) CSDDD).

49 A 2017 report by the UN Working Group on Business and Human Rights, emphasised the need to ensure that rights holders are an integral part of any process that aims to provide an effective remedy for corporate human rights abuses. UN General Assembly, 'Report of the Working Group on the issue of Human rights and transnational corporations and other business enterprises', UN Doc. A/72/162, 18 July 2017.

leading to inconsistent implementation; limited scope, as the Directive may not cover all sectors or types of companies, resulting in regulatory gaps for certain industries and smaller businesses; ambiguity in consent requirements; Insufficient enforcement mechanisms; divergent national interpretations; potential conflicts with other regulations; risk of "tick-box compliance," whereby companies meet only the minimum legal requirements without meaningfully engaging in due diligence, thereby undermining the Directive's objectives.

Given that both the *privacy by design* and *human rights due diligence* frameworks exhibit shortcomings in protecting employee privacy, the next section will explore the potential for integrating these two approaches to bridge the existing gaps in this context. As we have seen, although HRDD and PbD share the common goals of protecting privacy and preventing harm, they operate in different yet complementary ways. HRDD offers a broad, human rights–oriented framework that requires companies to actively assess and manage the impact of their actions on workers' rights. It encourages proactive engagement and stakeholder involvement, which is especially important in workplaces where surveillance and data collection are pervasive. PbD, on the other hand, focuses specifically on data privacy and security at the system level. It requires organizations to embed privacy protections at every stage of data handling—from collection to processing, storage, and destruction. By integrating both approaches, organizations can more effectively safeguard employee privacy, ensuring compliance with legal requirements and adherence to ethical standards in increasingly digitalized workplaces. Real-world examples demonstrate that it is possible to build systems that not only comply with regulations but also uphold fundamental rights. [50] In the following chapter we shall

[50] After criticism from privacy advocates and scholars, Microsoft faced scrutiny over its "Productivity Score" tool, initially released as part of Microsoft 365, which allowed employers to monitor individual employee activity. Microsoft revised the tool to align better with human rights and privacy by design principles. The result of the revision is Microsoft's Productivity Score: Privacy-Centric Redesign, tool that aggregate data at the organizational level, removing identifiable information about individual employees. (The Guardian+2VPN Overview+2Microsoft+2); IBM's Transparent Remote Work Monitoring- software which IBM implemented during the pandemic for the monitoring of remote workers, which initially faced employee reactions over privacy concerns. In response IBM has incorporated transparent guidelines and employee feedback into the process, demonstrating a commitment to balancing organizational needs with employee privacy. Studies indicate that 54% of employees are more productive when they feel their privacy is respected, Available at:
[https://vorecol.com/blogs/blog-how-do-workplace-surveillance-practices-differ-across-states-and-what-can-employers-learn-from-these-variations-206966?]; SAP's SuccessFactors is platform that offers workforce analytics designed with privacy considerations. The system emphasizes data minimization, transparency, and user consent, aligning with privacy by design principles; Cisco's Ethical Use of Collaboration Analytics - provides analytics tools within its collaboration platforms, such as Webex, to help organizations understand usage patterns. Cisco emphasizes ethical data use by aggregating data and avoiding intrusive monitoring. Their approach includes clear communication with users about

demonstrate how the human rights due diligence and privacy by design failures have created grounds for the employee privacy litigation and company reputational harm. But before we go further it is important to stress that illustrated real-life cases that employers in both cases were not legally bound by CSDDD due to the fact that they took place before Directive came into the force.

3.2. Detailed Case Study: H&M – Covert Employee Profiling

3.2.1. Background[51]

H&M Hennes & Mauritz Online Shop A.B. & Co. KG is a fast-fashion chain founded in 1947. and currently headquartered in Stockholm. It currently operates world-wide in 53 online markets and a total of 4,913 stores, with a revenue of 24.25$ in 2024.[52]

Hundreds of its employees worked in the Nuremberg Service Centre, and the company retained information about them on their local network drives. In this situation, H&M was both the data controller and the data processor of the employees' (the data subjects) data. Since at least 2014, management at the company collected voice recordings and detailed notes about many employees at meetings called Welcome Back Talks, which occurred after employee absences such as holidays and sick leaves. These consisted of one-on-one conversations between employees and team leaders. These conversations included sensitive health information and vacation experiences, and the related notes included detailed information about the private lives of employees such as family disputes and religious beliefs. Information was processed without the employees' informed consent to create detailed profiles of the employees which were used in their work evaluations. Up to 50 managers throughout the company had at least partial access to this information. In October 2019 the data collected became public knowledge after a configuration error made the data accessible throughout company-wide for a few hours.[53] As the service centre is in Nuremberg, it was under the jurisdiction of the

what data is collected and how it is used, ensuring alignment with privacy by design principles (https://hrtechedge.com/cisco-report-genai-use-raises-employee-privacy-concerns/).

51 Taylor, L., *Employee Data Protection and the GDPR: Lessons from the H&M Case*, Journal of Business Ethics, 2021, Vol. 169, No. 2., pp. 291–308, Available at: [https://doi.org/10.1007/s10551-020-04523-8].

52 Available at: [http:// https://companiesmarketcap.com/h-m/revenue/], Accessed 26 March 2026.

53 Available at: [https://www.cpomagazine.com/data-protection/hm-hit-with-e35-million-gdpr-fine-for-profiling-private-lives-of-employees/], Accessed 26 March 2026.

HmbBfDI[54] which was alerted of this privacy violation and, after freezing the network drive, obtaining its 60GB contents, and further investigation, they imposed the €35 million fine against the company a year later.

3.2.2. Human Rights Due Diligence (HRDD) Failures

3.2.2.1. Lack of Impact Assessment

In conducting human rights due diligence business should identify and assess the nature of the actual and potential adverse human rights impacts with which a business enterprise may be involved. This would include: where possible, assessing the human rights context prior to a proposed business activity; identifying potential affected subjects; cataloguing the relevant human rights standards and issues; and projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified.[55] In H&M case there was no conducted privacy impact assessments (PIAs) or HRDD evaluations of its data practices.

3.2.2.2. Absence of Stakeholder Engagement

Business enterprises should seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement. This would enable business enterprises to assess their human rights impacts accurately. Where such consultation is not possible, business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society.[56] In H&M case employees were neither informed nor consulted about data collection or surveillance practices, undermining participatory governance.

3.2.2.3. Inadequate Remedy and Non-Judicial Grievance Mechanisms

Where a business enterprise identifies that it has caused or has contributed to an adverse human rights impact through its human rights due diligence process or other means that it has not foreseen or been able to prevent, its responsibility is to require active engagement in remediation, by itself or in cooperation with other actors.[57]

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54 The Hamburg Commissioner for Data Protection and Freedom of Information.

55 UNGP, art. 18 a).

56 UNGP, art. 18 b).

57 UNGP, art. 22.

To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted. They are typically administered by enterprises, alone or in collaboration with others, including relevant stakeholders. Also, a business enterprise could also participate in the operational-level grievance mechanisms that are provided through recourse to a mutually acceptable external expert or body. Those bringing a complaint do not require first access other means of recourse. They can engage the business enterprise directly in assessing the issues and seeking remediation of any harm. To be effective grievance mechanism should be: legitimate, accessible, predictable, equitable, transparent, rights-compatible and continuous source of learning.[58]

In H&M case there was no grievance mechanisms established prior to exposure, that way violating preventive and remedial standards. Employees were compensated post-facto.

3.2.2.4. Intersection with Privacy-by-Design Principles

The GDPR requirement that requires from the controller, both at the time of the determination of the means for processing and at the time of the processing itself, to implement appropriate technical and organisational measures, such as pseudonymisation, which are designed to implement data-protection principles, such as data minimisation, in an effective manner and to integrate the necessary safeguards into the processing in order to protect the rights of data subjects,[59] also serves as a tool to operationalise HRDD. H&M failed to implement basic privacy-enhancing technologies (PETs), such as pseudonymisation, access restrictions, or retention schedules.

3.2.3. Privacy by Design (PbD) Failures

3.2.3.1. No Lawfulness, Fairness and Transparency'

In collecting personal data, the principles of lawfulness, fairness and transparency' should be respected. [60] In order for the personal data to be lawfully processed at least one of the following should apply: the data subject has given consent to the processing of his or her personal data for one or more specific purposes; processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a

[58] UNGP, art.31.

[59] GDPR, art. 25 (1).

[60] GDPR, art. 5 (a).

contract; processing is necessary for compliance with a legal obligation to which the controller is subject; processing is necessary in order to protect the vital interests of the data subject or of another natural person; processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child. [61] Furthermore, GDPR requires that the controller shall take appropriate measures to provide any information regarding personal data processing in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically to a child.[62]

In H&M case principle of lawfulness was not respected. None of the conditions for the lawfulness of the processing of personal data set in GDPR, art 6, were not met. Also, the principle of transparency was not met due to the fact that the employees were fully unaware of the data collection and its uses.

3.2.3.2. No Purpose Limitation

Personal data should be collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes (purpose limitation)[63] In the H&M case data was not collected for a specific purpose.

3.2.3.3. No Data Minimisation

Personal data should be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation')[64]. In the H&M case the scope of data collected and processed was unjustifiably broad. Namely, collecting health, family, and religious data for routine management decisions exceeded any legitimate necessity.

Furthermore, processing of the personal data must be and is lawful only if at least one of the following applies: the data subject has given consent to the processing

61 GDPR, art. 6.

62 GDPR, art. 12.

63 GDPR, art. 5 (b).

64 GDPR, art. 5 c.

of his or her personal data for one or more specific purposes; processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; processing is necessary for compliance with a legal obligation to which the controller is subject; processing is necessary in order to protect the vital interests of the data subject or of another natural person; processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child. [65]

3.2.3.4. No consent for the Processing of Sensitive Data

Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation (sensitive data) shall be prohibited.[66] Exceptionally, sensitive data could be processed only if the data subject has given explicit consent to the processing of those personal data for one or more specified purposes, processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law, processing is necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent, as well as other justifications listed in GDPR[67] Due to the fact that H&M was processing sensitive (health, family, and religious data) it was obliged to proceed in accordance with the conditions for consent set in GDPR.[68]

3.2.3.5. No Security of Processing

Taking into account the risk of varying likelihood and severity for the rights and freedoms of natural persons, the controller and the processor shall implement appropriate technical and organisational measures to ensure a level of security

65 GDPR, art. 6.

66 GDPR, art. 9(1).

67 GDPR, art. 9.

68 GDPR, art. 7.

appropriate to the risk, including inter alia as appropriate: the pseudonymization and encryption of personal data; the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services; the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident; a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the processing.[69]

In H&M case sensitive data was accessible to a wide group of managers without robust protections, violating GDPR's integrity and confidentiality principles. The discovery of the violation of employee's privacy, was in fact due to a data breach when a configuration error allowed employees throughout the company to view the collected data. The IT specialists at the service centre were responsible for this secondary violation which could have been prevented by violation could have been avoided by more extensive testing and checks on the network configurations.

3.3. Post-Case Developments and Impacts

So, what was the impact of the case on H&M employee's privacy protection? In response to the discovery of these violations, H&M released a press statement taking "full responsibility" for the violation and provided considerable financial compensation to those affected. Furthermore, the company has provided new employee privacy policy to ensure better data protection in the future. Further elements of the newly introduced data protection concept include a newly appointed data protection coordinator, monthly data protection status updates, more strongly communicated whistleblower protection and a consistent information concept.[70]

The H&M case is textbook example of a corporate breakdown in human rights due diligence and PbD failure. It highlights the urgent need for companies to move beyond compliance and adopt holistic, preventative strategies for managing digital risks to employee's privacy. Integrating HRDD with PbD can ensure businesses uphold both regulatory and ethical standards in the datafied workplace. Also, the case demonstrates an increased need for employee education on their data rights and improved whistleblower protections, so that they are able to make violations known.

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69 GDPR, art. 32.

70 Available at: [https://cs.brown.edu/courses/csci2390/2021/assign/gdpr/lzhu17-h-and-m.pdf], Accessed 29 March 2026.

4. POLICY RECOMMENDATIONS FOR SAFEGUARDING EMPLOYEE PRIVACY: INTEGRATING HUMAN RIGHTS DUE DILIGENCE AND PRIVACY BY DESIGN IN CORPORATE PRACTICE

Drawing on international human rights standards, legal standards, corporate case studies, and normative frameworks, we have identified key failures in HRDD and privacy by design frameworks in employee privacy settings in real-case scenarios. Now by learning from mistakes we shall outline a best practice scenario for aligning best practice policy recommendations that integrates the principles of Human Rights Due Diligence (HRDD) and Privacy by Design (PbD) frameworks to support employee privacy rights in both regulatory and corporate governance contexts.

To operationalize employee privacy in a rights-respecting and proactive manner, organizations should adopt a policy framework that. The following best practices provide a robust foundation for aligning technological innovation with international human rights standards and data protection norms. A best practice in both Privacy by Design (PbD) and Human Rights Due Diligence (HRDD) is when an organization proactively embeds privacy and human rights considerations into the design, implementation, and governance of its technologies, services, and business operations before harm occurs. In that context companies should apply following HRDD and privacy-by-design principles.

4.1. Policy Recommendations for Corporate Implementation of core HRDD Principles Applied to Employee Privacy

4.1.1. Governance Integration of Employee Privacy

Companies should integrate due diligence policy into their employee privacy and risk management systems,[71] which should be developed in prior consultation with the company's employees and their representatives[72]. Due diligence policy should contain: a description of the company's approach, short-term and long term to due diligence[73]; a code of conduct [74] describing rules and principles to be followed throughout the company and its subsidiaries, and the company's direct or indirect business partners and a description of the processes put in place to integrate due diligence into the company's relevant policies and to implement due diligence,[75]

71 CSDDD, art. 5 1 (a) and art. 7.

72 CSDDD, art. 7 (2).

73 CSDDD, art. 7 (2) a.

74 CSDDD, art. 7 (2) b.

75 CSDDD, art. 7 (2).

including the measures taken to verify compliance with the code of conduct. Companies are obliged to update their due diligence policies without undue delay after a significant change occurs, and review and, where necessary, update such policies at least every 24 months.[76]

4.1.2. Conduct Human Rights Impact Assessments (HRIA) Before Deployment

Organizations must assess the human rights risks of workplace technologies, including surveillance, biometric identification, productivity trackers, and algorithmic management, before deployment. A data protection impact assessment should be carried out prior to implementing an employee monitoring system to weigh up the employer's interests against the risk to employees.[77] This will help to assess how proportionate and necessary the form of monitoring is and to mitigate the potential risks early. In this context it is of utmost importance to evaluate both actual and potential harms and not just legal non-compliance. [78]

4.1.3. Prevent and Mitigate Adverse Privacy Impacts

Companies must take appropriate measures to identify. prevent, mitigate, or end adverse impacts on employee privacy rights arising from their own operations or those of their subsidiaries and, where related to their chains of activities, those of their business partners. Appropriate measures could include development and implementation of a prevention action plan, with reasonable and clearly defined timelines for the implementation of appropriate measures and qualitative and quantitative indicators for measuring improvement. An action plan may be developed in cooperation with industry or multi-stakeholder initiatives.[79]

4.1.4. Meaningful Stakeholder Engagement

Privacy solutions which include implementation of monitoring or data-driven tools must be co-designed with employees, unions, and ethics committees to reflect diverse workplace experiences (alignment with UNGPs art.18). Participation enhances the legitimacy and effectiveness of workplace monitoring policies and ensures compliance with the UNGPs' requirements for stakeholder engagement. Consultation of stakeholders shall take place at the following stages of the due diligence process: when gathering the necessary information on actual or potential adverse impacts, in order to identify, assess and prioritise adverse impacts; when developing prevention

[76] CSDDD, art. 7 (3).

[77] UNGPs art. 17-18.

[78] CSDDD, art. 8.

[79] CSDDD, art. 12 (2)a.

and corrective action plans; and developing enhanced prevention and corrective action plans; when deciding to terminate or suspend a business relationship; when adopting appropriate measures to remediate adverse impacts and when developing qualitative and quantitative indicators for the monitoring. [80]

4.1.5. Integration, monitoring and review of privacy safeguards

The companies should embed privacy safeguards into internal processes and governance and continuously assess their effectiveness, especially as technologies and business models evolve. Also, companies should regularly audit surveillance systems and data usage for compliance with rights-based criteria. All these tasks should be at the responsibility of senior management level.

4.1.6. Transparency and justification

Before employee monitoring is implemented, employees (and any agency staff, visitors or other individuals who will be monitored) should be informed about the monitoring and given detailed information including but not limited to information about the nature and extent of the data processing, when and how the data will be obtained, why and how it will be used, who it will be disclosed to, who the data protection officer is, retention periods, the right to lodge a complaint and how confidential or sensitive information will be handled. This should be clearly outlined in accessible workplace privacy notices and relevant internal policies such as 'Acceptable Use/ IT Communications' policies. Regarding the processing of the sensitive data of employees a consumer-focused initiatives like Apple's App Tracking Transparency (ATT) framework which reflects robust privacy-by-design elements should be applied internally to protect employee's privacy. Namely, ATT requires apps to ask users for permission to track their activity across other companies' apps and websites.

4.1.7. Implement Data Minimization and Purpose Limitation

Workplace monitoring should be limited to what is strictly necessary for the specific, legitimate purpose. Regularly audit data processing activities to ensure alignment with stated purposes. Consideration should be given to how to limit the scale and scope of the data obtained (alignment with UNGPs art.13).

If an employer wants to use workplace monitoring to assess employee performance, other less invasive methods which could achieve that aim, should be considered first. Before implementing a close monitoring system, the employer should

[80] CSDDD, art. 13 (3).

carefully consider will anything new be gained from obtaining more detailed or precise information, or is there already sufficient existing data available. Also, continuous surveillance should be avoided unless justified. Biometric data collection should be limited to legally required or consent-based uses.

4.1.8. Establish Internal Remedy and Accountability Mechanisms

Organizations should provide accessible, confidential, independent and non-retaliatory grievance mechanisms (alignment with UNGPs art.29-31). This is in line with HRDD principle on access to remedy provided in UNGP as well as PbD principle on accountability by design. Features would include anonymous reporting channels, independent oversight bodies (e.g., ethics or compliance boards) and transparent reporting on number and nature of complaints and remediation outcomes. complaints may be submitted by: natural or legal persons who are affected or have reasonable grounds to believe that they might be affected by an adverse impact, and the legitimate representatives of such persons on behalf of them, such as civil society organisations and human rights defenders and trade unions and other workers' representatives representing natural persons working in the chain of activities concerned. The company should provide employees with regular report on privacy grievances and resolutions.[81]

4.1.9. Lifecycle Oversight

Privacy and human rights risks are dynamic. Namely, due to a technological shift (e.g., AI, biometric wearables), legal developments (e.g., GDPR, AI Act, CSDDD, ILO conventions) and organizational practices and employee feedback regular audits and evaluations should be institutionalized. In that context companies should carry out periodic assessments of their own operations and measures, those of their subsidiaries and, where related to the chain of activities of the company, those of their business partners, to assess the implementation and to monitor the adequacy and effectiveness of the identification, prevention, mitigation, bringing to an end and minimisation of the extent of adverse impacts. Such assessments shall be based, where appropriate, on qualitative and quantitative indicators and be carried out without undue delay after a significant change occurs, but at least every 12 months and whenever there are reasonable grounds to believe that new risks of the occurrence of those adverse impacts may arise.[82]

[81] CSDDD, art. 14 (2).

[82] CSDDD, art. 15.

4.2. Policy Recommendations for Corporate Implementation of Privacy by Design principles under the GDPR

For corporations managing employee privacy in a new complex digital environment, operationalizing these obligations requires a structured, multi-layered approach. The recommendations below represent actionable policies for protecting employee privacy in corporate environments based on GDPR principles.

4.2.1. Integrate Data Protection into the Design of Employment Systems

The company should appoint a data processing officer (DPO) with specific responsibility for employee data protection. It is of utmost importance to ensure independence, adequate resources, and direct reporting lines to senior management. To oversee privacy compliance and integrate privacy risks it is useful to establish a privacy governance committee comprising HR, Legal, IT, Security, and Employee Representatives. Also, it is important to maintain a detailed register of all employee data processing activities, including purposes, categories of data, recipients, legal basis, and retention periods.[83] Furthermore, policy framework covering data processing, and employee monitoring protocols should be established.

Companies must implement technical and organizational measures that embed data protection principles, such as[84], inter alia, minimising the processing of personal data, pseudonymising personal data (for internal analytics to separate identity from behavioral data) as soon as possible, encryption (in particular employee health data and communications, especially when processed remotely or via cloud platforms), ttransparency with regard to the functions and processing of personal data, enabling the data subject to monitor the data processing, enabling the controller to create and improve security features directly into the design of employee-related systems (e.g., HR platforms, performance monitoring tools, time-tracking software).[85]

4.2.2. Ensure Data Minimization and Purpose Limitation

The principle of data minimization implies that only data which are adequate, relevant and limited to what is necessary in relation to the specified, explicit and legitimate purposes for which they are processed and not further processed in a manner that is incompatible with explicit purposes should be processed.[86] That obligation applies to the amount of personal data collected, the extent of their

83 GDPR, art.30.

84 GDPR, recital 78.

85 GDPR, art. 25 (1).

86 GDPR, art. 5 (1) a, b, c.

processing, the period of their storage and their accessibility. In line with this, companies should avoid pervasive surveillance (e.g., keystroke logging, location tracking), unless demonstrably necessary. Also, it is important for the company to define narrowly tailored purposes for each type of employee data and document the legal basis for lawful processing.

4.2.3. Role-Based Access Controls and Internal Data Governance

Companies should employ access restrictions to ensure that only by default personal data are not made accessible without the individual's intervention to an indefinite number of natural persons, but to personnel who need employee data to perform their job functions have access to it.[87] With that purpose companies should implement role-based access controls and regularly review access logs. The controller and the processor shall implement appropriate technical and organizational measures to ensure a level of security appropriate to the risk, including inter alia as appropriate the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services.[88]

4.2.4. Conduct Data Protection Impact Assessments for High-Risk Processing

Where a type of processing in particular using new technologiesas often occurs in workplace surveillance or algorithmic management, is likely to result in a high risk to employee privacy protection, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data. The controller could seek the advice of the data protection officer, employee representatives, and IT security experts where designated, when carrying out a data protection impact assessment. A data protection impact assessment shall in particular be required in the case of a systematic and extensive evaluation of personal aspects relating to natural persons which is based on automated processing, including profiling, and on which decisions are based that produce legal effects concerning the natural person or similarly significantly affect the natural person.[89] A data protection impact assessment should follow next steps:

- state the purpose of processing and describe the processing procedure;
- respect the principle of necessity and proportionality,
- identify risks to employee' s rights and freedoms;
- define mitigation measures:
- consult employee representatives and data processing officer;

87 GDPR, art. 25(2).

88 GDPR, art. 32 (1) b.

89 GDPR, art. 35 (3) a and recital 91.

- document outcomes and integrate into project risk management.

4.2.5. Implement Transparency and Employee Rights Awareness Measures

When processing employee's data the company (the controller) should take appropriate measures to provide any information referred to processing to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language. The information shall be provided in writing, or by other means, including, where appropriate, by electronic means. When requested by the data subject, the information may be provided orally, provided that the identity of the data subject is proven by other means.[90] Transparent processing is a prerequisite for fair and lawful data processing. Privacy by Design requires that employees understand what data is collected, why, and how it is protected. With a purpose of raising employee's awareness of their rights to privacy protection the access to self-service portals should be enabled. The self-service portals enable employees to:

- view collected data;
- correct inaccuracies;
- exercise data portability;
- withdraw consent;
- object to specific processing

5. CONCLUSION

In the digital economy, employee privacy has become a frontline issue. Companies that collect and process great amounts of employee's personal data must strike a right balance between operational efficiency and employee privacy and well-being. As corporate data ethics evolve, applying privacy by design and human rights due diligence across all data subjects, employees included, must become standard practice. Companies should harmonize their external privacy leadership (customer privacy) with their internal governance systems (employee privacy). Applying the same ethical and legal standards to employee data as to consumer data is not only a compliance requirement but a strategic imperative in the age of responsible innovation and AI governance. Responsible monitoring regime choices combined with strong data governance policies can allow businesses to responsibly collect and process employee's data. Fostering a culture of mutual trust while protecting stakeholder interests is critical as virtual and hybrid work persists. The most effective approach to operationalize employee privacy in a rights-respecting and proactive

[90] GDPR, art. 12 (1).

manner is for organizations to adopt a policy framework that integrates the principles of Human Rights Due Diligence (HRDD) and Privacy by Design (PbD).

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Review article

DECENT WORK FOR MIGRANT WORKERS THIRD-COUNTRY NATIONALS IN CROATIA*

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ABSTRACT

Migrant workers are essential for the functioning of the internal market of the EU. Croatia too has over the recent years become dependent on migrant workers (third-country nationals) due to the shortage of workers. The current geo-political crises (following COVID) and practices involving undeclared work, abusive subcontracting, intermediaries and letterbox companies, rendered these workers one of the most vulnerable and least protected groups.

Observed against this backdrop, this paper analyses the working conditions of third-country nationals in Croatia, including abusive recruitment practices, R&W permits and appropriate accommodation. By virtue of a comparative approach, the authors propose viable legal solutions for the national legislation.

Keywords: *Accommodation, Croatia, Decent work, Migrants, Recruitment, Third-country nationals*

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1. INTRODUCTION

As other EU Member States, Croatia is facing an increased employment of migrant workers – third country nationals (non-EU workers; hereinafter: TCNs). The shortage of domestic workers is visible especially in the construction, hospitality and tourism sector (HORECA), as well as in the public health sector, which marks the highest outflow of workers to other EU Member States.

In comparison with other EU Member States the number of workers TCNs in Croatia is still small, showing a growth tendency since 2021. According to the Ministry of Interior, in 2025 a total of 170,723 residence and work permits were issued to workers TCNs, which is 35,917 less permits than in 2024 (an decrease of 17.3%), but 530,92% more than in 2018.[1] Most migrant workers came from Bosnia and Herzegovina (32,225), Nepal (31,708), Serbia (24,278), the Philippines (17,629), India (15,400), North Macedonia (11,856), Kosovo (6,355), Uzbekistan (5,521), Egypt (5,504) and Bangladesh (3,404).[2] The most common occupations for which residence and work permits were issued in 2024 include the following categories: high-rise construction worker, waiter, cook, assistant cook, bricklayer, civil engineering worker, cleaner, valet, assistant waiter, and carpenter.[3] Therefore, migrant workers TCNs in Croatia are mostly employed in low-qualification jobs which are associated with the highest risks of undignified work and exploitation.

Different actors point to these problems. In her report for 2024, the Ombudswoman of the Republic of Croatia (herein forward: Ombudswoman) emphasized that her office received more complaints of foreign workers compared to the previous year. They complained aboutissues such as: working without the residence and work permit (hereinafter: R&W permit), non-payment of stipulated or promised salary, partial envelope payment of salary, illegal overtime work, denial of the right to rest periods, non-payment of the salary compensation for unused paid annual leave, failure to report injuries at work, failure to register to the competent obligatory insurance authorities, non-conclusion of employment contract and unlawful

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1 But since 2021, when the new Aliens Act was enacted, the number has been growing: 2021 – 81.995; 2022 – 124.121; 2023 – 172.499. Vlada Republike Hrvatske, *Nacrt Prijedloga Zakona o izmjenama i dopunama Zakona o strancima*, Zagreb, veljača 2026, p. 2.

2 Ministarstvo unutarnjih poslova, *Statistika*, Available at: [https://mup.gov.hr/gradjani-281562/moji-dokumenti-281563/stranci-333/statistika-169019/169019], Accessed: 20 February 2026. New employment: 80,365; prolongation: 70,275; seasonal employment: 20,083.

3 Ombudswoman's Report for 2024, p. 65, Available at: [https://www.ombudsman.hr/hr/download/annual-ombudsman-report-for-2024/?wpdmdl=21831&refresh=69d62ea8829fb1775644328], Accessed: 19 February 2025.

dismissal. What is more, they had been exposed to harassment from their employer, based on their race or ethnic origins. The Ombudswomen points out that, after receiving the general legal information, "most did not come forward, certainly due to fear of dismissal and the obligation to return to their country".[4]

Some workers complained about high employment intermediation fees, up to several thousand euros, that often forced them to take up loans, and of paying for the issuing of documentation they never received, while the intermediaries stopped communication. Recognizing the urgency of this problem the Ombudswoman concluded that systematic supervision over the work of the intermediation agencies had to be carried out, in the interest of both migrant workers and agencies that operate by the law.[5] For more see *infra* chapter 6.

The inefficient protection of migrant workers in Croatia (as well as in other EU Member States) represents a well known problem.[6] In the Ombudswoman's Report the lack of protection of migrant workers' rights concerned several aspects: difficulties in reporting the injuries at work or in claiming unpaid salary. Workers who claimed their rights by the employer, or wanted to change the employer, suffered threat or insults from the employer, or were forced to leave Croatia. The problem arose when the R&W permit was issued for a specific employer and consequently the workers had no option to change the employer (see *infra* chapter 5). In some cases, the employers took the worker's passport and other documents, actually limiting their freedom to move.[7]

Furthermore, the Ombudswoman underscored the lack of knowledge of both Croatian and English. Consequently, the complaints of migrant workers were often difficult to understand. In order to overcome this, the general information (concerning the way of legal protection of rights) was given not only in these two languages but also in ten other languages, including the languages of the countries of origin of most of those workers. The migrants were given the possibility to send complaints and documentation to the Ombudswoman that forwarded it to the Croatian State Inspectorate and other competent authorities.[8]

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4 Ombudswoman's Report for 2024, *op. cit.,* note 3, p. 63.

5 Ombudswoman's Report for 2024, *op. cit.,* note 3, p. 63.

6 Kotulovski, K.; Laleta, S., *The abuse and exploitation of foreign seasonal workers: did the coronavirus emergency exacerbate already precarious working conditions in the agricultural sector?,* in: Petrašević, T.; Duić, D.;, Novokmet A. (eds.), EU and Comparative Law Issues and Challenges Series (ECLIC 5): EU 2021 – The future of the EU in and after the pandemic, Osijek, Pravni fakultet Sveučilišta Josipa Jurja Strossmayera u Osijeku, 2021, pp. 326-358.

7 Ombudswoman's Report for 2024, *op. cit.*, note 3, p. 64.

8 Ombudswoman's Report for 2024, *op. cit.,* note 3, p. 63.

Migrant workers face the problem of inadequate accommodation.[9] The Ombudswoman examined the employers' practices, acting on her own initiative, discovering that employers placed numerous workers in the same, sanitarily and technically inadequate rooms.[10] See more *infra*, chapter 7. A great portion of migrant workers performs seasonal work, facing an even higher level of precariousness compared to migrant workers employed as "regular workers".[11] One of the challenges is undeclared work of TCNs. It is considered "a serious concern for fair competition in host-countries, decent employment relations, but also social and fundamental rights of those workers … that… more often engage in undeclared work – and are consequently exposed to exploitative working conditions".[12] Moreover, recent research highlights that the development of better immigration policy and integration policy of migrant workers and their families in Croatian society, creation of employers' and trade unions' strategies concerning migrant workers as well as strengthening of the labour inspection and education of labour inspectors about the vulnerabilities of migrant work are necessary.[13]

Most workers TCNs in Croatia perform work temporary, based on a (up to) 3-years R&W permit. Therefore, in this paper the authors focus and analyse the recruitment practices, residence and work permit, and some aspects of working and living conditions, particularly appropriate accommodation of TCNs, focusing primarily on one group of migrant workers - legally residing TCNs with a restricted work authorization (limited to sectors, such as seasonal workers, or linked to a single employer, such as workers who work based on the opinion of the CES). This specific group is considered more vulnerable than the group of migrant workers TCN with a fully flexible work authorisation.[14]

In case of breach of the conditions of their status, the R&W permit could be withdrawn or not renewed. This "increases their dependency on their employer and,

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9 Izvješće Odbora za rad, mirovinski sustav i socijalno partnerstvo, P.Z.E. br. 63, Available at: [https://www.sabor.hr/hr/radna-tijela/odbori-i-povjerenstva/izvjesce-odbora-za-rad-mirovinski-sustav-i-socijalno-325], Accessed: 11 March 2026.

10 Ombudswoman's Report for 2024, *op. cit.,* note 3, pp. 66 – 67.

11 Kotulovski *et al.*, *op. cit.*, note 6, p. 342; Stefanov, R.; Mineva, D., *Tackling undeclared work among seasonal (including mobile) workers: developments, trends and good practices*, 2021, p. 1-3., Available at: [https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32014L0036], Accessed: 11 March 2026.

12 Nierop, P. van; Scönenberg, L.; Terziev, P., *Counteracting undeclared work and labour exploitation of third-country national workers*, European Platform tackling undeclared work, January 2021, p. 1.

13 Butković, H.; Samardžija, V.; Rukavina, I., *Strani radnici u Hrvatskoj: Izazovi i mogućnosti za gospodarski i društveni razvoj (Foreign Workers in Croatia: Challenges and Opportunities for Economic and Social Development)*, IRMO, Zagreb, 2022, p. 9-14.

14 See distinction in: Nierop, *op. cit.*, note 12, pp. 2-3.

in turn, the risk of labour exploitation."[15] If they work only part-time, it is likely that they work undeclared in order to earn more money or they find a better job at the same employer or in a sector not permitted by their status. Consequently, they complain less about their working conditions.[16]

2. THE VULNERABILITY OF MIGRANT WORKERS TCNS: UNDECLARED WORK AND LABOUR EXPLOITATION

According to research, most migrant workers TCNs come from countries with lower wages, restricted job opportunities and often with a higher share of undeclared work, while the risk to be engaged in labour exploitation can increase if they work illegally, and/or are low-skilled workers, and/or lack adequate language skills. They are employed mostly in sectors that engage flexible workforce in labour-intensive jobs (agriculture, construction, domestic work and transport), but also work illegally or undeclared in services within the HORECA sector, and beauty salons. The specificity of these sectors is the difficulty to monitor labour, due to "frequently changing or hidden workplace settings and subcontracting chains".[17] The recruitment in undeclared work is "primarily via private contracts and informal networks, fraudulent temporary work agencies, online recruitment and pick-up spots."[18]

There is no official EU legal definition of labour exploitation. The European agency for fundamental rights (FRA) defines it as: "work situations that deviate significantly from standard working conditions as defined by legislation or other binding legal regulations, concerning in particular remuneration, working hours, leave entitlements, health and safety standards and decent treatment".[19] In short, it is the treatment of workers below minimum standards, deviating significantly from decent work.[20] It can be understood "as a continuum ranging from mild inconsistencies with the principles of decent work to severe exploitation, characterised by distinctive forms and degrees of immobility, devaluation, and coercion".[21] Severe forms of labour exploitation fall under criminal law. As a result of dependency on

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15 Nierop, *op. cit.*, note 12, pp. 3, 22.

16 Nierop, *op. cit.*, note 12, p. 22.

17 Nierop, *op. cit*., note 12, p. 4.

18 Nierop, *op. cit*., note 12, p. 4.

19 European Union Agency for Fundamental Rights (FRA), Severe labour exploitation: workers moving within or into the European Union, 2015, p. 10.

20 Nierop, *op. cit*., note 12, p. 17.

21 Nierop, *op. cit*., note 12, p. 17; Skrivankova, K., *Between decent work and forced labour: examining the continuum of exploitation*, Joseph Rowntree Foundation, 2010, pp. 16-21.

the employer exercising his power over worker in order to cut costs, labour exploitation includes different employers' strategies to control workers.[22]

"Compared with undeclared work, labour exploitation undermines a wider set of obligations by employers and to fair and decent work" in relation to: undeclared work (as a form of labour exploitation), payment, working time, health and safety regulations, no access to other basic rights (e.g. written contracts), pressuring the worker to work as self-employed or in atypical employment relations. Undeclared work is a form of labour exploitation and increases the risk thereofbecause of the fact that the worker is "hidden" from enforcement authorities.[23]

3. LEGAL SOURCES REGULATING THE EMPLOYMENT OF MIGRANT WORKERS TCNS IN CROATIA

3.1. Aliens Act and Labour Act

In the Croatian legal system, the legal status of TCNs is regulated through the interaction of several legal acts, whereby the Labour Act[24] (hereinafter: LA) functions as the *lex generalis* in the field of employment relations, and Aliens Act as the *lex specialis* with regard to the access to the labour market and the legality of residence. The LA applies to all workers irrespective of nationality and governs the fundamental aspects of the employment relationship, including the conclusion of employment contracts, working time, rest periods and leave, termination of employment, and the protection of workers' rights. It is grounded in the principle of equal treatment, ensuring that TCNs enjoy the same employment-related rights as domestic workers. However, the applicability of these rights is contingent upon prior compliance with the requirements set out in the Aliens Act,[25] which regulates the conditions for issuing residence and work permits, the linkage of the worker to a specific employer, and other conditions governing access to the labour market, thereby establishing its role as a special legal regime that precedes the application of labour law.

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22 Those are: creating a fearful and intimidating environment, e.g. threats with dismissal or reporting the worker; spatial and social isolation of many exploited workers (especially those that perform housework or work in agriculture) that doesn't allow them to communicate with the outside worls and seek help; inadequate accommodation; minimize the risk of detection during labour inspections; low income that enables the worker to pay for accommodation and consequently finds himself / herself in 'debt-bondage'. Nierop, *op. cit.,* note 12, p. 19.

23 See more: Nierop, *op. cit.*, note 12, p. 18 ff.

24 Zakon o radu, Official Gazzette (hereinafter: OG), Nos. 93/2014, 127/2017, 98/2019, 151/2022, 64/2023.

25 Zakon o strancima, OG, Nos. 133/2020, 114/2022, 151/2022, 40/2025.

3.2. Health Insurance, Health Care and Occupational Health and Safety

The legal position of TCN workers is further complemented by the Act on Compulsory Health Insurance and Health Care of Foreigners in the Republic of Croatia.[26] It regulates entitlement to healthcare and compulsory health insurance for foreigners, including TCN workers. In line with the Art. 6 (1) TCN worker that is obliged to the mandatory health insurance, has the rights and duties deriving from mandatory health insurance under the same conditions and in the same manner as the insured persons that have this status according to the Act on Compulsory Health Insurance.[27]

Although health protection is formaly accessible, the scholars point to the shortcomings regarding real accessibility of those rights to migrant workers TCN. H. Špadina[28] emphasises that Croatian legislation is not fully harmonized with the international and European standards of social rights of migrants, especially with regard to the access to health protection and harmonization with the European Social Charter. This access is often limited due to their insurance status and (dis) continuity of the payment of contributions. Consequently, the workers with only temporary stay authorization may have only the right to urgent medical care. This model causes the discontinuity of rights in connection with the termination of employment (or administrative pitfalls), in particular those categories of workers in temporary or insecure type of employment have a limited acces to health services.

In a comparative analysis,[29] the Croatian system has been depicted as formally inclusive, but functionaly restrictive, especially due to the dependence on the contributions, limited scope of rights guaranted to certain categories of migrants and administrative impediments in the realization of rights.

Occupational Health and Safety Act (OHSA)[30] regulates the the duty of the employer to train the employees to work safely. For the migrant workers it should be done in an understandable and clear way, considering their knowledge of the

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[26] Zakon o obveznom zdravstvenom osiguranju i zdravstvenoj zaštiti stranaca u Republici Hrvatskoj, OG, Nos. 80/2013, 15/2018, 26/2021, 46/2022.

[27] Zakon o obveznom zdravstvenom osiguranju, OG, Nos. 80/2013, 137/2013, 98/2019, 33/2023, 105/2025.

[28] Špadina, H., *Socijalna prava stranaca u Republici Hrvatskoj*, Zbornik Pravnog fakulteta u Zagrebu, vol. 69, no. 5–6, 2019, p. 252.

[29] Špadina, H.; Kovacevic, L., *Social Law as a Lighthouse for Labour Migration Law: Comparative Study—Croatia and Serbia,* in: Jorens, Y. (ed.), The Lighthouse Function of Social Law, 2023, Springer, Cham, pp. 467-485.

[30] Zakon o zaštiti na radu (Occupational Health and Safety Act, OG, Nos. 71/2014, 118/2014, 154/2014, 94/2018, 96/2018).

Croatian language. Special right to health protection at work is regulated in the mentioned general acts on compulsory health insurance and health care.

3.3. Labour Market Act

The Labour Market Act[31] fosters the development of standardized classifications of occupations and competencies, as well as the implementation of active employment policies aimed at acquiring the required skills, such as training programs and lifelong learning. These tools serve as a basis for adopting educational and migration policies, and are directly linked to the identification of shortage occupations and the implementation of a labor market test. The fact that third-country nationals often do not have equal access to certain labour market measures can be attributed to the circumstance that access to some services and rights depends on their migration status, residence and work permit, or registration as unemployed persons..[32] The Act also provides for employment mediation by the CES and private agencies as well as cash benefits for unemployment if the legal prerequisites are met (Art. 1; Art. 10, 14, 15 (concerning TCN).

The fact that third-country nationals often do not have equal access to certain labour market measures can be attributed to the circumstance that access to some services and rights depends on their migration status, residence and work permit, or registration as unemployed persons.

4. PITFALLS OF THE REGULATION IN FORCE

According to the Croatian Government, the existing model of issuing the R&W permit does not allow the migrant workers TCNs to change the occupation that is not in high demand by the same employer, nor to change the employer before one year in other occupation (Art. 103 b (1)). Therefore, the new procedure of issuing a residence and work permit, and consequently new administrative costs, new opinion of CES, in sum new administrative burden for authorities, TCN migrant worker and employer are necessary.[33]

The procedure of issuing the R&W permit seems to have some pitfalls. First, the term of 15 days[34] is too short for police authorities to conduct the necessary checks

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31 Labour Market Act (Zakon o tržištu rada), OG, Nos. 118/2018, 32/2020, 18/2022, 156/2023, 152/2024.

32 See: CES, Available at: [https://www.hzz.hr/en/services/third-country-non-eu-nationals/?utm], Accessed 2 July 2026.

33 Nacrt Prijedloga ZIDZS, *op. cit.*, note 1, pp. 2-3.

34 See Aliens Act, Art. 91 (7).

before issuing the permits and to prevent their misuse, from both migrant workers, human traffickers or fictitious employers.[35] Second, as Croatia has become a part of Schengen area it is necessary to prevent misuse in issuing the R&W permits, mostly from those TCN migrant workers coming from the countries that represent migration risk, from human traffickers or fictitious.

The labour market test was introduced five years ago.[36] The CES decides upon the list of shortage occupations, in which case the labour market test is not neccessary. The shortage occupation can be determined for the whole territory of Croatia, but also for a particular county.[37] In practice some employers misuse it by getting R&W permit for the territory where particular occupation is in high demand, and then send the migrant worker to the territory where it is not, and where the labour market test would be necessary (and their demand for issuing the R&W permit would be refused).[38] Consequently, the duty to undergo labour market test is circumvented and the labour market stability is undermined. The examples are taxi drivers or workers in the construction industry.[39]

Moreover, first, for seasonal workers the employer has to obtain a new permit for every season (AA, Art. 104, 106), what represents a burden for all envolved in the issuing procedure. Second, the AA does not prescribe the knowledge of Croatian language and Latin script as obligatory precondition for employment,[40] but only as a possibility for the employer to set it as a condition during the selection procedure.

In the following part the analysis of the regulation concerning residence and work permit (single permit) is given.

5. RESIDENCE AND WORK PERMIT

In Croatian law, a R&W permit is a combined approval of temporary stay and work. Concerning its duration, according to Art. 91 (10) of the AA it can be

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35 Their goal is primarily to make the entrance to the EU territory easier for the TCNs who do not really want or need to work in Croatia. Nacrt Prijedloga ZIDZS, *op. cit.*, note 1, p. 3.

36 Aliens Act, OG, No. 133/2020 (Art. 98).

37 Aliens Act, Art. 101.; see: Lista Upravnog vijeća HZZ, available at: [https://www.hzz.hr/usluge/radne-dozvole-za-zaposljavanje-stranaca-i-test-trzista-rada/savjeti-za-predaju-zahtjeva/], Accessed 1 June 2026.

38 Nacrt Prijedloga ZIDZS, *op. cit.*, note 1, p. 3.

39 Especially in construction industry the AA does not restrict the employment of migrant workers TCN, that got permit without the labour market test in order to perform work on reconstruction of buildings damaged by the earthquake (in 2020), to work on the territory of other counties (police headquarter) where the permit should be obtained. Nacrt Prijedloga ZIDZS, *op. cit.*, note 1, p. 3.

40 It is presecribed as precondition for the long-term stay (AA, Art. 152-154).

issued: a) for the same period on which the employment contract is concluded (with the employer or with the employer – temporary work agency (TWA), to up to three years if it is issued based on a labour market test or in case of R&W permit prolongation; b) for the same period on which the employment contract for a seasonal work is concluded, up to 90 days or up to nine months (in accordance with the Art. 104 of the AA); c) for a period necessary to perform work resp. for the same period for which the employment contract is concluded, to up to two years in case of issuing or the prolongation of a permit for certain categories of persons etc.

A permit can be issued if the CES gives a positive opinion about the employment of the TCN, based on the results of the labour market test.[41] This rule has exceptions.[42]

One important exception should be emphasised. It concerns seasonal workers in so far as in case of employment of seasonal workers in agriculture, forestry, catering industry and tourism in Croatia, the residence and work permit may be issued without the labour market test and the opinion of the CES for a period of up to 90 days during a calendar year or in a case of the prolongation of the R&W permit for the same employer and same third-country national in the same occupation. (Art. 97 (7) AA).

5.1. Issuing of R&W Permit When the Employer is a Temporary Work Agency

If the employer is a temporary work agency, the assignment contract should be attached, whose duration could be shorter than the duration of the employment contract and the user company should fulfil the general conditions prescribed for the employer of the worker TCN[43] (Art. 100 (1-2) AA). The temporary work agency can assign the worker TCN to another user company in the same occupation for which the R&W permit was issued. The agency has a duty to submit the application for the change of user company to the police authority within three days from the conclusion of the assignment contract with other user company. The police authority will officially request the opinion of CES (Art. 100 (3-4) AA).

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41 The employer's obligation is to request a labour market test before submitting the application for a residence and work permit. The test is carried out by the CES office.

42 Pursuant to Art. 110 of the AA, the permit is issued without the CES labour market test and the opinion of CES for a number of TCN, e.g. foreign reporter, accredited in Republic of Croatia or a reporter of a foreign media; key staff in companies, candidates for the EU blue card etc.

43 For general conditions see Art. 99 (1-3) of the AA.

5.2. New Application for the R&W Permit (Change of employer and/or Occupation)

A new application for the R&W permit should be submitted for the worker who has a permit based on the opinion of the CES in the following cases: if the worker TCN wants to change occupation by the same employer, whereas the occupation is not a shortage one; if he/she changes the employer in the same occupation within one year; if he/she changes the employer and the occupation (Art. 103 b (1) AA).

In the period of validity of the permit the migrant worker enjoys the right to a period of unemployment of up to 60 days (consequtively or with breaks), during which he/she has the right to search for a job and to employment (Art. 103 a of the AA). If the application for the permit was submitted during this period, the worker TCN may stay in Croatia until the decision on the application has become enforceable. The application submitted after the prescribed period of unemployment is going to be discharged by a decision, and the R&W permit cancelled (Art. 103 b (2-3).

Similar to Croatia, in Slovakia non-EU workers who lose their job have to find a new employment in 60 days, otherwise they must leave the country due to the invalid permit. Therefore, this so-called "protection period" seems to be too short and the TCN workers with such uncertain legal status are generaly vulnerable.[44] Research confirms, moreover, the difficult situation of TCNs in countries who tied the permits to a specific job and employer, as the worker is tied to the employer who uses different strategies to exploit this situation.[45]

5.3. Novelties Enabling Easier Changes of Occupation and/or Employer

In 2025 the number of issued R&W permits decreased. According to the Croatian Government it is the result of the novelties introduced by the amendments to the AA (in 2025), including the new rules (institutions) of the possibility to change more easily shortage occupation by the same employer, and easier change of em-

[44] Chudžíková, A.; Bargerová, Z., V*ictims of labour exploitation or 'illegal' migrants? Ukrainian workers' labour rights protection in Slovakia*, Bratislava, Centre for the Research of Ethnicity and Culture, 2018, pp. 16-17.

[45] European Labour Authority, Counteracting undeclared work and labour exploitation of third-country national workers, 2023, p. 3, Available at: [https://www.ela.europa.eu/sites/default/files/2023-12/counteracting-undeclared-work-labour-exploitation-third-country-national-workers.pdf], Accessed 10 April 2026.

ployer in the same occupation. Therefore, it is no longer necessary to apply for a new R&W permit.

In the following part the authors analyse the possibility of the worker TCN to change occupation and/or employer, i.e. the degree of the restriction (flexibility) of their work authorization, that point to their vulnerability/exploitation and existing legal gaps.

5.3.1. Change of (Shortage) Occupationat the Same Employer

Pursuant to Art. 103 c (1-2) of the AA a worker TCN who has a R&W permit or the permit was prolonged may change his/her occupation with the same employer within the validity period of the permit, if it concerns a shortage occupation and the employment contract for the new occupation is concluded for the period until the end of the validity period of the R&W permit. This worker may start working in a new occupation from the date of a positive opinion from the CES, and the R&W permit shall remain valid until its expiry (i.e. up to three years). This provision does not apply to seasonal workers.

5.3.2. Change of the employer in the same occupation

According to Art. 103 d (1, 3) of the AA a worker TCN who has a R&W permit valid for at least one year, based on the opinion of the CES, or has it extended, may, within the validity period after one year of work, change employer in the same occupation. The other employer is obliged to submit a request for a change of employer to the police administration in three days after the conclusion of the employment contract, which will officially request the opinion of the CES. A worker TCN may start working for another employer from the date of a positive opinion of the CES, and his/her R&W permit shall remain valid until its expiry.

If the opinion of the CES is negative, a TCN with a valid permit may seek a new employer within the mentioned period of unemployment (of up to 60 days), taking into account previous periods of unemployment, and be employed.[46]

This provision also applies to a worker TCN who has immediately before resided and worked continuously in Croatia for at least one year on the basis of a R&W

[46] If the opinion was negative, the Ministry of Interior (through the police administration or police station), rejects the request for a change of employer by a decision and inform the worker TCN of the permitted period of unemployment and that it will revoke the permit if the longest permitted period of unemployment has elapsed and worker has not found employment within that period (Art. 103 d (4, 6) AA).

permit based on the opinion of CES (Art. 103 d (9). It seems that this provision can be used as a sort of "bridge" because it does not refer only to the existing R&W permit, but to total uninterrupted employment of the worker in Croatia. This provisoin can be useful for a worker who has a single permit issued for less than a year, under the condition that the previous permit was also based on the opinion of the CES and that there is not interruption in the employment relationship/stay. CES has to check if the worker had performed work for a year and if the employer legally performed his activity (has no debts etc.(Art. 93 (1) (1-5) of the AA).

The legal gap is evident on the example of workers who have seasonal work permits (up to 6 or 9 months) or workers who get the permit exactly up to one year, without the possibility of extension. Therefore, worker who is dismissed e.g. after 11 monhts, according to a strict interpretation has not fulfilled the condition of „one year of work" and has to pass the new labour market test (as the worker who has just arrived in Croatia). The new amendments envisage the extension of the permits up to three years.

The mobility of workers and possibility to change employer is prescribed in Directive (EU) 2021/1883. Art. 15 provides for the possibility of change of employer while preserving the legal status of worker (blue card).[47] Even though the Directive refers to high-qualified workers, it reflects the common trend of EU law to more flexibility and mobility at the labour market. This can serve as a base for the proposals *de lege ferenda* for national law.

5.3.3. Additional work of worker TCN

Pursuant to Art. 103 e (1, 2, 9) of the AA, a worker TCN who has a valid R&W permit based on the opinion of the CES or has it extended, who is employed and works full-time of 40 hours per week may, within the validity period of the permit, additionally works on the basis of an employment contract for additional work for second employer under the conditions prescribed by the Labour Act.[48] The second employer requests a labour market test from the CES before submitting a request for additional work. A worker who remains unemployed with his/her first employer or does not work full-time (40 hours per week) may not continue to work additionally with a second employer and is obliged to notify the

[47] Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC [2021] OJ L 382.

[48] As a rule, up to 8 hours per week (or 16 hours per week if working time is unevenly distributed). Art. 18 a – 18 c, LA.

police department or police station and return the certificate (on additional work) issued by the police authority.

This provision is rather strict. As additional work can be a possible step to employment of migrant worker by the second employer, it is worth to consider different solutions.

German law has a similar provision. Pursuant to the German Residence Act (*Aufenthaltsgesetz*), third country nationals with a residence permit should have an explicit authorisation for performing an economic activity, including additional work. Worker who wants to change the employer or perform additional work in first two years, has to previously request an approval of the Foreigners Office (*Ausländerbehörde*). The working time should not exceed 48 hours per week in total (Act on Working Time, (*Arbeitszeitgesetz*). In case of termination of employment relationship, the permit holder is obliged to inform the Foreigners Office in two weeks. After the employment has terminated, the Office may approve additional term of 3 up to 6 months for finding a new job matching the qualifications.[49] If the Blue Card holder wants to change the employer, he/she needs approval of the Foreigners Office during the first 12 months, and afterwards he/she has only to inform this office.[50] Persons who had insurance at least 12 months in the last 30 months are entitled to the unemployment subsidy (*Arbeitslosengeld*).[51]

According to German, as well as Croatian law, the migrant worker has the right to perform additional work only if the worker at the same time performs full-time work by the first employer. This causes the legal and economic dependency of the migrant worker from the first employer and can have a deterrent effect on the worker's mobility and transfer to more stable employment. In contrast, EU law points to the need of more flexible regulation. Namely, Directive 2011/98/EU,[52] in Art. 12 prescribes the right to equal treatment of TCNs with nationals of the Member State where they reside, while settled case law emphasizes the need

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49 Aufenthaltsgesetz (Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet), In der Fassung der Bekanntmachung vom 25.02.2008 (BGBl. I S. 162), zuletzt geändert durch Gesetz vom 20.03.2026 (BGBl. I S. 95) m.W.v. 02.04.2026, Available at: [https://dejure.org/gesetze/AufenthG], Accessed 10 April 2026, Art. 82 (6) and Art. 7 (2).

50 Aufenthaltsgesetz, *op. cit.*, note 48, Art. 4a (1); Art. 18 (2); Art. 3-5; Art. 18. g (4).

51 Art. 137, 142. Drittes Buch Sozialgesetzbuch - Arbeitsförderung - geändert durch Gesetz vom 18.06.1997 (BGBl. I S. 1430) m.W.v. 01.06.1998, zuletzt geändert durch Gesetz vom 22.12.2025 (BGBl. I S. 371) m.W.v. 01.01.2026, Available at: [https://dejure.org/gesetze/SGB_III], Accessed 10 April 2026.

52 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011], OJ L 343.

to enable real access to the labour market.[53] Directive (EU) 2021/1883[54] explicitely prescribes larger mobility of workers, including the possibility to change the employer, under certain conditions and control of the competent authorities (e.g. Arts. 15 and 16).

Therefore, in order to improve the Croatian regulation, the authors' proposal *de lege ferenda* is to introduce the possibility for a second employer to submit a request for issuing a new single permit in an appropriate term after the termination of the first employment (e.g. 30 days), while guaranteeing the worker the right to continue working for the second employer (by a written approval of the competent police authority) during the period of issuing the permit. This solution would be in line with the goals of EU law, enhancing the labour market flexibility and guaranteeing a higher level of protection for workers TCNs.

6. EMPLOYMENT INTERMEDIATION AGENCIES

As mentioned, TCNs are vulnerable due to the recruitment methods.

The list of service providers facilitating the matching of supply and demand for foreign labour is continuously expanding in the contemporary labour market.[55] However, intermediary arrangements involve a specific category of actors characterized by highly problematic practices. In this research, the authors focus specifically on private employment agencies particularly as the enforcement of TCN rights at user undertakings may give rise to the same issues encountered by agency workers who are Croatian citizens.[56] This article examines the recruitment channels for TCNs and the conditions for establishing private employment agencies.

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53 See e.g. ECJ, Case C-449/16, *Kerly Del Rosario Martinez Silva v Istituto nazionale della previdenza sociale (INPS) and Comune di Genova*.

54 Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC, OJ L 382.

55 European Labour Authority, *Posting of third-country nationals: Contracting chains, recruitment patterns, and enforcement issues. Insights from case studies*, ELA Strategic Analysis, Publications Office of the European Union, 2025, Luxembourg, p. 47, Available at: [https://www.ela.europa.eu/sites/default/files/2023-12/counteracting-undeclared-work-labour-exploitation-third-country-national-workers.pdf], Accessed 1 April 2026.

56 Under Croatian law, agency workers must be entitled to the same scope of rights as workers employed directly by the user undertaking; this applies to working conditions, remuneration, occupational health and safety, etc. Without entering into a detailed analysis, research indicates that, in practice, the rights of agency workers at user undertakings are significantly more limited than those of workers employed directly by the user. For more, see Senčur Peček, D.; Laleta, S.; Kotulovski, K., *Ugovorni odnosi u vezi s privremenim agencijskim radom*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 40, No. 3, 2019, pp. 1101–1127.

These insights can help identify factors that could increase the risk of non-compliance and unfavourable working conditions for TCN workers. Additionally, particular emphasis is placed on the role of labour market intermediaries in the process of recruiting TCN workers involved in transnational labour supply chains.

6.1. The concept and development of private employment agencies

The concept of private employment agencies is not uniformly defined at the EU level. Generally, a distinction is made between two fundamental categories: recruitment agencies (placement services) and temporary agency work providers.[57] While the concept of temporary work agencies[58] has been progressively harmonised at the EU level, the broader term 'private employment agencies' remains heterogeneous.[59]

Private employment agency is any natural or legal person, independent of the public authorities, who provides various labour market services including matching offers of and applications for employment, without becoming a party to the employment relationships that may arise therefrom and other services relating to job-seeking, determined by the competent authority.[60] This is a profitable service which, according to some sources, significantly contributes to the successful matching of supply and demand on a global scale.[61] Since the 1990s, both their role and numbers have increased, driven in part by the privatization of government migration management processes.[62] The development of private agencies is closely linked to the gradual abandonment of the monopoly held by public employment services and the simultaneous establishment of foreign branches aimed

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57 The concept of private employment agencies may operate as intermediaries between labour supply and demand without assuming the status of employer, whereas temporary work agencies employ workers and assign them to user undertakings.

58 Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work defines temporary-work agency as any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction (Art. 3 (1) (c).

59 European Parliament, *The Role and Activities of Employment Agencies*, Directorate-General for Internal Policies, Policy Department A: Economic and Scientific Policy, Brussels, 2013, pp. 38-41.

60 Article 1(1) of the ILO Private Employment Agencies Convention, 1997 (No 181).

61 Cremers, J., *The international recruitment chain: Experiences and policy recommendations*, European Journal of Industrial Relations, Vol. 32, No. 1, 2026, p. 72.

62 Jones, K.; Ksaifi, L.; Clark, C., *'The biggest problem we are facing is the running away problem': recruitment and the paradox of facilitating the mobility of immobile workers*, Industrial Relations Journal, Vol. 54, No. 3, 2023, p. 240.

at building a global network comprised of numerous subcontracting entities.[63] In this context, their legal classification stems from the broader system of EU economic freedoms. Specifically, the private agency market is growing robustly precisely due to the liberalization of the labour market. At the same time, private agencies operate within the framework of the freedom to provide services (Art. 56 TFEU) and the freedom of competition. This duality reflects a compromise between the social function of employment and market principles. Private agencies can partially address both requirements, which is why they are considered key actors in global foreign labour recruitment chains.[64] The case law of the Court of Justice of the EU (hereinafter: CJEU) has played a crucial role in dismantling state monopolies in the field of employment intermediation.[65]

6.2. Private Recruitment Agencies for TCNs in Croatia: Challenges in Practice

There is a rising number of exploitative business methods that remain insufficiently researched. According to the Ombudswoman,[66] employers in Croatia rely heavily on the recruitment of TCNs through intermediation agencies. This practice particularly applies to small and medium-sized enterprises which often lack the necessary capacity (financial resources, human capital or professional expertise) for international recruitment.[67]

Agencies play a crucial role in the arrival of foreign workers and the filling of vacancies.[68] However, their operations in practice reveal systemic deficiencies. Trade

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63 Cremers, J., *op. cit.*, note 61, p. 72.

64 European Parliament, *The Role and Activities of Employment Agencies*, Directorate-General for Internal Policies, Policy Department A: Economic and Scientific Policy, Brussels, 2013, p. 23.

65 Case C-55/96, Job Centre II, EU:C:1997:603. More: Houwerzijl, M., *The working conditions of cross-border temporary agency workers on paper and in reality*, European Labour Law Journal, 2024, Vol. 15, No. 1, pp. 50–672.

66 European Labour Authority, *Accommodation and food service activities: issues and challenges related to labour mobility*, ELA Strategic Analysis, Publications Office of the European Union, Luxembourg, 2024, Available at: [https://www.ela.europa.eu/sites/default/files/2024-10/horeca-report-ela.pdf], Accessed 3 March 2026.

67 See also: Villares-Varela, M., *"Not helping out": classed strategies of the (non)contribution of children in immigrant family businesses*, Ethnic and racial studies, Vol. 40, No. 10, 2017, pp. 1758–1775, Available at: [https://www.tandfonline.com/doi/epdf/10.1080/01419870.2016.1206591?needAccess=true], Accessed 15 March 2026.

68 Sve više agencija za uvoz radnika: Uskoro ćemo zapošljavati strance i u javnom sektoru, Available at: [https://www.vecernji.hr/vijesti/sve-vise-agnecija-za-uvoz-radnika-uskoro-cemo-zaposljavati-strance-i-u-javnom-sektoru-1775841?utm], Accessed 23 March 2026.

unions warn of a sharp increase in the number of agencies[69] participating in the immigration process, which has led to an expansion of the intermediation market, but also to the emergence of unfair competition and insufficiently regulated business models that can negatively impact the position of both foreign workers and employers. The greatest challenge for trade unions concerns access to migrant workers in order to provide them with timely and comprehensive information regarding their rights. Agencies in Croatia are actively involved in sourcing candidates, the logistical organization of workers' arrival, and the process of obtaining necessary work permits and other documentation.[70] With the aim of securing quick profits, agencies import unskilled workers whom employers can select from 'candidate catalogues.' However, in this process, they frequently 'trade' in TCNs, treating them as mere commodities, due to high intermediation costs[71] and the retention of personal documents,[72] leading TCNs into debt bondage and a state of dependency on their recruiters.[73] Such business models call into question the responsibility of states that fail to safeguard the dignity and fundamental human rights of foreign workers. One of the root causes of this problem stems from non-transparent recruitment procedures, which create conditions for abuse, particularly regarding workers arriving from distant Eastern countries who often lack sufficient information on almost all aspects of living and working in Croatia.

An additional challenge is the emergence of 'fictitious' agencies which, exploiting the liberal framework for incorporating companies, evade responsibility for paying wages and social security contributions, leaving foreign workers without legal protection or means of subsistence.[74] Specifically, natural or legal persons

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69 Izvješće o agencijskom radu za 2024., Available at: [http://apzp.mrms.hr/Izvjesce_2024.pdf], Accessed 8 March 2026.

70 NOVI SUPER BIZNIS: U Hrvatskoj su svi "stručnjaci" za zapošljavanje stranih radnika, 2024, Available at: [https://totalinfo.hr/novi-super-biznis-u-hrvatskoj-su-svi-strucnjaci-za-zaposljavanje-stranih-radnika/p6+], Accessed 2 April 2026.

71 InfoMigrants, Nepalese workers: Fueling Croatia's economy amid violence and exploitation, 2026, Available at: [https://www.infomigrants.net/en/post/69895/nepalese-workers-fueling-croatias-economy-amid-violence-and-exploitation], Accessed 11 April 2026.

72 Ispovijesti stranih radnika, Available at: [https://www.24sata.hr/news/ispovijesti-stranih-radnika-u-hrvatskoj-ne-isplacuju-nam-place-ne-mozemo-naci-lijecnika-1068458?utm], Accessed 14 March 2026.

73 Nezavisni hrvatski sindikat, Neki strani radnici u Hrvatskoj rade u katastrofalnim uvjetima, često i bez sanitarnih čvorova!, 2023, Available at: [https://www.nhs.hr/novosti/neki_strani_radnici_u_hrvatskoj_rade_u_katastrofalnim_uvjetima_cesto_i_bez_sanitarnih_cvorova_72270/?utm], Accessed 17 March 2026.

74 Jutarnji list, U Hrvatskoj je više od 115.000 stranih radnika, dovode ih 424 agencije za posredovanje, 2023, Available at:

establish limited liability companies (d.o.o.) with a share capital of only ten euros, import TCNs, collect commissions, and then lead the company into bankruptcy at the first intervention by supervisory bodies or the labour inspectorate following a regulatory violation, most commonly the non-payment of wages to TCNs.[75]

In this regard, the increasing number of such agencies in Croatia often operate outside the professional scope. Employers, acting as users, conclude employment contracts and import TCNs via 'phantom agencies' before work permits or visas are issued; in the meantime, TCNs work in the informal economy (undeclared work). Consequently, 'lapsed' work permits occurre when TCNs fail to appear or employers withdraw but fail to de-register the permit, which, clogs the system with redundant documentation. A large number of TAWs opened annually are registered under different National Classification of Activities (NKD) codes. As stated by the Croatian Chamber of Economy (HGK), regardless of whether they are registered for intermediation or temporary agency work, some TAWs operate illegally by 'hiding' behind ce rtain codes (the so-called use of licences for illegal work).[76] Ombudswoman that monitoring of media reports also indicates that TCNs from distant countries pay intermediaries amounts of up to 10,000 euros to come to Croatia. The Ombudswoman emphasized that TNC reported paying high fees to agencies and other intermediaries involved in the recruitment process, which reached several thousand euros and often led them into debt. At the same time, complaints were recorded that, after making these payments, workers were not provided with the promised documentation. Moreover, intermediaries ceased communication with TNC.[77] Irregularities are equally present among both large and small employers.

6.3. Legal Prerequisites for Establishing Employment Mediation Agencies Under Croatian law

At EU level, there is no single comprehensive legal framework governing private recruitment agencies for TCNs. Instead, the regulatory environment is fragment-

[https://www.jutarnji.hr/vijesti/hrvatska/u-hrvatskoj-je-vise-od-115-000-stranih-radnika-dovode-ih-424-agencije-za-posredovanje-15293929?utm], Accessed 5 April 2026.

75 Source: information received from the manager of the employment agency.

76 Nova regulativa dovest će do masovnog gašenja agencija za uvoz stranih radnika, poslodavci protiv strožih uvjeta zapošljavanja (Donatella Pauković), Lider, Available at: [https://lidermedia.hr/biznis-i-politika/nova-regulativa-dovest-ce-do-masovnog-gasenja-agencija-za-uvoz-stranih-radnika-poslodavci-protiv-strozih-uvjeta-zaposljavanja-155700/], Accessed 23 March 2024; European Labour Authority, *Accommodation and food service activities*, *op. cit.*, note 63, p. 98.

77 Pučka pravobraniteljica Republike Hrvatske, Izvješće pučke pravobraniteljice za 2024. godinu, Analiza ljudskih prava i jednakosti u Hrvatskoj, 2025, Available at: [https://www.ombudsman.hr/wp-content/uploads/2025/05/Izvjesce-pucke-pravobraniteljice-za-2024.-godinu-2.pdf], Accessed 2 June 2026, p. 63.

ed and based on a combination of international standards, EU secondary legislation and soft-law instruments.[78]

Croatia has not yet ratified the ILO Convention No. 181[79] although its standards have been partially incorporated into domestic regulation through European legislation.[80] There is therefore scope for improving and regularly supervising this system, particularly given that Article 4(4) of the Temporary Agency Work Directive[81] leaves measures on registration, licensing, certification, financial guarantees and monitoring of TAW to Member States.

Croatian law primarily regulates placement activities through the Labour Market Act and the LA as the general statute governing employment relations. The *lex specialis* for foreign workers including employers' obligations towards TCNs — is the Aliens Act, which indirectly prescribes preventive measures for lawful agency conduct when mediating in the employment of TCNs. The distinction between agency employment and placement depends on the level of legal responsibility and applicable sources of law.

Conditions for establishing and performing TAW are regulated at the statutory level when the agency has the status of employer. Under the current LA, the legislator introduced an obligation to register and licence agencies in accordance with special regulations and to obtain the relevant authorisation and entry in the competent ministry's register (Art. 44) to ensure legality, supervision and prevention of abuse. On registration, the ministry issues a certificate containing the number under which the agency is registered and the date of registration. In legal transactions, in business documents, on every letter and contract, the Agency is obliged to indicate the number under which it is entered in the records of the ministry (Art. 52). It must also comply with statutory restrictions and prohibitions (Arts. 46-49), which are subject to oversight by the competent authority. This statutory specification of conditions for establishment and operation provides, to some extent, clear identification of regulatory requirements largely aligned with those in the TAWD.[82]

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78 Cremers, J., *TCNs on the EU Labour Market*. Working paper. INTEFP-Lyon: Eurodétachement-Project, 2024, p. 6.

79 ILO, Private Employment Agencies Convention, 1997 (No. 181).

80 Čujko, K., Agencije za privremeno zapošljavanje, *Pravnik*, Vol. 38, No. 79, 2004, p. 39.

81 Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5 December 2008.

82 Directive 2008/104/EC (TAWD) establishes minimum standards for agency work but does not regulate the migration status of TCNs or the conditions for establishing agencies. It focuses on operational safeguards, including the prohibition of fees charged to agency workers, while leaving registration, licensing, financial guarantees and supervision to national law. Although Article 4 addresses restrictions

By contrast, placement regulated by the Labour Market Act is a service activity of matching supply and demand. In this model, the agency acts solely as an intermediary facilitating the formation of the contractual employment relationship between worker and employer, without assuming employer status or related obligations. Pursuant to Art. 4(7), both legal and natural persons may perform placement services if registered for those activities under special regulation, opening the field to private intermediaries independent of the public employment service. (Constitution, Art. 4). However, the Act does not elaborate on the content, manner and conditions of placement operations, instead referring to a subordinate act — the By-law on the Provision of Activities Related to Employment.[83] It prescribes legal and administrative conditions, including mandatory registration and notification in the Ministry of Labour's register before commencing its activity. The By-law defines that placement includes: employment mediation, professional guidance and education in order to increase the employability of the workforce (Art. 1). Agencies are required to establish their terms of business and inform employers and job seekers who request their services about those terms (Art. 5). They are also obligated to keep appropriate records of legal transactions and business documents and indicate its register n umber in all correspondence and contracts (Art. 6). Following recent amendments there is no longer an explicit statutory prohibition limiting them to market research or counselling, which permits a broader scope of operations while maintaining the obligation to perform placement professionally, impartially and critically free of charge for jobseekers.

However, the sources of labour law under review do not contain detailed provisions on the registration procedure. The latter is governed by separate legislation (Companies Act[84], Crafts Act[85]), leaving founders with the choice whether to register the placement agency as a craft or a commercial company. The registration procedure for temporary-employment agencies in Croatian law therefore follows a registry model: the right to conduct the activity is acquired by entry in the Ministry of Labour's register without prior assessment of compliance with substantive operational requirements. The fact that an agency may be established as a company with minimal initial capital or even as a craft, without prescribed financial guarantees or specific economic conditions, creates legal uncertainty. Moreover,

on agency work, it does not harmonise authorisation systems across Member States. Furthermore, the Directive provides limited remedies against abuse and allows significant regulatory divergence, while triangular employment relationships such as subcontracting remain outside its scope.

83 Pravilnik o obavljanju djelatnosti u svezi sa zapošljavanjem, OG, No. 104/2025.

84 Companies Act, OG, Nos. 111/1993, 34/1999, 121/1999, 52/2000, 118/2003, 107/2007, 146/2008, 137/2009, 111/2012, 125/2011, 68/2013, 110/2015, 40/2019, 34/2022, 114/2022, 18/2023, 130/2023, 136/2024.

85 Crafts Act, OG, Nos. 143/2013, 127/2019, 41/2020.

the law does not provide for *ex ante* control before commencement of operations; oversight is exercised subsequently via labour inspection. The registry system and the obligation to submit statistical data through an application[86] typically rely on self-reporting without effective data verification, reducing the reliability of supervision and complicating detection of irregularities.

In line with the ILO standards and the principles of Private Employment Agencies Convention (No. 181), that gives the "green light" to states to pass strict national conditions to ensure worker protection, Croatia should enhance its regulatory framework by introducing more stringent spatial and personnel requirements for agencies. To combat the issue of 'hidden' TAWs the legislation should mandate that agencies provide adequate premises ensuring confidentiality (a room for interviews). Furthermore, professionalizing the employees with appropriate qualifications and relevant experience (often requiring at least tertiary education for managers). By incorporating these specific criteria into national law, Croatia would align with international best practices, ensuring that only legitimate entities with the necessary infrastructure and expertise can facilitate labor migration, thereby preventing the exploitation of workers through unauthorized recruitment channels.

6.4. Recommendations for the Development of Intermediary Structures in Cross-Border Employment of TNCs in Croatia

Unlawful employment of TCNs undermines tax revenues, social security systems and fair competition, and therefore requires coordinated action. The relaxation of the regulatory framework has led to the emergence of a complex system of relationships requiring continuous oversight in order to ensure adequate protection of TNCs who indisputably contribute to the state budget. Proposed improvements do not call into question the principles of free market competition or the advantages of employment through intermediary agencies. Furthermore, it should be emphasized that Convention No. 181 directly regulates the activities of private employment agencies by establishing minimum standards for their operation. Given the rapid increase of the number of migrant workers TCNs in Croatia, there is a clear need for stricter supervision of both the establishment and operation of agencies engaged in TNC recruitment. In this context, the proposal for its ratification is further justified under current circumstances, particularly as it would provide Croatia with clearer rules on agency accountability and improved protection of workers within recruitment chains.

[86] Art. 44(7) of the LA.

The ILO Convention No. 181 highlights the need for specific measures to prevent abuses in the recruitment of foreign workers.[87] Croatian law explicitly stipulates that intermediaries may not charge workers fees for employment mediation, which is consistent with the principles of the Convention. In the broader context of foreign worker employment and international mediation, practical challenges arise due to the lack of detailed legal regulation of all related costs, which intermediaries may in practice transfer to workers.

The objective is to reduce the number of "ghost agencies" that merely act as intermediaries without assuming responsibility for workers, through the introduction of stricter registration requirements. Recent amendments to the Aliens Act stipulate that the competent employment service (CES) will issue a positive opinion if the employer meets certain conditions. For the purposes of this research, key prerequisites include engagement in a registered economic activity and, for legal entities, a minimum turnover of 10,000 euros per month over the previous six months, and for natural persons, 15,000 euros over the observed period, as well as other prescribed conditions that in sum represent an attempt to filter employers through criteria such as: lawful business conduct, settlement of public liabilities, minimum employment levels, and a certain degree of financial activity (Art. 99(1–3) AA). However, the AA does not provide for a system of continuous supervision following the issuance of permits, nor does it impose an obligation of periodic verification of compliance. Furthermore, there is reason to question whether these requirements are primarily oriented toward formal legality rather than the substantive protection of workers. Such an approach does not necessarily ensure effective prevention of fraud in complex subcontracting and recruitment chains, where formally compliant employers may still engage in exploitative practices affecting TCNs.

The current framework focuses on the formal employer while neglecting the actual structure of work, particularly in cases involving subcontracting, agency work, and outsourcing, where the end user of labour remains beyond the scope of effective control. This leads to the fragmentation of responsibility for labour rights compliance, thereby complicating enforcement and worker protection. The ILO explicitly emphasizes that private employment agencies operate within the broader labour market context.[88] Consequently, the definition of employment mediation as merely linking unemployed persons with employers appears overly narrow,

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87 See: ILO General Principles and Operational Guidelines for Fair Recruitment, Available at: [https://www.ilo.org/resource/ilos-2016-general-principles-and-operational-guidelines-fair-recruitment], Accessed 3 March 2026; Palm Olsson, A.-K.; Choi, D.; Espinosa Erazo, G., *Guide to Private Employment Agencies*, 2nd (revised) edition, ILO, Geneva, 2022, p. 25.

88 Palm Olsson, A. et al., *op. cit.*, note 87, p. 25.

as it limits the governance of TNC migration flows to traditional intermediation functions.

There is scope for improvement, particularly given that the requirement of "economic activity" lacks precise operational criteria for assessing lawful agency operations. Apart from the employer's compliance with public obligations and absence of prior offences, the AA does not establish detailed quantitative thresholds or standardized criteria for evaluating "genuine economic activity" or "irregularities in business conduct," which may lead to inconsistent application in practice. A central issue lies in the discrepancy between the ease of company formation and the weak supervision of agencies operational activities. Current legislation allows the establishment of companies with minimal capital, leading to a rapid increase in the number of employment agencies lacking real operational capacity (so-called "fake agencies" without deposits or guarantees), often operating in violation of ethical and labour standards.

The CES issues a positive opinion based, among others, on a legally prescribed level of employer's turnover achieved over the previous six months (Art. 99 (1) (7) of the AA). Other Member States place greater emphasis on system development, cooperation, licensing, supervision, and transparency of employers' business operations within recruitment chains. Drawing on comparative models, the Croatian legislator should consider, alongside formal licensing requirements, the introduction of criteria relating to managerial integrity, professional qualifications, proof of operational capacity,[89] mandatory financial guarantees, including subsidiary liability of user undertakings in cases of agency insolvency.[90] The absence of such qualitative selection mechanisms weakens control over actors within recruitment chains.

The Croatian system remains predominantly administrative rather than a genuine market control mechanism. While it provides that agencies must pay wages to assigned workers if the user undertaking fails to submit payroll calculations (Art. 49 (4) of the Labour Act), questions remain regarding the actual availability of financial resources to fulfil such obligations. Additionally, agencies engaged in one-off recruitment often evade accountability by changing their business identity following complaints or inspections. To address "letterbox companies" that facilitate TCN employment while depriving workers of fundamental rights, the

[89] See Slovenian law, Zakon o urejanju trga dela (ZUTD) 62/24, Available at: [https://www.racunovodstvo.net/zakonodaja/zutd/163-clen?utm], Accessed 1 January 2026.

[90] Frenzel, H., *The Temporary Agency Work Directive*, ELLJ, Vol. 1, No. 1, 2010, p. 131.

establishment of a public register of agencies with a rating system is proposed.[91] Serious violations should result in the immediate and permanent revocation of licenses for all associated persons (owners and directors).[92]

7. ADEQUATE ACCOMMODATION

Inadequate accommodation represents a form of labour exploitation concerning health and safety regulation. In order to be admitted to work in the EU under the Seasonal Work Directive, workers must accompany their application with evidence of adequate accommodation (Art. 5 (1) (c)). The most used indicators to define minimum standards may vary among Member States but mostly include sanitation, living space and safety.[93]

Before the amendments in 2025, the Croatian AA guaranteed the adequate accommodation only to seasonal workers TCNs.[94] But stories about horrible living conditions of migrant workers in general, often coming from the media,[95] as well as warnings and demands of Ombudswoman or trade unions, raised awareness of the problem prompting the legislator to extend the right to adequate accommodation. Pursuant to (amended) Art. 103 f of AA, this right should be also guaranteed to TCNs who perform work for which they need a permit based on the opinion of the CES.

In the application for the R&W permit, an approval of adequate accommodation should be enclosed when the employer has ensured the accommodation or the employer acts as an intermediator in ensuring the accommodation (Art. 97(3) AA).

Consequently, the R&W permit will be issued to these two categories of migrant workers TCNs only if they have "ensured adequate accommodation".

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91 For an EU Directive on subcontracting and labour intermediation, 2025, Available at: [https://www.etuc.org/en/document/eu-directive-subcontracting-and-labour-intermediation], Accessed 25 March 2026.

92 Employment agencies and businesses UK, Available at: [https://www.gov.uk/employment-agencies-and-businesses/licences-for-employmentagencies?utm], Accessed: 19 February 2026.

93 Where the accommodation is arranged by or through the employer, the Directive aims to protect seasonal workers and prohibits excessive rent that should not be automatically deducted from his or her wage (Art. 20).

94 See Art. 104(5) AA.

95 Uvodi se novo pravilo, Available at: [https://www.dnevno.hr/gospodarstvo-i-turizam/uvodi-se-novo-pravilo-odzvonilo-omrazenoj-i-opasnoj-praksi-sa-stranim-radnicima-2721380/], Accessed 19 March 2026.

The „ensured adequate accommodation" is defined as "the accommodation enabling … adequate standard of living during the entire stay" (Art. 103 f (2) AA). The employer who has ensured or who is an intermediator in ensuring the accommodation should demand that the migrant worker TCN / seasonal worker pays a rent that is not too high compared with his/her net remuneration and with the quality of the accommodation. Such rent should not be automatically deducted from the wage of these workers. The employer should submit the rental contract or an equivalent document in which the rental conditions for the accommodation are clearly stated, ensuring that the accommodation fulfils the general health and security norms in force in Croatia (Art. 103 f (3); for seasonal workers Art. 104 (10) AA).[96]

Technical and other conditions for the adequate accommodation should be prescribed by a special By-law of the Minister of Interior (with the approval of the ministers in charge of construction, labour and health; Art. 103f (4) AA). The By-law proposal has passed the public consultation but has not been adopted to date.

Therefore, there is a legal lacuna. We have a special By-law from 2022 that applies only for seasonal workers.[97] According to this By-law, in the rental contract (or the equivalent document) the amount of rent, the data on the surface area and the number of persons (seasonal workers) that use such a space should be specified (Art. 46 (2)).

Rental contract or an equivalent document are considered valid proofs of adequate accommodation.[98] The premises must satisfy certain conditions in order to be considered adequate (Art. 47-48).[99]

While the draft of the new Aliens Act is in the legislative procedure, the novelties provided by the draft By-law concerning accommodation are worth mentioning. The By-law introduces additional formalities concerning the necessary documents for the both mentioned categories of migrant workers. If the employer ensures accommodation the rental contract should be authorizided by the public notary or tax authority; in other cases, the same goes for the statement of the owner of the

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96 Member States have the possibility to determine whether workers are free to arrange accommodation or if it is the employer's responsibility. See more: Herzfeld Olsson, *op. cit.*, note 87, p. 452.

97 By-law on residence of third country nationals in the Republic of Croatia, Official Gazette (OG), Nos. 20/2022, 155/2022) (*Pravilnik o boravku državljana trećih zemalja u Republici Hrvatskoj*).

98 The accommodation expenses should be appropriate to the amount of wage of the seasonal worker and should not exceed 30% of the net wage. If the employer ensures the accommodation to the seasonal worker without charge, he/she has to issue a document in which the conditions of the accommodation are clearly specified (Art. 28 (e)).

99 See in: Kotulovski et al., *op. cit.*, note 6, p. 342.

property (that should be added when applying for residence and stay permit). If seasonal worker ensures the accommodation himself, the statement of the person who is in a parental relationship with him/her should be enclosed.

If the accommodation is ensured by a legal or natural person that offers accommodation services (in line with the regulation of catering activity), proof of paid accommodation is needed.

Also, the draft By-law defines the characteristics of buildings in which an adequate accommodation for both categories of migrant workers should be ensured. It is: an apartment in a building with two or more residential units and a house (a building with one living unit) (Art. 24).

The conditions of minimum ensured space for accommodation was not changed, but some restrictions are introduced: 8 persons TCNs can be placed in one apartment, irrespective if the space is bigger than the previously mentioned maximum, and it should have at least one sanitary facility. A maximum of 10 workers can be placed in a house, and it should have at least one sanitary facility on 150 m2. Several new technical conditions for an accommodation have been introduced that must be considered adequate (concerning daily/artificial light, airing, furniture etc.) (Art. 25, draft By-law).

7.1. Control of the Accommodation

The adequate accommodation is crucial in guaranteeing and achieving decent working and living conditions of migrant workers. Different research proved that migrant workers in the EU, often in the sectors of agriculture, manufacturing and healthcare, are accommodated in "overcrowded, unsanitary environment that contribute to serious health risks. Poor ventilation, inadequate sanitation, and pest infestations lead to the spread of infectious diseases, respiratory issues, and gastrointestinal ailments. Additionally, the psychosocial impact of insecure living conditions – stress, anxiety, and depression – further harms workers' well-being."[100] The occupational health risks at work and poor wages of migrant workers are issues that are more visible in the policy sphere and research discourse compared with their substandard accommodation. Therefore, the latter aspect merits more attention.[101] Croatian medical scientists recently warned of different diseases that are

[100] Samant, Y.; Fabregat, M. R.; Seneviratne, M., *Europe's Overlooked Health and Hygiene Issues in Migrant Worker Housing: A Call for Action*, Safety and Health at Work, Vol. 16, 2025, p. 255; Bubaš, M. *et al.*, *Utjecaj* životnih *i radnih uvjeta na zdravlje radnika migranata*, Sigurnost, Vol. 55, No. 4, 2013, pp. 333 – 339.

[101] Samant, Y., *op. cit.*, note 95, pp. 255 – 256.

the result of poor working and living conditions of migrant workers. Research of dermatologists about melanoma show that foreign workers often come too late to medical experts, when the disease is advanced.[102]

With that in mind, it is not surprising that the Croatian legislator decided to regulate more technical details of the accommodation. Croatian media bring up many stories about inadequate living of migrant workers, like the one about migrant workers living in an ex-coffee shop in Zadar. When they turned on the light, neighbours and passers-by could see through the curtains the stack of bunk beds and the stove in the former bar, out of function. In this space migrant workers lived throughout the year, not only in the season. Since adequate accommodation was prescribed only for seasonal workers, the journalist concluded that such scenes should not be surprising. The State Inspectorate answered that it was powerless because it had no legal ground to act, and was waiting for a new By-law to define adequate accommodation. It added that the building inspection of the State Inspectorate included the mentioned location[103] in its supervision plan as the place was not converted into a residential space as it should have been bylaw. They attempted to contact the tenants but unsuccessfully. The neighbours never complained, because the workers were not laud and, apart for the occasional scent of spices they sometimes noticed, everything was normal.[104]

We are aware of the practice of employers taking advantage of migrant workers, using them to perform construction work on weekends, without being paid for overtime work, in the employer's building in which he is going to place these workers.[105]

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[102] Koža svijeta: Dermatološki izazovi u doba migracija, Šitum, Mirna (ed.), Zagreb: Medicinska naklada, Hrvatska akademija znanosti i umjetnosti, 2025; HTV, Dijagnoza - Koža svijeta: Dermatološki izazovi u doba migracija, Available at : [https://hrtprikazuje.hrt.hr/hrt1/dijagnoza-koza-svijeta-dermatoloski-izazovi-u-doba-migracija-12436341], Accessed 6 April 2026.

[103] It consisted of 231,18 square meteres, of nine9 working rooms, 4 spremišta and double sanitary …-four storage rooms and double toilet facilities…the owner was one company from Slavonia which they could not reach by phone.

[104] Bucić, Ivo, (Ne)legalni smještaj: Strani radnici privremeni dom pronašli u – kafiću. Inspektorat tvrdi: "Nemoćni smo", 16 February 2026, Available at: [https://www.glasistre.hr/hrvatska/2026/02/16/strani-radnici-privremeni-dom-pronasli-u-kaficu-inspektorat-tvrdi-nemocni-smo-1051059], Accessed 16 February 2026.

[105] See also a story of 50 foreign workers of one big Croatian building company, placed in a shabby house, close to Zagreb airport, living without electricity, warm water and heating, in a house full of mould and moisture, crammed into small rooms with bunk beds, without salary. Strani radnici iz derutne kuće kod Zagreba mjesecima rade bez plaće, očajni su: "Nemamo za hranu, neki su se razboljeli", 2.3.2026, dnevnik.hr; Available at:

As mentioned, labour exploitation includes different employers' strategies to control workers. Employers can use the accommodation, inadequate housing or living at the employers' home to control workers: not only their work, but their access to food and transport. Based on our experience, we can add – and their free time too.[106] In case of a low wage and a high rent for the accommodation arranged by the employer, the workers can find themselves in a "debt-bondage".[107]

One of the challenges regarding the adequate accommodation of workers TCNs is the efficient control of the conditions in practice. Before the amendments of the AA in 2025, it was not strictly regulated which body had to perform control over the accommodation. The Ministry of Interior and State Inspectorate kept passing the responsibility back and forth. Therefore, it is possible to conclude that the control was inefficient.

This legal lacuna was (partly) eliminated by means of the amendments. Pursuant to Art. 239 (1) of the AA the body authorised to carry out the inspection over the accommodation of seasonal workers and workers TCNs is "the body of public administration in charge of inspection of labour of foreigners and posted workers". The Ombudswoman suggested that in the Act the exact name of the inspection (sector) of the Inspectorate authorized to control the accommodation should be provided, but this was not accepted. Instead, this broader formulation is used.[108] Therefore, it is still not clear who will be in charge of the inspection,[109] namely, sector of labour inspection or sanitary inspection. The authors are of the opinion that such uncertainity might have a negative impact on the quality and efficiency of the control.

[https://dnevnik.hr/vijesti/hrvatska/strani-radnici-nisu-dobili-placu-od-prosinca-vlasnik-obecao-stize-ovaj-tjedan---966646.html], Accessed 6 April 2026.

106 ETUC, 2020, Overlooked: migrant workers in the COVID-10 crisis, mentiones transport sector in which workers had to sleep in their trucks for months, without a right to weeky rest periods. Available at:
[https://www.etuc.org/en/document/overlooked-migrant-workers-covid-19-crisis], Accessed 6 April 2026; Nierop, *op. cit.*, note 12, p. 19.

107 Nierop, *op. cit.*, note 12, p. 19. We heard the migrant taxi drivers complaining on their (big) employer that cut off the rent from their salary, that is far below the minimum wage, in a fixed amount, earned for 16 hours working day, but only if they earn 200 euro for drives per day (otherwise they are additionaly penalized).

108 Konačni Prijedlog Zakona o izmjenama i dopunama Zakona o strancima, Available at:
[https://www.sabor.hr/sites/default/files/uploads/sabor/2025-02-07/095303/PZE_63.pdf], Accessed 19 March 2026.

109 Novi list, Katalinić, Dražen, *Stroža kontrola boravka stranih radnika. Država naredila kontrolu, a ne zna još tko će ju provoditi,* Available at:
[https://www.novilist.hr/novosti/hrvatska/stroza-kontrola-boravka-stranih-radnika-drzava-naredila-kontrolu-a-ne-zna-jos-tko-ce-ju-provoditi/], Accessed 20 March 2026.

Pursuant to the Act on State Inspectorate,[110] the sector of labour inspection monitors the implementation of laws and other regulations that govern the relationships between employer and worker in the field of employment relationship and OSHA. In the field of employment relationships, the labour inspection is responsible for the control of the legality of the work of foreigners (TCNs) in Croatia (based on the R&W permit or application for work when prescribed), salaries, intermediation, activity of temporary employment agencies and user companies, working time, etc. In the field of OSHA,[111] the inspection controls, *inter alia*, are done by the investors, owners of buildings, concesionars and other persons for whom work is performed, and fulfill the prescribed duties in implementing OSHA measures during the design of buildings, construction and the execution of construction works; perform control upon other bodies' requests and joint inspection control; and control in the field of health protection and social care.[112]

The Croatian State Inspectorate lacks inspectors and capacities.[113] The issue of scarce resources of the inspection and other authorities is not a uniquely Croatian problem, but exists in other European countries, limiting their authorities' scope especially in case of undeclared work and illegal employment and in complex fraud schemes of employers who want to gain profit.[114]

Research shows that when labour authorities prioritize checking the workers' immigration status, this diverts attention from working conditions, and guaranteeing workers' rights, as well as from informing the workers about their rights and supporting services.[115]

Relevant literature and research hence emphasize the need for cooperation between different actors: inspection, trade unions, NGOs, police, tax, migration and social security organisations in tackling undeclared work and labour exploitation. There are however good examples that point to the joint cooperation procedures

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110 State Inspectorate Act, OG, No. 67/2023.

111 In 2024, 86 foreign workers were injured, representing 12,3% of totally injured workers. Ombudswoman's Report for 2024, *op. cit.*, note 3, p. 66.

112 Sektor inspekcije rada, Available at: [https://dirh.gov.hr/o-drzavnom-inspektoratu-9/ustrojstvo-77/13-sektor-inspekcije-rada/364], Accessed 12 April 2026.

113 Manojlović Toman, R.; Lopižić, I., *Personalni kapaciteti Državnog inspektorata*, Informator, No. 6924 26 January 2026, Available at: [https://informator.hr/strucni-clanci/personalni-kapaciteti-drzavnog-inspektorata], Accessed 1 April 2026.

114 Nierop, *op. cit.*, note 12, p. 43.

115 European Union Agency for Fundamental rights (FRA), *Protecting migrant workers from exploitation in the EU: boosting workplace inspections,* 2018, pp. 7-8.

as good mechanisms to combat fraud, violations and crime, even though there are obstacles (like limitation cocnerning data sharing and cooperation, capacity constraints in enforcement, limited resources etc.).[116]

7.2. Good Practices in EU Member States

Showcasing examples of good practice, the authors point to first, the cooperation between labour inspection and the police, and second, to the cooperation of multiple authorities (multi-agency approach), as these are interesting for the Croatian regulation.

In Spain, a special law regulates assistance and collaboration between police forces and Labour and Social Security Inspectorate, further specified by their agreements. It resulted in numerous joint visits that they routinely perform together (e.g. in 2019 almost 20.000 visits). In Italy the police (*carabinieri*) and national labour inspectorate jointly act in combating exploitation of foreign workers. Belgian labour inspectors can ask for assistance from police in case of fraud detection, illegal work or human trafficking. Moreover, a special police unit deals with the labour exploitation undertaking monthly inspections of high-risk sectors, led by auditor or public prosecutor. In addition, they have support of labour and social inspectorates, and victim support organizations.[117]

Also, the literatures point to the need for cooperation between more subjects – authorities, using the tools of each enforcement authority in a single case. This mechanism offers a more effective cooperation.[118] Sweden and the Netherlands can be mentioned as positive examples in this respect. In Sweeden, the Regional Agency Cooperation (RAC) cover eight subjects (agencies) that deal with the work-place irregularities, with the emphasis on TCNs: police, Work Environment Authority, the Tax Agency, the Gender Equality Agency, the Migration Agency, the public employment service, and the Social Insurance Agency. Each plays its part. The first three take part in joint inspections. RAC has its own reporting system, listing all measures from the respective agencies, inspected companies, control and sanctions etc.[119] In 2020, Dutch special teams were established, involving seven ministries,

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116 Nierop, *op. cit.*, note 12, p. 42.

117 FRA, *Protecting migrant workers*, *op. cit.*, note 110, p. 13.

118 ILO, Labour inspection in Europe: undeclared work, migration, trafficking, Geneva, International Labour Organization, 2010, pp. 23-27; International Migration Outlook 2018, *Chapter 4. Addressing the illegal employment of foreign workers*, OECD Publishing, Paris, Available at: [https://www.oecd.org/en/publications/international-migration-outlook-2018_migr_outlook-2018-en.html], Accessed 3 April 2026.

119 Nierop, *op. cit.*, note 12, p. 45.

cooperating with other stakeholders, like social partners, at the local and sectoral level, focusing upon the working conditions of foreign workers. To emphasize, the inspectors conducted interviews at the residences of migrant workers and worked with other authorities "to collate information and resultant visits to companies" where they expected problems (where many migrant workers were employed, e.g. meat processing industry, distribution centres, construction industry firms etc.).[120] Also worth mentioning are the Norweigan joint work-crime centres, gathering police, labour authorities and tax administration, who opt for a specific procedure on a case-by-case basis. This is is a model of a stronger cooperation that sets off at the beginning of a specific case in order to save time and resources.[121]

Several Croatian county police authorities inform about the non-announced joint inspections with the State Inspectorate into the legality of residence and work of foreign citizens in order to protect workers' rights, prevent informal work and raise common security.[122]

Based on these examples, the authors conclude that the Croatian labour inspection should be strengthened by new employments of inspectors. Some model of cooperation of labour inspectors and other authorities (police, construction inspection, sanitary inspection etc.) should be introduced.

8. CONCLUSION

Eventhough desirable and needed, migrant workers TCNs in Croatia face different problems. Those with a restricted work authorization that is linked to a specific occupation or employer are more vulnerable and exposed to a higher risk to be engaged in undeclared work and labour exploitation. The opinion of the authors is that their position could be improved by introducing *de lege ferenda* longer term (unemployment period) after the termination of employment to find a new job matching the qualifications, e.g. three to six months, instead of 60 days.

The regulation of the criteria of appropriate accommodation, including more technical details, is one of the prerequisites for good living and working standards of workers TCNs. But the efficient control of the accommodation conditions can be achieved only with *de lege ferenda* strictly prescribing a body (bodies) authorised to provide inspection of the premises. Furthermore, the regulation of joint

120 Nierop, *op. cit.*, note 12, pp. 45-46.

121 Nierop, *op. cit.*, note 12, p. 46.

122 Obavljale poslove bez valjanih dozvola za boravak i rad u RH, Available at: [https://bjelovarsko-bilogorska-policija.gov.hr/vijesti/obavljale-poslove-bez-valjanih-dozvola-za-boravak-i-rad-u-rh/23230], Accessed 6 April 2026.

inspection (authorities) control, well equipped and with specific knowledge of the issue of labour exploitation and illegal work, together with other social actors (social care, NGOs, trade unions) could improve the social position of TCNs, as good practices of other Member States illustrate.

Concerning the complex issue of employment mediation, the authors propose strengthening of the conditions for the activity of different "placement agencies" and their control, as well as severe sanctions in case they break the law.

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Review article

GLOBAL IMPACT OF THE EU DUE DILIGENCE IN SUPPLY CHAINS NORMATIVE FRAMEWORK*

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ABSTRACT

Responsibility for respecting human rights and environmental standards in supply chains has been raised to a new level with the introduction of various European Union regulations, which affect all participants in supply chains, including non-member countries. This creates a global effect that impacts the economy, as well as the quality of safety and health at work measures and respect for workers' basic economic rights.

In this regard, a series of questions arise regarding application of these standards, perception of the European Union's position as a trendsetter globally, and actual impact that the application of due diligence regulations will have on production relations and the desirability of EU countries as trading partners.

The research tracks these challenges and analyses existing and potential effects of implementing regulations such as the Corporate Sustainability Due Diligence Directive, the Forced Labour Regulation and the Corporate Sustainability Reporting Directive. These normative solutions are presented in the research only within basic outlines, which are relevant for their understanding. The mechanisms of global action are explained in more details, as well as the tasks that are set before companies in supply chains as their essential obligations. Furthermore, potential consequences of applying these regulations are investigated – how their full imple-

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mentation will be ensured, how EU companies will treat partners outside the EU, and how soft pressure can be applied to partner companies to make them comply with basic human rights standards and environmental regulations. Finally, some attention is also given to interim grievance mechanisms – how and whether they can lead to greater changes in global employers' practices.

The aim of the research is to show whether it is realistic to expect that fully functional envisioned legal framework will protect workers and the environment in the countries from which suppliers of large European companies originate. The aim is also to demonstrate how realistic it is to expect the EU to position itself in this way as a global leader in promoting due diligence in supply chains, i.e., how complementary such a policy is to the efforts of the UN and other states' individual and collective endeavours.

In accordance with the research topic, the normative method and the comparative method are applied.

***Keywords**: Corporate sustainability, Due diligence in supply chains, Forced labour, International labour standards, Interim grievance mechanisms*

1. INTRODUCTION

As Koula points out, there has been a decades-long effort in the international community to bring multinational corporations under the basic principles of respect for universal human rights, regardless of the regulatory framework of the specific country in which they operate. The economic power of these companies alone is sufficient to conclude that at the national level they are most often the dominant entity in the business and administrative relations with the host country: "Notably, it has been found that the combined profits of the top 10 companies would make them the third wealthiest country globally, surpassing economically prosperous states like Japan, Russia, and Spain."[1] Therefore, the classic concept of corporate responsibility, which relies solely and exclusively on local commercial law regulations and the general normative framework of business and labour law, had to be adapted to the global conditions of operation of these business conglomerates. This particularly applies to countries that base their economies on direct foreign investment through the promotion of cheap labour, favourable treatment of investors, various business incentives, and even *de facto* extraterritoriality, which is reflected in the non-application or selective application of regulations in force. Such behaviour by the host country usually leads to consequences both in the quality of the enjoyment of labour rights and in the domain of compliance with legal norms in principle. Schilling-Vacaflor and Lenschow emphasize that in such cases "a lack of state capacity, poor regulation, lax enforcement, corruption, or a

[1] Aikaterini-Christina, K., *Corporate Responsibility To Respect Human Rights Defenders Under the UNGPs and Steps Towards Mandatory Due Diligence*, Liverpool Law Review, Vol. 45, 2024, p. 343.

too-close relationship between business and government have hindered the protection of human rights and the environment".[2]

The concept of due diligence in business, as well as in supply chains, therefore comes as a reaction to the long-term relatively unhindered collapse of the classical concept of responsibility, which implies state institutions defending their national interests and protecting citizens by providing them with all the rights that belong to them in accordance with the national legal framework and general international rules. The reactions that appear in the form of initiatives within the United Nations (UN), and later national laws in individual countries, have been rounded off in the European region by specific regulations adopted by the European Union (EU), which relate to different but complementary aspects of solving these challenges.

The research follows potential consequences of the evolutionary development of due diligence within the framework of EU regulations, but also complementary mechanisms that act as a normative whole, and through which attempts are made to regulate the activities of multinational companies as well as supply chains outside the territory of the EU. The basic hypothesis is that the application of the aforementioned framework can influence the improvement of the quality of enjoyment of workers' rights, human rights in general, as well as environmental protection in countries that are usually called "periphery" and that in a more or less direct way favour the "race to the bottom" as their basis for economic policy. Through the global operation of regional instruments, a greater degree of legal certainty is created for citizens whose home countries are not interested in providing them with such protection. The outcome of the implementation of this innovative legal framework could be not only the eradication of slave labour, child labour, and environmental preservation, but also improved social security and a culture of respect for human rights at the global level. In this regard, the research critically examines the potential of the new regulations and the realism of such projections.

In addition to the classic introductory notes and concluding section, which synthesize the research findings in relation to the initial hypothesis, the paper consists of three main parts. The first explains in more detail the basic principles of the functioning of the EU regulatory framework that is the subject of the research, with the aim of presenting basic potentials of their application to the global working conditions. The second focuses on internal grievance mechanisms that, as a specific tool available in microenvironments, can create a macro effect over time.

[2] Schilling-Vacaflor, A.; Lenschow, A., *Hardening Foreign Corporate Accountability Through Mandatory Due Diligence in the European Union? New Trends and Persisting Challenges*, Regulation & Governance, Vol. 17, No. 3, 2023, p. 679.

The main goal of this approach is to show an example how and to what extent the global application of the normative framework on due diligence can create a cumulative effect over time, by operationalizing one of the elements that, in the author's opinion, is vital for the effective implementation of such regulations. Finally, the third part focuses on the thesis on the potential global consequences of the application of EU regulations. Although the breadth of the topic does not allow for a detailed analysis of each relevant aspect, certain elements have been assessed to represent key points in the implementation of the regulatory framework, which will potentially create the effect of better working conditions over time. At the same time, numerous risks along the way are also pointed out, which can realistically significantly reduce the reach and effectiveness of due diligence in supply chains regulation. Despite this, the synthetic conclusion is written in a positive and optimistic tone, primarily focusing on the prerequisites for fulfilling the purpose of the adopted framework.

The classical normative method, as well as case analysis, were used as the methodological basis of the research. The normative method is limited to EU instruments, but in some parts characteristic examples of national legislation are used, as is the case with the German Due Diligence Act.

2. EU DUE DILIGENCE NORMATIVE FRAMEWORK

In order to examine potential of the European Union to act as a global standard-bearer in the field of human rights and environmental protection through due diligence regulation, it is necessary to examine basic characteristics of the existing regulatory framework.

The concept of due diligence evolved significantly over the last few decades. It existed long before it was associated with the concept of respect for human rights[3], and primarily referred to as "investigation of facts and data to identify and manage commercial risks, including the potential for legal liability, ahead of a given commercial transaction or activity".[4] Shift in understanding and scope of the due diligence process originally came with drafting of the United Nations Guiding Principles on Business and Human Rights (UNGP) in 2011. The UNGP are considered a groundbreaking instrument in the field of ascribing responsibilities

[3] Quijano, G.; Lopez, C., *Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edge Sword?,* Business and Human Rights Journal, Vol. 6, No. 2, 2021, p. 2.

[4] Bonnitcha, J.; McCorquodale, R., *The Concept of Due Diligence in the UN Guiding Principles on Business and Human Rights*, The European Journal of International Law, Vol. 28, No. 3, 2017, pp. 901–902.

for human rights violations to companies.[5] They include the "protect, respect, remedy" framework developed by John Ruggie.[6]

Over the time, the concept of the due diligence was changed. "Due diligence of a business company in the field of environmental protection refers to the risk, that is, to the situation in which, based on the actual circumstances, there is a sufficiently high probability that one or more of the aforementioned legal prohibitions will be violated."[7] Due diligence is thus being reshaped into a series of preventive and reactive activities along the entire supply/value chain, with the aim of ensuring full transparency in operations, especially with regard to respect for human rights and environmental impact. This system of rules also implies effective supervision of their implementation, as well as appropriate sanctions for those participants who do not comply to it. A human dimension is therefore being introduced into the classic business and financial institute of risk management.[8] As McCorquodale and Smit observe, "In the UNGPs, due diligence is aimed at identifying and preventing risks to rights-holders, not merely to the business, it is also ongoing rather than a one-off step, and it requires that the views of the potentially affected people are factored into the process."[9]

There are three basic documents shaping the due diligence normative framework of the European Union: Directive on corporate sustainability reporting[10] (hereinafter: CSRD), Directive on corporate sustainability due diligence[11] (hereinafter:

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5 Lafarre, A.; Rombouts, B., *Towards Mandatory Human Rights Due Diligence: Assessing its Impact on Fundamental Labour Standards in Global Value Chains*, European Journal of Risk Regulation, Vol. 13, No. 4, 2022, pp. 567-570.

6 Ruggie, J., A/HRC/8/5, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Human Rights Council, 7 April 2008.

7 Tomić, Lj. M., *Ekološko-pravni aspekti novog nemačkog zakona o korporativnoj dužnosti pažnje u lancima snabdevanja – ispitivanje dejstva na pravne subjekte u Republici Srbiji,* Strani pravni život, Vol. LXVII, No. 2, 2023, p. 218.

8 Principale, S., *Fostering Sustainability in Corporate Governance – Analysis of the EU Sustainable Corporate Governance and Due Diligence Directives*, Springer, Cham, Switzerland, 2023, p. 65; Lafarre, Rombouts; *op. cit.,* note 5, p. 575.

9 McCorquodale, R.; Smit, L., *Human Rights, Responsibilities and Due Diligence Key Issues for a Treaty*, in: Surya, D.; Bilchiltz D. (eds.), Building a Treaty on Business and Human Rights: Context and Contours, Cambridge University Press, 2017, pp. 216, 224–225. Cited by: Quijano, G.; Lopez, C., *op. cit.,* note 6, pp. 4, 6.

10 Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, [2022] OJ L322/15.

11 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, [2024] OJ L2024/1760 (consolidated text of 17 April 2025).

CSDDD) and Regulation on prohibiting products made with forced labour on the Union market[12] (hereinafter: FLR).

These regulations address various issues but were essentially adopted in the same wave of the EU's normative response to forced labour, modern slavery, and the respect of workers' rights worldwide, as a sort of response tactics to the challenges posed by the global economy, particularly processes of outsourcing of labour to peripheral countries with the aim of gaining extra profits and maximizing the cheapening of production, which often results in the negation of basic workers' rights as well as the devastation of the environment.

All three are focused on the problems arising from the global actions of multinational corporations, particularly because of the so-called "race to the bottom" and the issues surrounding foreign direct investments in underdeveloped countries on the global periphery of the capital market. These challenges refer to the irresponsibility of capital owners who invest in countries where local regulations are far below European Union standards, or where direct foreign investments are granted preferential treatment, with investors benefiting from leniencies that they enjoy in such local communities (arising from political reasons, corruption, or other official or unofficial practices), often in violation of even the minimal legal requirements governing labour rights and production processes. As stated above, since national legal systems cannot be (sufficiently) effective in addressing such abuses the theory of due diligence in supply chains emerged, along with a stronger response from states to the occurrence of behaviour by employers that is completely unacceptable from a civilizational standpoint toward workers and the environment in the countries where production takes place. Therefore, the focus of this regulation is on establishing universal standards that every employer originating from the EU, or operating within the territory of the EU, must meet to maintain their status in the future.

As a result of the previously analysed aims, all three normative instruments are being implemented globally.

1) Article 40a) of the CSRD broadens the scope of its application to "subsidiary undertaking established in Member State territory whose ultimate parent undertaking is governed by the law of a third country", but also "a branch located in Member State's territory, and which is a branch of an undertaking governed by the law of a third country, which is either not part of a group or is ultimately held

[12] Regulation (EU) 2024/3015 of the European Parliament and of the Council of 27 November 2024 on prohibiting products made with forced labour on the Union market and amending Directive (EU) 2019/1937, [2024] OJ L2024/3015.

by an undertaking that is formed in accordance with the law of a third country". Although these norms do not constitute a global reporting obligation in the literal sense, the provisions of Article 40a clearly indicate an extension of the scope to all companies that have a business interest in the EU.

2) The CSDDD is, by its very nature, focused on global implementation. By the Article 2(2) its implementation simply encompasses "companies which are formed in accordance with the legislation of a third country", that meet the given additional criteria. In the process of drafting CSDDD, European Commission consulted with numerous relevant stakeholders. Consultations were partly realized through the questionnaire comprised of 26 questions, all related to the potential concept and scope of the due diligence mechanism. One of the questions was: "In your view, should the due diligence rules apply also to certain third-country companies which are not established in the EU but carry out (certain) activities in the EU?"[13] The dominant responses from stakeholders were positive. But it is interesting that the responses from business entities moved in the direction of cautious optimism and rational concerns. The main cause of concern was the reduction of competitiveness compared to companies that did not fall under the future regime. Therefore, European companies advocated for the widest possible scope of application of the future Directive, in order to preserve the rules of fair market competition.[14] In other words, the concept of "global" application of the Directive received general support from various stakeholders, which did not necessarily stem from the same motivation and assessment of the impact of the Directive's application on business.

3) The same conclusion can be drawn for the scope of the FLR, which is naturally geared towards global application, as it applies to every product that finds its way to the EU market, regardless of its country of origin.

Finally, efforts have been made in all three instruments to operationalize the provisions in ways that allow economic entities to continue doing business and maintaining business connections with partners in other countries, thus ensuring that the existence of business cooperation or investments in those countries is not jeopardized, but at the same time a range of mechanisms has been enabled that should lead to the effective and satisfactory application of these regulations in a manner that meets the minimum standards of conduct, or reduces the gap in the quality of workers' rights and environmental protection between the countries of origin of capital and those in which capital is invested.[15] This soft pressure is well described

[13] Principale, S., *op. cit.,* note 8, p. 50.

[14] *Ibid.*, p. 52.

[15] See more: Smit, L. *et al.*, *Human Rights Due Diligence in Global Supply Chains: Evidence of Corporate Practices to Inform a Legal Standard*, The International Journal of Human Rights, Vol. 25, 2021, pp. 960-965.

by Quijano and Lopez, who emphasize that due diligence processes are mainly "a learning tool" for the company, [16] which allows for a deeper look at partnerships with suppliers or manufacturers, to take on some of the social responsibility in return for the profits generated, as well as to effectively improve business operations by ensuring more humane working conditions for workers in the value chain, or by preserving the environment in their local communities. We cannot agree with the technique advocated by some authors that in due diligence system see a chance for "incentives for compliance rather than strict penalties"[17], because it leads to results that are contrary to the basic postulates of introducing due diligence in business models (human rights have to be respected as a universal value, not because it is made to look profitable for some business). However, it should be noted that these constructions are not without foundation and that they also have support in certain segments of the functioning of the due diligence system. The communication that business entities are necessarily directed to throughout the process leaves little or no room for concealing relevant facts, if carried out as intended and in accordance with its basic objectives. This type of interaction, even in situations where one party normatively positions itself as dominant (in terms of conducting investigations, addressing authorities, implementing certain sanctions or restrictions) is not necessarily intended to break business relationships, but rather to strengthen them by strengthening the capacity of associates in the value chain. "Even if conceding that this might be legally prescribed, as a preventative tool or, as some argue, a tool to guide companies in their journey for continuous learning and improvement, it should carry no major legal liability repercussions (except, perhaps, in relation to gross misconduct). Over the years, a different understanding of HRDD (human rights due diligence) has emerged for an important part of the legal community that associates HRDD with legal liability, where the lack of compliance with HRDD as a standard of conduct for businesses to discharge their responsibility to respect human rights would trigger civil liability."[18]This also, may be linked to the obligation of companies to autonomously regulate their own values in terms of behaviour, which might be seen as paramount importance for the respect of labour rights at the global level. This is because the content of the code of conduct of each employer in the supply chain is within their jurisdiction. Accordingly, companies are the entities that must ensure compliance standards, which in fact entrusts private actors with an important regulatory role in global governance. Therefore, codes of conduct should be seen as a means through which due diligence is operationalized. Furthermore, the influence that originates from

[16] Quijano, G.; Lopez, C., *op. cit.,* note 3, p. 6.

[17] Draper, P. *et al., The Impact of Due Diligence Legislation on International Trade and Business: Analysis of Potential Trade-Offs*, Global Policy, Vol. 16, 2025, p. 1076.

[18] Quijano, G.; Lopez, C., *op. cit.,* note 3, p. 6.

one company and spreads (given the obligation to comply with domestic legislation and international standards) is actually a mechanism by which companies are included in the group of entities that create standards of respect for labour rights and business behaviour in international supply chains.[19]

3. GRIEVANCE MECHANISMS – MICRO CHANGES FOR MACRO CHALLENGES

In accordance with the initial hypothesis of the paper that the global application of due diligence standards can contribute to a greater degree of protection of human and labor rights, grievance mechanisms stand out as one of the key operational instruments for achieving such an effect, as they enable the continuous collection of information on potential and actual violations of labour rights in supply chains. Under Article 14 of CSDDD "all companies falling within the scope of the CSDDD will need to make available two distinct types of mechanisms through which people can communicate complaints, concerns or information regarding possible breaches of due diligence obligations under the CSDDD regime". These two mechanisms are "complaints procedure" and a "notification mechanisms".[20] This implies that the CSDDD expressly foresees them as an integral part of the process of identifying and eliminating negative impacts, which directly connects appeal procedures with the stages of risk assessment, prevention and remediation. By establishing accessible and transparent complaint channels, companies gain an additional source of information that complements formal risk assessments and supplier audits.[21] In this way, appeals mechanisms function as a dynamic instrument of due diligence, which enables continuous monitoring of the situation and timely response, instead of relying exclusively on periodic controls.

The only country that has so far adopted a specific law regarding due diligence in supply chains is Germany, which has a special law - German Supply Chain Due Diligence Act (Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten ger.,) that provides for a complaints procedure to be integrated into risk management obligations.[22] Al-

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19 Vandenbroucke, S., *The Evolution of Codes of Conduct to Ensure Labor Rights in Global Supply Chains*, AJIL Unbound, 2024, pp. 298-299.

20 Zerk, J.; Holly, G., *Access to Justice in the CSDDD: Symposium event report*, Danish Institute for Human Rights, Copenhagen, 2025, p. 14.

21 See: Grama, B., *Lost in Translation: Company Grievance Mechanisms and Human Rights*, Journal of Human Rights Practice, Vol. 17, No. 3, 2025, p. 1.

22 Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten, Available at: [https://www.gesetze-im-internet.de/lksg/], Accessed 28 March 2026.

though the German Supply Chain Due Diligence Act is not an act of European Union law, its importance for the analysis of grievance mechanisms stems from the fact that it represents the first comprehensive national model for regulating due diligence obligations in Europe, the solutions of which served to a significant extent as the basis for the later normative shaping of the mechanisms provided for in the CSDDD. German law stipulates that the grievance mechanism must be integrated into the risk management system, i.e. that the information collected through complaints serves to assess risks and formulate preventive measures. This emphasizes, as Urdarević points out, that the grievance mechanism is not only a means of resolving individual cases, but also an analytical tool that allows the identification of structural problems in the supply chain. In practice, this means that employee complaints can lead to changes in codes of conduct, strengthened supervision of suppliers or the introduction of additional protection measures, thus closing the circle of due diligence – from risk identification to their elimination.[23] Although grievance mechanisms are to be considered as one of the important instruments of internal protection of workers' rights, as well as an essential part of the modern concept of socially responsible corporate governance,[24] yet, in literature there is debate on their real effectiveness. Those who are sceptical of the role of grievance mechanisms, placed their view on the excessive power given to companies to regulate the grievance mechanisms themselves, thereby establishing a certain privatization of companies over "the protection of workers' human rights".[25] Grama even points out that grievance mechanisms can be seen as a means of deterring other forms of protection that have a much greater capacity to hold companies responsible for human rights violations.[26] On the other hand, there are those, who believe that grievance mechanisms have an important role, as a complement to judicial mechanisms, in strengthening corporate accountability. Laplante, thus, states that complaint mechanisms can even potentially offer complainants a cheaper and faster way to obtain legal remedy for irregularities than judicial mechanisms, and specifically emphasizes that "in places where judicial mechanisms fail, they are particularly important for rights holders who may

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23 See: Harrison, J.; Wielga, M., *Grievance Mechanisms in Multi-Stakeholder Initiatives: Providing Effective Remedy for Human Rights Violations?* Business and Human Rights Journal, Vol. 8, No. 1, 2023, pp. 5-8.

24 Camilleri, M.A., *Responsible Corporate Governance in Europe*, in: Aluchna, M.; Idowu, S.O. (eds.), Responsible Corporate Governance Towards Sustainable and Effective Governance Structures, Springer, Cham, 2017, pp. 11-15.

25 Haines, F.; Macdonald, K., *Nonjudicial Business Regulation and Community Access to Remedy,* Regulation and Governance, Vol. 14, No. 4, 2020, p. 847.

26 Grama, B., *Company-Administered Grievance Processes For External Stakeholders: A Means For Effective Remedy, Community Relations, Or Private Power*?, Wisconsin International Law Journal, Vol. 39, No. 1, 2022, p. 104.

otherwise have no other means of legal protection".[27] We can agree that essence of implementing grievance mechanism is for sure, reflected in providing an institutional channel through which workers can point out violations of their rights or legitimate interests, without fear of retaliation and with the guarantee that their complaint will be considered in a fair, efficient and transparent procedure. In this way, grievance mechanisms contribute to strengthening trust between the employee and the employer, but also prevent the possibility of major labour disputes that would end up in court or before some other competent authority.[28] Therefore, grievance mechanisms are part of the system for protecting workers' rights within the company.[29] Their most important function is in prevention, as they enable the identification of systemic problems in the work environment and their resolution at an early stage. This contributes to reducing the number of labour disputes, but also to improving the overall organizational efficiency of the employer. This is only valid under the assumption that it is important for the employer to operate in a socially responsible manner, which, among other things, also assumes that the workforce and human capital will be viewed as a resource, and not just as a cost of production.[30] However, we must be aware of the fact that, in words of Harrison *et al.*, „ ... even the most optimistic assessments of grievance mechanisms recognize that they will not necessarily produce valuable results for rightsholders if they do not function 'effectively'".[31]

As grievance procedures can be implemented in practice through national laws and regulations, collective agreements or company rules developed with or without consultation with workers' representatives, the extent to which employers and workers themselves can develop them will depend on the country and will vary between countries. Practice shows that the most effective development of grievance mechanisms is achieved through collective agreements as a key instrument of social dialogue. This allows grievance mechanisms to be tailored to the specificities of a particular industry or employer, while preserving the basic guarantees of protection for all workers. In this context, the role of social partners, in particular trade unions, is crucial for the legitimacy and effectiveness of grievance mecha-

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27 Laplante, L.J., *The Wild West of Company-Level Grievance Mechanisms: Drawing Normative Borders to Patrol the Privatization of Human Rights Remedies*, Harvard International Law Journal, Vol. 64, No. 2, 2023, pp. 319-321.

28 Urdarević, B., *Priručnik o žalbenim mehanizmima,* ILO/GIZ, Beograd, 2023, p. 6.

29 Kovačević, Lj., *Zasnivanje radnog odnosa*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2021, p. 1113.

30 Urdarević, *op. cit.,* note 28, p. 6.

31 Harrison, J.; Wielga, M.; Parejo, M., *In Search of Effective Corporate Grievance Mechanisms: Can Mandatory Due Diligence Laws be a Progressive Force?*, Journal of Human Rights Practice, Vol. 16, No. 3, 2024, p. 822.

nisms.[32] Through the activities of these actors, first of all trade unions in different industries, and then at national level, the issue of labour rights violations goes beyond supply chains, but represents an opportunity to raise awareness of possible problems more widely, by establishing new structures of protection through collective bargaining.

Although one may argue that the institution of grievance mechanisms currently has limited contribution within supply chain, the establishment of grievance mechanisms within the employer contributes to the institutionalization of due diligence as a permanent process of labour rights management. These mechanisms enable workers and their representatives to actively participate in the system of monitoring compliance with standards, thus giving due diligence a participatory character. When grievance procedures are accessible to workers along the entire supply chain, they contribute to reducing the information gap between formally adopted policies and actual working conditions. This creates a broader context for the protection of workers' rights, in which individual complaints are transformed into data relevant for risk assessment and improvement of standards. In this way, grievance mechanisms not only contribute to the efficiency of due diligence, but also concretise it, transforming it from a normative requirement into an operational system of prevention and protection of labour rights. It should also be noted that the literature often emphasizes that grievance mechanisms are a way of ensuring the right to access a legal remedy that does not involve court proceedings, thus enabling "easier access" to protection.[33] As Laplante points out, "the right to an effective remedy is one of the most fundamental rights, given that it serves as the oil that makes the entire human rights machine operate effectively. Its omission leaves all other rights vulnerable while providing impunity for wrongdoers".[34]

Finally, the impact of establishing grievance mechanisms in supply chains has a direct impact on the transfer of obligations to suppliers at every level of the chain through cascading contractual provisions. In this way, an important functional link between the grievance system and local social dialogue structures, capacity-building programmes and social auditing activities can be achieved. To this end, effective structural incentives for supplier participation need to be created, such as minimum purchase price obligations and long-term supply arrangements. It is not uncommon for member companies (especially those that procure) of the organisation managing the grievance mechanism to adapt their procurement practices – by guaranteeing fair prices and reasonable delivery times – to enable suppliers

[32] *Ibid.*, p. 7.

[33] Grama, B., *Lost in Translation… op. cit.*, note 21, p. 9.

[34] Laplante, L.J., *op. cit.*, note 27, p. 322.

to comply economically with human rights standards in general and to fulfil the obligations arising from specific grievance procedures in particular.[35]

4. GLOBAL IMPACT

After analyzing the normative framework and grievance mechanisms as one of its operational instruments, lastly, it is crucial to question whether and to what extent due diligence regulations can produce real global effects, as one of the main focus of this research.

4.1. Structural and Institutional Limitations of Due Diligence Mechanisms

The concept of due diligence encompasses a range of topics and can be adapted to different sectors of the economy, specific challenges, and current perceived problems. For example, Tolabaga analyses the possibilities of these mechanisms applied to the very specific problem of sexual harassment and violence against women in the mining sector.[36] Furthermore, Bilić discusses about effects of human rights due diligence on ethical workplace surveillance, successfully linking the concept of "privacy by design" with the right to privacy at workplace as a part of the fundamental labour standards (and thus well within the scope of application of the CSDDD).[37]

There is no doubt that at the micro level the application of developed standards can lead to an improvement in the position of workers, the humanization of the work environment, as well as the raise of the awareness of responsibility for environmental impact. The question that arises is whether it is possible to discuss of the global impact of these mechanisms on the quality of enjoyment of human rights and environmental protection?

Firstly, one should consider the environment in which due diligence standards must be applied. Lam and Elsayed highlight certain contradictions that arise in the labour markets of poorly developed countries. The shortfall in skilled jobs that may be traced back to an underdeveloped manufacturing and secondary sec-

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35 Gläßer, U. *et al.,* Non-*judicial Grievance Mechanisms in Global Supply Chains Recommendations for Institutionalisation, Implementation and Procedural Design - Executive Summary*, European University Viadrina Frankfurt (Oder), Frankfurt, 2021, pp. 11-12.

36 Tobalagba, A., *Corporate Human Rights Due Diligence and Assessing Risks of Sexual Violence in Large-Scale Mining Operations*, Australian Journal of Human Rights, Vol. 26, No. 2, 2020, pp. 347-365.

37 Bilić, A., *Mitigating Digital Panopticism in the Workplace by Integrating Human Rights Due Diligence and Privacy by Design Framework*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 46, No. 3, 2025, pp. 499-528.

tor, leads to the consequence that better skilled workers may face a higher unemployment risk.[38] Furthermore, they conclude that "the findings hint at rather high unemployment in the absence of an extended subsistence agriculture sector, and persistently high unemployment among urban young people, even when well educated".[39] In such labour markets, employment at all costs becomes a matter of survival, and giving up some of one's labour rights, as well as other rights, is in one's perception an acceptable price to pay in exchange for low but stable income. Thus, the question is what will stimulate any worker to risk their job in such an atmosphere, just in order to activate some of the mechanisms of due diligence responsibility.

Another problem arises when debating whether some countries even have – despite of their political will – capacities to meet wanted criteria. Draper *et alia* cited Smith *et alia*[40] research that put in focus factual inability of the state to meet standards of decent work and environmental protection set by EU, taking an example of Moldova: …"imposing EU standards on the Moldavian economy does not fully take into account the ability of domestic institutional settings and socio-economic conditions to absorb, implement and enforce those standards". Furthermore, Felbermayr states that …"the idea that trade adds to socio-economic problems in developing countries, rather than improving them. In the Moldova example trade rules are seeking to improve labour conditions, but face an institutional environment that is underdeveloped relative to the standards required, and therefore acts as the barrier to compliance."[41] Draper *et alia* conclude that: "Adding costs and risks that encourage foreign firms to simply pull out of developing countries where due diligence is excessive, worsening overall labour conditions, becomes an unintended consequence of due diligence laws aimed at achieving the opposite outcome."[42]

4.2. Practical Effects of Due Diligence in the Supply Chains

Although it is inevitable that solid structural and normative constraints exist, given what was analyzed in the previous chapter, certain practical effects of due

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38 Lam, D.; Elsayed, A., *Labour Markets in Low-Income Countries: Challenges and opportunities*, Oxford University Press, Oxford, 2022, p. 65.

39 *Ibid*, p. 67.

40 Smith, A. *et al.*, *Labor Regimes, Global Production Networks, and European Union Trade Policy: Labor Standards and Export Production in the Moldovan Clothing Industry*, Economic Geography, Vol. 94, No. 5, 2018, pp. 565-566.

41 Felbermayr, G. *et al., Opportunities and Risks of a Due Diligence Law*, IMPULS-Foundation, Institut für Weltwirtschaft Kiel Institute for the World Economy, Kiel, 2021, p. 4.

42 Draper *et al., op. cit.,* note 17, p. 1081.

diligence obligations can still be identified in global supply chains. The principle outcome of their implementation is identical to the EU rules – cooperation with companies that violate basic human rights is not possible, and the goods of such companies are not welcome on the markets of countries that have strict control over the origin and method of production.

In this sense, perhaps the most famous European example is the company Linglong, a Chinese company, or rather its daughter factory in Serbia, which manufactures car tires. Although after journalists discovered Vietnamese workers who were hired by Chinese subcontractors to build this factory, the entire case was documented in great detail by civil society organizations in Serbia,[43] and all the collected data pointed to massive human trafficking for the purpose of labour exploitation, the Serbian state officials did not initiate any legal proceedings for further prosecution of this serious criminal offense. However, in the following years Linglong became a symbol of the abuse of the benevolent position of state authorities towards large investors – partly due to the repetition of the similar development with Indian workers, this time on a slightly smaller scale but with same mechanisms of maltreatment that pointed to human trafficking. The Linglong Serbia factory appeared, among other documents, in the very preamble of the FLR, citing European Parliament's resolution of December 16, 2021, and clearly categorizing mentioned events as forced labour. As a response to growing concern on using trafficking of human beings and forced labour both in phases of building the factory and in production of tyres, German company MAN Truck & Bus broke the contract with Linglong in November 2024[44], and U.S. Customs and Border Protection issued withhold release order, practically banning products from Serbian Linglong factory to enter U.S. market.[45]

In relation to another similar case of Brazil, an important question has been raised that can also be relevant to the abovementioned example from Serbia – how is a functional connection established between the actions of employers and the alleged harmful consequences, if the host state fully accepts the employer and its

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43 ASTRA Anti-trafficking Action, *Would you really buy this?*, 2022, Available at: [https://documentation.lastradainternational.org/lsidocs/3456-Would%20you%20really%20buy%20this-%20Final%20report%20on%20LingLong%20case%20by%20ASTRA.pdf], Accessed 20 March 2026.

44 Dragojlo, S.; Stahl, S., *Kompanija u vlasništvu Volkswagena više ne uvozi gume iz Linglonga zbog kršenja ljudskih prava*, 2024, Available at: [https://birn.rs/volkswagen-prekida-uvoz-guma-linglong-ljudska-prava/], Accessed 20 March 2026.

45 CBP issues Withhold Release Order on Linglong International Europe D.O.O. Zrenjanin, 2025, Available at: [https://www.cbp.gov/newsroom/national-media-release/cbp-issues-withhold-release-order-linglong-international-europe-doo], Accessed 25 March 2026.

practices, i.e., with its actions, it gives the appearance of legality and legitimacy to such actions? Brazilian soybean and beef production is growing, but it leads to, among other, illegal deforestation, loss of access of local communities and indigenous peoples to land, pesticide contamination and poisoning and violation of labour rights. However, Schilling-Vacaflor and Lenschow state that over a decade the Brazilian government is diminishing capacities for oversight of these issues, while simultaneously creating knowledge gaps and traceability of the supply chains. Even once these obstacles are overtaken, there remains the establishment of clear links between concrete supply chains and environmental and social impacts on the ground, as another challenging task for the law enforcers.[46] In such circumstances, European partner companies must go well beyond official information flows and try to gather other data from independent sources. The question is how effective they will be in this, but also how credible such sources will be and how precise they will be able to point to violations of regulations or standards for the enjoyment of human rights or environmental protection. Finally, the question is how willing and able the companies are to approach such an organizational task. That is, how much it would be worth it for them to invest in such long-term investigations with an uncertain outcome.

Bearing all in mind, it is no surprise that the presented concept of due diligence has not been met in the public without criticism, on the contrary. Firstly, it has been criticized that the scope of companies in the home EU countries is too narrow to create a comprehensive effect. Furthermore, there is serious criticism regarding the possibility of avoiding "checking" obligations without substantial change, or as some authors state, "window dressing" while the internal organization of work (and violation of) rights is not even touched.[47] Some authors emphasize that many terms are not yet defined as general legal standards: "However, when attempting to operationalize these and other due diligence norms, invariably, we find ourselves in somewhat of an interpretative lacuna. Terms crucial to their efficacy are often unclear, if not entirely undefined, hindering their regulatory potential. It is, for instance, often not apparent what factors are (and are not) covered by the phrase 'adverse environmental impact' in these norms, or what threshold must be

[46] Schilling-Vacaflor, A.; Lenschow, A., *Hardening Foreign Corporate Accountability Through Mandatory Due Diligence in the European Union? New Trends and Persisting Challenges*, Regulation & Governance, Vol. 17, No. 3, 2023, pp. 681, 688.

[47] Lafarre, A., *Mandatory Corporate Sustainability Due Diligence in Global Value Chains: The Long-Awaited European Solution Compared to Existing International Standards*, Ondernemingsrecht, Vol. 33, 2023, p. 237; Hiessl, C., *Labour Rights & Their Enforcement In Global Value Chains – The EU's Legislative Initiatives on Corporate ESG Due Diligence in Context*, ERA Forum, No. 24, 2023, p. 203.

met before an 'impact' (or harm) is deemed to occur. Even where a threshold is provided (e.g. 'significant' or 'severe'), it is often not clearly articulated."[48]

Another potential limitation of the application of due diligence systems is related to the so-called crowd work, i.e. a situation in which multiple workers, independently of each other, work on micro-jobs that together form a single functional work flow. These jobs are especially expanding with the widespread use of so-called "artificial intelligence". These workers are often recruited through digital platforms, which in themselves cannot always be considered employers, but only intermediaries in engagement.[49] Will each segment of this unorthodox work process be considered part of the supply chain? Only practice can answer this question. Also, transferred to more traditional production segments, the question can be raised whether a company that knows that the electricity it uses for production comes from "dirty sources" which significantly affect environmental pollution, constitutes a violation of due diligence? Is the supply of energy for production considered a part of the supply/value chain, and how will this situation be interpreted? Indeed, in creating legal standards based on the use of certain terms, one should expect the formation of limits to the application of normative solutions.

Without a sincere intention to understand due diligence mechanisms as continuous and dynamic communication between business partners, which should respond to substantive challenges and not to the fulfilment of a form without concrete results, the analysed EU regulations do not have much chance of creating a global effect. It seems that it is still too early for such conclusions. On the other hand, some national legislations have been in force long enough to consider that at least some of their results speak in favour of the tendency that a macro effect is not only desirable but also possible.

5. CONCLUSIONS

Could international corporations be expected to voluntarily comply with rules to which they are not formally bound? The past period seems to have shown that such outcome is not realistic. Not only that due diligence is a costly obligation, but in many cases of investment in the countries of the global periphery it is precisely the lack of certain types of rules and the subservient attitude of the host

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48 Mackie, C., *Due Diligence in Global Value Chains: Conceptualizing 'Adverse Environmental Impact'*, Review of European, Comparative & International Environmental Law, Vol. 30, No. 3, 2021, p. 298.

49 Reljanović, M.; Misailović, J., *Radnopravni položaj digitalnih radnika – iskustva evropskih zemalja,* Strani pravni život, Vol. LXV, 3(2021), pp. 423-424; See also: Rajić Ćalić, J.; Živković, A., *Legal Protection of Workers and Employers When Using Artificial Intelligence in the Working Environment,* Srpska politička misao, Vol. 95, No. 1, 2026, pp. 59-64.

country officials towards companies, that has conditioned companies' migration. As Ćorić, Knežević Bojović and Matijević point out, corporations chose those formal methods of simulated due diligence that allowed them to only purport to respect human rights and the environment, without actually supporting its core idea of universal rights. Even if there are some improvements, and businesses that are truly devoted to the due diligence framework, there is no real impact without the "more effective exercise of state authority at both the national and the international level".[50] The EU due diligence system does not fully fit this description, on the contrary, it bypasses national jurisdiction in those countries that are not interested in following up on human rights and environmental standards, and the responsibility lies with the multinational companies themselves. National jurisdiction is activated only in the HQ countries of these companies and only after the previous risk management system has proven unsuccessful. Even such a system does not always ensure full compliance with the targeted standards and may lead to the mentioned "window dressing" if not implemented correctly, and with the true aim of full compliance. As Hiessl very sharply concludes, "it seems hard to avoid the impression that the same market forces which reward companies for *claiming* to invest in ESG sustainability are most likely to punish those making actual substantial and costly efforts for the sake of results which are difficult to prove". [51] Indeed, easiest and cheapest way to "comply" is to fake the commitment and to encourage such behaviour along the supply chain. In such situations, soft measures must be replaced by concrete legal pressure and sanctions on the company at the beginning of the supply chain, in its home country. And it is on this that the success of the entire system will depend, whether in a decade or so we will write about it as successful, or just as another administrative obstacle that international corporations have bypassed without much difficulty.

The EU regulations expand the existing scope of due diligence rules. The vast majority of the EU member states have not had such internal rules so far. The same can be said for the wide coverage of companies that must apply these rules, as well as the types of sanctions that can potentially be imposed, but also for the circle of entities that can point to violations of regulations or international standards. These are fair and realistic preconditions that allow us to assume that tangible results can be achieved, i.e. a global impact on the quality of the enjoyment of human rights and environmental protection.

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50 Ćorić, V.; Knežević Bojović, A.; Matijević, M., *Potential of the EU Draft Directive on Corporate Sustainability Due Diligence to Contribute to a Coherent Framework of Corporate Accountability For Human Rights Violations*, Regional Law Review, 2023, p. 137.

51 Hiessl, C., *op. cit.*, note 47, p. 203.

In the light of the previously written on significance of the grievance mechanisms, it remains to be seen whether their impact on preserving labour rights within supply chain will expand (primarily by specific legislation). However, it must be noted that so far, grievance mechanism is without doubt a solid basis for raising workers voice, notably of those employed in areas (countries) with low legal protection. This form of internal workers protection can have major consequences for the companies in the supply chain which are "labelled" as those that do not respect the rights guaranteed by law. What is more, imposing obligations on employers to focus on preventing violation of the workers' rights, within the supply chain inevitably has an impact on the business, that, in a broader sense, can have a very significant impact on the entire business process. In this sense, grievance mechanisms can be seen as a specific way to ensure quality business operations with a special emphasis on prevention as a key institution, in order to protect workers' rights.

While not every company will be equally interested in monitoring their supply chain, the other type of argumentation that obligations are being imposed on companies that they cannot fully meet, cannot be accepted. As the Brazilian case has shown, it is not always possible to establish all the facts in a complete manner. But this type of criticism fails to consider two important facts as relevant. First, the "investigation" is dominantly based on the communication between two business partners. Only full refusal to communicate could be a sign of distrust and lack of transparency that should not be tolerated and would initiate further actions. Furthermore, the collection of data will never depend solely on the company that "monitors", since past practice shows that illegal conduct is mainly brought to the attention of the governments, public, but also of businesses, through the actions of individual workers, groups of workers, trade unions, other professional organizations, or civil society organizations. Usually, such public notification is accompanied by a whole range of evidence indicating that a violation of rights has indeed occurred.

It is difficult to say with certainty how much the concept of due diligence will affect the future of workers' rights. They have certainly touched a kind of "bottom minimum" in the previous period, while new threats are emerging in the form of uncharacteristic forms of work that differ drastically in terms of the scope and quality of rights from those that workers have in a classic employment relationship. But precisely because of this preserving human rights, which includes both the right to human dignity and the right to work in all its aspects, is a minimum that must not be questioned regardless of where the worker is located and what his formal or factual legal relationship is with the company at the other end of the supply chain. It is therefore rational to think about the necessity of the global

impact of implementing the EU legal framework on due diligence and the ban on goods produced through forced labour.

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Review article

HUNGARIAN FOOD SUPPLY SECURITY MEASURES AND THEIR ASSESSMENT UNDER EU LAW

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ABSTRACT

In the new global order, the European Union is increasingly emerging as a geopolitical actor, while global crises – such as the pandemic, energy and raw material supply disruptions, and armed conflicts – have a direct impact on agricultural and food supply chains. In this environment, Member States are increasingly using national legal instruments aimed at preserving food supply security, while potentially coming into conflict with the principles of the EU internal market. The presentation examines how Member States' restrictive measures adopted with reference to food supply security can be assessed in the light of EU law and in particular the established case law of the Court of Justice of the European Union. The analysis is carried out through three different instruments of Hungarian regulatory practice affecting EU fundamental freedoms: official food price regulation, state control over agricultural and food industry investments, and export restriction and notification mechanisms.

The focus of the analysis is on how these national measures fit into the EU requirements on the free movement of goods and capital and the freedom to conduct a business, and how they can be interpreted within the framework of the justification tests consistently applied in EU case law – in particular, justification based on public interest, necessity and proportionality. The examined Hungarian agricultural and food supply measures are not only national crisis management tools, but also represent a "pushing" of the legal boundaries of the EU internal market. These measures highlight the structural tension that develops between the market-building logic of EU integration and the Member State autonomy (sovereignty) that increases in crisis situations, and which may play a decisive role in the development of the future global and internal governance model of the European Union. The analysis is facilitated by the fact that direct or indirect CJEU judgments have been issued in all three areas concerned, thus revealing the interpretation directions of the related EU law.

Keywords: *Food supply security, Member state restrictions, Global crisis phenomena, State intervention, Official price regulation*

1. INTRODUCTION

One of the defining objectives of European integration was to create lasting stability and predictability through economic and political cooperation among the Member States, with particular regard to access to essential resources and goods. One of the earliest and most significant manifestations of this objective was the creation of the Common Agricultural Policy (CAP), which served not only to support farmers but also to guarantee the security of food supply[1] by deepening solidarity and integration between Member States. Security of supply therefore emerged from the outset as a community-level objective,[2] the implementation of which required the strengthening of common regulatory frameworks.

In contrast, a trend can be observed today in which some Member States – citing global crisis situations, such as the COVID-19 pandemic or the consequences of the Russian-Ukrainian war – are starting to introduce unilateral measures based precisely on security of supply.[3] These measures often result in restrictions on common EU regulatory frameworks and contribute to the fragmentation of the internal market, creating tension between national sovereignty and the principles of Community integration. This phenomenon highlights the contradiction that, while security of supply was originally a reason for deepening integration, in current practice it is increasingly becoming a means of justifying exceptions to common rules. The question is therefore not only economic or political, but also fundamentally legal: how far the regulatory autonomy of Member States may extend in times of crisis without undermining the unity of EU law and the original objectives of common policies.[4]

Hungarian legislation of recent years can serve as a suitable basis for conducting this investigation, as since the mid-2010s, Hungary has operated under various forms of emergency governance. Under the auspices of these special legal regimes, citing the threat to the country's security of supply, a large number of laws have been enacted that are incompatible with EU legislation. This study examines three

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1 European Comission: Drivers of food security, SWD(2023) 4 final, Brussels 4 January 2023, p. 3, Available at: [https://commission.europa.eu/system/files/202301/SWD_2023_4_1_EN_document_travail_service_part1_v2.pdf], Accessed 05 February 2026.

2 Mata, F.; Dos-Santos, M.J.P.L., *European Citizens' Evaluation of the Common Agricultural Policy; Sustainability* 2024, Vol. 16, Issue 10, 2024.

3 For example, different types of regulatory price regulation in some Member States - Van Rompuy, B., *Territorial Supply Constraints: A Hidden Driver of Grocery Price Inflation?*, European Competition and Regulatory Law Review, Vol. 7, Issue 3, 2023, p. 140.

4 For the effectiveness of joint action, see: Poczta-Wajda, A.; Poczta, W., *Stability of Food Security in EU Member States – Does the Common Agricultural Policy Ensure Resilience of Food Systems During Crises*, *Ekonomista*, 2024, No. 4, pp. 395–419.

Hungarian regulatory instruments relating to food supply security that challenge the boundaries of EU internal market law.

2. EMERGENCY GOVERNANCE IN HUNGARY

Until the mid-2010s, Hungary's system of special legal orders largely operated within the framework of the classical constitutional model,[5] in which the application of emergency powers were regarded as exceptional and temporary instruments. The Fundamental Law of Hungary listed the state of emergency among the cases of special legal order, which could be declared primarily in the event of natural or industrial disasters.[6] The detailed rules were determined by Act CXXVIII of 2011 on the Protection of Natural Resources, which specified the conditions for declaring a state of emergency and the scope of applicable extraordinary measures. Based on this construction, the function of the state of emergency was primarily to accelerate disaster management intervention, not as a general governance technique.

However, the migration crisis that unfolded in 2015 induced new types of legal responses. The legislator did not respond by applying the special legal categories under the Fundamental Law, but introduced a separate statutory emergency regime known as the crisis situation caused by mass immigration.[7] Its application was not closely linked to a single, specific event, but could be repeatedly extended in time if the conditions specified by the legislator were met. As a result, the "crisis situation caused by mass immigration" became a permanent, quasi-extraordinary legal regime in practice.

The real turning point in Hungarian emergency governance was the COVID-19 pandemic, following which the Government made extensive use of the emergency authorization under the Fundamental Law in the spring of 2020 for the first time. The declaration of the state of emergency was carried out by Government Decree 40/2020. (III. 11.), which established a special legal order covering the entire ter-

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5 Gárdos-Orosz, F., Burján, E., *From Constitutional Risk Management to Constitutional Risk Management (Emergency Law Misuse) in Hungary*, Cambridge University Press, 03 February 2025, p. 423, Available at: [https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/from-constitutional-risk-management-to-constitutional-risk-management-emergency-law-misuse-in-hungary/B3EA36CFA4E5842A8DE1EFAE37146F98], Accessed 21 April 2026.

6 Former Article 53(1) of the Fundamental Law of Hungary, Hungarian Official Gazette, No. 43/2011 (25 April 2011).

7 Merkl, Z., *Crisis Situation Caused by Mass Immigration – Amendments to the National Defense Act and Other Legislative Changes in the Use of Weapons*, Academic Journal of Internal Affairs (Belügyi Szemle), 2016, No. 6, p. 110., Available at: [https://belugyiszemlejournal.org/index.php/belugyiszemle/article/view/291/291], Accessed 2 April 2026.

ritory of the country in view of the consequences of the COVID-19 epidemic.[8] However, one of the most important features of the 2020 state of emergency was not merely the fact of the declaration, but the related legal construction of authorization.[9] The Parliament adopted Act XII. 2020 on the Protection against Coronavirus, which – in contrast to previous practice – granted the Government the authority to maintain the effect of the emergency decrees without any time limit.[10] In the second phase of emergency governance, the legislator modified this model and switched to a system of time-limited but repeatedly extendable authorization.

In the period between 2020 and 2022, the economic interventions that later became defining elements of emergency governance began to appear. With this, the function of the emergency finally went beyond the narrow framework of crisis management and became an integral tool of economic policy governance.

Following the conclusion of the state of emergency legislation related to the COVID–19 pandemic, the dominance of the ordinary legal order did not return to the Hungarian legal system, but rather special legal order governance entered a new phase, now explicitly focused on the economy and security of supply. The direct legal basis for this turn was created by Act VI of 2022[11] on the management of the armed conflict in a neighbouring state and its humanitarian consequences, which authorized the Government to declare a state of emergency in view of these circumstances. The function of the state of emergency shifted definitively from classic crisis management to economic and security of supply governance, and the focus of state of emergency legislation shifted to interventions in inflation management, market regulation and strategic resource protection.

Overall, emergency governance has remained in force in Hungary almost continuously since 2020., which was immediately terminated by the new government elected on April 12, 2026, on May 14, 2026.[12]

The following chapters will analyze three Hungarian regulations in different areas, which were created on the one hand with reference to the emergency legal basis,

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8 Section 1 of Government Decree No. 40/2020 (III. 11.) on the Declaration of a State of Emergency, Hungarian Official Gazette, No. 39/2020.

9 Mészáros, G., *Rethinking the Theory of State of Exception after the Coronavirus Pandemic? – The Case of Hungary*, Regional Law Review, 2020, No. 12, pp. 96–97.

10 Mészáros, G., *Carl Schmitt in Hungary: Constitutional Crisis in the Shadow of Covid-19,* MTA Law Working Papers, No. 17, 2020, pp. 11–12., Available at: [https://real.mtak.hu/121759/1/2020_17_Meszaros.pdf], Accessed 02 June 2026.

11 Act VI of 2022 on the prevention of the consequences in Hungary of an armed conflict or humanitarian disaster in a neighbouring country.

12 Horváth, F., Blackburn, G., *Hungary's Orbán-era wartime state of emergency ended*, Available at: [https://www.euronews.com/my-europe/2026/05/14/hungarys-orban-era-wartime-state-of-emergency-ended-pm-peter-magyar-says], Accessed 02 June 2026.

and on the other hand which restrict three different EU legal freedoms – enterprise and pricing, establishment, free movement of goods. In view of this, they are suitable for examining where the limits of Member State regulatory autonomy lie in otherwise harmonised areas of EU law when measures are justified by concerns relating to security of supply.

3. FORMS OF STATE PRICE INTERVENTION IN HUNGARY

During the period of emergency governance following 2020, Hungary adopted two major forms of intervention in retail food pricing. Several forms of legislative influence on commercial prices are known,[13] and the two laws described in the following subsection are based on different legal bases and different legal instruments.

3.1. Regulation of Government-Priced Products

Government Decree 6/2022[14] – in force since 1 February 2022[15] – introduced the category of so-called price-capped products, citing the authorisation based on the fight against the coronavirus pandemic. The aim of the decree was to protect disadvantaged consumers and combat inflation by ensuring the supply of affordable basic foodstuffs.

In the case of price-capped products, retail prices were capped at their 15 October 2021 level. In addition, in order to avoid retailers removing the affected products from their range, it was also prescribed that retailers are obliged to keep the products in stock in such quantities.[16] When the regulation came into force, its material scope covered the following foodstuffs: granulated sugar (white sugar), fine wheat flour BL 55, refined sunflower cooking oil, domestic pork legs (including bone-in, skin-on, filleted, cut, sliced or minced, whether or not sold pre-packaged, fresh, chilled, frozen), chicken breast, chicken thighs - back, whole or separate rump and wing tips (including bone-in, skin-on, filleted, cut, sliced or minced,

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13 Justin-Damien, G., Price Controls – Good Intentions, Bad Outcomes, Policy Research Working Paper, No. 9212, World Bank, 2020, Available at: [https://documents1.worldbank.org/curated/en/735161586781898890/pdf/Price-Controls-Good-Intentions-Bad-Outcomes.pdf], Accessed 02 June 2026.

14 Government Decree No. 6/2022 on the different application of Act LXXXVII of 1990 on the establishment of prices during the state of emergency.

15 Although the Decree has not been formally repealed, it has contained no operative provisions since 1 August 2023.

16 According to Government Decree No. 6/2022, paragraph 2 (1): „The trader is obliged to distribute the products listed in Annex 1 on 15 October 2021 and to sell at least the average daily quantity for 2021 for the given day of the week.".

whether or not sold pre-packaged, fresh, chilled, frozen), ultra-high-temperature heat-treated cow's milk with a fat content of 2.8% by weight.

Regarding Government Decree 6/2022, it should be emphasized that its adoption and application took place during a period in which food price inflation in Hungary was the highest in the European Union.[17] This inflation peaked in January 2023.[18]

The regulation was the subject of a preliminary ruling procedure by the CJEU in case C-557/23.[19] The basis of the case was the imposition of a consumer protection fine, which was imposed on the grounds that a quantity of a product with an official price was not available in one of the commercial units of SPAR Hungary Kft. in accordance with the regulation. It is important to note that the store had the product in question, and even a closing stock remained that day, and no consumer complaint was filed. In its appeal against the fine, SPAR Hungary Kft. argued that consumer needs were continuously met, thus the objective set out in the regulation was achieved.

During its proceedings, the CJEU examined the conformity of the Hungarian regulation with Regulation (EU) No 1308/2013[20] on the common organisation of the markets in agricultural products. In this regard, it referred to Case C-400/19. The Court of Justice has referred to the principle-based findings of the judgment in Case C-311/01 Commission v Hungary, [21] which was also a case of price regulation by the authorities. The following were highlighted: (1) the free determination of the selling price on the basis of free competition is an element of Regulation (EU) No 1308/2013 and is an expression of the principle of the free movement of goods under conditions of effective competition; (2) the common market organisation does not prevent Member States from applying national rules which pursue objectives of general interest other than those of the Regulation, even if those rules may affect the functioning of the internal market in the sector concerned,

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17 Hungarian National Bank: Domestic food inflation, underlying factors (MNB In-depth Analyses), 4-5. p., Available at: [https://www.mnb.hu/letoltes/mnb-melyelemzes-a-hazai-elelmiszerinflacio-mogott-meghuzodo-tenyezok.pdf] Accessed 05 September 2025.; Matthews, A., *Food price situation in Europe*, Studies in Agricultural Economics, Vol. 125, 2023, p. 62.

18 Csorba, N., *Hungarian National Bank: Inflation on a declining path*, Foreign Affairs, No. 1, 2023, p. 68.

19 Case C-557/23. *SPAR Magyarország Kft. v Bács-Kiskun Vármegyei Kormányhivatal* [2024] ECLI:EU:C:2024:737.

20 Regulation (EU) no 1308/2013 the European Parliament and of the Council, establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, [2013] OJ L 347.

21 Case C-557/23. paras 37-38.

provided that those rules are suitable for securing the attainment of the objective pursued and do not go beyond what is necessary to attain that objective.[22] In relation to the latter condition, the CJEU has stated that national legislation is only suitable for securing the attainment of the objective pursued if it is genuinely intended to attain it in a coherent and systematic manner.[23]

Overall, the CJEU found in relation to Government Decree 6/2022 that "the harm to traders' access to the free market under conditions of effective competition and, consequently, the disruptions throughout the supply chain caused by the official prices imposed on those traders and the obligation on the latter to sell a certain quantity of the products concerned, exceed what is necessary to achieve the objectives pursued by that Government Decree."[24]

The judgment was delivered on September 12, 2024, when the legislation under review was already out of force, but its findings of principle should always serve as a guideline.

3.2. The 2025 Margin-Cap Regulation

The currently effective form of official price regulation, the so-called margin-stop regulation, was adopted in March 2025. The legal basis of Government Decree 42/2025. (III. 11.) on the measures necessary to reduce food prices is the state of emergency introduced in view of the armed conflict and humanitarian disaster in Ukraine, as well as in order to prevent and manage their consequences in Hungary. According to the preamble, the purpose of the decree is "*to reduce food prices in order to protect Hungarian families*".

The scope of the regulation covers a specific range of basic foodstuffs intended for daily consumption — such as cow's milk, white granulated sugar, BL 55 fine flour, poultry meat, eggs, vegetable and fruit categories. One of the peculiarities of the new regulation is that the margin regulation is not a direct price stop, but a ratio-based restriction. The basic unit of the regulation is the transfer price invoiced by the supplier or, in the case of own production, the cost price. This item can be increased by a maximum of a specified percentage margin, which ensures that the distributor can incorporate cost increases — for example, energy or logistics fees — into the price, albeit to a limited extent.

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22 Case C-557/23. paras 37-38.

23 Case C-557/23. para 45. – cited judgment: Case C-333/14. *Scotch Whisky Association and Others v The Lord Advocate and The Advocate General for Scotland* [2015] ECLI:EU:C:2015:845.

24 Case C-557/23. para 47.

In addition to the applicable margin, the regulation also contains a quantitative obligation, according to which if the trader sold a product belonging to the regulated product category in the given store on the day before the regulation came into force, he is "*obliged to sell at least the average daily quantity of the given product sold by him in 2024 in such a way that the service of customers is continuously ensured.*"[25]

There has been no CJEU ruling on the current regulation, however, based on consistent case law, it may reasonably be argued that shifting the negative effects of inflation exclusively to retail distributors, in such a way that the continuous extension of the scope of the regulation makes the application of the law unpredictable, does not meet the requirement of proportionality.[26]

4. SCREENING OF FOREIGN DIRECT INVESTMENTS IN STRATEGIC SECTORS

In September 2025, the Ministry of National Economy issued[27] a statement stating that the Hungarian State had prohibited the foreign acquisition of Alföldi Tej Kft.[28] The Ministry's statement stated the following reasons:

"*Alföldi Tej Kft. currently accounts for nearly 20% of domestic raw milk purchases. Due to its significant market share, foreign ownership acquisition could cause significant market disruption in domestic milk production and purchases, as well as a high risk of security of supply.*

If the Hungarian-owned Alföldi Tej Kft. were to fall into foreign hands, the performance of the domestic processing industry would decrease: raw milk would be exported and dairy products produced abroad would be purchased at higher prices than before, and well-known and popular products would disappear from the shelves of domestic stores.

The prohibition of the implementation of the legal transaction is in the interest of the security of supply for the population."

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25 Government Decree No. 42/2025 (III. 11.), Section 2 (5).

26 Immediately prior to the conclusion of this study, on May 13, 2026, the new government repealed the legislation.

27 Ministry of National Economy, The Hungarian State Prohibited the Foreign Acquisition of Alföldi Tej Kft.
[https://kormany.hu/hirek/a-magyar-allam-megtiltotta-az-alfoldi-tej-kft-kulfoldi-felvasarlasat] Accessed 30 March 2026.

28 The acquisition would have involved 100% ownership of the company by the Greek Hellenic Dairies.

The regulation of foreign direct investments[29] provides one of the most complex examples of Hungarian emergency governance, as it was implemented at several, overlapping normative levels.[30] The statutory control regime established by Act LVIII of 2020[31] was supplemented by Government Decree 561/2022 (XII. 23.)[32] for the post-2022 emergency period, which expanded the existing framework and adapted it to security of supply considerations. The system was finally integrated at the statutory level in 2025 with the adoption of Act LVIII of 2025, which provided for the elevation of the emergency decrees issued in view of the armed conflict in Ukraine to the statutory level. The legislative justification for the investment control therefore ranged from ensuring a regulatory transition related to extraordinary measures taken during the state of emergency to prevent the human epidemic caused by the COVID-19 infection in 2020 and to address its consequences, to the state of emergency due to the armed conflict in Ukraine.

The general licensing mechanism established by Act LVIII of 2020 was supplemented in the emergency period after 2022 primarily by Government Decree 561/2022 (XII. 23.) and its amendments in such a way that security of supply aspects, including those related to food supply, became more prominent.

The purpose of the regulation of foreign direct investments is the state control of the acquisition of a certain amount of shares by foreign investors in so-called strategic companies. According to Section 36(2)(3) of Act L of 2025 currently in force, a strategic company is "*a limited liability company, a private limited company, a public limited company or a higher education institution as a legal entity with its registered office in Hungary, the main or additional activity of which falls within the strategic sectors specified in Annex 1, in particular the energy, transport and communication sectors, and the sectors referred to in Article 4(1)(a) to (e) of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.*"

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29 Regarding the regulation of foreign direct investments, Cheng Bian identifies three fundamental, typical problems from the entrepreneurial side: unpredictability, procedural uncertainty, and lack of transparency – see Bian, C., *Foreign Direct Investment Screening and National Security: Reducing Regulatory Hurdles to Investors Through Induced Reciprocity*, The Journal of World Investment & Trade, Vol. 22, 2021, p. 567.

30 For other dimensions of foreign investment control, see: Kovács, B., *Investment control at the intersection of data protection and competitiveness*, Economy and Law, Economy and Law, No. 11–12, 2025, pp. 36–42. For the EU regulation of foreign direct investment screening, see: Vig, Z., *The Regulation of Screening of Foreign Direct Investments in the European Union*, Pro Futuro, No. 4, 2020, pp. 9–24.

31 Act LVIII of 2020 on transitional rules related to the end of the state of emergency and on epidemiological preparedness.

32 Government Decree 561/2022. (XII. 23.) on the different application of certain provisions necessary for the economic protection of Hungarian business associations during the state of emergency.

Annex 1 referred to in the definition also includes the food and agricultural sector, within which the scope of the law covers the following sectors: food production; beverage production; tobacco production; crop production, animal husbandry, game management and related services; forestry; fishing and aquaculture; and the leasing and operation of agricultural and forestry land.

In the case of foreign direct investments falling within the scope of the law, a notification must be made to the minister responsible for the domestic economy, based on which the minister examines, among other things, whether "*there is a harm or threat to the state interests, public security, public order of Hungary, or the possibility of their occurrence, with particular regard to the security of the provision of basic social needs (...).*" In the event of harm to an interest specified in a law, the minister makes a prohibitive decision, which he is obliged to justify.

The compatibility of the Hungarian investment-screening regime with EU law was examined by the CJEU in Case C-106/22 Xella Magyarország.[33] regarding one of the acquisitions. Although this judgment was not related to the currently effective legislation, but to the first legislation of the licensing system, i.e. Act LVIII of 2020, it nevertheless contains a number of principles that are also relevant to the compatibility its compatibility with the legislation currently in force.

The subject matter of the legal transaction serving as the basis for the procedure was the acquisition of a company (Janes és Társa Kft.) based in Hungary, whose main activity is the extraction of gravel, sand and clay. This acquisition was subject to investment control due to the fact that the direct and indirect owners of the buyer, Xella Magyarország Építőanyagipari Kft., also based in Hungary, were identifiable as EU and non-EU companies and private individuals. The Minister, acting on the basis of the mandatory notification, made a decision prohibiting the purchase contract, highlighting in the justification of the decision that (a) safe and predictable extraction and supply of raw materials is of strategic importance, (b) the Covid-19 pandemic has made it clear that serious disruptions can occur in the operation of global supply chains in a short time, which could have a negative impact on the national economy, (c) in the case of the production of construction additives – such as sand, gravel and crushed stone – the market share of foreign-owned domestic manufacturers is already decisive, (d) if Janes és Társa Kft. becomes indirectly owned by a company registered in Bermuda, this would pose a risk in the long term to the security of supply of raw materials to the construction industry, especially in the region in which this company is based, given

[33] Case C-106/22 *Xella Magyarország Építőanyagipari Kft. v Innovációs és Technológiai Miniszter* [2023] ECLI:EU:C:2023:568.

that the company has a 20.77% market share in this region, (e) the proportion of domestically owned enterprises decreases when a strategic company falls into foreign hands, which, broadly interpreted, may harm "state interests".[34]

The questions submitted to the European Court of Justice raised the question of the application of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019[35] establishing a framework for the screening of foreign direct investments into the Union. As regards the scope of that regulation, the CJEU held that it did not cover the case at issue, given that it was limited to investments within the Union made by undertakings incorporated or otherwise constituted in accordance with the laws of a third country.[36] It therefore interpreted the case in EU law not on the basis of Regulation (EU) 2019/452, but on the basis of the freedom of establishment laid down in Article 54 of the Treaty on the Functioning of the European Union (TFEU), referring to settled case-law.[37] According to this, national legislation which, by its purpose, applies to holdings which enable a certain degree of influence to be exercised over the decisions of a company and to determine its activities falls within the scope of the rules on freedom of establishment and not on the freedom of movement of capital.[38] Freedom of establishment was relevant in that the cross-border ownership structure of the acquiring domestic company within the European Union, which determines the situation in the main proceedings, constituted a foreign element relevant to the answer to the first question referred for a preliminary ruling.[39]

Under Article 49 TFEU, "*any restriction on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited*." According to the relevant case-law of the CJEU, any measure of a Member State which prohibits, hinders or renders less attractive the exercise of the freedom of establishment is considered a restriction.[40]

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34 Case C-106/22. paras 23-24.

35 Regulation (EU) 2019/452 of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union, [2019] OJ 2019. L 79., For revisions to the regulation, see: Riela, S., *The EU's foreign direct investment screening mechanism two years after implementation*, European View, Vol. 22, Issue 1, 2023.

36 Case C-106/22. para 32.

37 See for example Case C-563/17 *Associação Peço a Palavra és társai kontra Conselho de Ministros* [2019] ECLI:EU:C:2019:144; Case C-251/98 *C. Baars v Inspecteur der Belastingen Particulieren/Ondernemingen Gorinchem* [2000] ECLI:EU:C:2000:205; Case C-686/13. *X AB v Skatteverket* [2015] ECLI:EU:C:2015:375.

38 Case C-106/22. para 42.

39 Case C-106/22. para 56.

40 Case C-563/17. para 54.

Taking into account that the Hungarian legislation at issue in the main proceedings constituted a "particularly serious restriction"[41] on the freedom of establishment, the CJEU examined whether the conditions[42] for a restriction existed. In doing so, the CJEU established, with a fundamental importance, that, on the one hand, purely economic reasons linked to the promotion or proper functioning of the national economy cannot justify a restriction on one of the fundamental freedoms guaranteed by the Treaties, and, on the other hand, public policy and public security may be invoked only in the event of a genuine and sufficiently serious threat affecting one of the fundamental interests of society.[43] In light of these considerations, it could not be established during the procedure that the local provision of certain basic construction raw materials would fall within the scope of "a fundamental social interest", nor that the specific acquisition would create a real and sufficiently serious threat affecting a fundamental social interest.[44]

Although the basis of the judgment in the analyzed case C-106/22 is not related to food enterprises, its general principles established by the Court findings are relevant for enterprises of any profile that are classified as strategic under the law, thus by analogy also for the regulatory procedure conducted for the acquisition of Alföld Tej Kft., referred to at the beginning of the chapter.

5. RESTRICTION ON THE EXPORT OF AGRICULTURAL PRODUCTS OF STRATEGIC IMPORTANCE

The third Hungarian regulation analyzed in this study, which restricts EU law by reference to national security of supply,[45] provided for the notification procedure and related measures related to the export of agricultural products of strategic importance. The relevant Government Decree 83/2022. (III. 5.) was adopted on the basis of the statutory authorization for the protection against the coronavirus pandemic. The following products fell within the scope of the decree: wheat, rye, bar-

41 Case C-106/22. para 59.

42 The national measure concerned meets an overriding reason based on public interest, is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary to attain it - Case C-555/19. *Fussl Modestraße Mayr GmbH v SevenOne Media GmbH* [2021] ECLI:EU:C:2021:89.

43 Case C-106/22. paras 64. and p. 67.

44 Case C-106/22. paras 69. and p. 71.

45 In this regard, it is worth referring to the study by Aleksandra Kowalska, Anna Budzyńska and Tomasz Białowąs, which found in an international context that supply security was not caused by food shortages, but by rising food prices, which were exacerbated by export restrictions. See Kowalska, A., Budzyńska, A., Białowąs, T., *Food export restrictions during the COVID-19 pandemic: Real and potential effects on food security*, International Journal of Management and Economics, Vol. 58, No. 4, 2022, p. 420.

ley, oats, corn, soybeans, sunflower seeds. During the export of these products from the territory of Hungary abroad, the state had a pre-emptive or purchase right, which right could be exercised based on a written notification by the person selling or intending to export the product abroad.[46] The decision was made by the Hungarian National Asset Management Company based on the position of the Minister of Agriculture. In giving his position, the Minister of Agriculture examined whether "*the sale or export of the grain concerned abroad significantly hinders or makes impossible the supply of raw materials necessary for the feed supply of domestic livestock farms, whether it endangers public supply, or whether it poses a risk to food security.*"[47]

A country can restrict exports in several ways, typical instruments being export quotas and export bans.[48] The Hungarian regulation under examination can be considered milder than these, as it "only" provides a pre-emptive right for the benefit of the state, but given the restriction itself, it must be compatible with EU law.[49] Although no CJEU ruling has been issued regarding this specific legislation, it is worth analyzing the judgment of the CJEU in Case C-499/23[50], which was based on infringement proceedings initiated due to Government Decree 402/2021. (VII. 8.), which was a regulation on the registration procedure and other measures related to the export of raw materials and products of strategic importance for the security of supply in the construction industry to be adopted in order to restart the economy. The regulation also imposed a notification obligation in the case of the export of certain construction materials, based on which the Hungarian state could exercise pre-emptive and purchase rights based on the proposal of the government commissioner if the sale or export of the construction material abroad significantly hinders or renders impossible the establishment, operation, maintenance and development of critical infrastructures, thereby endangering public supply or posing a risk to the security of supply in the construction industry. Considering its regulatory logic and reasons, it can be seen that the regulation examined by the CJEU is practically analogous to the legislation on the restriction of grain exports.[51]

In its judgment in Case C-499/23, the CJEU focused on the prohibition laid down in Article 35 TFEU, which provides that "*all quantitative restrictions on*

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46 Government Decree No. 83/2022. (III. 5.) Sections 1-2.

47 Government Decree No. 83/2022 (III. 5.), Section 3 (2).

48 Ghori, U. H., *Export Restrictions and Export Controls - From WTO to the Realm of Global Security*, Edward Elgar Publishing, Cheltenham–Northampton, 2023, p. 9. [https://doi.org/10.4337/9781800889828].

49 Mazur-Kumrić, N., Zeko-Pivač, I., *Triggering emergency procedures / A critical overview of the eu's and un's response to the covid-19 pandemic and beyond*, ECLIC, Vol. 5, 2021, Special Issue: EU 2021 – The Future of the EU in and after the Pandemic, p. 107.

50 Case C-499/23. *European Comission v Hungary* [2021] HL C, C/2026/133

51 It should be noted that both pieces of legislation have since been repealed.

exports and measures having equivalent effect shall be prohibited between Member States." In this regard, it referred, inter alia, to the case-law laid down in the Groenveld judgment,[52] according to which measures having equivalent effect to quantitative restrictions on exports are national measures which have the object or effect of specifically restricting exports and, as a result, create a difference in treatment between the internal trade of a Member State and its exports in such a way as to favour domestic production or the internal market of the State concerned at the expense of trade or production in other Member States.[53] It was also reiterated that Articles 34-35 TFEU Articles 1 and 2 of the Treaty on the Functioning of the European Union preclude the application of national legislation in relations within the Union which, even as a mere formality, maintains the requirement to obtain import or export permits or any similar procedure.[54]

The CJEU found that Government Decree 402/2021. (VII. 8.) clearly aims to restrict trade in construction materials by creating a difference in treatment between internal trade and export trade in those products and by granting an advantage to the internal market of that Member State.[55] The CJEU held that the effects of the legislation could not be qualified as too incidental or indirect, given the administrative burdens imposed, the extension of delivery times and the penalties envisaged.

In relation to the conditions for justifying restrictive measures regulated in Article 36 TFEU, [56][57] the CJEU referred to paragraph 36 of the judgment in Campus Oil

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52 Case 15/79. *P.B. Groenveld BV v Produktschap voor Vee en Vlees* [1979] ECLI:EU:C:1979:253.

53 Case 15/79. paras 6-7.

54 Case C-499/23. para 57. p, cited judgment: Case 51 to 54-71, *International Fruit Company NV v Produktschap voor groenten en fruit* [1972] ECLI:EU:C:1971:128, para 9.

55 Case C-499/23. para 61.

56 Article 36 TFEU
„ The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property. Such prohibitions and restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.'

57 In this regard, the main findings of the case law cited by the CJEU:
- A national measure contrary to Article 35 TFEU may be justified by one of the reasons of public interest referred to in Article 36 TFEU or by an overriding requirement of public interest, provided that it is suitable for achieving the objective pursued and does not go beyond what is necessary in order to achieve that objective. (see for example: Case C-648/18. *Autoritatea națională de reglementare în domeniul energiei (ANRE) v Societatea de Producere a Energiei Electrice în Hidrocentrale Hidroelectrica SA.* [2020] ECLI:EU:C:2020:723, para 34.);
- national legislation is only suitable for achieving the said objective if it actually seeks to achieve it in a coherent and systematic manner (see for example Case C-98/14, *Berlington Hungary Tanácsadó és Szolgáltató Kft and Others v Hungary* [2015] ECLI:EU:C:2015:386, para 64.).

and Others,[58] in which it was stated that for the application of Article 36 TFEU it is important that this measure is actually justified by objective circumstances corresponding to the needs of public security. Referring to the case analysed in the previous chapter, the CJEU also found in this case that public security can only be invoked in the event of a genuine and sufficiently serious threat affecting a fundamental interest of society.[59] Overall, it was also found here that Hungary has not demonstrated that Government Decree 402/2021. actually and strictly corresponds to the needs of public security in terms of objective circumstances.[60] It was highlighted that the regulation generally identifies Hungarian infrastructures as objects of protection, without establishing that each of them actually has an essential social interest, since the regulation under review contains neither a list of infrastructures serving such an interest nor a definition of the concept of "critical infrastructure" – either directly or by reference to another legal act – which would allow for a clear and exhaustive identification of the infrastructures concerned.[61] Finally, the CJEU reiterated that purely economic reasons linked to the promotion of the national economy or its proper functioning cannot justify a restriction on one of the fundamental freedoms guaranteed by the Treaties.[62]

The issue of compatibility with Regulation (EU) 2015/479[63] on common rules for exports also arose in the proceedings, given that, in the Commission's view, the restrictions contained in Government Decree 402/2021 also applied to exports to third countries, thus qualifying as a measure falling within the scope of the common commercial policy, and thus Hungary infringed Article 3(1)(e) TFEU, according to which the Union has exclusive competence in the field of the common commercial policy. According to Hungary, the regulation under review was adopted on the basis of the authorisation provided for in Article 10 of Regulation (EU) 2015/479, which states that "*without prejudice to other Union provisions, this Regulation shall not preclude a Member State from introducing or applying quantitative restrictions on the export of certain products on grounds of public morality, public interest or public security; the protection of health and life of humans, animals and plants; the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property.*"

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58 Case 72/83, *Campus Oil Limited v ministre pour l'Industrie et l'Energie* [1984] ECLI:EU:C:1984:256

59 Case C-499/23. para 72.

60 Case C-499/23. para 76.

61 Case C-499/23. para 77.

62 Case C-499/23. para 84.

63 Regulation (EU) 2015/479 of the European Parliament and of the Council on common rules for exports, [2015] OJ L 83.

The CJEU found in its judgment that the concept of "public security" as set out in Article 10 of Regulation (EU) 2015/479 and Article 36 of the TFEU have the same content, so Hungary's claim that the security of supply of construction materials for critical infrastructures is at risk is unfounded even in this legal context.[64]

Similarly to the previous chapter, given the identical regulatory system of the legislation that forms the basis of the analyzed CJEU judgment, the fundamental findings of the judgment can also be considered as guiding with regard to the legal framework regarding the restriction of food exports.

6. SUMMARY

In recent years, efforts by member states to adopt measures that are contrary to the fundamental regulatory structures of the European Union, citing their own security of supply and justifying them with a global crisis, have intensified. What was previously the basis for integration between member states has now become a reference against it. This phenomenon can be observed widely in Hungary, the basis of which is the state of emergency legal order that has existed practically continuously for many years. This legal order creates the opportunity for the government to enact legislation by decree, either instead of laws or by amending them. This practically unlimited authorization has led to the government in several cases adopting legislation in order to achieve economic policy goals, in which case the originally indicated security of supply legal basis may be questionable. This questionability not only limits certain EU legal "freedoms", but also calls into question the legitimacy of the restriction. The CJEU judgments analysed in the study clearly show that the existence of a crisis situation and the reference to it do not in themselves make Member State measures restricting EU law legitimate. In all cases, it is necessary that the measures serve to avert a real and demonstrable threat, that the restrictions are suitable for achieving the objective pursued and that they do not go beyond what is necessary to achieve the objective pursued, in accordance with consistent case-law.

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[64] Case C-499/23. paras 107-108.

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Review article

GENDER BALANCE AND LEADERSHIP: THE IMPLEMENTATION OF DIRECTIVE (EU) 2022/2381 IN CROATIAN COMMERCIAL COMPANIES

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ABSTRACT

This paper aims to examine the process of implementing Directive (EU) 2022/2381 into the Croatian legislation via amending the Companies Act in 2024 in order to evaluate its significance for increasing gender balance in corporate leadership and its general relevance in the context of European regulatory and normative practice. Specifically, the focus will be on the importance of these regulations in the promotion of the European Union as an active global actor in the domain of inclusive governance, equal rights and socially sustainable business principles.

The methodology of the research will consist in using a doctrinal approach based on the analysis of the relevant legislation, primarily Articles 272.s – 272. z. of the Companies Act as of 2024.

The analysis will cover such issues as requirements for gender representation in the management and supervisory boards of listed companies, the presence of targets and exceptions, procedural methods and selection procedures in case the necessary level of representation is not achieved. Attention will be paid to the practical significance of the discussed regulation in terms of corporate governance practices.

Based on the performed analysis, it can be concluded that the Croatian legislation in this regard fully meets the requirements and expectations formulated at the European level, thus testifying to the effectiveness of its efforts to shape the standards of corporate governance at the Member States' level.

In this regard, it is also possible to interpret the Directive as one of the measures aimed at supporting European values and ideas in relation to gender equality, balanced representation, and other aspects of socially sustainable business operations. On the other hand, there are certain difficulties associated with its implementation, primarily in achieving a balance between legislation and corporate governance practices.

Overall, these legislative changes represent a significant contribution to the formation of modern corporate governance practices. Nevertheless, their full effectiveness will largely depend on continuous implementation, proper institutional support, and the creation of additional regulatory frameworks at both the national and supranational levels. In this regard, the presented paper is expected to contribute to further research of this complex issue.

***Keywords**: Corporate governance, Croatian Companies Act, Directive (EU) 2022/2381, European Union as a global actor, Gender balance*

1. INTRODUCTION

Equal rights for women and men are among the founding principles of the European Union.[1] This principle has grown from the narrow economic dimension of equal pay to encompass a cross - cutting fundamental right, which applies to almost every policy area covered by the Union.[2]

It is against this backdrop that Directive (EU) 2022/2381 of 23 November 2022 represents a crucial milestone. For the first time, the Union legislator enacts binding procedural obligations in order to increase the representation of both sexes on the boards of listed companies.[3]

According to this Directive, the underrepresented sex must make up at least 40 % of the non-executive board members or 33 % of all the board members by 30 June 2026.[4]

The aim is to achieve it by means of transparent, meritocratic selection procedures based on the "comply-or-explain" principle.[5]

There are valid reasons why this measure is needed.[6] As of 2021, women held less than 31 % of the board seats and only 8.5 % of chairpersons in the largest listed companies in the European Union.[7]

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1 Consolidated Version of the Treaty on the Functioning of European Union [2012] OJ C326/13 26 October 2012, pp. 47–390, Art. 2.

2 Treaty on the Functioning of the European Union, Art. 8 and Art. 157; Charter of Fundamental Rights of the European Union, Art. 23.

3 Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures, OJ L 315/44, 7 December 2022 (hereinafter "Directive 2022/2381".

4 Directive 2022/2381, Art. 5(1).

5 Directive 2022/2381, Recitals 7 and 15–16.

6 Birkmose Hanne S., *Improving the Gender Balance Among Directors of Listed Companies in the EU*, European Company and Financial Law Review, De Gruyter, 2023. vol. 20, No. 1, p. 166.; Hamplová, E.; Janeček, V.; Lefley, F., *Board gender diversity and women in leadership positions–are quotas the solution?*. Corporate Communications: An International Journal, 2022, Vol. 27, No. 4, p. 742.

7 Directive 2022/2381, Recital 18.

In Croatia, the problem is particularly acute. According to the Corporate Governance Report of the Croatian Financial Services Supervisory Agency (HANFA) for 2022, women comprised only 23 % of the supervisory boards and 16 % of the management boards of listed companies; even more importantly, 67 % of these companies did not have any woman on their management boards.[8]

More recently, empirical data emerging from the Italian context also confirms that a critical mass of minimum three female directors, especially executive, positively affects ESG performance and advisory value within the board.[9]

The latest studies conducted in Europe also demonstrate that gender quotas have been quite effective: those countries which implemented them had a considerably higher number of women serving in company boards (35% as compared to only 22% in other countries).[10]

Such numbers clearly demonstrate the slow development of voluntary measures noted in the Directive.[11] As Novaković has correctly pointed out, Croatian legislators have to choose whether to confine themselves to regulating listed companies only or – following European best practices – to cover state-owned or predominantly state-owned companies, whose example may serve as an example for private sector.[12]

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8 Novaković, N., *Izazovi prenošenja Direktive o ženskim kvotama na upravljačkim položajima u velikim tvrtkama uvrštenima na burzu*, Informator, No 6826; 8 March 2024, p. 3, Available at: [https://informator.hr/strucni-clanci/izazovi-prenosenja-direktive-o-zenskim-kvotama-na-upravljackim-polozajima-u-velikim-tvrtkama-uvrstenima-na-burzu], Accessed 12 December 2025.; Croatian Financial Services Supervisory Agency (HANFA) Annual Report on corporate governance 2022. Available at: [https://www.hanfa.hr/media/pbxnhxyw/godi%C5%A1nje-izvje%C5%A1%C4%87e-2022.pdf], Accessed 12 January 2026.

9 Cambrea, D.R.; Paolone, F.; Cucari, N., *Advisory or monitoring role in ESG scenario: Which women directors are more influential in the Italian context?,* Business Strategy and the Environment, 2023, Vol. 32, No. 7, p. 4310.

10 Kirsch, A.; Sondergeld, V.; Wrohlich, K., *While gender quotas for top positions in the private sector differ across EU countries, they are effective overall*, DIW Weekly Report, 2022, Vol. 12, No. ¾, p. 32.; Mendizabal, E. L.; Basoredo-Otzerinjauregi, I.; González, A. M. *et al*., *A code of good practice to promote gender equality on boards of directors of medium-sized enterprises as a corporate sustainability goal*. SN Bus Econ 4, 39, 2024, [https://doi.org/10.1007/s43546-024-00635-4]; Lin, E.; Zhang, L.; Zhang, Q., *Exploring the Roles and Impact of Women in Executive Leadership: A Comprehensive Analysis of Gender Diversity in Top Corporate Management*, SSRN Electronic Journal, 2023, 10.2139/ssrn.4453695, Available at: [http://dx.doi.org/10.2139/ssrn.4453695], Accessed 17 April 2026.

11 Directive 2022/2381, Recital 19.

12 Novaković, *op. cit*., note 8, p. 4.

The Proposal for the Act on Amendments to the Companies Act (P.Z.E. No. 84)[13] was presented to the Croatian Parliament on 6 November 2024 via the urgent procedure channel by the Government of the Republic of Croatia. The Act has been passed by the Croatian Parliament on 15 November 2024[14] and came into effect on 5 December 2024 (with the exception of Article 272.t that will become effective on 1 July 2026).

In its current version, the Act introduces a completely new articles (Articles 272.s – 272.z), which introduces a direct transposition of the provisions of the Directive in relation to the listed companies whose shares are admitted to trade on a regulated market. The new article prescribes also processes for the selection of candidates, the obligation to set up measurable targets for the women represented on the management boards, reporting procedures, and the involvement of the Gender Equality Ombudsperson.

Existing board mandates may be continued to the end of the regular term, but new ones should ensure the required balance.

Although it is apparent that the amendments in question have been in accordance with the Directive and are functioning successfully, the legislative documents indicate that there has been no ex ante assessment of the said amendments and the connection between merit-based selection and gender equality has not been considered either.[15]

Empirical research in the area might be useful for answering such questions. Female directors tend to advocate for gender equality when they have strong identification with women as social group, support is provided by board culture and they are expected by their colleagues to speak out.[16] Moreover, it has been empirically proven that the "critical mass" of three women on a board is required for diversity to have any significant influence on decision - making and performance of the board.[17] This evidence becomes even more valuable for the Croatian case, since

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13 Proposal of Amendments to the Companies Act (P.Z.E. br. 84), Croatian Parliament, 6 November 2024, p. 2, Available at: [https://www.sabor.hr/hr/sjednice-sabora/prijedlog-zakona-o-izmjenama-i-dopunama-zakona-o-trgovackim-drustvima-s-konacnim-7], Accessed 17 April 2026.

14 Official Gazette No. 136/2024.

15 Proposal of Amendments to the Companies Act, op. cit. note 13; OECD (2024), OECD Guidelines on Corporate Governance of State-Owned Enterprises 2024, OECD Publishing, Paris, [https://doi.org/10.1787/18a24f43-en].

16 Kirsch, A., *Revolution from Above? Female Directors' Equality-Related Actions in Organizations*, Business & Society, Vol. 61, Issue 3, 2022, pp. 572-601.

17 Sabovchyk, A., *Gender Balance in the Board of Directors, Naukovyi visnyk Uzhhorodskoho Natsionalnoho Universytetu*, Seriia PRAVO, Vypusk 76, chastyna 2, 2023, pp. 257-263.

the new law enters into effect precisely in the area with low number of women in leadership positions.

The purpose of this paper, therefore, consists in three components. First, it maps the transposition of Directive (EU) 2022/2381 into Croatian law, focusing primarily on the newly enacted Article 272.s and the related procedural mechanism. Second, it evaluates the limitations of the proposed regulation. Third, the paper places the Croatian experience in the context of the ongoing European Union - wide debate about the transition from legislative measures towards softer, incentive-based governance and suggests further avenues of development.

In order to place the Croatian transposition in a broader European perspective, selected examples from other Member States – in particular Slovenia, Germany, Poland and Romania – will also be briefly examined.

The methodology of the research rests on a doctrinal approach centred on the analysis of primary legal sources — specifically Articles 272.s through 272.z of the Companies Act as amended in 2024, the transposing legislation of four selected Member States, and the relevant provisions of Directive (EU) 2022/2381 itself. This normative analysis is supplemented by an empirical dimension: official statistical data drawn from HANFA's Annual Reports on Corporate Governance 2022 and 2024.

The 2025 Annual Report of the Gender Equality Ombudsperson and Eurostat's 2025 SDG 5 Monitoring Report are used to assess the practical implications of the legislative framework examined.

The transition between normative analysis (Section 2) and practical evaluation (Section 3) is deliberate: legal compliance and substantive impact are treated as analytically distinct but mutually dependent variables.

By combining the insights gained in the areas of legal studies and corporate governance, the paper aims to contribute to the ongoing discussion about the prospects of gender - balance legislation for promoting truly inclusive leadership in line with the principle of merit.

2. THE DIRECTIVE (EU) 2022/2381 AND ITS TRANSPOSITION INTO CROATIAN LAW: A THEORETICAL AND LEGAL ANALYSIS

The legal framework established by Directive (EU) 2022/2381 must be approached from the dual perspective of European acquis on gender equality and corporate governance theory. Two theoretical approaches stand out due to their

ability to explain resistance to gender - balance rules within corporations and their conditions for effectiveness: social identity theory and critical mass theory.[18]

According to the social identity theory, board members partially identify with particular groups and are inclined to recruit candidates from their own group thus reinforcing existing elite networks.[19] This phenomenon is particularly salient when male directors, having several mandates on different boards, see women as rivals to their power and network advantages. Huang et al. (2020), based on data from German DAX 30 companies during 2010-2015, demonstrate that the presence of men with several mandates is negatively correlated with female nominations, while women with several mandates and women who serve on executive committees have a positive "role - model" effect.[20]

This conclusion is supported by the observation that the executive category of women directors exerts more beneficial effects on ESG performance compared to the independent women directors, which is due to the fact that advisory role of women directors should be considered, not only monitoring.[21]

The European perspective in general further confirms the same trend: the implementation of gender quota legislation in nine EU member states has resulted in increasing the number of women on boards.[22]

These results are consistent with Kirsch (2022) who concludes in her qualitative study that female directors actively promote equal opportunity initiatives only when feeling solidarity with women and supportive board culture.[23]

Critical mass theory adds to the above that at least three women must constitute the board membership in order to influence decision - making and organisational outcomes.[24] Below that threshold, women are symbolic representatives of diversity, but above it they contribute to transforming board culture from monitoring towards strategic leadership.[25]

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18 Kirsch, 2022, *loc. cit*. note 10.*;* Huang, J.; Diehl, M.-R.; Paterlini, S., *'The Influence of Corporate Elites on Women on Supervisory Boards: Female Directors' Inclusion in Germany',* Journal of Business Ethics, 2020, 165, pp. 347–364.

19 Tajfel, H.; Turner, J.C., 1979, cited in Huang *et al.*, 2020, *op. cit.*, note 18. p. 348.

20 Huang *et al,* 2020, *op. cit.,* note 18.

21 Cambrea *et al*, 2023 *op. cit.* note 9, p. 4311.

22 Kirsch, *et al*, 2022, *op. cit.* note 10, p. 35.

23 Kirsch, 2022, *op. cit.,* note 16. p. 12, pp. 15-18.

24 Sabovchyk, *op. cit.,* note 17.

25 Shanmugam, J. *at al.*, *Conceptual Analysis of Board Diversity and Corporate Governance,* Gading Journal for the Social Sciences (e-ISSN 2600-7568). 2025. 28(2) 2025, 190–204, 28. 190-204. 10.24191/gading.v28i2.665. p. 190.

In addition to the above-mentioned theoretical perspectives, the interpretation and implementation of Directive (EU) 2022/2381 may also be informed by the case law of the Court of Justice of the European Union (CJEU) concerning equality, non - discrimination and procedural fairness. Although the Directive itself has not yet been extensively interpreted by the Court, these principles provide an important framework for assessing whether national measures ensure not only formal compliance, but also substantive equality.[26] These legal principles complement the theoretical insights discussed above and are further supported by empirical findings.

Empirical evidence for this threshold has been found in both Germany and Romania.

In Germany, despite the implementation of a quota of 30 % for supervisory boards (since 2015) and at least one woman on executive boards (since 2021), only 8–10 % of executive-board positions are held by women who earn less compared to their peers, controlling for tenure, company size and performance.[27] According to Handschumacher - Knors, a multilevel study of almost 600 executive board members in DAX, MDAX and SDAX companies between 2016 - 2019 demonstrates that the gender pay gap is primarily caused by shorter tenure and fewer CEO positions, but a gender effect is still indirect.[28]

Studies of German supervisory boards also show a picture where despite an increase in overall percentage representation since the adoption of the quota, women still tend to be underrepresented in key roles such as the position of chairperson.[29]

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[26] See, for example, Case C-409/16 *Ypourgos Esoterikon v Kalliri*, where the Court held that formally neutral criteria may constitute indirect discrimination if they disproportionately disadvantage one sex, unless objectively justified; Case C-613/21 P European Parliament v Ferrera, emphasising that selection criteria must be predetermined and cannot be altered during the procedure; Case F-115/11 *CG v European Investment Bank*, highlighting that conflicts of interest and unequal access to information may violate the principle of equal treatment; Case C-595/12 *Napoli*, confirming that exclusion from professional training due to maternity leave constitutes discrimination; Case C-174/16 *H. v Land Berlin*, stressing that parental leave must not adversely affect access to managerial positions; and Case C-252/13 *Commission v Netherlands*, in which the Court underlined that the transposition of directives must be clear, precise and effective in ensuring tangible results. Although these cases do not directly concern Directive (EU) 2022/2381, they provide a coherent legal framework for interpreting its underlying principles.

[27] Handschumacher-Knors, F. *Does a gender pay gap exist on executive boards? An empirical multilevel analysis of executive board compensation in German listed companies,* J Bus Econ, 2023, 93, 325–357, p. 326. – 328, Available at:
[https://doi.org/10.1007/s11573-022-01107-7], Accessed 12 January 2026.; Prahoveanu, A., 'Implementation of the Women on Boards Directive in Romania: A Multi-Stakeholder Perspective, Romanian Diversity Chamber of Commerce, 2025, Available at:
[https://www.rdcc.ro/service/gender-equality/], Accessed 12 January 2026. p. 1-2.

[28] *Ibid.*

[29] Bozhinov, V.; Koch, C.; Schank, T., *Has the Push for Equal Gender Representation Changed the Role of Women on German Supervisory Boards*?, IZA Discussion Papers, 2017, No. 11057, p. 3.

In Romania, despite the historically determined availability of qualified women in large numbers, according to Prahoveanu, gender biases are still the major impediment to the Directive implementation.

In this theoretical context, Directive (EU) 2022/2381 dated 23 November 2022 constitutes a significant milestone in EU legislation regarding gender equality. For the first time, the Union establishes mandatory procedural requirements stipulating that the underrepresented sex should occupy no less than 40 % of non-executive board member positions or 33 % of all board member positions in listed companies by 30 June 2026.[30] This legislation balances the principle of equal treatment guaranteed by Article 157(4) of the Treaty on the Functioning of the European Union with the autonomy of commercial companies.[31] Recitals state that voluntary initiatives have been ineffective and mandatory measures are needed to speed up change and at the same time guarantee meritocracy.[32]

As mentioned in the Introduction, the Directive was implemented into Croatian law through the Act on Amendments to the Companies Act.[33]

The Act became effective on 5 December 2024 (with the exception of Art. 272.t, which becomes applicable on 1 July 2026).[34]

A central provision of this Act is the newly added Articles 272.s – 272.z, which mirror the goals set by the Directive. Balanced representation is achieved when the underrepresented sex meets the ratio indicated in Attachment 7 (concerning supervisory boards or non-executive members of the management board) or Attachment 8 (overall composition of the management and supervisory boards).[35] The ratio is measured based on the number of elected/appointed members, rather than defined in articles of associations.[36]

If balance is not achieved, Art. 272.t prescribes that a clear, transparent and non-discriminatory procedure shall be adopted by the supervisory or management board. Should candidates prove equally qualified, priority must be given to the

30 Directive (EU) 2022/2381, Art. 5(1).

31 *Ibid.,* Recital 18.

32 *Ibid.,* Recitals 3–5.

33 Official Gazette of 27 November 2024 No. 136/2024) passed on 15 November 2024 and published on 27 November 2024.

34 Amendments to the Companies Act, Official Gazette No. 136/2024.

35 Companies Act., Art. 272.s(2) – Attachment 8 Official Gazette No. 111/1993, 34/1999, 121/1999, 52/2000, 118/2003, 107/2007, 146/2008, 137/2009, 111/2012, 125/2011, 68/2013, 110/2015, 40/2019, 34/2022, 114/2022, 18/2023, 130/2023, 136/2024 Art. 272.s(1).

36 *Ibid.*

less represented sex unless there are "particularly justified reasons" to choose otherwise.[37] A candidate believing to be on equal terms can initiate misdemeanour proceedings, leaving on the company the burden of proof.[38] Moreover, Article 272.u obliges the supervisory or management board to establish quantitative goals for the less represented sex in the management board (or executive directors) at least twice every year, along with concrete measures and a deadline of no longer than 18 months.[39]

Two improvements to the reporting requirements should be highlighted. First, as modified by Art. 272.p (2) – (3), companies must provide in a separate part of the annual report detailed information concerning gender composition, lack of balance and its reasons, measures taken or proposed, and quantitative targets related to executive directors.[40] Secondly, the same information should be submitted within 15 days after the general meeting to the Gender Equality Ombudsperson.[41] The Ombudsperson is defined as competent authority in charge of promoting, analysing, monitoring and supporting balance (Art. 272.v).[42] Failing to comply with these reporting requirements leads to fines prescribed by modified Arts. 630 and 631 and does not exceed 10,000 euros.[43]

Micro, small and medium-sized enterprises (less than 250 employees; turnover not more than €50 million and/or total balance-sheet amount not more than €43 million) are exempted and excluded from applicability (Art. 272.z).[44] The transitional rules of Art. 37 permit existing mandates to expire, but any subsequent mandates would have to restore the necessary balance. Lastly, the Ministry of Foreign and European Affairs is supposed to submit a report to the European Commission every two years starting from 29 December 2025 with data on the quantitative goals of companies (Art. 1(3) of the amending Act).[45]

Despite the legislative approach closely reflecting procedural requirements of the Directive, certain issues arise because of theoretical considerations.[46]

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37 *Ibid*., Art. 272.t(3).
38 *Ibid*., Art. 272.t(5).
39 *Ibid*., Art. 272.u.
40 *Ibid*., Art. 272.p(2).
41 *Ibid*., Art. 272.p(3).
42 *Ibid*., Art. 272.v(1).
43 *Ibid*., Art. 630(2).
44 *Ibid.,* Art. 272.z.
45 *Ibid.,* Art. 37(2).
46 *Ibid.,* Art. 1(3).

On the basis of the comparative experience, a soft-law approach might not be sufficient to counter entrenched biases within the corporate elites and to achieve the required critical mass within the specified period.[47] The practical impact of these drawbacks is discussed further.

3. CRITICAL ANALYSIS OF THE CROATIAN APPROACH TO THE TRANSPOSITION OF THE DIRECTIVE

While the Act on Amendments to the Companies Act[48] accurately reflects the procedural logic of the Directive (EU) 2022/2381, it still contains a number of opportunities for further improvement, which can ensure the full exploitation of the potential for gender balance on the boards of listed companies.

First of all, the choice of a "comply-or-explain" framework is consistent with the flexibility promoted in the Directive. On the other hand, the lack of any hard quotas and the limitation of the obligations to privately held companies mean that there is an opportunity to adopt voluntary additional measures. According to Vrdoljak Raguž et al, the average proportion of women in supervisory and management boards of the largest Croatian companies fell to 17.3% in 2017 compared to 20% or even slightly higher in 2015 and 2016.[49] The new legislation thus opens a window of opportunity for faster progress due to better defined goals and increased reporting.

One of the possible steps in this direction could be the ex-ante evaluation of the gender distribution in Croatian boards. While neither the Government's explanatory memorandum nor parliamentary discussions contained an evaluation of the current status quo, including sectoral variations and factors that could hinder achieving the target level, such an analysis could make a good baseline for monitoring progress.

The meta-analysis of Halliday, Paustian-Underdahl and Fainshmidt, involving 60,648 organisations in 36 countries, demonstrates that the gender equality context in a particular country substantially moderates the relationship between board-level characteristics and women on the board.[50]

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47 Novaković, *op. cit.,* note 8.; Handschumacher-Knors, *op. cit.*, note 19; Prahoveanu, *op. cit.*, note 27.

48 Official Gazette No. 136/2024.

49 Vrdoljak Raguž, I.; Krželj-Čolović, Z.; Milić Beran, I., '*Women on Corporate Boards in the Republic of Croatia in the Context of the European Union Directives and National Policies*', InterEULawEast, 2019, Vol. 6, No. 1, p. 317.

50 Halliday, C.S.; Paustian-Underdahl, S.C.; Fainshmidt, S., *Women on Boards of Directors: A Meta-Analytic Examination of the Roles of Organizational Leadership and National Context for Gender Equality*, Journal of Business and Psychology, 2021, 36, p. 174.

For instance, in countries with relatively low gender - equality norms, like Croatia, which has significantly fewer women on boards than the European average, additional institutional support may help address implicit biases and homophily among multi-board male directors.[51]

At the same time, Croatian legislators managed to preserve the right balance between the formal requirements of equality and the long established requirement of meritocratic selection. Article 272.t(3) states that if the two candidates are equally qualified, preference should be given to the underrepresented sex when, unless "particular justification" exists. In line with the wording of the Directive, the further elaboration of the conditions under which the second alternative applies could increase legal certainty in this case. Indeed, Lepetić highlights that clear guidelines would be especially useful when making decisions through the use of AI based tools, to avoid discrimination.[52]

Finally, the enforcement mechanisms could be strengthened to increase their effectiveness. Fines up to 10,000 euros are envisaged (Articles 630 and 631); however, since the main penalty is reputational, the mandate of the Gender Equality Ombudsperson to monitor the "comply-or-explain" provision may become even more effective in the future if equipped with relevant tools for enforcing the obligation. Comparative evidence shows that, apart from reputation, soft law can benefit from certain incentives. For instance, Wilson et al.'s analysis of the UK private companies' experience demonstrated that female board representation can be connected with lower insolvency risk. However, the effect materialised only when female participation reached the critical mass necessary for influencing board dynamics.[53]

Given that the transitional provisions of Article 37 allow keeping the status quo until the end of the term, additional measures can facilitate reaching the required threshold faster. [54]

In such circumstances, it is noteworthy that the overall experience of Europe in regulating the issue of financial market infrastructures proves that excessively demanding independence could result in a limited pool of diversity and expertise.

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51 *Ibid.,* p. 185.

52 Lepetić, J., *Gender Balance Among Directors in the Age of AI*, InterEULawEast, 2025, Vol. 12, No. 1, p. 173.

53 Wilson, N.; Wright, M.; Altanlar, A., *Private Equity, Debt and Company Risk*, SSRN Working Paper No. 1932107, 2011, pp. 4–5.

54 Ferran, E.; Hickman, E., *The Regulation of Corporate Governance in European Financial Market Infrastructures: A Critique*, European Company and Financial Law Review, 2024, Vol. 21, No, 1, p. 32.

Even though the scope of Article 272.s is limited to listed companies whose securities are traded on a regulated market (and SMEs are excluded per Article 272.z), this targeted application leaves room for complementary actions. The involvement of state-owned entities, despite being outside the scope of the obligations imposed on private companies, may create positive spillovers and contribute to their being role models, as noted by Novaković prior to transposition.[55]

Recent empirical findings in Poland in regard to family listed companies[56] further suggest that particular ownership structures have the potential to boost female involvement and may represent a useful example for voluntary application of the principles in Croatia.

As far as the immediate impact is concerned, the first practical benefit of the new legislation is already visible from the reports published by the HANFA Agency.

According to HANFA's Annual Report on Corporate Governance for 2022, the baseline position was stark: women occupied only 23% of supervisory board seats and 16% of management board seats, with 67% of listed companies reporting no women on their management boards at all.[57] The most recent data materially alter this picture. HANFA's 2024 Annual Report records that women's share of management board positions in listed companies reached 20.3% — a significant increase from the 2022 baseline — while their share of supervisory board seats stood at 23.7%, representing the third consecutive annual decline in that figure.[58] The divergence between the two trajectories is analytically significant: gains at management-board level suggest that the pre-legislative signalling effect of the Directive has begun to operate, whereas the supervisory-board contraction raises questions about whether "comply-or-explain" alone will sustain upward momentum once the June 2026 deadline passes.

An important institutional consequence of the transposition of Directive (EU) 2022/2381 was the expansion of the mandate of the Gender Equality Ombudsperson. The Ombudsperson's 2025 Annual Report indicates that fourteen cases handled during the reporting period concerned powers acquired under the 2024

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55 Novaković, *op. cit.,* note 7.

56 Majda-Kariozen, A. *Women in Family Companies: The Perspective of European Directive 2022/2381*, 2024, No. 207, p. 359.

57 The Croatian Financial Services Supervisory Agency (Hanfa) Annual report on corporate governance 2022, *op. cit.* note 7, p. 11 (section 2.1.) and p. 143.

58 Croatian Financial Services Supervisory Agency (HANFA), Annual Report on Corporate Governance 2024 (Zagreb, 2025), p. 11 (section 2.1.) (section 2.1.) and p. 145., Available at: [https://www.hanfa.hr/publications/annual-report-on-corporate-governance], Accessed 9 June 2026.

amendments to the Companies Act, implementing the Directive.[59] In practical terms, this involved the establishment of a system for monitoring gender representation in corporate governing bodies, supervising listed companies with regard to compliance with the statutory targets and providing support in the implementation of gender-balance measures.[60]

The significance of these developments lies not merely in the formal designation of the Ombudsperson as the competent authority under Article 272.v of the Companies Act, but in the creation of an entirely new supervisory function within the Croatian equality framework.[61] Listed companies are now required to provide detailed information on the gender composition of their supervisory and management bodies, including explanations where the prescribed objectives have not been achieved and the measures envisaged for their attainment.[62]

The initial phase of implementation has already revealed a gap between the legislative assumptions and the practical scope of application. While the legislative process proceeded on the basis that approximately twenty-four companies would be subject to the new regime, the Ombudsperson's subsequent analysis of data obtained from the Zagreb Stock Exchange, HANFA, the court register and company documentation identified forty-four companies potentially falling within its scope.[63] During 2025, information was received from only a limited number of undertakings, resulting in the publication of a list of eight companies satisfying at least one of the statutory gender-balance criteria.[64]

The Report itself therefore stresses that annual publication of compliant companies represents only the final stage of a considerably broader process involving data collection, analysis, communication with companies and the development of internal monitoring procedures.[65]

These findings are relevant when assessing the effectiveness of the Croatian model. They suggest that the success of the new framework will depend not only on the legal obligations imposed on companies but equally on the institutional capacity available for their monitoring and enforcement, a concern explicitly raised by the

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59 Gender Equality Ombudsperson, Annual Report 2025, p. 15, Available at: [https://www.prs.hr/application/uploads/Izvjes%CC%8Cc%CC%81e_PRS_2025.pdf], Accessed 9 June 2026.

60 *Ibid*., p. 15

61 *Ibid.,* p. 19.

62 *Ibid*., pp. 19–20.

63 *Ibid.*

64 *Ibid.,* p. 20.

65 *Ibid.*

Ombudsperson in the context of the resources required for the performance of these newly assigned tasks.[66]

While the Croatian transposition of Directive (EU) 2022/2381 complies with all mandatory provisions and has produced tangible improvements in the field of transparency, there is room for further enhancing its effects in a number of directions. Additional ex-ante evaluation, clearer guidelines for making decisions based on merit-plus, modest reinforcing of the enforcement mechanism and voluntary involvement of state-owned enterprises can help address remaining barriers, as revealed in social identity theory and facilitate reaching the critical-mass threshold. It is important to examine relevant comparative experiences in other Member States in more detail.

4. COMPARATIVE APPROACHES: INSIGHTS FROM SELECTED MEMBER STATES AND THE EU GENDER EQUALITY STRATEGY 2026-2030

The Croatian transposition of Directive (EU) 2022/2381 through the Act on Amendments to the Companies Act, has faithfully implemented, though sparingly, the European Union's model of "comply-or-explain." An analysis of comparative approaches from selected Member States – Germany, Romania, Poland and Slovenia – in conjunction with the strategic perspective of the newly adopted Gender Equality Strategy 2026-2030, sheds light on how Directive (EU) 2022/2381 may be put into practice more efficiently. These examples help identify both the strong points as well as additional steps that could be taken to speed up the process towards genuine gender balance on company boards whilst fully maintaining a meritocratic approach.[67]

Germany stands out as an illuminating case study in terms of the dual-board system (supervisory and management boards) functioning under the same Directive (EU) 2022/2381.

By invoking the opt-out mechanism under Article 12 of the Directive, Germany notified the European Commission in November 2024 that its existing legislative architecture already satisfied the Directive's requirements.[68] The operative

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66 *Ibid.,* pp. 20–22.

67 European Commission (2026) Gender Equality Strategy 2026-2030, COM(2026) 113 final, p. 12.

68 DLA Piper, 'Gender diversity at board level – EU directive in force', 2025, Available at: [https://www.dlapiper.com/en-de/insights/blogs/employment-blog-germany/2025/gender-diversity-on-the-board-eu-richtlinie-in-kraft\>], Accessed 17 April 2026; IBA, 'Gender balance quotas: The key to gender equality?', Available at: [https://www.ibanet.org/gender-balance-quotas-key-gender-equality\>], Accessed 17 April 2026.

provisions are embedded in the German Stock Corporation Act (Aktiengesetz, AktG[69]): § 96(2) AktG — introduced through the Act on Equal Participation of Women and Men in Leadership Positions (Führungspositionengesetz, FüPoG I, 2015[70]) — mandates a 30% gender quota for supervisory boards of listed, parity co-determined companies, while § 76(3a) AktG — added by the Second Leadership Positions Act (FüPoG II, entered into force on 8 August 2021) — requires management boards of more than three members to include at least one woman and one man.[71] An election in violation of these provisions is void, rendering the sanction directly effective rather than merely reputational.[72]

As recent research shows in the context of DAX 30 companies from 2010–2015, corporate elite influence on supervisory-board appointments operates heavily through homophily and social networks; yet the synergy between the nationally enacted quota (2015) and the EU Directive has contributed to a growing number of women appointed as supervisors.[73]

Handschumacher-Knors' multilevel analysis of executive-board compensation in German listed companies during 2016–2019 further shows that once a sufficient proportion of women is reached, the gender pay gap diminishes significantly.[74] Broader empirical research on DAX, MDAX and SDAX companies confirms, however, that formal compliance does not eliminate gender-based disparities at the executive level: women remain underrepresented in chairperson roles, driven primarily by shorter tenure and fewer CEO appointments.[75]

This example demonstrates how national legislation may work together with a European directive in the context of a "comply-or-explain" mechanism without undermining meritocracy — while equally illustrating the ceiling effect that

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69 Aktiengesetz [AktG]. (1965). Bundesgesetzblatt, I, 1089.

70 Gesetz für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst vom 24. April 2015 (BGBl. I S. 642).

71 CMS Law-Now, Women on Boards Directive: (Uniform) gender quotas for listed companies throughout Europe?, 2023, Available at: [https://cms-lawnow.com/en/ealerts/2023/01/women-on-boards-directive-uniform-gender-quotas-for-listed-companies-throughout-europe\>], Accessed 8 April 2026; Library of Congress, Germany: Second Law Establishing Gender Quotas, 2021, Available at: [https://www.loc.gov/item/global-legal-monitor/2021-09-12\>], Accessed 8 April 2026.

72 IBA, *op. cit.*, note 62 (election in violation is void per FüPoG I/II mechanism).

73 Huang *et al., op. cit.,* note 14, p. 348.; Odriozola, M. D.; Blanco-González, A.; Baraibar-Diez, E., *The link of ESG performance and board gender diversity in European firms,* Corporate Social Responsibility and Environmental Management, 2024, Vol. 31, No. 6, p. 5660.

74 Handschumacher-Knors, *op. cit.,* note 19, p. 328.

75 Handschumacher-Knors, *op. cit.*, note 19, pp. 326–328.

purely procedural mechanisms may produce once an initial critical mass has been achieved.

Romania's situation tells a different Central/Eastern European story. The country had a December 28, 2024 deadline to implement the EU directive, but as of this writing, it still hasn't passed the necessary legislation—a gap the European Commission acknowledged by launching infringement proceedings against it.[76]

The problem isn't a complete lack of framework. Romania does have Law No. 202/2002 on Equal Opportunities for Women and Men (Legea nr. 202/2002 privind egalitatea de șanse între femei și bărbați), which offers broad anti-discrimination protections.[77] But it doesn't set specific targets for how many women should sit on corporate boards.

Instead of introducing hard quotas, Romania has taken a softer route—a choice Prahoveanu's 2025 stakeholder research suggests reflects deeper cultural hesitation. Post-communist skepticism about state-imposed gender parity runs deep in Romanian business circles, and legislators have had to navigate that resistance carefully.[78] Their approach combines tax breaks for companies hitting the 40%/33% targets with diversity training programs and support from the National Agency for Gender Equality (Agenția Națională pentru Egalitatea de Șanse între Femei și Bărbați, ANES).[79]

This strategy has actually worked—corporate boards have become more receptive to the idea. But there's a catch: voluntary measures and incentives can only take you so far. The Directive itself demands real legal teeth. Romania's experience reveals a risk that Croatia faces too: if you rely on reputation and goodwill instead of binding rules, change might not happen fast enough to meet the June 2026 deadline. Romania's experience serves as an illustrative example of another, Central/Eastern European setting. According to Prahoveanu's 2025 stakeholder study of the Directive's implementation in Romania, the country's post-communist environment can be suspicious about quota requirements, but the Romanian legislator has supplemented the "comply-or-explain" requirement by introducing soft-law measures such as tax advantages for firms meeting the 40%/33% targets and diversity training for company board members. All these measures, together with

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76 SEG, *Ustawa transponująca dyrektywę Women on Boards*', 2025, Available at: [https://seg.org.pl/regulacja/ustawa-transponujaca-dyrektywe-women-on-boards\], Accessed 27 April 2026.

77 World Bank, Women, Business and the Law 2024 (WBL 2.0) – Romania, p. 2 ("No applicable provisions could be located" regarding gender quota for corporate boards).

78 *Ibid.*

79 Prahoveanu, *op. cit.,* note 27, pp. 2–3.

active participation of the National Agency for Gender Equality, helped reduce resistance to implementation of the Directive.

Romania's experience shows how useful non-legislative measures like training, incentives and inter-institutional collaboration may be in implementing Directive (EU) 2022/2381.

Poland's situation raises analogous concerns, albeit at a legislative rather than cultural level.[80] The Ministry of Justice published a draft implementing act (project UC63) in September 2024, providing for amendments to two statutes: the Act on Public Offerings and the Conditions for Introducing Financial Instruments into Organised Trading and on Public Companies (Ustawa o ofercie publicznej i warunkach wprowadzania instrumentów finansowych do zorganizowanego systemu obrotu oraz o spółkach publicznych, Dz.U. 2024, poz. 620) and the Act on the Implementation of Certain EU Provisions on Equal Treatment (Ustawa o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania, Dz.U. 2023, poz. 970).[81] The key provision — Article 90gg of the draft — has been criticised by the Association of Stock Exchange Issuers (Stowarzyszenie Emitentów Giełdowych, SEG) for going beyond the Directive's minimum requirements.[82] As of mid-2025, however, the legislation had not been enacted; the Commission issued formal charges against Poland for failure to transpose within the statutory deadline.[83] Notwithstanding this legislative gap, Poland's corporate landscape offers substantive lessons: research on Warsaw Stock Exchange-listed family companies confirms that particular ownership structures correlate with significantly higher female representation at management-board level, suggesting that ownership-driven governance cultures can produce outcomes that legislation alone may struggle to replicate.[84]

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80 Bukalska, E.; Sosnowski, T.; Wawryszuk-Misztal, A., *Women on Management Board and Firm Performance: Evidence from The Visegrad Group Countries,* Entrepreneurial Business and Economics Review, 2024, 12, pp. 43-59, [10.15678/EBER.2024.120203] p. 43.; Sedláková, S.; Hinke, J.; Dvořáková, L., *Gender Diversity on Management Board of Listed Companies in the V4 in the Context of the EU Directive*, Management, 2025, pp. 84-106, [10.58691/man/210918], p. 86; Majda-Kariozen, *op. cit.* note 56. p. 358.

81 Ustawa o ofercie publicznej i warunkach wprowadzania instrumentów finansowych do zorganizowanego systemu obrotu oraz o spółkach publicznych, Dziennik Ustaw, 2005 nr 184 poz. 1539, 2006 nr 157 poz. 1119, 2009 nr 13 poz. 73, 2010 nr 167 poz. 1129, 2013 poz. 1321, 2016 poz. 61, 2018 poz. 512, 2019 poz. 2217, 2021 poz. 1983, 2023 poz. 825, 2024 poz. 620.

82 *Ibid*. (kritika čl. 90gg).

83 Olesiński i Wspólnicy, ‚Dyrektywa Women on Boards w Polsce' (september 2025), Available at: [https://olesinski.com/dyrektywa-women-on-boards-w-polsce/\>], Accessed 19 May 2026.

84 Bukalska, Sosnowski, Wawryszuk-Misztal, *op. cit.,* note 80, p. 43.

Slovenia, by contrast, completed timely transposition through the Act Amending the Companies Act[85]. ZGD-1M simultaneously transposed Directives 2021/2101/EU, 2022/2464/EU and 2022/2381/EU, situating gender balance reform within a broader corporate governance overhaul.[86] Substantively, the amendment requires listed companies — and, notably, companies with majority state or municipal ownership, extending beyond the Directive's minimum scope — to achieve at least 40% representation of the underrepresented sex among non-executive directors and at least 33% across all directors by 30 June 2026.[87]

Complementing the statutory framework, the Association of Directors of Slovenia (Združenje nadzornikov Slovenije) launched a voluntary gender-diversity initiative targeting the same thresholds across both listed and state-owned enterprises. As of 31 December 2025, progress tracking demonstrates that 56% of participating companies (27 of 48 entities) have already achieved both targets, with supervisory boards averaging 31.6% female representation and combined management-and-supervisory bodies averaging representation approaching the 33% benchmark.[88]

The voluntary initiative has proven instrumental in generating momentum ahead of the statutory deadline, with four companies advancing their gender-balance metrics between September and December 2025 alone.[89]

The inclusion of state-owned enterprises reflects a deliberate policy choice to leverage public-sector leadership as a catalytic mechanism - an approach strongly endorsed in existing Croatian scholarship and, as noted in section 3 above, equally applicable to Croatia.[90]

Against this backdrop, the Gender Equality Strategy 2026–2030 positions Directive (EU) 2022/2381 at the core of its Roadmap Principle 5, committing the Commission to publishing a report on equally effective national measures by 2026 and to a comprehensive assessment of the Directive's efficiency by 2029.[91]

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85 (Zakon o spremembah in dopolnitvah Zakona o gospodarskih družbah, ZGD-1M), adopted by the National Assembly (Državni zbor) on 22 November 2024 and published in the Official Gazette of the Republic of Slovenia (Uradni list RS, No. 102/2024) on 3 December 2024, entering into force on 18 December 2024.

86 Uradni list, ZGD-1M – nove obveznosti za podjetja, Available at: [https://www.uradni-list.si/novice/pogled/zgd-1m---nove-obveznosti-za-podjetja-glede-porocanja-in-spolne-uravnotezenosti\>], Accessed 10 May 2026.

87 ZGD-1M, Article 288.a and Article 288.b.

88 Združenje nadzornikov Slovenije & Deloitte, 2026. *Poročilo o napredku za doseganje ciljne spolne raznolikosti*, Ljubljana, pp. 4–6.

89 *Ibid*., p. 5 (detailing advances by Cinkarna Celje, Elektro Celje, SID Banka Ljubljana, and Telekom Slovenije in Q4 2025).

90 Novaković, *op. cit*., note OECD (2024), *op. cit.*, note. 15.

91 European Commission (2026), *op. cit.*, note 49, p. 12.

The Strategy's additional focus areas — algorithmic bias in recruitment, targeted action plans for women in research and innovation, and gender mainstreaming of all EU funding instruments — signal that legislative compliance is increasingly understood as the floor, not the ceiling, of expected national action.[92]

Recent legal analyses emphasize the cautious application of the equal treatment principle and Member States' hesitant implementation of Directive 2022/2381, illustrating a shift from hard rules to incentive-driven governance. This reinforces the need for voluntary national measures. [93]

Taken together, these four national experiences highlight several complementary measures capable of strengthening Croatia's transposition without departing from the "comply-or-explain" model can be identified: (a) introduction of incentives exceeding the target requirements, such as simplified public procurement scoring or modest tax relief, as proven effective in the German and Romanian contexts; (b) issuance of administrative guidance on the interpretation of the "particularly justified reasons" clause in Article 272.t(3), drawing on German and Slovenian practice; (c) establishment of regular joint reporting by HANFA and the Gender Equality Ombudsperson, incorporating cross-country benchmarking data; (d) development of board-diversity training aligned with the Strategy's algorithmic risk-mitigation objectives; and (e) voluntary extension of ZGD-1M-style obligations to large state-owned enterprises, as advocated in recent literature and explicitly endorsed by the Gender Equality Strategy 2026–2030.[94]

5. CONCLUSIONS REMARKS AND RECOMMENDATIONS

The Croatian transposition of Directive (EU) 2022/2381 through the Act on Amendments to the Companies Act created a robust "comply-or-explain" basis that considers the Directive's flexibility and meritocratic nature. The comparative analysis of approaches followed by selected Member States along with the forward-thinking Gender Equality Strategy 2026-2030 shows that the adoption of supplementary measures can further advance the Directive in practice. The publication of Eurostat's 2025 Monitoring Report on SDG 5 (Gender Equality) provides an important reference point for this purpose.

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92 *Ibid.*

93 Matsa, D. A.; Miller. A. R., *Did Board Gender Quotas Break the Glass Ceiling in Europe?,* AEA Papers and Proceedings, 2025, pp. 529–35, p. 115, [DOI: 10.1257/pandp.20251077] p. 529; Moreau, F., *The principle of equal treatment between women and men in European Union law: Cautious Expansion*, Member State Hesitation and a Shift in Method – The Case of Directive 2022/2381 "Women on Boards", Pensar – Revista de Ciências Jurídicas, 2025, 30, e15968. p. 7.

94 European Commission (2026), *op. cit.*, note 49, p. 13.

According to the 2025 Eurostat SDG 5 report, the EU has shown strong performance in gender equality throughout the past five years. The gender employment gap has been shrinking, the gender pay gap has been reduced, and female representation in leading positions has improved. Perhaps of greatest interest for the present study is the fact that in 2024 women held 33.8 % of board positions in the largest listed firms, indicating that the EU is heading in the right direction in order to meet the Directive's goal of reaching at least 40 % of non-executive or 33 % of all directors by 30 June 2026.

On the contrary, Eurostat data indicate that the gender employment gap has been closing too slowly to achieve the 2030 target of halving it compared to the 2019 value. Moreover, women are still much more likely than men to fall out of the labour market due to caring responsibilities. These results suggest that legislative acts alone, although important, should be combined with other supportive policies in order to make a breakthrough in gender equality.

These findings, in the context of Croatian gender equality policy, confirm both the positive developments noted before and outline the aspects that Croatia needs to improve upon. First of all, the introduction of mandatory systematic Gender Equality Ombudsperson monitoring as stated by the new Article 272.v gives promising signs for Croatia, as seen in the recent 2024 report issued by HANFA. This assessment is corroborated by two sources: HANFA's Annual Report on Corporate Governance 2024, which records a notable increase in women's management-board representation to 21%, and the 2025 Annual Report of the Gender Equality Ombudsperson, which confirms the institution's active engagement with the new monitoring mandate from the date the legislation entered into force.

Second, Croatia's share of women on corporate boards lags behind the European average of 33.8%, whereas the lack of either a quota mechanism or any incentive is in line with slow voluntary achievements mentioned in the recital 7 of the Directive.

Lastly, according to the Eurostat figures, Member States combining the Directive's framework with additional national measures – such as Germany's binding quota regime – achieve faster increases in women's board representation than those relying solely on "comply-or-explain".

Still, several recommendations follow to enhance Croatia's position and help it become a proactive participant of European Union's SDG 5 and Gender Equality Strategy 2026-2030 initiatives:

Develop voluntary "exceed-the-target" incentives (e.g. simplified public-procurement scoring or modest tax relief for companies exceeding the 40 %/33 % thresholds), based on successful Romanian and German practice.

Issue clear administrative guidelines regarding the interpretation of Article 272.t(3) ("particular justification") and reducing uncertainty and contributing to merit plus decision making.

Introduce stronger joint annual reporting by HANFA and the Gender Equality Ombudsperson, which will include peer benchmarking.

Start training programmes targeting board diversity and AI audit to ensure alignment with the 2026-2030 strategy's algorithmic risks mitigation focus.

Consider a voluntary introduction of the principle to large state-owned enterprises as advocated in recent literature and emphasised by the Gender Equality Strategy 2026-2030.

These steps will not only ensure full compliance with the Directive, but will also convert the Croatian gender equality policy into a dynamic part of Eeuropean agenda. Using the Eurostat's SDG 5 framework and the Gender Equality Strategy 2026-2030's policy menu, Croatia can manage to fully contribute to the gender equality goal on European level to by 2030 and maintain a proper balance with the spirit of Directive (EU) 2022/2381.

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Chapter 5

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Review article

EXIT TAXATION AS A MEASURE AGAINST TAX AVOIDANCE IN THE EUROPEAN UNION*

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ABSTRACT

Tax fraud and evasion undermine the functioning of democratic societies, distort economic decision-making, and erode the trust between citizens and governments. Tackling this issue is critical to safeguarding public trust, ensuring the functioning of the European Union's single market, and promoting economic stability. Tax fraud limits the capacity of European Union states to raise the funds they need, implement economic and social policies, and sustain public services. The repercussions include potential cuts in public services and a slower economy. Tax

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fraud has several main consequences: a) economic consequences, b) Inequity and unfairness, c) trust erosion for the law and public institutions, d) criminal activity, and e) global implications. Changes in the registered office of companies are a common occurrence in a globalised market, and such changes are significant not only from the perspective of company law but also from a tax law standpoint. Furthermore, an exit tax is a means of preventing artificial relocations aimed at obtaining tax benefits in other tax systems with a lower tax burden. Such practices raise many questions related to the principle of fairness, freedom of establishment, and the distribution of states' taxing rights. Therefore, the European Union adopted the Council Directive (EU) laying down rules against tax avoidance practices that directly affect the functioning of the internal market, which regulates the rules related to exit taxation. This paper analyses the rules related to exit taxation. In the case of exit taxation, it is proposed that where a taxpayer moves assets or its tax residence out of the tax jurisdiction of a state, that state taxes the economic value of any capital gain created in its territory even though that gain has not yet been realised at the time of the exit. It is therefore necessary to specify cases in which taxpayers are subject to exit tax rules and taxed on unrealised capital gains which have been built into their transferred assets. In order to compute the amounts, it is critical to fix a market value for the transferred assets at the time of exit of the assets based on the arm's length principle. It is also necessary to allow the receiving state to dispute the value of the transferred assets established by the exit state when it does not reflect such a market value. In those situations, taxpayers should have the right to either immediately pay the amount of exit tax assessed or defer payment of the amount of tax by paying it in instalments over a certain number of years, possibly together with interest and a guarantee.

Keywords: *European Union (EU), Exit taxation, Exit tax, Tax avoidance, Tax jurisdiction*

1. INTRODUCTION

Throughout history, the process of globalisation has had a significant impact on the legal system, and as a result, the legal norms that had been in force up to that point were not fully applicable, as the market had become global and technology-driven. An outdated legal system and legal norms have facilitated the transfer of profits. It is precisely because of the existence of different corporate income tax systems in various states that companies engage in profit shifting.[1] Changes in the registered office of companies are a common occurrence in a globalised market, and such changes are significant not only from the perspective of company law but also from a tax law standpoint.[2] A company typically initiates a relocation to the territory of another jurisdiction due to its business needs and the optimal legal framework to which it will be subject. Furthermore, an exit tax is a means of preventing artificial relocations aimed at obtaining tax benefits in other tax systems with a lower tax burden.[3] Exit taxes are, in essence, a form of capital gains tax. In

1 Herceg, M., *Izmjene u oporezivanju dobiti*, Financije, pravo i porezi, Vol. 30, No. 2, 2020, p. 27.

2 Klemenčić, I., *Porez na izlazak trgovačkih društava iz zemlje*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 66, No. 4, 2016, p. 527.

3 *Ibid*., p. 528.

other words, exit taxes have existed for decades, and, according to Appleby, their existence is justified because the jurisdiction that provides the benefits enabling the taxpayer to generate income should also have the right to tax that income. This principle applies regardless of whether the jurisdiction provides the taxpayer with the opportunity to generate income originating in that jurisdiction, or, if there is no identifiable source from which the income originates, it may tax the taxpayer on the basis that the taxpayer is resident in that jurisdiction.[4] Through their tax legislation (by implementing the Council Directive (EU) laying down rules against tax avoidance practices that directly affect the functioning of the internal market (hereinafter: ATAD),[5] the Member States of the European Union (hereinafter: EU), are seeking to also cover capital gains that have merely been accumulated but not realised within their borders, i.e., to prevent their transfer to other jurisdictions without prior taxation. In other words, the ATAD sets out a series of legally binding measures against aggressive tax planning. The aim is, in particular, to address situations where groups of companies exploit differences between national tax systems in order to reduce their overall tax liability. To this end, ATAD sets out legal provisions against aggressive tax planning, which include rules on exit taxation. The question arises as to how the rules on exit taxation affect the market value of assets and the risk of double taxation? Therefore, the remainder of this paper will analyse the rules on exit taxation, and the conclusion (de lege ferenda) will propose rules concerning the market value of assets upon exit and the potential occurrence of double taxation.

2. EXIT TAXATION IN GENERAL

A tax jurisdiction that provides benefits to a taxpayer that enable him to earn income should, as stated above, tax the earned income. Most tax systems adopt a realization requirement whereby the jurisdiction only charges tax when the income is earned. This means that if the value of an asset owned by a taxpayer increases, the state charges capital gains tax on the sale or other disposition of that asset. The most important reason that justifies that tax jurisdictions charge tax on increased value only at the moment of realization (sale) of assets is the issue of liquidity.[6] Also, the reason why states tax only realized capital gains lies in the principle of fairness in taxation. The generally accepted criterion for the fair distribution of the tax burden

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4 Appleby, A., *No Migration Without Taxation: State Exit Taxes*, Harvard Journal on Legislation, Vol. 60, 55, Stetson University College of Law Research Paper, No. 12, 2022, p. 61.

5 Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [2016] OJ L 193/1 and (EU) 2017/952 of 29 May 2017 OJ L 144/1 (ATAD).

6 Appleby, *op. cit.*, note 4, p. 61.

is the economic strength of the taxpayer, or his ability to pay.[7] In the principles of fairness of the tax system, we distinguish between vertical fairness, which states that the tax burden should be distributed fairly among people with different abilities to pay, and horizontal fairness, which states that people in the same position should be treated equally.[8] Therefore, the authors believe that the taxpayer's economic power increases significantly only when the asset is sold at a profit.

In the absence of taxpayer mobility, the realization of capital gains is a matter of time, which theoretically means that the tax jurisdiction will eventually tax the income. However, the problem arises with the mobility of taxpayers in the case where a tax jurisdiction exclusively taxes realized capital gains; all the income that arises within that jurisdiction could move to another jurisdiction together with the taxpayer before the capital gain realization event occurs. The tax jurisdiction that provided the income-facilitating benefits would lose the ability to tax that taxpayer. The tax revenues generated would be accrued to another tax jurisdiction that did not deserve them, or, as is more common in practice, would be eliminated through simple tax planning strategies. Therefore, according to the benefit theory, exit taxation at the national level is justified.[9] The theory of benefit as a sub-type of the theory of price justifies taxation because the state, by protecting external borders and regulating internal order (judiciary, police, state administration), enables and ensures that taxpayers can enjoy their property and the income they earn without hindrance. Taxpayers who have greater property, or who have earned a higher income, should pay a higher amount of tax because greater property and income enable them to enjoy greater enjoyment. The theory of price, or its variants, the theory of insurance, and the theory of enjoyment start from the market principle of exchange, where on one side there is an action and on the other, a counteraction.[10] Therefore, proponents of the benefit theory argue that wealth creation depends on the government's protection of property and social order, its provision and maintenance of economic infrastructure, and so on, and further that the higher one's income, the more one benefits from these services.[11] Therefore, when a taxpayer in a certain jurisdiction earns income during a tax period, he must pay tax in that jurisdiction on the income earned.[12] In the case of exit

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7 Gadžo, S., *Prilog istraživanju sadržaja načela pravednosti kao kriterija evaluacije normi međunarodnog poreznog prava*, Pravni vjesnik, Vol. 31, No. 2, 2015, p. 135.

8 Rosen, H. S.; Gayer, T., *Javne financije*, Institut za javne financije, Zagreb, 2010, pp. 401 – 412.

9 Appleby, *op. cit.*, note 4, pp. 61 – 62.

10 Jelčić, B. *et al.*, *Financijsko pravo i financijska znanost*, Narodne novine, Zagreb, 2008, p. 97.

11 Elkins, D., *A Scalar Conception of Tax Residence for Individuals*, Virginia Tax Review, Vol. 41, No. 2, 2020, p. 157.

12 Dabija, V., *Exit Taxation in the European Union Is there really a problem?*, HARN60 Master Thesis, Master's Programme in European and International Tax Law, Lund University School of Economics and Management Department of Business Law, Lund, 2015, p. 7.

taxation, the situation is different because the income is not realized. Therefore, exit taxation is an expression of the tax sovereignty of the state by taxing unrealized capital gains, hidden reserves, and increases in the value of the assets of an individual or company that leave its jurisdiction. Although this is also a possible situation, the tax base is not determined by determining the income realized, but most often represents the untaxed increase in the value of the assets belonging to the company or individual. Usually, the increase in value or capital gains is not taxed until they are realized (sold).[13] Therefore, the exit tax is a tax on unrealized capital gains, and the taxable event occurs when a person moves to another state. Therefore, the tax liability arises due to the decision of a company or individual to leave the tax jurisdiction of a particular state, because if they had not changed residency, only the capital gain realized on the disposal of the property would be taxed. The tax base for the exit tax is the increase in the value of the property since its acquisition, while the tax rate applied to such unrealized capital gains is usually the same as the tax rate applied to realized capital gains.[14] Taking into account the fact that the tax base must correspond to the increase in the value of the assets at the time the person left the jurisdiction of the state, does not mean that exit taxes must always be applied as direct exit taxes. It is also possible to have arrears of taxes, in such a way that the exit taxation is postponed until the moment the assets are effectively sold, but at the latest until the tax liability is determined before the individual leaves the state. If the amount due has already been determined, considering unrealized capital gains at the time of emigration, but the collection is postponed, this tax also falls within the scope of the exit tax.[15]

The concept of exit taxation is also based on the principle of territoriality. States seek to protect their tax sovereignty by considering the moment of exit of a taxpayer or property as a taxable event when the obligation to calculate exit tax arises. Exit taxation aims to preserve the tax base; therefore, at the moment of exit, the amount of income over which the state loses the power to tax, which was generated during the period in which the taxpayer was resident, is assessed and taxed. The tax administration generally calculates this tax as the "difference between the market value of the property and its book value". Although some scientists such as de Man and Albin believe that for a tax to qualify as an exit tax, "the tax base must represent the value of unrealized capital gains at the moment when a person leaves the state of exit", in Dabija's opinion, other situations are also possible and he divides exit taxes into 4

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13 *Ibid*., Zernova, D., *Exit Taxes on Companies in the Context of the EU Internal Market*, Intertax, Vol. 39, No. 10, 2011, p. 472.

14 De Man, F.; Albin, T.*, Contradicting Views of Exit Taxation under OECD MC and TFEU: Are Exit Taxes Still Allowed in Europe*, Intertax, Vol. 39, No. 12, 2011, p. 615.

15 *Ibid*., p. 616.

categories, namely: Immediate exit taxes on unrealized gains - which represent the taxation of gains that have not yet been realized, but the change of jurisdiction still triggers a taxable event. Immediate exit taxes on realized gains - in this situation, the profit is realized before the exit date, but taxation is deferred until a later time, and emigration triggers the tax. Deferred exit taxes on realized and unrealized gains - the only difference between these two categories and the previous ones is that the extended tax liability is determined at the time of exit, and tax collection is postponed until the sale of the property or until some other time.[16]

As mentioned above, the exit tax is triggered when an individual or company changes its place of residence. For individuals, residency is fairly straightforward to determine. However, in the case of companies, it depends on the type of connecting factors that the state uses to determine residency, whether it is the place of incorporation and registration (incorporation theory) or the actual management of the company (the real seat theory).[17]

States choose in their legislation whether to base the regulations on the residency of companies on the principle of the actual seat or on the principle of the state of incorporation, while in both cases protecting their tax bases, and are not inclined to approve the relocation of a company without first paying capital gains tax on the company's assets realized during residency in that state. In addition, the exit tax is a means of preventing artificial relocations aimed at obtaining tax benefits in other tax systems with a lower tax burden. Such practices raise many questions related to the principle of fairness, freedom of establishment, and the distribution of states' taxing rights. Taxing unrealized gains at the time of relocation to another state potentially puts companies in an unequal position compared to other companies that change their registered office within the same state, and causes a particularly heavy tax burden due to the collection of taxes at the time when capital gains are not realized.[18] Therefore, the purpose of exit taxation is to ensure that a taxpayer who transfers assets or tax residence from one state to another can be taxed by the state from which the assets or tax residence are transferred on the economic value of capital gains arising in its territory, even if such gains were not realized at the time of exit.[19] Similarly, exit taxation is a measure that prevents tax base erosion in the state from which a company emigrates or relocates its assets.[20]

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16 Dabija, *op. cit.*, note 12, pp. 7 – 8.

17 *Ibid.*, p. 8.

18 Klemenčić, *op. cit.*, note 2, pp. 527 – 528.

19 Dojčić, I. *et al.*, *Porez na dobit u Republici Hrvatskoj*, TEB, Zagreb, 2023, p. 477.

20 Žunić Kovačević, N.; Jurić, D.; Gadžo, S., *Cross-border transfer of company's seat and exit taxation in the European Union* in: Przygoda, M.; Mikić, M.; Kurečić, P. (eds.), Economic and Social Development

2.1. Taxation of Capital Gains

In this section, it is necessary to briefly analyze the taxation of capital gains to better understand how exit taxation is applied.

Capital gain is the investor's earnings from increasing the value of his investments. Capital gains occur when market prices of investments exceed the costs of their acquisition. If the investment is sold at a price higher than the one for which it was purchased, it is referred to as a realized capital gain, while in the case of continuing to hold the investment, it is unrealized.[21] As capital gains are one of the most important drivers of investment, one of the striking findings of empirical research in finance has been that individual investors tend to sell rising stocks too early and hold declining stocks too long. However, tax considerations can significantly influence investor behavior and may change the above findings.[22] The different approach to the taxation of capital gains stems from the fact that the taxation of capital gains is associated with several problems of both practical and theoretical nature. One of them certainly lies in the fact that capital gains are usually not taxed when they actually arise, but only when they are realized, i.e., when assets are sold. Since capital gains are only taxed when they are realized, it is not in the owners' interest to sell the assets, and the portfolio structure is retained. Such retention or non-sale of assets would be avoided if unrealized capital gains were taxed, but this procedure is administratively complex and requires regular valuation of the entire asset.[23] Furthermore, a distinction should be made between long-term capital gains and short-term capital gains, i.e., gains on assets held for the long term and gains on assets held for a shorter period. Long-term capital gains are taxed at lower rates than short-term capital gains, because short-term capital gains are considered to be realized to achieve speculative profits.[24]

There are reasons for and against the taxation of capital gains. According to Auerbach, one of the reasons for the taxation of capital gains is the "lock-in" effect, i.e., the investor's decision to keep assets whose value increases to postpone the taxation of already realized profits. In this situation, investors accept a lower pre-tax rate of return than they would for new investments without such realized profits, and the

(Book of Proceedings), 17th International Scientific Conference on Economic and Social Development "Managerial Issues in Modern Business", Warsaw, 2016, p. 178.

21 Orsag, S., *Oporezivanje kapitalnih dobitaka*, Ekonomija/Economics, Vol. 18, No. 1, 2011, p. 82.

22 Globan, T.; Škrinjarić, T., *Penny wise and pound foolish: capital gains tax and trading volume on the Zagreb Stock Exchange*, Public Sector Economics, Vol. 44, No. 3, 2020, p. 300.

23 Žunić Kovačević, N., *Trebaju li nam promjene u nekim aspektima oporezivanja (nepokretne) imovine*, Zbornik Pravnog Fakulteta Sveučilišta u Rijeci, Vol. 28, No. 1, 2007, pp. 13 – 14.

24 *Ibid*., p. 14.

result is a distorted capital allocation and inefficient portfolio selection.[25] Also, the reason for taxing capital gains is that the value of the property of the person who made the gain increases, and therefore, this income should be taxed for reasons of horizontal and vertical fairness and to prevent legal tax evasion. The arguments against capital gains taxation are that it is very difficult and impossible to tax capital gains that exist because the value of an asset has increased, but that value has not been realized through disposal. Therefore, capital gains tax can result in artificial immobilization of capital, which can lead to economic inefficiency. Furthermore, the difficulty lies in linking the capital gains tax to real, rather than inflationary, gains. If inflationary gains are taxed, this will violate horizontal equity, which requires that equals should bear the same tax burden, and in that case, the inflationary (apparent) capital gains tax is paid only by those who have made that apparent gain. Also, capital gains may be very high in one period, but not in another, and capital losses may even be realized when selling a similar asset in another year. In this case, it is necessary to allocate the profit and loss, and the method of such allocation is different in different states and therefore incomparable between them, which can cause problems if taxpayers operate in more than one state, e.g., they realize a capital gain in one and a loss in another.[26] Tax aspects are important when making the decision to relocate. It is usual to tax capital gains when they are realized in domestic transactions, but in the case of cross-border situations, states are looking for ways to reduce the risk of losing tax revenues to which they would have been entitled had the relocation not occurred. Then there is the application of tax on leaving the state, tax on unrealized capital gains, which is usually applied before leaving the state of previous residence. The main reasons for such taxation are the prevention of relocation caused by the legal avoidance of tax liability and the capture of profits and capital gains that states consider they have the right to tax because they were acquired during the taxpayer's residency in that state.[27] An exit tax refers to a tax liability that arises when a taxpayer moves or transfers assets out of a state or out of the reach of that state's tax authorities. While the term can refer to a variety of taxes, it most commonly refers to the income of individuals and corporations. This tax arose due to the increasing globalization of the economy. The practical and legal possibilities for moving individuals, companies, and assets out of the reach of national tax rules have increased significantly, as has the temptation to do so. From a national tax perspective, such behavior is particularly worrisome in terms of hidden tax debt arising from acceler-

[25] Auerbach, A. J., *Retrospective Capital Gains Taxation*, American Economic Review, Vol. 81, No. 1, 1991, p. 167.

[26] Arbutina, H., *Porez na kapitalne dobitke fizičkih osoba – osnove teorijskog koncepta i normativna rješenja u Hrvatskoj*, in: Lončarić Horvat, O. (ed.), Zbornik radova u povodu 80. godišnjice života prof. emeritusa Božidara Jelčića, Visoka poslovna škola Libertas, Zagreb, 2010, pp. 47 – 49.

[27] Klemenčić, *op. cit.*, note 2, p. 531.

ated tax depreciation and other tax provisions that reflect earned but not yet taxed income. However, increased asset values reflecting as-yet-unrealized capital gains are also a concern, as deductible expenses that result in valuable assets. Protection of the national tax base is an important basis for exit taxes. This can have negative effects on states that thus fail to collect income tax on unrealized capital gains. However, the exit tax is an obstacle to the functioning of the international market. Therefore, the reasons for introducing a tax on leaving the state range from the application of the principle of territoriality to opposing tax avoidance.[28]

Therefore, in the case of exit taxation of companies, unrealized capital gains are taxed when the registered office, operations, or assets of the company are moved.

3. EXIT TAXATION AND THE OECD MODEL

In this chapter, we will briefly analyze exit taxation and double taxation avoidance treaties concluded under the OECD Model, as disputes over the right to tax may arise if these treaties do not specify which of the contracting states has the right to tax unrealized capital gains when transferring property, residency, or business from one state to another.

Exit taxes levied under double taxation treaties based on the OECD Model do not cause conflict between contracting states, as they are levied by the emigrating state before the immigration state acquires tax jurisdiction over the moving person. However, the fact that taxation occurs before the transfer of residence does not mean that a double taxation agreement may not apply to the case at hand. If a taxpayer leaves one Contracting State for another Contracting State, the relevant double taxation agreement between those two States remains applicable to that taxpayer because, normally, there is no point in time when the taxpayer is not a resident of either State. Exit taxes fall within the material scope of a double taxation treaty because they apply to taxes on income and on capital imposed on behalf of a contracting state. Since the so-called exit taxes fall within the personal and material scope of the double taxation treaty, the key questions are whether the charging of the exit tax is prohibited by the relevant double taxation treaty and how to qualify such income under the relevant double taxation treaty.[29] As stated, the tax base for the exit tax is the increase in the value of the property, i.e., the unrealized capital gains that have occurred since the acquisition of the property. Because tax acts as a tax on unrealized capital gains, exit taxes are often linked to capital gains taxes. Therefore, Article 13 of the OECD Model should be analyzed

[28] Zimmer, F., *Exit Taxes in Norway*, World Tax Journal, Vol. 1, No. 1, 2009, p. 115.

[29] *Ibid*., p. 616.

to assess whether exit taxes are limited by a double taxation treaty. It is important to note that double taxation treaties do not grant taxing rights to a state but only allocate them between states. A provision that allows the taxation of a particular income must be present in the domestic system of the state. Therefore, a double taxation treaty only limits the taxing rights of states and never expands them.[30] Article 13(5), which is appropriate for application to exit tax, states: Gains from the alienation of any property, other than that referred to in paragraphs 1, 2, 3, and 4, shall be taxable only in the Contracting State of which the alienator is a resident.[31] The words "alienation of any property" would seem to suggest that it refers only to realized capital gains. Meanwhile, the taxable event for exit taxes is generally a presumed disposal of the property that occurs at the time of emigration and is therefore a fiction rather than an actual disposal. This legal position has also been upheld in exit taxation cases involving significant shareholdings by the Dutch Supreme Court. The Dutch Income Tax Act interprets the notion of disposal as the time when the taxpayer changes residence and considers the time of realization to be the time before the taxpayer loses residence.[32] It is important to note that this provision applies in situations where there is a real gain from the disposal of the property. The material criterion in this case is the alienation of the property as such. Therefore, this material criterion is different from the one that represents the exit tax, that is, the act of leaving the tax jurisdiction of the state.[33] For this reason, it can be established that, until the alienation occurs, i.e., the taxable event will not occur, and Article 13(5) will not be applicable.[34] Therefore, the main question is whether the cross-border transfer of residence or individual property can be implicitly considered as "alienation of property". In relation to this issue, de Man and Albin consider that the comments on Article 13 of the OECD Model are unambiguous when they state that the words "disposal of property" are used for capital gains arising from the sale or exchange of property, but also from partial alienation, expropriation, transfer to a company in exchange for shares, sale of rights, gift and even transfer of property on death. Based on this definition, they state that for an alienation to take place, there must be an actual transfer of ownership from the alienator to another person. Therefore, Article 13, paragraph 5, does not apply to taxes on immediate exit. It is important to emphasize that the Article does not prohibit the taxation of unrealized capital gains but

30 *Ibid*., p. 617.

31 *Model Tax Convention on Income and on Capital:* Condensed Version 2017, OECD Publishing, 2017, p. 38.

32 Dabija, *op. cit.*, note 12, p. 22 – 23.

33 De Man, Albin, *op. cit.*, note 14, p. 617.

34 Carramaschi, B., *Exit Taxes and the OECD Model Convention: Compatibility and Double Taxation Issues*, Tax Notes International, Vol. 49, No. 3, 2008, p. 284.

only grants the right to tax after the alienation has taken place. The question of the taxation of unrealized capital gains will be decided by the domestic law of the State concerned. It should be noted that, even if the broad concept of alienation were accepted and Article 13(5) were applied, the State of emigration would still have the right to levy tax on exit. Article 13(5) grants taxing rights to the State of residence of the alienator. Therefore, Article 13(5) does not constitute a restriction on the taxation of unrealized capital gains on exit, since it is for the domestic law of the State to decide on the taxation of unrealized capital gains.[35] However, one can still ask whether any other provisions of the Double Taxation Agreement limit the taxing rights of the emigration state. In this regard, one could refer to Article 7 of the OECD Model on Business Profits, or Article 21 of the OECD Model on Other Income, which provides a general rule regarding income not covered by the business profit provision, giving exclusive taxing rights to the state of residence of the recipient of the income. Since it may still be questionable whether the business profit was generated without the alienation of the asset, Article 21 seems more appropriate to regulate the situation, as long as the unrealized capital gains can be considered as taxable income. The taxation of the capital gains of a former resident is a more complex issue. This deferred "exit taxation" is a typical case regulated by Article 13(5) and grants exclusive rights to tax the capital gains to the State of residence of the alienator. Therefore, if the domestic law of the state of emigration allows taxation of income only after the alienation of the property, it can be argued that, if the state of emigration and the state of immigration have agreed to avoid double taxation, the former cannot tax the realized capital gain. Therefore, it can be said that the state of emigration faces a "tax now or never" situation when a resident decides to migrate. The only way for the emigration state to retain its taxing rights is to amend the wording of Article 13(5) of its double taxation treaties to guarantee a tax claim for capital gains realized since part of the gain arose while the individual was a tax resident of that state. Considering the tax structure of the exit tax presented above, de Man and Albin reaffirm that exit taxes can only be considered as exit taxes if the tax base of this extended tax liability corresponds to the increase in the value of the assets at the time the taxpayer left the state of emigration, i.e., if it is "frozen" until the moment of collection. The use of a different tax base, for example, gains from the disposal of assets, which may have increased or decreased after the migration of the taxpayer, is inconsistent with the idea of an exit tax. This corresponds to the actual capital gains tax, as prescribed by the OECD Model, and as noted, results in exclusive taxing rights being granted to the state of immigration. Even if it is taken into account that fixing the tax liability at the time of the taxpayer's emigration could still result in taxation of unrealized

[35] De Man, Albin, *op. cit.*, note 14, p. 617.

capital gains, and Article 13 of the OECD Model would not be applicable, the state of emigration would lose its right to tax because the state of immigration would become eligible for taxation under Article 21 of the OECD Model.[36]

4. EXIT TAXATION IN EU LAW

Exit tax, i.e., the transfer of assets or registered offices from one EU Member State to another, was introduced as part of ATAD. ATAD aims to ensure that taxes are paid where profits and value are created, thereby ensuring greater tax fairness.

In practice, there was often a transfer of assets within a single taxable entity to states with lower levels of taxation, which ultimately led to lower taxes being paid. States had until 31 December 2019 to introduce exit taxation into their national rules. However, for some European states, the exit tax was not new and had already been prescribed in some form in their national tax legislation.[37] Before the adoption of ATAD, the key source of law guiding the regulation of exit taxes in the EU was the judgments of the Court of Justice of the EU (hereinafter: CJEU). The European Commission has also initiated several infringement proceedings against Belgium, Denmark, and the Netherlands for infringement of EU law in relation to exit taxes, for example, against Belgium, Denmark, and the Netherlands, requesting them to adapt their legislation. The case against Sweden has been closed as Sweden has successfully adapted its legislation. The Commission has also referred cases against Denmark, the Netherlands, and Spain to the CJEU, and cases have already been brought against Spain and Portugal. Ireland has been requested to amend its legislation, and Norway has received a reasoned opinion from the EFTA Surveillance Authority with the same request.[38] The principle of exit taxation is that when a taxpayer transfers his assets or tax residence to another Member State, the state of origin taxes the economic value of all capital gains made in its territory, regardless of whether these gains are realized or not.[39]

4.1. Exit Taxation in the Decisions of the Court of the EU Until the Adoption of the ATAD

As stated above, until the adoption of ATAD, the key source of law provided guidelines for the regulation of taxes on leaving the state in the territory of the EU was

[36] *Ibid*., p. 617 – 618.

[37] Budínská, S.; Skálová, J., *Exit taxation in relation to cross-border mergers*, European Financial and Accounting Journal, Prague University of Economics and Business, Faculty of Finance and Accounting, Vol. 19, No. 1, 2024, pp. 39 – 40.

[38] Klemenčić, *op. cit.*, note 2, pp. 538 – 539.

[39] Budínská, Skálová, *op. cit.*, note 37, p. 41.

the judgments of the CJEU. The CJEU's jurisprudence on appropriate exit taxes has developed significantly from the 2004 judgment in the first case, De Lasteyrie du Saillant (C-9/02; Lasteyrie), 2004, to the 2011 judgment in National Grid Indus (C-371/10; NGI), which resolved the currently recognized grounds.[40] In the Lasteyrie, the CJEU ruled that if a taxpayer who wishes to transfer his tax residence outside the territory of a Member State, exercising his right guaranteed by Article 49 Treaty on the Functioning of the EU (hereinafter: TFEU), has to pay exit tax on hidden increases in the value of his securities, he is subject to unfavorable treatment compared to a person who maintains his residence in that State. That taxpayer becomes liable, solely because of such a transfer, for income tax, which has not yet been realized and which he will only potentially receive. Whereas, if he remained in that Member State, the value increase would become taxable only if and to the extent that they were realized. That difference in treatment may have significant consequences for the assets of a taxpayer wishing to transfer his tax residence outside such a Member State and is likely to discourage him from carrying out such a transfer.[41] The CJEU has found that French legislation that taxed unrealized gains in the value of securities when an individual moved outside France was contrary to the freedom of establishment. Mr. de Lasteyrie de Saillant moved from France to Belgium and was subject to tax on unrealized gains in the value of shares in a French company he owned. The court concluded that such treatment represents unfavorable treatment in relation to a person who maintains residency in France. On this matter, the European Commission concluded that the majority of member states have abolished the provisions on the exit tax for individual shareholders, similar to those in the Lasteyrie, and accordingly, the procedures for violation of EU law have been suspended.[42] In the NGI case, the main question was whether Article 49 TFEU conflicted with the legislation of a Member State which sought to tax unrealized capital gains from the assets of a company established under the laws of that Member State when the effective management of the company is transferred to another Member State, without providing for a tax deferral until the gains are actually realized and without taking into account possible reductions in value after the transfer of management. At the outset, the CJEU confirmed the analysis carried out in its previous exit tax cases about the existence of a restriction on the freedom of establishment. It found that a company incorporated under Dutch law,

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40 Hernández González Barreda, P. A., *Exit Taxes: One Size Should Not Fit All,* in: Almudí Cid, J. M.; Ferreras Gutiérrez, J. A.; Hernández González Barreda, P. A. (eds), Combating Tax Avoidance in the EU: Harmonization and Cooperation in Direct Taxation, Kluwer Law International, Alphen aan den Rijn, 2019, p. 206.

41 Pecho, P.; Van Waeyenberge, A., *Fiscal Consequences of Cross-border Residence and Company Seat Transfers within the EU*, Liber Amicorum Ján Klučka, Košice 2021, pp. 251 – 253.

42 Klemenčić, *op. cit.*, note 2, pp. 543 – 544.

which wishes to transfer its place of effective management outside Dutch territory, is placed at a disadvantage in exercising its rights under Article 49 TFEU compared to a similar company that retains its place of effective management in the Netherlands. Under the national legislation in question, the transfer of the management of a Dutch company to another Member State gave rise to the immediate taxation of unrealized capital gains relating to the transferred assets, whereas such gains would not have been taxed if the company had transferred its place of management within the Netherlands. Capital gains on the assets of a company transferring its place of management within the Netherlands were not subject to taxation until they were realized. This discriminatory treatment was therefore likely to deter a company established in the Netherlands from transferring its place of management to another Member State. Consequently, it constituted a restriction on the TFEU provisions on freedom of establishment. In the second step of its analysis, the CJEU examined the possible justifications for such a restriction, particularly the objective of ensuring a balanced allocation of tax powers between Member States in accordance with the principle of territoriality. It was found that such an exit tax was intended to prevent situations which could jeopardize the right of the Member State of origin to exercise its powers of taxation in relation to activities carried out on its territory and could therefore be justified.[43] Therefore, the CJEU concluded that the exit tax does not constitute a violation of the freedom of establishment but it is contrary to the principle of proportionality to determine the tax liability at the moment of leaving the state, but rather, based on the taxpayer's request, the tax liability must be deferred until the gains based on the assets/liabilities are realized.[44] The main difference between these two judgments is that in the first case the CJEU seems to have been very reluctant to allow any exit tax to be compatible with EU freedoms, as it did not accept any grounds for justification or at least rejected the idea that an exit tax could be proportionate to any rule of reason; on the other hand, the NGI judgment upholds the compatibility of an exit tax with EU freedoms as long as the taxpayer can defer payment of the tax and the tax authority has no discretion in this regard, except for the possible request for guarantees if there is a risk that the tax will not be paid.[45] This difference, combined with the fact that Lasteyrie and the subsequent N case, which also negate exit taxes, relate to individuals and NGI to legal entities, led to the conclusion that there is a different doctrine for each type of person. However, this changed with the judgment in the case of Commission v Portugal (C-503/14), where the Court applied the principles of NGI to

[43] Pecho, Van Waeyenberge, *op. cit.*, note 41, pp. 253 –255., see also: Pantazatou, K., *National Grid Indus: The first case on companies' exit taxation*, European Business Law Review, Vol. 23, No. 6, 2012, pp. 945 – 972.

[44] Klemenčić, *op. cit.*, note 2, p. 542.

[45] Hernández González Barreda, *op. cit.*, note 40, pp. 206 – 207.

individuals, although this was contrary to the previous cases of Lasteryie or N. In Hernandez's view, this reflects an evolution of the court's reasoning, probably due to the series of cases mentioned above, towards prioritizing legal certainty and equal treatment rather than the previous case-by-case proportionality analysis, which was probably more accurate. More importantly, however, by unifying the doctrine of exit taxes, the ECJ's limits on such charges have defined the model of exit tax followed by most Member States and now ATAD.[46] Analyzing first the applicable freedom, in the NGI case, the Court refers to its case-law on the transfer of the seat in order to verify whether the freedom of establishment is applicable. From the Daily Mail (C-81/87), Überseering (C-208/00) and Cartesio (C-210/06) cases, the CJEU concludes that, if the State of origin, the Netherlands in the NGI case, retains the status of a company under its domestic law despite the transfer of the seat to another Member State, in this case the United Kingdom, the company is protected and can rely on the freedom of establishment under Articles 49 and 54 TFEU. Similar reasoning in the context of the free movement of persons or the free movement of capital applies in other cases involving individuals or shares.[47] As a second step, the CJEU, in a series of cases following the NGI case, concluded that exit taxes on the transfer of seat, residence or exchange of shares constitute a restriction on the relevant freedom in question, if the entity exercising that freedom is at a financial disadvantage compared to an entity remaining within the state, and therefore the exit tax prevents corporations from exercising that freedom. This reasoning seems to fall within what the CJEU calls the discrimination reasoning, since the CJEU itself states that there is no justification for such differential treatment.[48]

The NGI judgment, the judgment in case DMC (C-164/12), and in case Verder LabTec GmbH & Co. KG v Finanzamt Hilden (C-657/13) judgment have made a major contribution to legal entities in the area of exit taxation. The latter concerned a German limited partnership that had transferred intellectual property rights to its permanent establishment in the Netherlands. The CJEU was asked to determine whether the German tax on unrealized profits from the transfer of assets to a Dutch establishment was compatible with EU law. The CJEU found that the rules were permissible under EU law. The CJEU reached this conclusion because the rules: (i) were necessary to preserve the allocation of taxing powers between the Member States concerned and were therefore objectively justified by overriding reasons in the public interest; and (ii) were proportionate, in particular by virtue of the fact that the tax payable was levied over a period of ten years. In

46 *Ibid*., p. 207.

47 *Ibid*., pp. 207 – 208.

48 *Ibid*., p. 208., see also: Panayi, C. HJI., *Exit Taxation as an Obstacle to Corporate Emigration from the Spectre of EU Tax Law*, Cambridge Yearbook of European Legal Studies, 2011, Vol. 13, pp. 268 – 274.

short, according to the judgments of the CJEU, Member States have an unquestionable right to levy an exit tax. Another revolutionary conclusion was the fact that the CJEU clearly stated that the taxpayer should have the choice between immediate taxation and deferral of payment until the moment of realization. The CJEU not only confirmed the right of Member States to collect exit tax at a time other than the actual realization but also approved the possibility of dividing the payment of exit tax into installments. In response to this case law and the repeated incompatibility of national tax laws of individual Member States with EU rules, significant measures had to be taken.[49]

The above-mentioned judgments influenced the shaping of the rules on exit taxation from ATAD, which are presented in the next chapter. In the Lasteyrie du Saillant case, the CJEU held that the exit tax, as regulated under national law, constitutes an obstacle to and a limitation on the freedom of establishment, as it has a deterrent effect on taxpayers who wish to transfer their residence to another Member State.[50] The CJEU concluded that the transfer of a natural person's tax residence outside the territory of a Member State does not in itself constitute tax avoidance. Tax avoidance or evasion cannot generally be inferred from the fact that a natural person's tax residence has been transferred to another Member State and cannot justify a fiscal measure which jeopardizes the exercise of a fundamental freedom guaranteed by the Treaty. Therefore, such an exit tax cannot be established without significantly exceeding what is necessary to achieve its objective, which is to presume an intention to circumvent national law on the part of any taxpayer who transfers his tax residence outside France.[51] The impact of the Lasteyrie case is that the CJEU found that the current collection of taxes on unrealized gains is disproportionate and violates the freedom of establishment, and Article 5(2) of ATAD stipulates the deferment of tax payments. Likewise, the impact of this judgment on ATAD is that ATAD stipulates that guarantees for deferred payment can only be requested if there is a real risk of non-payment of taxes. In the NGI judgment, the CJEU established that, in accordance with the principle of territoriality and the balanced allocation of taxing powers between Member States, it is fully justified for the departure state to determine the amount of tax on unrealized capital gains realized in its territory at the very moment of the transfer of the seat or assets.[52] However, the CJEU clarifies that a national provision requir-

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49 Budínská, Skálová, *op. cit.*, note 37, pp. 42 – 43.

50 Case C-9/02 *Hughes de Lasteyrie du Saillant v Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECLI:EU:C:2004:138, paras. 45-46.

51 Case C- 9/02 *Hughes de Lasteyrie du Saillant v Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECLI:EU:C:2004:138, paras. 51-52.

52 Case C-371/10 *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam* [2011] ECLI:EU:C:2011:785, para. 49.

ing the exit tax to be paid at the time of exit creates a serious liquidity problem for the company, as domestic companies only pay tax when they actually realize the profit. Therefore, such automatic and immediate collection of the tax was declared disproportionate.[53] The CJEU concludes that national legislation would be proportionate if it offers the taxpayer a choice between immediate payment of a fixed amount of tax and a delay in payment of that tax.[54] This affected the rule in Article 5(2) of the ATAD. In the judgment Verder LabTec, the CJEU confirmed that national legislation providing for the gradual collection of taxes on unrealized profits over five to ten years is not contrary to EU law.[55] ATAD, as stated below, provides for the possibility of deferring the payment of exit tax. In the DMC judgement, the CJEU made decisions that specified the economic conditions for the deferral of exit tax. The CJEU found that the taxpayer's obligation to provide a bank guarantee to exercise the right to tax deferral does not in itself constitute a disproportionate restriction of EU freedoms. Since the risk of non-payment of taxes increases with the passage of time, the state has the right to protect its budget. However, the CJEU emphasized that such a guarantee must depend on the real risk of non-payment.[56] The CJEU analyzed German legislation that offered cross-border taxpayers the option of distributing the tax burden through five equal annual installments (without interest). The court decided that such a period of five years is fully balanced and does not go beyond what is necessary to achieve the legitimate aim of the member state.[57] This ruling also affected the rule on exit taxation as regulated by ATAD (Article 5(2)(3)).

4.2. Exit Taxation in ATAD

Exit taxation is regulated by Article 5 of the ATAD. This rule appears to be a codification of the CJEU's jurisprudence on exit taxation.[58] The main reason for the adoption of ATAD is the shift from determining whether and under what

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53 Case C-371/10 *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam* [2011] ECLI:EU:C:2011:785, para. 37.

54 Case C-371/10 *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam* [2011] ECLI:EU:C:2011:785, para. 73.; see also: Case C-38/10 *European Commission v Portuguese Republic* [2012] ECLI:EU:C:2012:521, paras. 26-35.

55 Case C-657/13 *Verder LabTec GmbH & Co. KG v Finanzamt Hilden* [2015] ECLI:EU:C:2015:331, paras. 47-52.

56 Case C-164/12 *DMC Beteiligungsgesellschaft mbH v Finanzamt Hamburg-Mitte* [2014] ECLI:EU:C:2014:20, paras. 65-69.

57 Case C-164/12 DMC Beteiligungsgesellschaft mbH v Finanzamt Hamburg-Mitte [2014] ECLI:EU:C:2014:20, paras. 63-64.

58 Peeters, S., Exit Taxation: From an Internal Market Barrier to a Tax Avoidance Prevention Tool, EC Tax Review, Vol. 26, No. 3, 2017, p. 122.

conditions Member States may impose an exit tax on unrealized capital gains to the rule that Member States must subject such unrealized capital gains to exit taxation.[59] Therefore, Article 5(1) of the ATAD stipulates that a taxpayer is subject to tax equal to the market value of the transferred assets, at the time of the exit of the assets, less their value for tax purposes, when: the taxpayer transfers assets from its registered office to its permanent establishment in another Member State or a third state, if the Member State in which the registered office is located no longer has the right to tax the transferred assets due to that transfer; the taxpayer transfers assets from its permanent establishment in a Member State to its registered office or another permanent establishment in another Member State or a third state, if the Member State in which the permanent establishment is located no longer has the right to tax the transferred assets due to the transfer; the taxpayer transfers its tax residence to another Member State or a third state, except in the case of assets that remain linked to the permanent establishment in the first Member State; a taxpayer transfers the business carried out by its permanent establishment from a Member State to another Member State or a third state**,** if the Member State in which the permanent establishment is located no longer has the right to tax the transferred assets due to the transfer. Transfer of assets means the procedure by which a Member State loses the right to tax the transferred assets, while the assets remain in the legal or economic ownership of the same taxpayer. Transfer of tax residence means the procedure by which a taxpayer ceases to be resident for tax purposes in a particular Member State and acquires tax residence in another Member State or a third state. Transfer of an activity carried out through a permanent establishment means the procedure by which a taxpayer ceases to be resident for tax purposes in a Member State and acquires it in another Member State or a third state, without becoming resident for tax purposes in that Member State or a third state.[60] In accordance with Article 5(2) taxpayer shall be given the right to defer the payment of an exit tax referred to in paragraph 1, by paying it in instalments over five years, in any of the following circumstances: a taxpayer transfers assets from its head office to its permanent establishment in another Member State or in a third state that is party to the Agreement on the European Economic Area (EEA Agreement); a taxpayer transfers assets from its permanent establishment in a Member State to its head office or another permanent establishment in another Member State or a third state that is party to the EEA Agreement; a taxpayer transfers its tax residence to another Member State or to a third state that is party to the EEA Agreement; a taxpayer transfers the business carried on by its perma-

[59] Budínská, Skálová, *op. cit.*, note 37, p. 43.

[60] Dojčić *et al.*, *op. cit.*, note 19, p. 477.

nent establishment to another Member State or a third state that is party to the EEA Agreement.

Article 5(3) provides that a taxpayer defers the payment in accordance with paragraph 2, interest may be charged in accordance with the legislation of the Member State of the taxpayer or of the permanent establishment, as the case may be. If there is a demonstrable and actual risk of non-recovery, taxpayers may also be required to provide a guarantee as a condition for deferring the payment in accordance with paragraph 2. The second subparagraph shall not apply where the legislation in the Member State of the taxpayer or of the permanent establishment provides for the possibility of recovery of the tax debt through another taxpayer which is member of the same group and is resident for tax purposes in that Member State.

When a taxpayer is granted a deferral of payment of exit tax the deferral of payment shall be immediately discontinued and the tax debt becomes recoverable in the following cases: (a) the transferred assets or the business carried on by the permanent establishment of the taxpayer are sold or otherwise disposed of; (b) the transferred assets are subsequently transferred to a third state; (c) the taxpayer's tax residence or the business carried on by its permanent establishment is subsequently transferred to a third state; (d) the taxpayer goes bankrupt or is wound up; (e) the taxpayer fails to honour its obligations in relation to the instalments and does not correct its situation over a reasonable period of time, which shall not exceed 12 months. Points (b) and (c) shall not apply to third states that are party to the EEA Agreement if they have concluded an agreement with the Member State of the taxpayer or with the Union on the mutual assistance for the recovery of tax claims, equivalent to the mutual assistance provided for in Directive 2010/24/EU.[61] Where the transfer of assets, tax residence, or the business carried on by a permanent establishment is to another Member State, that Member State shall accept the value established by the Member State of the taxpayer or of the permanent establishment as the starting value of the assets for tax purposes, unless this does not reflect the market value.[62]

4.2.1. Determining Market and Tax Value for the Purposes of Exit Tax

The comparative overview of market value determination in Member States for exit tax purposes will be based on research conducted by Budínská and Skálová, and the authors will present in the conclusion how the market value should be determined for the purposes of taxation with exit tax.

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61 Article 5(4) ATAD, Helminen, M., *EU Tax Law, Direct Taxation*, IBFD, Amsterdam, 2021, p. 285.

62 Article 5(5) ATAD.

ATAD defines the need to determine the market value of the transferred assets at the time of their exit to calculate the exit tax. The market value should be determined in accordance with the arm's length principle. To ensure that this rule is consistent with the offsetting method, it is appropriate to allow Member States to rely on the moment at which the right to tax the transferred assets ceases. This right to tax should be defined at the level of each Member State. Recital 10 also states the possibility of challenging the value of the assets transferred by the receiving State if it does not sufficiently reflect the market value. The determination of the market value for exit tax varies from one Member State to another. For the sake of clarity, these market values are divided into four categories. The definition of market value as set out in ATAD is most like the legislation of Croatia, the Czech Republic, and Romania.[63] ATAD defines market value as the amount for which an asset can be exchanged, or mutual obligations can be settled between willing, unrelated buyers and sellers in a direct transaction.[64]

The dominant share in the method of determining market value is played by transfer pricing rules. In this way, Bulgaria, Hungary, Latvia, and Luxembourg determine the market value based on these rules. Similarly, Italy, Belgium, and Spain determine the market price in accordance with the arm's length principle. In the case of Italy, the value of goodwill must also be considered in the situation of a transfer of a company or a permanent establishment. Goodwill must be calculated considering the transferred functions and risks. To determine this fair market value, it is necessary to consider the guidelines issued by the Italian Minister of Finance and Economy on 2 July 2014. For Belgium, in the case of a transfer of shares or immovable property, it is recommended to draw up an expert opinion to determine the market value.[65] The arm's length principle requires that business relationships between affiliated companies be established as if they were taking place between independent companies under similar conditions. This principle emphasizes that the prices, fees, and terms of transactions between related companies should be set in a manner that closely approximates the prices that independent parties would choose in similar business relationships. In other words, if there is a business relationship between related parties that imposes different terms and conditions from those that would apply between independent entities, then any profit that one of the companies would have earned in the absence of those terms and conditions, but did not earn due to those different terms and conditions, may be allocated to that company's profit and subsequently taxed.[66] Fair market values

63 ATAD Recital 10., Budínská, Skálová, *op. cit.*, note 37, pp. 47 – 49.

64 Article 5(6) ATAD.

65 Budínská, Skálová, *op. cit.*, note 37, p. 50.

66 *Ibid.*, pp. 50 – 51.

are used in Germany, the Netherlands, and Slovakia. According to the Slovak Accounting Act, fair value means: the market price; the value determined by a valuation model that primarily uses information from transactions or quotations in an active market, if the market price is not known; the value determined by a valuation model that primarily uses information from transactions or quotations in a market that is not active, if information about an active market is not available; or an expert opinion if none of the above valuation models can be used. It should be noted that all the above methods for determining market value are very similar (if not identical) to the definition of market value provided by ATAD. However, each state may use different procedures and rules to determine this price, so it is always important to thoroughly examine the tax treatment of a particular state. Only two states do not require specific rules for determining market value for exit tax purposes. Under Estonian tax regulations, the local average price is used to determine this value. Portuguese regulations do not specify how to determine market value. Therefore, the market value and the method of calculation must be provided by the taxpayer or the tax authorities.[67]

Unlike the market value, the tax value is not regulated by the ATAD provisions. The most frequently used tax value is the purchase price. Italy and Portugal use the purchase price as such, without further adjustments, as the tax value by which the market value is reduced for the purpose of calculating the exit tax. The purchase price less depreciation (residual tax price) or depreciation deducted from the income tax base is used as the tax value for exit tax purposes in Belgium, the Czech Republic, Slovakia, and Spain. The purchase price may vary depending on the type of asset and the way it was acquired. In the case of purchased assets, it is the price at which the asset was acquired. In the case of assets created through own activities, the purchase price will be the own costs incurred in their creation; in the case of assets acquired free of charge, it may be the replacement cost, etc. The purchase price as a tax value for exit tax also differs depending on whether the asset is depreciated or not. In these cases, the purchase price of a depreciated asset is its net cost (i.e., purchase price less depreciation), while in the case of a non-depreciated asset, it is simply the purchase price without further adjustments. Another category for determining tax expenses is the use of the book value (whether adjusted or not). Germany, Hungary, Romania, and the Netherlands use the book value as a tax-deductible expense. Under Hungarian law, the adjusted book value of the transferred asset is considered the tax value.[68]

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67 *Ibid*., p. 51.

68 *Ibid*., pp. 51 – 52.

The fair market value, as the basic tax value for exit tax, can be found in the tax regulations of Croatia, Estonia, and Luxembourg. Bulgaria and Latvia are included in the category of specific cases. Latvia defines the tax value differently depending on the type of transaction carried out. In the case of a transfer of assets from a permanent establishment in Latvia to a parent company or another permanent establishment abroad, the tax value for exit tax is the book value. In the case of a transfer of assets due to the transfer of the registered office of a company or the transfer of economic activity to a main company abroad, the tax value is the market value less than the amount of liabilities relating to those assets (excluding accumulated liabilities attributable to future expenses). The tax value of assets subject to tax depreciation in Bulgaria is their tax value on the date of transfer. The tax base of undepreciated assets is their book value at the date of transfer, adjusted for increases or decreases in temporary tax differences (e.g., from revaluation) and the revaluation provision applicable to the individual asset. Finally, it should be noted that the definition of accounting, purchase, or market prices may vary from state to state, so it is always necessary to thoroughly investigate the tax treatment of a particular state before carrying out any reorganization. The same applies to the determination of market value.[69]

5. CONCLUSION

Exit tax is not a distinct form of tax; rather, it is an income tax paid on a tax base that is increased by the difference between the market value of an asset and its value for tax purposes (book value), as well as on assets transferred to another Member State or a third state. In other words, exit taxes represent an expression of state sovereignty by taxing increases in the value of assets, hidden reserves, and any untaxed income generated within its territory.[70] On the other hand, exit taxes are characterised by the taxation of unrealised, i.e., potential, capital gains. The exit tax mechanism is based on the fiction that there has been a disposal of a right whose value has increased in the meantime, which is why the gain embodied in that right is taxed before it is actually realised, e.g., at the time when the taxpayer ceases to be a resident of the relevant jurisdiction or at the time when the assets are transferred outside its borders. To calculate the amount, it is crucial to determine the market value of the transferred assets at the time of their exit, based on the arm's length principle. To ensure that the rules are consistent with the use of the credit method, it is advisable to allow EU Member States to refer to the point in time at which the right to tax the transferred assets is lost. It is also necessary to

[69] *Ibid*., pp. 51 – 53.

[70] Dabija, *op. cit*., note 12, p. 1.

allow the receiving Member State to challenge the value of the transferred asset as determined by the exit Member State in cases where that value does not reflect the market value. For this purpose, a Member State could make use of existing dispute resolution mechanisms. The calculation of unrealized capital gains is based on the nominal increase in the asset's value, without adjusting for inflation. Since the inflation-adjusted capital gain represents the most accurate and fair representation of the actual increase in the assets, the authors suggest that the market value of the asset, when disclosed, be adjusted for the inflation rate. Therefore, it is proposed that, upon exit, the market value of the asset for the purposes of exit taxation must be adjusted for the effect of inflation, as the nominal fair value alone does not reflect the actual capital gain, thereby ensuring fairness in taxation. If the application of the exit taxation rules were to result in double taxation, taxpayers should be granted relief through the deduction of tax paid in another Member State or a third state, as the case may be. Therefore, exit taxation rules should be aimed not only at combating (preventing) tax evasion, but also at avoiding the creation of other market barriers, such as double taxation. It should also not be overlooked that exit taxation also pursues other objectives, namely the realisation of the principles of fairness, the allocation of states' taxing rights, and the freedom of establishment. Some of the key challenges and areas that require further research in the field of exit taxation are compliance with European Union law and freedom of movement (in particular the practice of the CJEU), assessment of unrealized profits and liquidity, international double taxation and tax evasion.

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Review article

CLASH OR COEXISTENCE OF PRINCIPLES OF EFFICIENCY AND EQUITY IN TAXATION IN LIGHT OF THE (EUROPEAN) SOCIAL CONSTITUTIONALISM*

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ABSTRACT

The framers of the Croatian Constitution envisioned the modern Republic of Croatia as a social state founded on the principle of social justice. The Croatian Constitutional Court has further emphasized the importance of this social dimension as an integral part of the broader concept of European social constitutionalism. The idea of social justice, however, does not exist in a theoretical legal vacuum; rather, it is operationalized through various social provisions of the Constitution and a wide array of regulations aimed at their concretization. One of the key manifestations of this constitutional concept is the principle of fairness (equity) in taxation, which represents an emanation of the social state and the principle of social justice in the field of taxation.

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As a constitutional principle, tax equity encompasses both vertical and horizontal equity and implies the establishment of a fair tax system based on the taxpayer's economic capacity. Such an understanding of tax equity presupposes a progressive tax system, which challenges the prevailing economic notion of equity founded on the principle of proportionality. This divergence raises the question: can the constitutional and economic concepts of tax fairness as well as the request for efficiency in taxation be reconciled?

The paper argues that such reconciliation is indeed possible. The constitutional principle of tax equity requires the progressivity of the tax system as a whole, but it does not mandate that every individual tax or tax rate be progressive. Nor does it require the exclusive use of progressive tax rates, allowing the legislator to employ alternative mechanisms to mitigate the regressive effects of certain taxes and to achieve overall system progressivity. This approach affords the legislator a wide margin of appreciation in designing tax policy and does not exclude the economic understanding of tax equity based on proportionality. In this context, compliance with constitutional principles of taxation is subject to restrained constitutional review.

The following research is conducted using methods of legal analysis, including both the textual interpretation of the constitutional text, as well as the legal argumentation adopted in the practice of the Croatian Constitutional Court. Additionally, the analysis of the secondary (scientific) sources is used. This way, the substance of the constitutional principle of tax equity is deduced and brought in connection with the constitutional principles of social state and social justice and then compared with the economic request for achieving efficiency in taxation.

Keywords: *Constitutional principles of taxation, Digitalization, Efficiency in taxation, Social justice, Tax equity, Progressivity*

1. INTRODUCTION

According to the Constitution,[1] the Republic of Croatia is defined as a social state,[2] committed to the realization of the principles of social justice as one of the highest values of the constitutional order.[3] This commitment to social principles is twofold; on the one hand, it represents a component of historically inherited social values,[4] while on the other, it expresses the belonging of the Croatian constitutional identity to the broader circle of European social states, that is, to the concept of European social constitutionalism[5] (despite the fact that, in the context

1 Constitution of the Republic of Croatia, Official Gazette, No. 56/90, 135/97, 113/00, 28/01, 76/10, 5/14 – Decision of the Constitutional Court No. SuP-O-1/2014 of 14 January 2014.

2 Article 1 Paragraph 1 of the Constitution of the Republic of Croatia.

3 Article 3 of the Constitution of the Republic of Croatia.

4 *See* Kuzelj, V.; Erent-Sunko, Z.; Javorić Barić, *Socijalne vrijednosti hrvatskog društva i legitimacija postsocijalističkog poretka*, in: Nastase, C. A., Monda, A.; Dias, R. (eds.), International Scientific Conference – EMAN 2024: Vol 8. Conference Proceedings, Association of Economists and Managers of the Balkans, Belgrade, 2024, pp. 643–656.

5 *See* O'Cinneide, C., *The Present Limits and Future Potential of European Social Constitutionalism*, in: Young, K. G. (ed.) The Future of Economic and Social Rights, Cambridge University Press, Cambridge, 2019, pp. 324–352.

of the European Union, it is at present possible to speak of the existence of a so-called social deficit,[6] which stands in opposition to the social component of certain Member States national constitutions, such as that of Croatia[7]). In this sense, the Constitutional Court of the Republic of Croatia has already, in its decision concerning the so-called crisis tax,[8] emphasized the following: "The social state is a constitutive element of the European constitutional identity, as confirmed by the Constitution of the Republic of Croatia. It belongs to the group of so-called socially conscious constitutions."[9]

In this (social) light, the constitutional provisions concerning the fundamental determinants of the Croatian tax system must also be read. Namely, it was precisely in the context of taxation, in the aforementioned decision on the crisis tax, that the first extensive interpretation of the social component of the Croatian Constitution was given, together with its connection to tax principles as elements intended to serve the realization of the Croatian social state.[10] Accordingly, the following analysis seeks to highlight the connection between the constitutional concept of the social state, the principle of social justice, and the fundamental principles of taxation. At the same time, as an added value of this paper, an effort is made to highlight the complexity of the relationship between the economic understanding of fairness based on the idea of proportionality of the tax burden and the efficiency of administration of adopted tax forms (in the sense of achieving fiscal effect, i.e. the revenue-raising function of the tax system) and the constitu-

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6 *See* e.g. Weatherill, S., *Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of 'Freedom of Contract'. Judgment of the Court of 18 July 2013: Case C-426/11 Mark Alemo-Herron and Others v Parkwood Leisure Ltd*, European Review of Contract Law, Vol. 10, No. 1, 2014, pp. 167–182; Garben, S., *The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union*, European Constitutional Law Review, Vol. 13, No. 1, 2017, pp. 23–61; Garben, S., *Balancing Social and Economic Fundamental Rights in the EU Legal Order*, European Labour Law Journal, Vol. 11, No. 4, 2020, pp. 364–390; Kuzelj, V., *Zaštita socijalne jezgre ustava država članica Europske unije od snižavanja razine socijalne zaštite pod utjecajem ordoliberalnog usmjerenja europske integracije*, Političke perspektive, Vol. 15, No. 2, 2025, pp. 55–79.

7 *See* e.g. Kuzelj, V.; Horvat Vuković, A., *Apoteoza socijalne države: ustavno-identitetska ukorijenjenost socijalne pravde u Republici Hrvatskoj*, Politička misao, Vol. 59, No. 1, 2022, pp. 75–99.

8 Constitutional Court of the Republic of Croatia, Decision and Ruling No. U-IP-3820/2009 U-IP-3826/2009 and others, of 17 November 2009.

9 *Ibid*., para 13.1.

10 Unfortunately, it follows from the analysis of the Constitutional Courts' reasoning on the meaning of the concept of the welfare state and the principle of social justice, in relation to individual social rights guaranteed by the Croatian Constitution, that it interprets the above-mentioned umbrella concepts (welfare state and social justice) separately from the components that should give them content (individual social rights, e.g. constitutional principles of taxation). *See* Miloš, M.; Kuzelj, V., *Ostvarenje i zaštita ustavnog ideala porezne pravednosti u svjetlu zahtjeva socijalne države*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 58, No. 4, 2021, pp. 1101–1120.

tional commitment to the social role of taxation as the primary principle of the Croatian tax system (as a whole).

In this regard, the paper employs methods of legal analysis and case-law analysis, accompanied by a review of secondary (scientific and professional) sources. Additionally, at certain points, reference is made to comparative examples, used as models for interpreting tax principles within the Croatian context.

2. THE POLITICAL AND LEGAL NATURE OF CONSTITUTIONAL PRINCIPLES OF TAXATION

The adoption of tax legislation, as well as the assessment and collection of taxes, has often been marked by the stigma of posing a danger to human rights, initially (historically) as an emanation of the unrestrained will of the ruler (in accordance with Bodin's conception of sovereignty as a form of authority that recognizes and acknowledges nothing above itself expect God: "…unlike a sovereign prince who is answerable only to God"[11]). In contemporary context, however, these matters are understood as an expression of the will of a perceived sovereign people (the *demos*), articulated through its representatives seated in the legislative branch — a conception that, in fact, affirms the central creed of the American Revolution, *No taxation without representation*, understood as a prohibition against adopting tax measures without the consent of the people manifested through the will of their representatives in the legislative body.[12] The accuracy of this assertion is confirmed primarily by two facts. The first fact is historical in nature and concerns the organic interconnectedness between the development of the taxing (and, in a broader sense, fiscal) powers of the legislative branch and the evolution of parliamentarism, most clearly visible in the struggle for parliamentary prerogatives in English constitutional history.[13] At this point, it is also necessary to pose the question of whether such authority pertains exclusively to the representation of citizens assembled in the legislative body, or whether it also encompasses representative institutions at lower levels of government?[14]

The second fact concerns the question of competences for decision-making in matters of taxation (and, in a broader sense, fiscal policy), which in a comparative

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11 *See* Bodin, J., *On Sovereignty: Four Chapters from The Six Books of the Commonwealth*, Cambridge University Press, Cambridge, 2010, p. 4.

12 Edrey, Y. M., *Taxation and Human Rights*, European Tax Studies, No. 2, 2014, p. 6.

13 *See* e.g. Marelja, M., Kuzelj, V., *Evolucija fiskalnoga suvereniteta u engleskoj: od sredstva ograničenja vladara do prerogativa zakonodavne vlasti*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 41, No. 2, 2020, pp. 509–529.

14 *See* e.g. Bulgarelli, A., *Representation And The Power Of Local Government To Levy Taxes*, European Tax Studies, No. 2, 2014, pp. 62–66.

perspective is most clearly manifested in the exclusion of the entire corpus of fiscal legislation from the reach of the wider populace through instruments of direct democracy (primarily referenda). In the practice of the Croatian Constitutional Court, this principle has been interpreted through the protection of the exclusive powers of representative-democratic bodies with respect to budgetary (and therefore necessarily also tax) matters.[15] In this way, somewhat paradoxically yet practically necessarily, tax (and, in a broader sense, fiscal) legislation – as an expression of the will of the sovereign people, translated through the sublimated popular will embodied in the national representative assembly (the legislative body) – is shielded by constitutional mechanisms from the volatility, impulsiveness, and susceptibility of the *demos* to the "siren song" of populist solutions, and is thereby placed within the exclusive sphere of competence of the representative component of democracy.

At first glance, one might conclude that the logical consequence of such exclusive prerogatives of representative bodies is that constitutional courts, as the ultimate guardians of human rights and fundamental freedoms[16] as well as of the separation of powers,[17] are likewise precluded from reviewing the conformity of tax legislation with the constitutional document. Yet this is only partially the case. Although tax legislation is not subject to constitutional review in terms of its expediency or justification, it may nevertheless be (and indeed is) subjected to constitutional scrutiny, as confirmed by the Constitutional Court of the Republic of Croatia in the case regarding the constitutionality of the so-called *crisis tax*.[18] Accordingly, in contemporary constitutional thought it has become widely accepted that the

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15 *See* e.g. Kuzelj, V., *Zabrana referenduma o proračunskim pitanjima u hrvatskoj i poredbenoj perspektivi*, *Hrvatska i komparativna javna uprava*, Vol. 22, No. 2, 2022, pp. 331–354.

16 *See* e.g. Šarin, D., *Ustavni sud Republike Hrvatske kao institucionalni zaštitnik ljudskih prava i temeljnih sloboda*, Zbornik radova Pravnog fakultet u Splitu, Vol. 52, No. 3, 2015, pp. 755–784.

17 For a more detailed discussion of the position of the Croatian Constitutional Court within the constitutional architecture and division of powers, *see* Šarin, D., *Položaj Ustavnog suda Republike Hrvatske s motrišta diobe vlasti i ustavne garancije njegove neovisnosti*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 62, No. 5-6, 2012, pp. 1379–1412.

18 This was a special, time-limited tax introduced by the Act on the Special Tax on Wages, Pensions and Other Income (Official Gazette No. 94/09), and the Act on the Special Tax on Income from Self-Employment and Other Incomes (Official Gazette No. 119/09). For a more detailed discussion of the (non-)social effects of the crisis tax and the assessment of its constitutionality before the Croatian Constitutional Court, *see* Cindori, S.; Kuzelj, V., *Socijalni aspekt kriznoga poreza: fiskalni instrument ili devijacija poreznog sustava?*, Ekonomska misao i praksa, Vol. 27, No. 2, 2018, pp. 479–502. For the Constitutional Court's own understanding of its role in reviewing the constitutionality of tax legislation, *see* Constitutional Court of the Republic of Croatia, *op. cit.*, note 8, para 10. For a more detailed discussion of the constitutionality review of tax legislation in the Republic of Croatia, *see* Arlović, M., *Ustavnosudska kontrola poreznih zakona u Republici Hrvatskoj*, in: *Porezno pravo i ustavno sudstvo*, Constitutional Court of the Bosnia and Herzegovina, Sarajevo, 2018, pp. 89–127.

mere authorization by citizens, transferred to the legislative branch as an expression of the collective will of the sovereign people, is insufficient for any particular tax measure to be regarded as just. It is also necessary that the adopted tax legislation conform to certain principles of taxation that have been recognized and entrenched at the constitutional level.[19] It is not sufficient, moreover, that such taxes merely refrain from assuming a *penal* or *confiscatory* character[20] (which is a necessary precondition of their constitutionality); it is also required that they be grounded in the principle of fairness (whereas the protection of a minimum content of fairness falls within the jurisdiction of constitutional adjudication, while the higher degrees of fairness of a particular tax measure, or of the tax system as a whole, are determined by citizens through the democratic process of electing their representatives[21]).

From the above said follows that the fundamental principles of taxation are not (exclusively) political in nature, although they are highly political and intrinsically linked to the idea of representative democracy. By their nature they are also legal, at least in the sense of protecting their constitutional minimum from derogation in legislative practice and by the conduct of tax authorities. Namely, at the material level, the jurisdiction of the Constitutional Court encompasses the protection of the minimum content of tax principles guaranteed by the Croatian Constitution, while citizens may express their judgment regarding a higher level of tax justice through democratic elections.[22] On the other hand, at the procedural level, the principle of tax justice requires effective protection of taxpayers' rights against unlawful or improper conduct by tax authorities, which falls within the jurisdiction of administrative courts. Only a correctly assessed and collected tax can, after all, be regarded as just. This is particularly important in the context of the development of new technologies, with which the improvement of tax-collection procedures must keep pace (e.g. through the process of digitalization), while at the same time ensuring the protection of taxpayers' rights (e.g. their privacy, personal data, as well as the fundamental principle of fair procedure in matters of taxation).

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19 Edrey, *op. cit.*, note 12, p. 7.

20 *See* e.g. Martinengo, S., *Reflections on Property Rights and Confiscatory Tax Systems*, European Tax Studies, No. 2, 2014, pp. 58–61.; Cindori, S.; Kuzelj, V., *Inadmissibility of Penal and Confiscatory Taxes*, in: 5th International Multidisciplinary Scientific Conference Social Sciences & Arts SGEM 2018, Conference Proceedings, Volume 5, Issue 1.2, STEF92, Sofia, 2018, pp. 583–590.

21 *See* e.g. Kuzelj, V., *Komplementarnost ustavnopravnih i društvenih odrednica porezne pravednosti u Republici Hrvatskoj*, in: Bevanda, V. (ed.), International Scientific Conference – EMAN 2020: Vol 4. Conference Proceedings, Association of Economists and Managers of the Balkans, Belgrade, 2020, pp. 469–475.

22 *Ibid.*, p. 474.

3. SUBSTANTIVE DIMENSION OF TAX JUSTICE

The Croatian Constitution embraces the idea of tax justice grounded in the principles of economic capacity (the ability-to-pay principle)[23] and in the equality and equity (fairness)[24] of the tax system.[25] The former principle, understood as an expression of so-called vertical equity in taxation, is widely accepted within the constitutional frameworks of European tax systems and, for example, constitutes a fundamental tax principle in both Italy[26] and Spain.[27] It is closely connected to the realization of the constitutional concept of the social state[28] and the principle of social justice,[29] both of which represent shared values of European constitutionalism. As the Croatian Constitutional Court has stated: "The social state is a constitutive element of the European constitutional identity, a fact confirmed by the Constitution of the Republic of Croatia. It belongs to the group of so-called socially conscious constitutions."[30]

It is therefore justified, as Arbutina argues, to conclude that the Croatian constitution maker places particular emphasis on the social component of taxation.[31] Moreover, one may contend that, by employing the concept of the social state and the principle of social justice (which, in the jurisprudence of the Croatian Constitutional Court, have been affirmed as part of the inviolable core of the Constitution; the so-called constitutional identity[32]) as vectors, the constitutional

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23 Article 51 Paragraph 1 of the Constitution of the Republic of Croatia.

24 Article 51 Paragraph 2 of the Constitution of the Republic of Croatia.

25 For a more detailed discussion of the constitutional principles of taxation in Croatian legal system and in the practice of the Constitutional Court of the Republic of Croatia, as well as in the broader European context, *see* e.g. Miloš, M., Kuzelj, V., *op. cit.*, note 10; Žunić Kovačević, N., *Europska dimenzija ustavnih načela u oporezivanju*, Hrvatski časopis za osiguranje, No. 10, 2024, pp. 109–124; Žunić Kovačević, N., *Načelo jednakosti u poreznom pravu i sudskoj praksi nekih zemalja EU*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 22, No. 2, 2001, pp. 763–789.

26 Article 53 of the Constitution of Italy Available at: [https://constituteproject.org/constitution/Italy_2020], Accessed 6 March 2026; *See* e.g. Santin, P., *Ability to Pay and Human Rights: A Case-Law Analysis*, European Tax Studies, No. 2, 2014, pp. 67–68.

27 Article 31 Paragraph 1 od the Constitution of Spain, Available at: [https://constituteproject.org/constitution/Spain_2011], Accessed 6 March 2026; *See* e.g. Gallardo López, L.; Fernández Marín, F., *A Jurisprudential Approach to the Spanish Ability to Pay Principle: Current Issues*, European Tax Studies, No. 12, 2022, pp. 11–12.

28 Article 1 Paragraph 1 of the Constitution of the Republic of Croatia.

29 Article 3 of the Constitution of the Republic of Croatia.

30 Constitutional Court of the Republic of Croatia, Decision and Ruling No. U-IP-3820/2009 U-IP-3826/2009 and others, of 17 November 2009, para 13.1.

31 Arbutina, H., *Ustavna i nadnacionalna ograničenja ovlaštenja na oporezivanje*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 62, No. 5-6, 2012, p. 1287.

32 For a more detailed discussion about the concept of so-called constitutional identity, *see* e.g. Kostadinov, B., *Ustavni identitet*, in: Bačić, A. (ed.), Dvadeseta obljetnica Ustava Republike Hrvatske, Croatian Academy of Sciences and Arts, Zagreb, 2011, pp. 305–337.

principles of taxation implicitly confirm their own belonging to the identity of the Croatian Constitution.[33] Additionally, it should be emphasized that the constitutional imperative of fairness in taxation, so understood, is situated at the systemic level, that is, it is to be realized at the level of the tax system as a whole, rather than through an insistence on its equal and uniform application in the design of each individual tax form. Thus, for example, the assessment of tax fairness in the case of direct taxes, primarily the personal income tax[34] or the corporate income tax,[35] differs significantly from the standard of fairness required in the case of indirect taxes, and especially the value-added tax.[36] Their roles within the tax system are, namely, distinct – while one type of tax is fairer, the other is more fiscally productive, and together (at the level of the system as a whole) they may yield a constitutionally

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33 Kuzelj, V.; Kvartuč, D., *Pluralizam ustavnih vrednota: Konstituiranje socijalnog tržišnog gospodarstva u Republici Hrvatskoj*, in: Bevanda, V., Dias, R. (eds.), International Scientific Conference – EMAN 2021: Vol. 5 Conference Proceedings, Association of Economists and Managers of the Balkans, Belgrade, 2021, pp. 503–504.

34 It is exactly in the context of personal income taxation that the principle of tax equity has been most heavily debated in the Croatian legal literature. *See* e.g. Ercsey, Z.; Jerković, E., *Porez na dohodak: odredbe o pravičnosti*, in: Župan, M.; Vinković, M. (eds.), Suvremeni pravni izazovi: EU – Mađarska – Hrvatska, Faculty of Law, University of Pécs and Faculty of Law, J.J. Strossmayer University of Osijek, Pécs and Osijek, 2012, pp. 255–274; Perić, R.; Szilovics, C., *Pravednost i jednakost u sustavima poreza na dohodak*, in: Župan, M.; Vinković, M. (eds.), Suvremeni pravni izazovi: EU – Mađarska – Hrvatska, Faculty of Law, University of Pécs and Faculty of Law, J.J. Strossmayer University of Osijek, Pécs and Osijek, 2012, pp. 243–254; Perić, R.; Jerković, E., *Personal Income Tax System: Provisions Regarding Fairness and Equality*, in: Kandžija, V.; Kumar, A. (eds.), Economic Integrations, Competition and Cooperation, Faculty of Economics, University of Rijeka, Rijeka, 2013, pp. 143–153; Perić, R.; Jerković, E., *Principle of Fairness in Regard to Personal Income Tax*, in: Bacher, U. *et al.* (eds.), Interdisciplinary Management Research X, Faculty of Economics, J.J. Strossmayer University of Osijek and Hochschule Pforzheim University, Opatija, 2014, pp. 821–828; Jerković, E., *Važnost ciljeva i socijalno-političkih načela oporezivanja u funkciji ostvarenja pravednosti prilikom oporezivanja dohotka od nesamostalnog rada i samostalne djelatnosti*, in: International Scientific Conference – ERAZ 2017: Vol 3. Conference Proceedings, Association of Economists and Managers of the Balkans, Belgrade, 2017, pp. 217–229; Perić, R.; Konjić, E., *Primjena načela pravednosti u sustavima oporezivanja dohotka*, in: Arbutina, H.; Rogić Lugarić, T. (eds.), *Spomenica Prof. dr. sc. Juri Šimoviću*, Faculty of Law, University of Zagreb, Zagreb, 2017, pp. 35–43; Kuzelj, V.; Jerković, E.; Perić, R., *Predanost zakonodavca temeljnim (socijalnim) poreznim načelima ustava pri uređenju sustava oporezivanja dohotka u republici hrvatskoj*, Zbornik Pravnog fakultet Sveučilišta u Rijeci, Vol. 43, No. 1, 2022, pp. 247–266; Kuzelj, V.; Surla, J.; Milenković, M.; Jurčević, V.; Dunatov, J., *Ustavno načelo oporezivanja u skladu s ekonomskom snagom poreznog obveznika i pozitivni zakonski okvir utvrđivanja stopa poreza na dohodak*, Pravnik, Vol. 58, No. 110, 2024, pp. 73–100.

35 *See* e.g. Jerković, E.; Zlatić, M., *Importance of Socio-political Tax Principles Regarding the Corporate Income Taxation*, SEE Law Journal, No. 11, 2023, pp. 35–54.

36 *See* e.g. Lončarić-Horvat, O., *Socijalna država i posredni porezi*, Revija za socijalnu politiku, Vol. 2, No. 2, 1995, pp. 115–121; Šimović, J., *Socijalni učinci poreza na dodanu vrijednost*, Revija za socijalnu politiku, Vol. 5, No. 2, 1998, pp. 99–109. The question of tax equity is closely (but not exclusively) connected to the problem of determination of the optimal number of tax rates of the value-added tax. About the latter problem *see* e.g. Cindori, S.; Pogačić, L., *Problematika utvrđivanja broja i visine stopa poreza na dodanu vrijednost*, Ekonomska misao i praksa, Vol. 19, No. 2, 2010, pp. 227–249.

acceptable degree of fairness in taxation (without sacrificing the fiscal interest of securing budgetary revenue, which is the very purpose of taxation).

It should be noted that this social aspect of taxation, as the only one explicitly recognized at the constitutional level, according to the position of the Croatian Constitutional Court, does not necessarily require taxation through the application of a progressive rate. The Constitutional Court comes to this conclusion by drawing a distinction between the provisions of the Croatian Constitution, on the one hand, and those of Spain and Italy, on the other: "The Constitutional Court, namely, is not competent to decide whether … the legislator ought to have applied a proportional or a progressive tax rate. It could decide on that question only under the assumption that the constitution maker has expressly prescribed that the tax system of the Republic of Croatia must conform to the principle of progressivity, as is the case in certain constitutions of European states. Thus, for example, Article 31 Paragraph 1 of the Constitution of Spain expressly provides that everyone shall contribute to the support of public expenditure in accordance with their economic capacity through a fair tax system based on the principles of equality and progressive taxation, which in no case shall be confiscatory in nature … Likewise, Article 53 Paragraph 2 of the Constitution of Italy prescribes that the tax system shall be governed by the principle of progressivity."[37] Although it does not require excessive imagination to conclude that the provisions of the Croatian Constitution concerning the principles of taxation, in substance (though not explicitly), correspond to the principle of progressivity,[38] which would, at least potentially, require the application of a progressive rate (in the regulation of direct taxes), it follows that the legislature is permitted to achieve progressivity (that is, fairness) in taxation through other instruments of tax policy, and not (exclusively) through the application of progressive tax rates.

Thus, for several decades in the context of income taxation in the Republic of Croatia the pursuit of tax justice has relied more heavily on the redistributive effect of the personal allowance and less on a system of progressive tax rates (the number of which has been gradually reduced,[39] so that only two tax rates are currently in force, with their level determined by local self-government units[40]). Nevertheless, recent research has shown that such an attempt to achieve tax justice fails to fulfil its purpose, given that, due to the continuous increase in the amount

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37 Constitutional Court of the Republic of Croatia, Decision and Ruling No. U-IP-3820/2009 U-IP-3826/2009 and others, of 17 November 2009, para 15.3.

38 *See* Kuzelj, V., *op. cit.*, note 21, p. 472.

39 *See* Kuzelj, V.; Jerković, E.; Perić, T., *op. cit.*, note 34, pp. 255–257.

40 For the current system of determining tax rates of personal income tax in the Republic of Croatia, *see* Kuzelj, V.; Surla, J.; Milenković, M.; Jurčević, V.; Dunatov, J., *op. cit.*, note 34, pp. 91–97.

of the personal allowance and its augmentations (for example, for dependent children or family members, for different degrees of disability or for pensioners), the total amount of the personal allowance for the socially most vulnerable taxpayers exceeds the amount of their taxable income[41]). Therefore, (only or at least more likely) by using progressive rate in income taxation both horizontal and vertical equality in taxation can be achieved, and through detailed analyses, solutions should be identified in order to regulate income taxation in a manner that aligns as closely as possible with the principle of tax equity (fairness), given the current circumstances and the present temporal and spatial context. This in turn challenges the prevailing economic notion of equity founded on the principle of proportionality. Namely, the request for proportionality through the use of flat rate in (primarily income) taxation is in big part driven not just by different understanding of equity, but also by the idea of enhancing efficiency of taxation in general. As Milton Friedman, in his seminal work, puts it: "In fact, such a flat rate, even with no change whatsoever in other features of the law, would yield a higher revenue because a larger amount of taxable income would be reported for three reasons: there would be less incentive than now to adopt legal but costly schemes that reduce the amount of taxable income reported (so-called tax avoidance); there would be less incentive to fail to report income that legally should be reported (tax evasion); the removal of the disincentive effects of the present structure of rates would produce a more efficient use of present resources and a higher income."[42]

Therefore, the question arises: can this economic notion of equity as proportionality, in connection with the request for efficiency of tax system, be reconciled with the constitutional (social) principles of taxation? Such reconciliation is indeed possible. As it is described above, the constitutional principle of tax equity requires the progressivity of the tax system as a whole, but it does not mandate that every individual tax or tax rate be progressive. Nor does it require the exclusive use of progressive tax rates, allowing the legislator to employ alternative mechanisms to mitigate the regressive effects of certain taxes and to achieve overall system progressivity. This approach affords the legislator a wide margin of appreciation in designing tax policy and does not exclude the economic understanding of tax equity based on proportionality.

From the taxpayer's point of view, the most important objective is to achieve fairness in taxation, as this has a direct impact on the taxpayer and his economic situ-

41 See Novinc, M.; Viljevac, V.; Novinc, F., *Povratni porezni kredit kao instrument pravednije porezne politike u Republici Hrvatskoj*, EFZG Working Paper Series, No. 26-02, 2026, pp. 5–8, 16.

42 Friedman, M., *Capitalism and Freedom*, The University of Chicago Press, Chicago and London, 2002, p. 175.

ation, while the primary interest and goal of the state is to satisfy the principle of generosity, which will ensure the inflow of funds necessary to meet public needs. People desire fair taxes more than lower taxes. They want everyone to pay their taxes in proportion to their wealth.[43]

Taxation achieves many objectives, the most obvious of which is, of course, the fiscal one, i.e. securing sufficient revenue to meet public needs. In addition to this goal, taxation can achieve numerous other important objectives aimed at influencing taxpayers' behavior, which can be, and often are, in direct conflict both with one another and with the fiscal objective of taxation, which has historically been by far the most important, and often represented the exclusive purpose of taxation. The growing needs and development of modern society have imposed a need to also achieve certain non-fiscal objectives. Of these, the social objective of taxation is often regarded as the most divergent from the fiscal objective, as it aims to establish a fairer distribution of income and wealth between taxpayers. However, in order to achieve the social aim of taxation, the generosity of the tax itself is inevitably reduced, which results in a reduced capacity to meet the primary (fiscal) objective of taxation.

Namely, tax efficiency refers to collecting as much tax revenue with as few expenses as possible, while tax equity (fairness) refers to the fairer redistribution of income and wealth in society, which necessarily requires more complex tax solutions. Thus, in economic theory, it is often considered impossible to achieve the principles of fairness and efficiency in taxation at the same time, given that "[a]n increase in efficiency must be accompanied by an inevitable loss of equity."[44] Nevertheless, it should be emphasized that the relationship between this two principles is partly complementary, because they stand in relation to each other as a goal and a mean by which it should be achieved. Namely, the collection of tax revenues in an efficient manner represents the primary goal of taxation in general, while the idea of tax equity (fairness) as a fundamental (in the Croatian context even constitutional) principle of tax system prescribes how this goal should be realized (so that a fair distribution of the tax burden is achieved).

4. THE PROCEDURAL ASPECT OF FAIRNESS IN TAXATION

The above-outlined conclusions largely subsume the considerations relating to the question of material (substantive) equity or fairness in taxation, that is, the

[43] Adams, C. W., *Za dobro i zlo: Utjecaj poreza na kretanje civilizacije*, Institute of Public Finance, Zagreb, 2006, p. 405.

[44] Bejaković, P., *How to Achieve Efficiency and Equity in the Tax System?*, Revija za socijalnu politiku, Vol. 27, No. 2, 2020, p. 138.

identification of the core of the constitution maker's requirements concerning the design of the tax system. On the other hand, it must also be noted that a tax that is fair *in abstracto*, even once it is translated into statutory text, adopted, published, and brought into force, means little to nothing if it is not implemented (as is, after all, the case with any other legal norm). It is therefore essential to highlight the integral connection between the concept of material or substantive fairness in taxation and its procedural dimension, which is realized through the correct and consistent application of tax legislation to concrete cases.[45] The latter dimension is realized primarily through tax procedure and the control of its legality and correctness in the administrative dispute and possibly even the constitutional dispute.[46] Consequently, only where both the material (substantive) dimension of tax fairness (at the level of the statutory design of the tax system as a whole) and its procedural aspect (in the process of assessment and collection of taxes from taxpayers) are consistently fulfilled can one meaningfully speak of a just tax system.

In this context, it is important to insist on the proper qualification of facts in order to determine whether tax provisions have been potentially (ab)used contrary to their purpose, while at the same time insisting on the lawful and consistent application of tax regulations by tax authorities (guided by the law and the facts, rather than by a desire to fill the budget, that is, to protect the fiscal interests of the state as the tax creditor). A good example of a questionable, or even suspect, approach by tax authorities is found in instances of the design and retroactive application of provisions on the so called piercing of the corporate veil for tax purposes,[47] as well as in the currently very prominent issue of determining the use

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45 *See* e.g. Petrović, T.; Cindori, S., *Prava poreznih obveznika kao ljudska prava: razmatranje procesne i materijalne pravednosti u oporezivanju*, u: Miloš, M.; Kuzelj, V.; Mikac, L.; Cindori, S. (eds.), Ljudska prava i pitanje identiteta, ZA-Pravo and Faculty of Law, University of Rijeka, Zagreb and Rijeka, 2022, pp. 221–243.

46 *See* e.g. Kuzelj, V., *The Role of Administrative Adjudication in the Realization of the Constitutional Principle of Tax Equity – A Croatian Perspective*, Zagrebačka pravna revija, Vol. 14, No. 1, 2025, pp. 1–29; Kuzelj, V., *Upravnosudska zaštita prava poreznih obveznika – utvrđivanje činjenica relevantnih za oporezivanje u upravnom sporu*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 62, No. 1, 2025, pp. 97–121; Žunić Kovačević, N.; Bassegli Gozze, V., *Dokazivanje u poreznim stvarima – porezni postupak i upravni spor*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 43, No. 3, 2022, pp. 873–896.

47 See e.g. Žunić Kovačević, N.; Gadžo, S., *Institut zakonskog poreznog jamstva nakon novele općeg poreznog zakona 2012.: 'proboj pravne osobnosti' trgovačkih društava u slučaju zloporabe prava*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 34, No. 2, 2013, pp. 635–670; Žunić Kovačević, N.; Gadžo, S., *Zakonsko porezno jamstvo nakon novele OPZ-a: 'Proboj pravne osobnosti' trgovačkih društava u slučaju zloporabe prava*, Pravo i porezi, No. 5, 2014, pp. 26–40; Gadžo, S.; Žunić Kovačević, N., *Retroaktivna primjena pravila o proboju pravne osobnosti u poreznim stvarima: analiza upravnosudske i ustavnosudske prakse*, Zbornik Pravnog fakulteta u Rijeci, Vol. 40, No. 1, 2019, pp. 345–380; Kuzelj, V., *Neprimjerenost preuzimanja instituta proboja pravne osobnosti trgovačkog društva u porezno pravo*, Pravo i porezi, No. 12, 2023, pp. 20–27; Kuzelj, V., *Zaštita od retroaktivne primjene poreznih propisa (zakonsko porezno*

of tax benefits contrary to the purpose of the law through the concealment of an employment relationship (i.e. dependent work) by means of the craft activities subject to lump-sum taxation.[48] These two examples illustrate situations in which it appears, at least externally, that the tax authorities act selectively and in accordance with the interests of the state as the tax creditor, rather than on the basis of the primacy of facts and the consistent application of the law. In this context, the role of the administrative courts (primarily), and that of the Constitutional Court (subsidiarily), in protecting the rights of taxpayers comes to the fore. Such protection failed to materialize in the context of the tax piercing of the corporate veil, but it has (at least for now) begun to emerge in the context of crafts subject to lump-sum taxation.

It should be emphasized that this is not merely a matter of supervising the legality of the tax administration's conduct in the context of application of individual tax institutes (although the two examples mentioned above illustrate this in a perfect way), but also of preserving legality in the context of contemporary trends and challenges in the work of tax authorities. A good example of the latter is the digitalization of tax authorities conduct and procedures, which carries significant potential for improving the (perception of) fairness of the tax system among citizens, while at the same time poses a challenge for the protection of the fundamental rights of taxpayers.

Within tax administration the principle of fairness in taxation and the process of digitalization are increasingly intertwined in modern public finance systems. Digitalization offers significant potential for enhancing both horizontal and vertical fairness by improving the accuracy, efficiency, and transparency of tax administration. Also, taxpayers' perception of the principle of fairness is largely shaped by their interactions with tax administration. It is assumed that a fair tax system is supported by efficient tax administration staffed by qualified professionals who

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jamstvo), Pravo i porezi, No. 4, 2024, pp. 46–53; Kuzelj, V., *Porezni proboj pravne osobnosti trgovačkog društva zbog nepodnošenja poreznih prijava*, Pravo i porezi, No. 3, 2025, pp. 68–74; Milotić, I., *Proboj odgovornosti za porezne obveze društva (Opći porezni zakon u 2012. i 2024. godini)*, Pravo i porezi, No. 3, 2026, pp. 62–68.

48 See e.g. Kuzelj, V.; Petrović, T.; Erent-Sunko, Z., *Prikrivanje radnoga odnosa (nesamostalnog rada) institutom paušalnoga obrta: financijskopravne i radnopravne implikacije*, Pravni vjesnik, Vol. 38, No. 2, 2022, pp. 55–74; Kuzelj, V., *Paušalni obrt ili radni odnos (nesamostalni rad) – kriteriji procjene u upravnosudskoj praksi*, Pravo i porezi, No. 4, 2026, pp. 54–61; Kuzelj, V., *Fingirani paušalni obrt? Kriteriji za procjenu postojanja radnog odnosa (nesamostalnog rada) u poreznom postupku i upravnom sporu*, IusInfo, 1 April 2026, Available at: [https://www.iusinfo.hr/aktualno/u-sredistu/fingirani-pausalni-obrt-kriteriji-za-procjenu-postojanja-radnog-odnosa-nesamostalnog-rada-u-poreznom-postupku-i-upravnom-sporu-68518], Accessed 12 April 2026.

continuously improve their competencies and maintain a relationship with taxpayers based on respect and transparency. Sush institutional characteristics contribute to strengthening trust and increasing the perceived legitimacy of taxation.

Compliance costs incurred by taxpayers, especially those associated with physical visits to tax administration offices, can increase resistance to paying taxes. These costs, both in terms of time and financial resources, can reinforce perceptions of fairness. In this context, the reduction of administrative burdens becomes an important factor in improving voluntary tax compliance. One key approach to addressing these challenges is the digitalization of tax administration. Modern communication between tax administrations and taxpayers is increasingly bi-directional and is no longer limited to traditional channels such as telephone communication or personal visits. Instead, a large number of taxpayers rely on digital communication channels (including online portals, email, and chatbot-based interactions).

Furthermore, the increased use of technology in tax administrations has the potential to significantly improve the quality of services provided to taxpayers and alleviate challenges in tax collection. As digitalization generates large amounts of data, it is crucial to use this data effectively, especially in the context of risk assessment and analysis, data exchange and administrative cooperation. Overall, digital transformation of tax administration plays a key role in reducing compliance costs, improving service efficiency and strengthening taxpayers' perceptions of fairness within the tax system.[49] If properly designed and implemented, digitalization can serve as a powerful instrument for strengthening the principle of fairness in taxation and increasing taxpayers' trust in the tax system, while at the same time increasing the efficiency and effectiveness of tax administration.

Alongside the undeniable advantages for efficiency and for the perception of fairness within the tax system, digitalization simultaneously carries risks to the fundamental rights of taxpayers (particularly in relation to cybersecurity, the protection of personal and business data, and similar concerns). It is therefore essential that this process be continuously monitored by the expert community, and that the judiciary (primarily the administrative courts) gradually prepares for potential new cases arising in this context.

One must remember that a right to a fair procedure is one of the fundamental principles upon which rests the entire European legal heritage, as it is guaranteed both by the (European) Convention for the Protection of Human Rights and

[49] See more: Jerković, E., *The Future of Tax Administration: Artificial Intelligence in the Service of a More Efficient Public Administration*, SEE Law Journal, No. 14, 2025, pp. 90–107.

Fundamental Freedoms,[50] as well as by the Charter of Fundamental Rights of the European Union.[51] It is also guaranteed by the Croatian Constitution.[52] All three guarantees, although in a different scope, are applicable to the tax matters.[53] Therefore, the respect for the taxpayers' procedural rights is not a choice, but an obligation for the tax administration and the (administrative) courts controlling the legality and correctness of its rulings and conduct.

5. CONCLUDING REMARKS

From the foregoing, several theses may be derived, which could also serve as separate subjects for future (independent) research. Namely, the concept of tax fairness is systemic in character, and in several distinct respects.

First, the ideal of equity (fairness) in taxation is closely linked to the realization of the constitutional concept of the social state and the principle of social justice. Second, tax fairness must be assessed at the level of the tax system as a whole, rather than at the level of individual tax forms, given that other legitimate interests also exist (such as the fiscal productivity or ease of collection of a particular tax, relating to the fiscal aspect of taxation, that is, the interest in securing tax revenues – an inefficient tax is *eo ipso* an unjust one). Third, at the procedural level, the assessment and collection of the due tax must be fair, since one cannot meaningfully speak of a just tax system in which statutory tax forms are designed in a fair manner but are not implemented in practice, or are implemented incorrectly and/or selectively.

Fourth, the need for administrative-judicial and, potentially, constitutional-judicial intervention aimed at correcting injustices committed within the (two-tier) tax procedure not only delays the administration of justice but also increases the overall cost of the process, thereby rendering it necessarily socially insensitive and *ipso facto* unjust (poorer taxpayers, fearing increased expenses, will seldom initiate proceedings to protect their rights violated in the tax procedure, and will often lack the legal knowledge required to do so).

The principles of efficiency and fairness in taxation stand in relation to each other as a means to an end. Namely, while the efficient collection of tax revenues represents the very purpose of the tax system, the fair distribution of tax burden

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50 Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette – International Treaties, No. 6/99, 8/99, 14/02, 1/06, 13/17.

51 Article 47 of the Charter of Fundamental Rights of the European Union, Official Journal of the European Union, C 202 of 7 June 2016, pp. 389–405.

52 Article 29 of the Constitution of the Republic of Croatia.

53 *See* Kuzelj, V., *The Role of Administrative Adjudication…*, *op. cit.*, note 46, pp. 9–27.

represents the constitution maker's choice of the method to achieve that goal in an acceptable way. Therefore, although usually marked as opposite and noncompatible values, principles of equity (fairness) and efficiency in taxation may actually reinforce one another. Namely, efficient and in today's age digitalized tax administration reduces the costs of tax collection and impacts the taxpayers' perception of the tax system as more fair and just, which is in turn socially desirable. On the other hand, if the taxpayers perceive tax legislation and the procedure of tax assessment and collection as fair, they will less likely challenge it before the (primarily administrative) courts. Only through equitable taxation and fair distribution of income the Republic of Croatia can join its European brethren in honoring the legacy of (European) social constitutionalism.

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4. Constitution of the Republic of Croatia, Official Gazette, No. 56/90, 135/97, 113/00, 28/01, 76/10, 5/14 – Decision of the Constitutional Court No. SuP-O-1/2014 of 14 January 2014
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Review article

FINANCIAL DIMENSIONS OF HEALTHCARE PROVISION UNDER SOCIAL SECURITY COORDINATION: EMPIRICAL EVIDENCE FROM BULGARIA (2018–2024)*

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ABSTRACT

This study examines the provision of healthcare under the rules on the coordination of social security systems, focusing on their application in Bulgaria on the basis of empirical data from the National Health Insurance Fund (NHIF) for the period 2018–2024. The analysis concentrates on the financial and institutional dimensions of coordination in the context of the free movement of insured persons within the European Union. Planned treatment and the application of Directive 2011/24/EU are explicitly excluded from the scope of the study.

The central argument is that the financial flows generated within the coordination mechanism—particularly inter-institutional payments and reimbursements—constitute a key empirical indicator of the functioning of the national health insurance system in a cross-border context. These flows reflect not only the intensity of healthcare utilisation across borders, but also reveal structural characteristics and asymmetries within the system. The findings demonstrate that healthcare provision under the coordination rules forms a distinct and financially significant segment of NHIF activity, characterised by internal differentiation, temporal discrepancies between the incurrence and settlement of expenditures, and a high degree of concentration with respect to a limited number of countries.

The study is structured into four main parts. The first part outlines the normative and institutional framework of coordination, with particular emphasis on Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009, as well as the role of the NHIF as the competent institution. The second part presents the methodology and data sources. The third part provides an

* The author discloses the use of ChatGPT exclusively as an auxiliary linguistic tool for translation and linguistic refinement, including ensuring terminological consistency. The tool was not used to generate substantive content, legal analysis, or conclusions, all of which remain the sole responsibility of the author.

empirical analysis of the main financial flows, including healthcare provided in Bulgaria to persons insured in other Member States, incoming and outgoing inter-institutional reimbursement flows, and reimbursements of costs to insured persons. The fourth part discusses the results and identifies the main trends.

Methodologically, the study employs a combination of complementary approaches, including document analysis, descriptive statistics, and comparative analysis over time, enabling the identification of both short-term fluctuations and more persistent structural patterns.

The conclusion argues that the coordination mechanism should not be viewed solely as a technical system for the financial settlement of expenditures between institutions, but as an essential guarantee for the effective exercise of the right to free movement. By shifting the organisational and financial burden onto national institutions, access to healthcare is ensured without direct financial impact on insured persons, thereby underscoring the role of coordination as a key instrument for the effective protection of social rights in a cross-border context.

***Keywords**: Cross-border healthcare, Healthcare expenditure, health insurance coverage, Free movement of persons, Social security coordination*

1. INTRODUCTION

This study assesses the implementation of social security coordination rules within health insurance frameworks by analysing their generated financial flows. In the context of increasing cross-border mobility within the European Union, these rules play a key role in ensuring access to healthcare outside the competent Member State, while at the same time regulating the allocation of the financial burden among national systems.

The coordination mechanism manifests itself through several interrelated financial flows: expenditure on healthcare provided in one state to persons insured in another; payments of claims for treatment received abroad; inter-institutional reimbursements; as well as reimbursements of costs to insured persons themselves. The interaction between these flows forms the overall financial logic of coordination and reveals the link between the mobility of persons and the subsequent settlement of healthcare-related expenditures.

The aim of the study is to analyse the dynamics, structure, and interrelationship of these flows over the period 2018–2024. The analysis is based on data from official annual reports and employs descriptive statistics and a comparative approach over time, allowing both short-term variations and more stable structural patterns to be identified.

The central thesis is that the coordination mechanism should be understood not only as an instrument for the allocation of costs between institutions, but also as an essential guarantee for the exercise of the right to free movement. It ensures access to healthcare without direct financial burden on insured persons, while

the organisational and financial responsibility is borne by national systems. It is precisely this function that gives coordination both social and economic significance within the European Union. The significance of this coordination becomes particularly evident in periods of public health crises and other cross-border challenges, when the need for effective institutional cooperation and guaranteed access to healthcare acquires even greater importance[1].

2. COORDINATION OF SOCIAL SECURITY SYSTEMS: NORMATIVE AND INSTITUTIONAL FRAMEWORK

In contemporary society, social security is understood as an integrated legal and institutional mechanism that ensures protection against social risks[2] through a combination of cash benefits and access to services and goods[3], including healthcare. Its functioning is based both on a legal framework defining the rights and obligations of insured persons and on an institutional structure through which these relations are administered within the public domain.

The provision of healthcare constitutes a core component of the social security system, the organisation and financing of which are primarily governed by national law. However, the development of the internal market and the guaranteed free movement of persons within the European Union have strengthened the cross-border dimension of the exercise of social rights, thereby necessitating coordination between different national insurance schemes. In this context, the coordination mechanism of social security systems has emerged, aiming to ensure the effective exercise of the rights of insured persons when moving between Member States, without undermining the autonomy of national systems.[4]

Coordination stems directly from European Union law, which requires the protection of social security rights for persons exercising their right to free movement[5].

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1 Đurić, S.; Lalatović, B., *Solidarity Check in Times of COVID-19. Analysis of the EU Approach Towards Its Closest Neighbours with a Special Focus on Montenegro*, in: Petrašević, T.; Duić, D.; Novokmet, A. (eds.), EU and Comparative Law Issues and Challenges Series (ECLIC), Vol. 5, 2021, pp. 177–178, Available at: [https://doi.org/10.25234/eclic/18303], Accessed 3 April 2026.

2 Rayanova, K., *Globalization of Contemporary International Political Processes*, Proceedings of University of Ruse, Vol. 60, Book 7.2, 2021, pp. 25–28, Available at: [https://conf.uni-ruse.bg/bg/docs/cp21/7.2/7.2-4.pdf], Accessed 2 April 2026.

3 Eichenhofer, E., *Social Security as a Human Right*, in: Pennings, F., Vonk, G. (eds.), *Research Handbook on European Social Security Law*, Edward Elgar Publishing, Cheltenham, 2015, pp. 3-31, Available at: [https://doi.org/10.4337/9781782547334], Accessed 30 March 2026.

4 Verschueren, H., *The role and limits of the European social security coordination in guaranteeing migrant persons social benefits*, European Journal of Social Security, Vol. 22, No. 4, 2020, pp. 390 – 402.

5 Cornelissen, R., De Wispelaere, F., *Sixty Years of European Social Security Coordination: Achievements, Controversies and Challenges*, in: *Social Policy in the European Union 1999–2019: The Long and Winding Road*, ETUI, Brussels, 2019.

Its function is to prevent the adverse effects of the unilateral application of national legislation in cross-border situations by ensuring continuity and effectiveness of social protection. The current legal framework of coordination is primarily established by Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009, which replaced the earlier Regulations (EEC) No 1408/71 and No 574/72. The new regulations have been applicable since 1 May 2010 and have subsequently been extended to the European Economic Area and Switzerland.

Regulation (EC) No 883/2004 constitutes the principal legal instrument defining the material and personal scope of coordination and establishing the principles governing the exercise of social rights in a cross-border context. Its purpose is not to harmonise national systems but to ensure their coordinated application through rules that prevent the loss or duplication of rights and determine the applicable legislation. Regulation (EC) No 987/2009 complements this framework by laying down the procedural and administrative mechanisms for its implementation. Together, the two regulations form the so-called "modernised coordination", aimed at enhancing the efficiency and transparency of the mechanism through institutional cooperation, information exchange, and coordination among competent authorities. Of particular relevance to this study are the provisions of Regulation (EC) No 883/2004 concerning entitlement to healthcare during residence (Article 17) and during a temporary stay (Article 19), as well as the provisions on the reimbursement of costs between institutions (Article 35), supplemented by the procedural rules of Regulation (EC) No 987/2009 (Articles 62–69). According to Article 1(q) of Regulation (EC) No 883/2004, the competent institution is the institution responsible, under the applicable legislation, for providing benefits. In the context examined, the National Health Insurance Fund (NHIF) performs the role of the competent institution in the application of the coordination rules.

The NHIF was established under the Health Insurance Act[6] (Article 6(1)[7]) as a legal entity with its seat in Sofia. Its structure comprises a central administration and regional health insurance funds. The Act defines its permissible scope of activity—namely, the administration of compulsory health insurance—and explicitly prohibits it from owning healthcare establishments and pharmacies[8].

Within the coordination mechanism, the NHIF is registered in the Electronic Exchange of Social Security Information (EESSI[9]) system as a "competent insti-

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6 Promulgated in the State Gazette, No. 70 of 19 June 1998.

7 The start of the operation of the National Health Insurance Fund is considered to be 15 March 1999.

8 For more on the National Health Insurance Fund, see Radeva, M., *Principles of Mandatory Health Insurance*, Academic Publishing House "University of Ruse", Ruse, 2025, pp. 131–196.

9 Electronic Exchange of Social Security Information (EESSI), Available at: [https://ec.europa.eu/social/social-security-directory/pai/select-country/language/bg], Accessed 2 April 2026.

tution", an "institution of place of residence/stay", and a "liaison body". In this capacity, it applies the provisions on benefits in kind in cases of sickness, ensuring the provision of healthcare in a cross-border context.

As a competent institution, the NHIF issues certification documents for cross-border healthcare, including the European Health Insurance Card (EHIC), provisional replacement certificates, and portable documents S1 and S2. Through the EESSI system, structured electronic documents are exchanged, serving as the basis for the settlement of financial relations between institutions.

Financial settlements between institutions are primarily carried out on the basis of actual costs in accordance with Article 35 of Regulation (EC) No 883/2004 and Articles 63–65 of Regulation (EC) No 987/2009. An exception is provided for certain Member States, where reimbursement may be based on fixed amounts when national administrative structures do not allow the application of actual costs. However, this regime is limited both in terms of the Member States concerned and the categories of persons to whom it applies.

Bulgaria is not among the Member States applying fixed amounts; therefore, the NHIF fully applies the principle of reimbursement of actual costs. In its capacity as an institution of the place of stay or residence, it is entitled to claim reimbursement from the competent institutions of other Member States on the basis of the issued certification documents.

In this context, the normative and institutional framework not only defines the rights of insured persons and the obligations of institutions but also establishes the framework within which the financial flows related to the provision of healthcare in cross-border situations are generated and recorded. These mechanisms are reflected in the reporting activity of the NHIF and determine the choice of data and methods used in this study.

3. METHODOLOGY AND DATA SOURCES

This study is based on empirical data obtained from the National Health Insurance Fund (NHIF) in its capacity as the competent institution responsible for the application of the rules on the coordination of social security systems. In logical continuity with the previously outlined normative and institutional framework, the methodological approach is directly linked to the established mechanisms of reporting and control governing NHIF activity, which determine both the content and the structure of the data used.

Pursuant to the Health Insurance Act, the NHIF is required to prepare an annual report on budget execution and an activity report, which must be submitted to

the National Assembly through the Council of Ministers no later than 30 June of the following year (Article 30 of the Health Insurance Act). These reports constitute the primary official source of information on the financial and functional performance of compulsory health insurance, including the application of the coordination rules.

Despite the existence of a statutory obligation to prepare and submit these reports, the current legal framework does not contain an explicit requirement for their public availability. This limits the transparency of NHIF activities and restricts access to information of significant public interest. Although the resolutions of the National Assembly concerning the approval of these reports are published in the State Gazette, the reports themselves are not systematically and consistently made publicly available.

NHIF practice indicates partial publication of annual activity reports on the institution's website, but without consistency and without full coverage of all years. At the same time, annual budget execution reports are generally not publicly accessible. This fragmentation of publicly available information creates significant constraints for conducting a comprehensive empirical analysis.

Within the framework of this study, these limitations were overcome through the use of the legal mechanism for access to public information. In accordance with the Access to Public Information Act, the missing annual activity reports of the NHIF, as well as the budget execution reports for the relevant period, were requested and obtained. This ensured a complete and comparable dataset of official institutional data, enabling a consistent analysis of financial flows within the coordination mechanism.

The study covers the period 2018–2024, which allows for the examination of the dynamics of the application of coordination rules over time and the identification of both stable trends and fluctuations across the different components of the mechanism.

Methodologically, the study relies on a combination of complementary approaches. First, a document analysis of annual reports is conducted, examining their content, structure, and reporting methodology. Second, descriptive statistical methods are used to systematise and quantitatively present the main financial indicators. Third, a comparative analysis over time is carried out, allowing trends, changes, and structural dependencies in the development of the examined financial flows to be identified.

For the purposes of the study, the empirical material is structured according to the main areas of application of the coordination mechanism. These include: health-

care provided in Bulgaria to persons insured in other Member States; inter-institutional reimbursements (both incoming and outgoing flows), including the dynamics of outstanding claims; as well as the reimbursement of costs by the NHIF to insured persons. This structure reflects the functional logic of coordination and allows for a consistent analysis of its financial dimensions.

The scope of the study is limited to healthcare provided under the rules on the coordination of social security systems, explicitly excluding planned treatment and the application of Directive 2011/24/EU. This distinction is necessary in view of the differences in the legal framework and financial mechanisms governing the two regimes.

Certain limitations of the study should also be noted. The data used are aggregated institutional data, which do not allow for analysis at the level of individual cases, and their structure is shaped by the reporting practices of the NHIF. Nevertheless, the use of official sources ensures a high degree of reliability and enables the formulation of well-founded conclusions regarding the functioning of the coordination mechanism from a Bulgarian perspective.

4. EMPIRICAL ANALYSIS

The empirical analysis traces the dynamics and structure of the main financial flows generated through the application of the rules on the coordination of social security systems over the period 2018–2024. The aggregated annual data indicate that a multi-component financial flow is formed within this mechanism. The share of these expenditures in total NHIF health insurance payments varies over the period under review, ranging from 1.9% in 2018 to 6.0% in 2019, followed by a lower range between 2.0% and 2.7% during 2020–2023, and declining to 0.9% in 2024.

To provide a clearer understanding of the scale of these processes in absolute terms, it should be noted that in 2024 health insurance revenues in the NHIF budget amounted to approximately EUR[10] 4,137,000 thousand, while total payments for healthcare provided under the coordination rules amounted to approximately EUR 38,970 thousand. Compared to 2023, this represents a decrease of approximately EUR 26,200 thousand, or 40.2%. This decline should be interpreted with caution, as it may reflect specific features of the settlement process and the time

[10] As of 1 January 2026, the Republic of Bulgaria adopts the euro as its official currency. Since 1 January 1999, the Bulgarian lev has been pegged to the euro at a fixed exchange rate of 1 euro = 1.95583 leva. All values presented in this study have been converted by the author at this fixed rate in order to facilitate readability and comparability of the data.

lag between the incurrence and settlement of expenditures, rather than a structural change in the intensity of healthcare utilisation under the coordination rules.

The data for the period under review reveal a variable pattern of expenditure that does not follow a linear trend, but is characterised by fluctuations over time while simultaneously indicating growth in certain components of the coordination mechanism. These developments should be interpreted cautiously, as they may be influenced both by the volume of cross-border mobility and by the specific features of reporting and settlement processes between institutions in individual years.

4.1. Healthcare Provided in Bulgaria to Persons Insured in Other Member States

The legal grounds for receiving healthcare outside the competent Member State are regulated by Regulation (EC) No 883/2004, which distinguishes between entitlement to benefits in kind during a temporary stay (Article 19) and during residence (Article 17). This distinction is of direct relevance to the present analysis, as it determines differences in both the scope of healthcare provided and, consequently, the nature and magnitude of the resulting expenditures. In cases of a temporary stay[11], insured persons are entitled to necessary healthcare, whereas in cases of residence they benefit from the full scope of healthcare services under the legislation of the state of residence, which implies higher expenditure per person. In both situations, when healthcare is provided on the territory of the Republic of Bulgaria to persons insured in other Member States, the NHIF acts as the institution of the place of stay or residence and pays for the services provided by contracted healthcare providers. These payments constitute an initial financial outlay for the Bulgarian system, which is subsequently subject to reimbursement by the competent institution of the competent Member State.

Data for the period 2018–2024 indicate an overall upward trend in NHIF expenditure on healthcare provided in Bulgaria to persons insured in other Member States, albeit with certain fluctuations over time. The NHIF paid EUR 3,428.3 thousand in 2018, EUR 3,975.7 thousand in 2019, EUR 3,930.6 thousand in 2020, EUR 5,570.3 thousand in 2021, EUR 7,087.7 thousand in 2022, EUR 10,078.9 thousand in 2023, and EUR 14,116.1 thousand in 2024. Following relatively stable levels during 2018–2020, a consistent and accelerating increase in

[11] Decision No S3 of 12 June 2009 of the Administrative Commission for the Coordination of Social Security Systems on determining the benefits covered by Article 19(1) and Article 27(1) of Regulation (EC) No 883/2004 of the European Parliament and of the Council and Article 25(A)(3) of Regulation (EC) No 987/2009 of the European Parliament and of the Council, Official Journal of the European Union, C 106/40.

this expenditure is observed from 2021 onwards, with the total more than doubling over the period 2021–2024. From a broader perspective, data indicate that over the eighteen years of Bulgaria's membership in the European Union[12], NHIF expenditure on healthcare provided on the territory of the country to persons insured in other Member States has increased at an average annual growth rate of approximately 30%, according to official data from the 2024 annual report on the execution of the NHIF budget.

The structure of expenditure by legal basis for access to healthcare shows a clear predominance of necessary healthcare provided during a temporary stay under Article 19. This expenditure amounted to EUR 2,367.0 thousand in 2018, EUR 2,688.0 thousand in 2019, EUR 2,486.8 thousand in 2020, EUR 3,849.9 thousand in 2021, EUR 4,753.1 thousand in 2022, EUR 6,916.6 thousand in 2023, and EUR 9,207.6 thousand in 2024. Its share remains relatively stable, ranging between 63% and 69%, reaching 65.2% in 2024, which indicates that this category accounts for the main share of the financial burden.

At the same time, expenditure for persons falling under Article 17, who benefit from the full package of healthcare services in the state of residence, shows a steady increase. It amounted to EUR 1,068.8 thousand in 2018, EUR 1,287.0 thousand in 2019, EUR 1,461.9 thousand in 2020, EUR 1,729.2 thousand in 2021, EUR 2,386.8 thousand in 2022, EUR 3,185.0 thousand in 2023, and EUR 4,898.4 thousand in 2024. Its share increases from 31.0% to 34.7%, indicating a growing significance of residence-based cases. The reasons for this trend cannot be conclusively determined due to the lack of data on the number of persons, and it may reflect both an increase in the number of individuals falling within this category and a rise in the average expenditure per person. Planned healthcare plays a negligible role during the period under review, with its share remaining below 0.1% and having no significant impact on the overall expenditure structure.

The breakdown by country of insurance reveals a persistent concentration of expenditure in a limited number of countries. During the period 2018–2020, the United Kingdom and Germany occupy leading positions, followed by Italy and Greece. From 2021 onwards, Germany establishes itself as the primary source of expenditure, reaching EUR 3,700.4 thousand (36.6% of total expenditure) in 2023. This concentration is consistent with the intensity of Bulgaria's economic and labour migration ties with these countries.

It should also be noted that the category "persons insured in other Member States" includes not only foreign nationals but also Bulgarian citizens who work and are

[12] Bulgaria acceded to the European Union on 1 January 2007.

insured in other Member States. Upon returning to Bulgaria, including during summer holidays, these individuals receive healthcare under the coordination rules and fall within the analysed category. From a Bulgarian perspective, a statistical breakdown distinguishing this group from genuinely foreign nationals would be of interest. However, such an analysis cannot be carried out on the basis of the available data, which are aggregated by "competent Member State" rather than by citizenship.

The analysis of monthly activity reveals a pronounced seasonal pattern, with peaks during the summer months (July–August) in both 2023 and 2024. This dynamic is comparable to the intensity of healthcare utilisation in a cross-border context. The territorial distribution of expenditure shows a stable pattern, with the largest shares concentrated in the regional health insurance funds of Plovdiv, Sofia-City, Burgas, and Varna, which together account for over 60% of total expenditure (60.9% in 2024). This distribution reflects both the concentration of healthcare facilities in major urban centres and the role of tourist regions and areas with high mobility.

By type of healthcare, expenditure is dominated by hospital care (EUR 23,574.6 thousand, or 64.5%), followed by outpatient care (13%), other benefits in kind (8.2%), pharmaceuticals (7.6%), average costs related to residence-based cases (5.3%), and dental care (1.5%). In 2024, the structure is as follows: 85.9% hospital care, 10.6% medicinal products for outpatient treatment, and 3.5% outpatient and dental care, indicating that the financial burden is primarily driven by resource-intensive services.

On the basis of the above data, more general conclusions can be drawn regarding the structure and dynamics of this component, which are addressed in the discussion section.

4.2. Financial Settlements Between Institutions Within the Coordination Framework

Financial settlements between institutions within the coordination of social security systems constitute an essential element of its functioning, through which the reimbursement of incurred costs between Member States is effected when healthcare is provided in a cross-border context. The legal basis for these settlements is established in Article 35 of Regulation (EC) No 883/2004, according to which benefits in kind provided by the institution of one Member State on behalf of the institution of another Member State are subject to reimbursement, as well as in the provisions of Regulation (EC) No 987/2009, which govern the procedures for the submission, processing, and settlement of claims.

Inter-institutional settlements do not represent a separate component but rather a logical continuation of the right of access to healthcare under the coordination rules, ensuring its financial implementation. Within this mechanism, two main interrelated financial flows are formed: revenues received by the NHIF from foreign institutions for healthcare provided in Bulgaria, and payments made by the NHIF in response to claims from other Member States for healthcare provided abroad to persons insured in Bulgaria. These flows should be analysed in sequence.

4.2.1. Reimbursement of costs to the NHIF for healthcare provided in Bulgaria to persons insured in other Member States

NHIF expenditure on healthcare provided in Bulgaria to persons insured in other Member States is directly linked to the claims submitted by the institution to the competent foreign institutions for reimbursement. In this respect, the NHIF initially bears the cost in its capacity as the institution of the place where healthcare is provided, and subsequently establishes claims against the competent Member State of the respective person. Data for the period 2018–2024 indicate a relatively stable structure of this mechanism, accompanied by fluctuations in the volume of claims submitted, reimbursements received, and the relationship between them.

As of 1 January 2018, approximately EUR 2,967.7 thousand were due under submitted claims to 28 countries, with the largest shares attributable to the United Kingdom (32%), Germany (17.5%), Italy (17.1%), and Greece (8.1%). In 2018, the NHIF submitted claims to 33 countries amounting to EUR 3,610.2 thousand, of which 40.5% were directed to the United Kingdom. By the end of the year, reimbursements had been received from 27 countries, representing 90.2% of the outstanding claims at the beginning of the period, with inflows increasing by 144% compared to 2017. The total amount of outstanding claims as of 31 December 2018 reached EUR 3,849.1 thousand, representing an increase of 29.7% compared to the previous period.

In 2019, submitted claims amounted to EUR 3,498.2 thousand to 33 countries, with the United Kingdom (28.3%) and Germany (22.6%) holding the largest shares. Reimbursements received totalled EUR 2,641.6 thousand from 28 countries, representing 68.6% of the outstanding claims at the beginning of the year and a slight decrease of 1.3% compared to 2018. Among recovered amounts, the largest share came from the United Kingdom (28.4%), followed by Germany (19.6%) and Greece (10.0%). By the end of 2019, outstanding claims reached EUR 4,665.5 thousand, reflecting an increase of 21.2%, with the largest shares attributable to the United Kingdom (32.3%) and Germany (22.4%).

In 2020, the NHIF submitted claims amounting to EUR 2,553.2 thousand to 32 countries, with the United Kingdom (16.8%), Italy (14.5%), Germany (10.3%), and Greece (9.7%) as leading contributors. Reimbursements totalled EUR 2,542.9 thousand from 29 countries (54.5% of outstanding claims at the beginning of the year), decreasing by 3.7% compared to 2019. Among recovered amounts, Germany accounted for the largest share (30.8%), followed by the United Kingdom (20.6%) and Greece (7.0%). The total amount of outstanding claims as of 31 December 2020 reached EUR 4,667.4 thousand. The largest shares were attributable to the United Kingdom (30.6%), followed by Italy (22.3%), Germany (11.1%), and Greece (6.0%). Compared to 31 December 2019, outstanding claims increased by EUR 1.9 thousand, or 0.04%.

In 2021, a significant increase in submitted claims is observed, reaching EUR 5,403.4 thousand, with the United Kingdom (36.5%) and Germany (31.3%) accounting for the largest shares. Reimbursements rose to EUR 2,816.5 thousand (60.3% of outstanding claims at the beginning of the year), increasing by 10.8% compared to 2020. Among recovered amounts, Germany accounted for the largest share (29.1%), followed by Italy (19.5%) and the United Kingdom (13.5%). Despite this, outstanding claims increased to EUR 7,254.6 thousand. The largest shares were attributable to the United Kingdom (EUR 3,018.6 thousand; 41.6%), followed by Germany (19.2%), Italy (11.8%), and Greece (3.0%). Compared to 2020, outstanding claims increased by EUR 2,587.2 thousand, or 55.4%.

In 2022, submitted claims amounted to EUR 5,696.9 thousand, with Germany holding the largest share (31.9%). Reimbursements received totalled EUR 4,339.8 thousand (59.8% of outstanding claims at the beginning of the year), increasing by 10.8% compared to 2021. Among recovered amounts, the largest share came from the United Kingdom (39.9%), followed by Germany (21.2%) and Greece (4.8%). Outstanding claims reached EUR 8,419.1 thousand, representing an increase of 16.1%. The largest shares were attributable to the United Kingdom (30.3%), followed by Germany (27.2%), Italy (14.3%), and the Netherlands (3.7%).

In 2023, the NHIF submitted claims amounting to EUR 7,563.1 thousand, with Germany accounting for 35.3%. Reimbursements totalled EUR 6,032.7 thousand (71.7% of outstanding claims at the beginning of the year), increasing by 39.0% compared to 2022. Among recovered amounts, the largest shares were from Germany (27.18%), the United Kingdom (27.15%), and Italy (14.9%). Despite the accelerated pace of reimbursement, outstanding claims reached EUR 9,902.5 thousand (+17.6%), indicating that the accumulation had not been overcome. The largest shares were attributable to Germany (33.4%), followed by the United Kingdom (26.7%), Italy (8.7%), and the Netherlands (4.4%).

In 2024, submitted claims increased to EUR 10,243.7 thousand, with Germany accounting for 36.4%. Reimbursements received amounted to EUR 7,058.5 thousand (71.2% of outstanding claims at the beginning of the year), increasing by 17.0% compared to 2023. The largest shares of recovered amounts came from Germany (38.2%), followed by the United Kingdom (21.4%), Italy (6.8%), the Netherlands (5.8%), and Greece (5.6%).

In summary, throughout the entire period under review, a persistent gap is observed between submitted claims and reimbursements received, both in terms of volume and timing. This discrepancy leads to the accumulation of outstanding claims and reflects a structural characteristic of inter-institutional settlements, whereby the time lag between the provision of healthcare and its final financial settlement is an inherent feature of the coordination mechanism.

4.2.2. NHIF Payments on Claims from Other Member States for Healthcare Provided to Bulgarian Insured Persons Abroad

The analysis of the dynamics of NHIF payments on claims from other Member States for the period 2007–2017, corresponding to the first ten years following Bulgaria's accession to the European Union, reveals a clearly pronounced upward trend in both submitted claims and payments made, accompanied by a steady increase in outstanding liabilities. Already in the first years following Bulgaria's accession to the European Union, a gradual expansion of this financial flow can be observed, which in subsequent years develops into a marked acceleration. A characteristic feature throughout the period is that the volume of payments consistently remains below the value of incoming claims, leading to a persistent accumulation of liabilities. This dynamic reflects both the increasing cross-border mobility of Bulgarian insured persons and the limited capacity for full financial settlement of obligations within a given budgetary year.

In 2018, the NHIF made payments on claims from other Member States amounting to EUR 36,536.3 thousand, representing 97.1% of total health insurance expenditure for healthcare under the coordination rules. Compared to 2017, this constitutes an increase of EUR 7,257.0 thousand, or 24.8%. As of 1 January 2018, the NHIF owed payments to 32 countries totalling EUR 132,538.6 thousand, with the largest shares attributable to Germany (45.7%), followed by France (15.1%) and Spain (8.9%). During the year, new claims were received from 31 countries amounting to EUR 51,242.3 thousand, with Germany accounting for the largest share (51.2%), followed by Spain (9.5%) and Austria (9.2%). Of the payments made, the largest share was directed to Germany (50.3%), followed by France (14.6%) and Austria (8.9%). By type of healthcare, expenditure is dominat-

ed by hospital care (EUR 23,574.6 thousand, or 64.5%), followed by outpatient care (13%), other benefits in kind (8.2%), pharmaceuticals (7.6%), average costs for residence-based cases (5.3%), and dental care (1.5%). By legal basis, the largest share relates to cases of temporary stay (EUR 20,573.0 thousand, or 56.3%), followed by cases of residence (32.1%), while planned treatment accounts for EUR 4,225.9 thousand (11.6%). As of 31 December 2018, total outstanding liabilities reached EUR 146,159.5 thousand, with Germany (46.3%), France (12.9%), and Spain (9.6%) accounting for the largest shares. Compared to the end of 2017, this represents an increase of EUR 13,662.6 thousand, or 10.3%.

In 2019, the NHIF made payments amounting to EUR 130,976.6 thousand, representing 98.8% of total health insurance expenditure under the coordination rules. Compared to 2018, this reflects an increase of EUR 94,440.3 thousand, or 258.5%. As of 1 January 2019, outstanding liabilities totalled EUR 146,159.5 thousand to 32 countries, with Germany (46.3%), France (12.9%), and Spain (9.6%) holding the largest shares. During the year, new claims from 33 countries amounted to EUR 57,610.8 thousand, with Germany (45.4%), France (12.3%), and Spain (9.8%) as leading contributors. Payments were again predominantly directed to Germany (49.4%), followed by France (14.1%) and Austria (10.0%). Hospital care remained dominant (EUR 83,116.8 thousand, or 63.5%). By legal basis, temporary stay accounted for EUR 55,588.0 thousand (42.4%), followed by residence (40.3%). As of 31 December 2019, total liabilities declined to EUR 72,212.0 thousand, with Germany (40.3%), Spain (11.4%), and France (10.1%) accounting for the largest shares. Compared to 2018, this represents a decrease of EUR 73,947.5 thousand, or 50.6%, which can be explained by the settlement of accumulated liabilities from previous years. This conclusion is consistent with the substantial increase in payments during the year (+258.5% compared to 2018). Nevertheless, a significant volume of outstanding liabilities remained at the end of 2019, including overdue obligations amounting to EUR 5,742.6 thousand.

In 2020, NHIF payments amounted to EUR 54,509.6 thousand (97.0% of total coordination-related expenditure), representing a decrease of EUR 76,467.0 thousand, or 58.4%, compared to 2019. This reduction can be explained by the significant settlement of accumulated liabilities in the previous year. As of 1 January 2020, outstanding liabilities totalled EUR 72,212.0 thousand to 33 countries. During the year, new claims amounted to EUR 54,049.9 thousand, while payments were primarily directed to Germany (31.6%), Austria (14.4%), and France (12.5%). By 31 December 2020, total liabilities declined to EUR 70,915.0 thousand (–1.8%).

In 2021, NHIF payments increased to EUR 67,173.7 thousand (95.5%), rising by 23.3% compared to 2020. New claims totalled EUR 55,454.6 thousand, with

Germany accounting for 51.3%. Payments were again predominantly directed to Germany (62.5%). By the end of the year, total liabilities decreased to EUR 58,961.4 thousand (–16.9%).

In 2022, payments reached EUR 69,455.3 thousand (90.5%), increasing slightly by 3.4% compared to 2021. New claims totalled EUR 66,091.0 thousand. Total liabilities declined further to EUR 54,747.0 thousand (–7.1%).

In 2023, NHIF payments amounted to EUR 60,743.7 thousand (93.2%), representing a decrease of 12.5% compared to 2022. New claims totalled EUR 62,161.9 thousand. By the end of the year, total liabilities increased slightly to EUR 55,733.4 thousand (+1.8%).

In 2024, NHIF payments amounted to EUR 31,694.8 thousand (80.9%), representing a substantial decrease of EUR 29,048.9 thousand, or 44.6%, compared to 2023. As of 1 January 2024, total liabilities amounted to EUR 55,744.7 thousand. During the year, new claims were received from 34 countries, with the total number of outstanding individual records reaching 65,489, amounting to EUR 97,509.2 thousand. Payments were predominantly directed to Germany (58.2%), followed by Belgium (10.9%), Austria (9.5%), and Spain (7.8%). Hospital care remained the dominant component (55.4%), while temporary stay accounted for 39.3% and residence for 53.3% of total expenditure.

Overall, the data for the period 2018–2024 reveal a clearly dynamic pattern in NHIF payments on claims from other Member States, both in terms of their absolute value and their internal structure. This financial flow maintains a significant share in total coordination-related expenditure, while exhibiting considerable fluctuations in both incoming claims and payments made. These quantitative parameters provide the empirical basis for further analysis of the trends and factors shaping the development of this component of the coordination mechanism.

4.3. Reimbursement by the NHIF of Costs Incurred by Insured Persons for Healthcare Paid During a Stay in Another State

The reimbursement by the NHIF of costs incurred by insured persons for healthcare paid by them during a stay in another state constitutes a specific element of the application of the rules on the coordination of social security systems, in which the financial flow operates directly between the institution and the insured person. The legal basis for this mechanism derives from Article 19 of Regulation (EC) No 883/2004, which guarantees the right to necessary healthcare during a stay, as well as from Article 25 of Regulation (EC) No 987/2009, which provides

for the possibility of reimbursement where the insured person has paid for the healthcare received.

Article 25 regulates two main scenarios. The first applies where the insured person has paid all or part of the costs of benefits in kind under Article 19 of the basic regulation and the legislation of the institution of the place of stay allows for reimbursement; in such cases, the person may submit a claim to the institution of the place of stay. The second scenario applies where such reimbursement has not been requested or has not been obtained, in which case the costs are reimbursed by the competent institution.

The analysis of reimbursement by the NHIF of costs incurred by insured persons for healthcare paid during a stay in another state over the period 2018–2024 shows a relatively stable volume, but a negligible share of total payments related to the application of the coordination mechanism: 0.9% in 2018, 0.2% in 2019, 0.5% in 2020, 0.6% in 2021, 0.2% in 2022, 0.5% in 2023, and 0.5% in 2024. The low relative share of such payments may be explained by the fact that reimbursement under this procedure constitutes a subsidiary mechanism, applicable primarily in cases where healthcare has been paid for by the insured person instead of being provided directly under the coordination rules.

Throughout the period under review, a stable structural pattern can be identified in which a substantial proportion of submitted applications does not result in reimbursement. The reasons for this remain consistent over time and include the absence of valid health insurance rights at the time the healthcare was provided, incomplete or incorrect documentation, expenses falling outside the scope of the coordination regulations, as well as expenses that do not fall within the scope of benefits in kind under the legislation of the state where the treatment was provided. These factors account for the persistent discrepancy between the amounts claimed and the amounts reimbursed.

The data also reveal a clear geographical concentration of cases. Throughout the entire period, Germany stands out as the leading country both in terms of the number of applications submitted and the value of reimbursed costs, reflecting a stable pattern of cross-border healthcare consumption.

Given its limited relative share, this component does not have a significant impact on the overall financial dynamics of the coordination mechanism and is therefore not subject to further detailed discussion.

5. DISCUSSION

The empirical data for the period 2018–2024 show that the application of the rules on the coordination of social security systems in the field of healthcare constitutes a distinct financial segment within the activity of the NHIF. Although this segment represents a relatively limited share of total health insurance expenditure, it exhibits a clearly defined internal structure and its own dynamic. The most significant finding of the analysis is that this segment cannot be regarded as a homogeneous financial flow. The data reveal differing logics across its components—namely, expenditure on healthcare provided in Bulgaria to persons insured in other Member States, inter-institutional reimbursements to the NHIF, payments by the NHIF on claims from other Member States, and reimbursements of costs to insured persons.

The first notable feature is the asymmetry between the two main inter-institutional flows. On the one hand, NHIF expenditure on healthcare provided in Bulgaria to persons insured in other Member States shows an overall upward trend, with a marked increase after 2020, reaching EUR 14,116.1 thousand in 2024. On the other hand, reimbursements received by the NHIF in this regard grow at a considerably slower pace and remain below the value of submitted claims throughout the entire period. This indicates that the role of the NHIF as the institution of the place of stay or residence involves not only the advance financing of healthcare expenditure but also a persistent accumulation of outstanding receivables. A comparison between submitted claims and actual reimbursements demonstrates that financial settlement does not follow the timing of expenditure but is realised with a temporal lag.

The second feature is the substantially larger scale of the outgoing financial flow. Payments made by the NHIF on claims from other Member States for healthcare provided to Bulgarian insured persons abroad remain significantly higher than incoming reimbursements throughout the period. Even with the considerable decrease observed in 2024, they amount to EUR 31,694.8 thousand, which substantially exceeds the inflows under the reverse flow. This indicates that the coordination mechanism operates under a persistent predominance of the financial burden associated with the treatment of Bulgarian insured persons abroad. It is precisely here that the main financial tension within the mechanism becomes apparent: the system not only absorbs a substantial outgoing resource but does so under conditions where outstanding liabilities to other Member States remain significant at the end of each reporting year.

A third stable characteristic is the high concentration of financial flows by country. Germany occupies a leading position in both main flows, particularly in the later

years of the period, with its share in some years reaching or exceeding one third of the respective flow. This concentration is not a random statistical outcome but reflects the close linkage between the financial effects of coordination and specific patterns of labour and social mobility. A similar, albeit less pronounced, concentration is observed for other countries such as the United Kingdom, Italy, France, Spain, Austria, the Netherlands, and Greece. Consequently, the system's financial exposure is not evenly distributed but concentrated within a limited number of bilateral relationships.

A fourth important finding is the stable internal structure of expenditure. In both healthcare provided in Bulgaria and payments made on claims from other Member States, hospital care consistently accounts for the largest share. This indicates that the financial dimension of the coordination mechanism is primarily driven by more resource-intensive forms of treatment.

In addition, the structure of expenditure by legal basis for access to healthcare reveals differences between the two flows. In the case of healthcare provided in Bulgaria, necessary healthcare during a temporary stay predominates, whereas in NHIF payments to other Member States the share of cases involving residence is significant and in certain years exceeds that of temporary stay. This suggests that the financial burden of the coordination mechanism is not generated solely by cases of necessary healthcare during short-term stays but also by cases involving a broader scope of healthcare services. In this respect, the analysis could be extended to examine trends related to more permanent residence of insured persons in another Member State. However, such an analysis would require additional empirical data not available within the present dataset and may therefore be the subject of future research.

Finally, the analysis shows that the reimbursement of costs to insured persons for healthcare paid during a stay in another state remains of marginal significance within the overall financial picture. This component is stable but negligible in relative terms and does not significantly affect the overall structure of the flows.

In summary, the empirical evidence indicates that the financial mechanism of coordination is characterised by a persistent asymmetry between incoming and outgoing flows, a high degree of concentration by country, and the predominance of hospital care. In addition, a consistent temporal mismatch between the incurrence of expenditure and its final financial settlement emerges as a structural feature of the coordination mechanism. The data demonstrate that the coordination mechanism functions as a financially significant yet internally differentiated segment of NHIF activity.

6. CONCLUSION

This study examined the coordination mechanism of social security systems in the field of health insurance through the prism of the financial flows generated by its application, on the basis of empirical data provided by the National Health Insurance Fund (NHIF) for the period 2018–2024. The analysis made it possible to outline the main parameters of these flows, their dynamics and internal structure, as well as to identify a number of stable patterns related to their development and interrelationship.

Although the study focuses on the financial dimensions of coordination from the perspective of the Bulgarian health insurance system, it should be emphasised that behind the analysed figures stand individual insured persons for whom this mechanism has direct practical significance. Whether they are in another Member State for a temporary stay or for a more extended period of residence, these persons are guaranteed access to necessary healthcare, while the corresponding costs are borne and settled between the institutions of the Member States. In this sense, coordination should not be regarded solely as a system of procedural rules governing the allocation of competences between institutions, but as an effective instrument for safeguarding the rights of insured persons. By ensuring continuity of health insurance coverage beyond the competent Member State, it creates the conditions for the effective exercise of one of the fundamental freedoms in European Union law—the free movement of persons. The possibility of receiving healthcare without the risk of prohibitive financial consequences constitutes a key prerequisite for this right to be exercised in practice, rather than remaining merely formal.

The data further demonstrate that the coordination mechanism transfers both organisational and financial responsibility onto national health insurance systems, which assume responsibility for financing and subsequently settling the costs incurred. It is precisely in this aspect that its essential social function is manifested: insured persons are the ultimate beneficiaries of healthcare, without being burdened by its financial and administrative arrangements, which remain entirely within the competence of the institutions. In this way, the coordination mechanism relieves individuals from the need to engage in complex inter-institutional settlements and cross-border financial relations, ensuring that access to healthcare is not dependent on their ability to bear immediate financial or administrative burdens.

At the same time, the empirical analysis reveals a number of structural characteristics of the mechanism—namely, asymmetry between incoming and outgoing flows, concentration of financial relations in a limited number of countries, the

predominance of hospital care, and a temporal gap between the incurrence and final settlement of expenditures.

In summary, the coordination of social security systems in the field of health insurance emerges as a complex financial and organisational mechanism which, despite the identified imbalances and challenges, fulfils its core function: to ensure effective protection of insured persons in a cross-border context[13]. It is precisely in this that its fundamental significance lies—both for the guarantee of individual social security rights and for the stability of national health insurance systems, as well as for the functioning of the European Union's internal market.

Although the analysis focuses on Bulgaria, the identified trends may also be considered in the broader context of mobility patterns and healthcare consumption within the European Union. In this respect, the Bulgarian experience may serve as a useful empirical basis for future comparative research examining how different national health insurance systems absorb and manage the financial effects of social security coordination. Such research could contribute to a deeper understanding of the practical functioning and long-term sustainability of coordination in the field of mandatory health insurance within the European Union.

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Review article

(RE)DEFINING CROATIAN STRATEGIC INSTRUMENTS: LEGAL CHALLENGES OF GEOPOLITICAL REALITIES

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ABSTRACT

We are currently witnessing a disrupted security architecture on both global and European scales. The annexation of Crimea and the subsequent war in Ukraine have entirely shifted the paradigm regarding the significance of security, sovereignty, and neutrality—whether based on international law, alliances, or trust as a primary factor in the geopolitical relations of political and military allies. This conflict has precipitated a loss of confidence in the efficacy of international law and the institutions tasked with conflict prevention and peacebuilding. It can be argued that this marked the beginning of an erosion of the international legal order established from the post-World War II era until 2022. Such geopolitical and international legal realities, coupled with the persistent political and security instability of the Western Balkans and the publicly disclosed National Security Strategy of the United States, are poised to forge new geopolitical dynamics between European Union Member States, NATO allies, and the U.S. In this rapidly evolving landscape, where historical shifts occur within days or weeks, a sense of confusion, mistrust, and fragmentation may arise among erstwhile allies. Accordingly, in light of these geopolitical and security challenges facing both the European Union and the Republic of Croatia, the authors of this study analyze existing Croatian strategic instruments concerning foreign policy and security operations (de lege lata). The research aims to address the scientific inquiry of whether circumstances now necessitate a (re)definition of these acts. Such

a redefinition would encompass Croatia's role in developing the EU's strategic autonomy and the (re)specification of its own political and security objectives through legislation and strategies (de lege ferenda). These processes of legislative activism and the normative systematization of national security, defense, and state sovereignty represent more than a mere legal challenge; they encompass broader ideological and political issues that foster social polarization within both the EU and Croatia, regardless of the perceived urgency of such measures. Consequently, through an analysis of strategic documents and a structured overview of geopolitical threats and their corresponding normative responses, this research illustrates the factual reality of the inextricable link between security policies and legal regulation as a reflection of the democratic values and the rule of law upon which 21st-century states should be founded.

Keywords: *Defense Act, Legal challenges, Legislative Activism, National Security Strategy, Strategic documents*

For strategies to inspire society,
leaders must assume a pedagogical role by
articulating objectives, mitigating skepticism,
and securing public support[1]

1. INTRODUCTION

The beginning of the third decade of the 21st century has been marked by structural disruptions of the international order and a radical destabilization of the security architecture on both global and European levels. Events such as the 2014 annexation of Crimea, and particularly the overt aggression of the Russian Federation against Ukraine in 2022, alongside the escalation of conflict in the Middle East (which, at the time of writing, involves direct confrontations between Israel, the United States, and Iran), represent a historical turning point. These processes do not merely redefine the concepts of sovereignty and neutrality; they cause a profound erosion of the international legal system established in the post-World War II era. That order broadly promoted democracy, human rights, multilateralism, international law, and international institutions. While its specific elements continued to develop and evolve, that process has now been halted. Today's realities and geopolitical shifts are fueling a crisis of confidence—not only in the effectiveness of international law as a normative framework for regulating interstate relations but also in the capacity of international organizations to act as guarantors of security and stability.

In this context, the now-shocking address by J. D. Vance at the 2025 Munich Security Conference, as well as the disclosed National Security Strategy of the United States, takes on additional significance. These developments signal more

[1] Kissinger, H., *Vodstvo – Šest studija svjetske strategije*, Školska knjiga, Zagreb, 2022, p. xv.

than just the absence of the post-WWII international legal framework; they foreshadow fundamental shifts in transatlantic relations and raise questions regarding the future distribution of responsibility between the U.S., NATO, and the European Union. Furthermore, they call into question the continued security policy and partnership framework known as *Pax Americana*.[2] The dynamics of such changes lead to uncertainty, confusion, and fragmentation among states that, until recently, functioned as stable political and military allies. Decision-making processes have accelerated to the point where historical shifts are no longer measured in decades, but in months and weeks. In theoretical and historical analyses, this is often expressed through the well-known mythological paraphrase of Lenin's assertion that there are "weeks where decades happen," further straining existing strategic and normative frameworks.

In such a geopolitical environment, the Republic of Croatia faces the challenge of adapting its own strategic framework to these new "geopolitical realities." The objective of this paper is to investigate whether existing Croatian national strategic instruments are sufficient to safeguard national interests amidst the fragmentation of transatlantic alliances and the erosion of trust within the international community, or whether the time has come for these instruments to be adapted to the new geopolitical circumstances—namely, whether the era of the "geopoliticization of law" has arrived. In seeking a scientific answer, this research will employ a comparative and qualitative content analysis of current Croatian strategic acts directly impacted by geopolitical realities, specifically those developed as a response to such circumstances, primarily in the fields of national security, defense, and energy. For the sake of scientific precision and coherence, the study will focus exclusively on these designated areas. Furthermore, the paper will utilize the teleological method, which is pivotal to the legal dimension of this work; it explores the *ratio legis* (purpose) of legal norms within the defense and security sectors, ensuring that any proposed changes are not merely administrative reactions but a purposeful protection of national identity and sovereignty.

Based on this methodology, the analysis will provide a descriptive response to the inquiry of whether the Republic of Croatia has integrated geopolitical reality into the very core of its strategic acts and legal norms. The aim is to determine if circumstances necessitate normative and legislative adjustments (*de lege ferenda*) to protect national security, sovereignty, and defense interests. By applying these scientific methods through structured chapters, this paper seeks to demonstrate

[2] For further details regarding J. D. Vance's address at the Munich Security Conference, see: Munich Security Conference, Available at: [https://securityconference.org/en/msc-2025/], Accessed 10 March 2026.

that 21st-century security policies cannot be decoupled from legal regulation. It further asserts that the timely (re)definition of strategic instruments is an imperative for any state striving to preserve democratic values and the rule of law within an unpredictable geopolitical environment.

2. GEOPOLITICS AND THE THEORETICAL FRAMEWORK AS A DETERMINANT FOR THE (RE)DEFINITION OF STRATEGIC INSTRUMENTS – THE GEOPOLITICIZATION OF LAW

In developing this chapter, we proceed from the fact that the research and presentation of geopolitical realities as security challenges in the mid-2020s poses a significant scientific challenge for authors in terms of defining these threats with the utmost precision. Given the political developments in the European and global contexts—where public policies, international relations, and alliances are being redefined daily, and events on the world stage unfold with exceptional dynamism (such as the ongoing conflict in the Middle East involving Israel, the US, and Iran)—the authors will analyze general geopolitical realities that undoubtedly affect the security of the Republic of Croatia. In this sense, the contemporary geopolitical challenges facing Croatia in 2026 necessitate a profound recontextualization of specific strategic acts through the prism of complementary theories of security and international relations, as traditional legal frameworks no longer adequately address the hybrid nature of modern threats. Therefore, the establishment of a theoretical framework in this research is essential because theories, according to Luša, make the world more intelligible. They combine the description of observed phenomena, offer causal explanations based on prior events or conditions, and enable the prediction of future outcomes.[3]

We can fully concur with such an explanation, as we are surrounded by a vast amount of information and geopolitical factors that directly impact our lives, decision-making, and consequently, existing legislative frameworks. Luša posits that it is precisely theories that indicate what we should focus on amidst a multitude of information when explaining and processing the world around us. The author emphasizes that theories are intellectual constructs composed of a series of interrelated propositions that assist in identifying facts and their interpretation.[4]

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[3] Hempel, C.G., *Philosophy of Natura!* Science, New York, Prentice - Hall, 1966, pp. 48-51 as cited, in: Luša, Đ., *Suvremeni izazovi realističke teorije međunarodnih odnosa*, Međunarodne studije, No. 3, 2011, p. 11.

[4] Viotti, P.R.; Kauppi, M. V., *International Relations Theory Y1 edition,* Pearson, New York, 2010, pp. 6-7 as cited in Luša, *supra*, note 3, p. 11.

In analyzing the connection between security theories and geopolitical realities—which should influence the redefinition of strategic acts and the geopolitization of the law of the Republic of Croatia—the primary challenge is the return of conventional military threats to the European continent. We have witnessed this since the beginning of the Russian aggression against Ukraine on February 24, 2022, which resulted in the destabilization of the regional order. Although conventional wars in Europe were considered a thing of the past, Russian aggression and the return to classical warfare—or, as Tertrais states, the return of "neo-empires" (Russia and China) that challenge the international order by using military force for border revision—represent the very essence of conventional wars.[5]

The return of conventional wars, the establishment of a balance of power among states, and the renewed arms race must be viewed through the tenets of neorealism. This is confirmed by Mearsheimer, who believes that in a multipolar system where international institutions are losing their influence (evident in the inactive role of the UN in establishing peace in Ukraine and other conflicts), states must rely on a policy of deterrence.[6] Waltz, as a representative of this theory, emphasizes that under conditions of anarchy and the absence of a superior authority, states must ensure their own security, leading them toward seeking a balance of power and increasing their might for the sake of survival.[7] In such circumstances, Clausewitz's theory that war is merely the continuation of politics by other means gains even greater historical weight and becomes relevant for depicting neorealist security theory.[8]

The anarchic nature of the international order and the return of war to Europe, coupled with the disregard for international legal provisions on territorial integrity and sovereignty, have led to the erosion of trust in international law. The compromised security architecture is taking on the contours of a geopolitical reality that introduces pessimism into international relations, thereby fully realizing the theory of realism.[9] The recurrence of realism, which was thought to be a relic of the past, is also confirmed by Tatalović. He believes that realist theory exists as

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5 Tertrais, B., *La Guerre des mondes; Le retour de la géopolitique et le choc des empires*, L'observatoire, Paris, 2023, pp. 11, 21.

6 Mearsheimer, J. J., *The Great Delusion: Liberal Dreams and International Realities*, Yale University Press, New Haven, 2018, p. 134.

7 Waltz, N. K., *Structural Realism after the Cold War*, International Security, Vol. 25, No. 1, 2000, pp. 55-41.

8 Carl von Clausewitz, *On war*, trans. Michael Howard; M., Paret, P., Oxford University Press, Oxford, 2007, p. 28.

9 Hakimi, M.; Cogan J. K., *The End of the U.S.-Backed International Order and the Future of International Law*, The American Journal of International Law, Cambridge University Press, Cambridge, Vol. 119, No. 2, 2025, p. 279.

long as states on the world stage do not trust one another, necessitating the expansion of their own power to secure national interests. Therefore, it is indisputable that the aforementioned theory fully aligns with current geopolitical realities and international relations in the world.[10] Within this theory, and in depicting geopolitical realities affecting Croatian security and foreign policy actions, one could link the emergence of impaired trust or the erosion of the transatlantic relationship between the United States and NATO member states from Europe (EU members) following Trump's inauguration as President of the United States in early 2025. Trump's political slogan "Make America Great Again" (hereinafter: the MAGA movement) from the election campaign was merely a prelude to such a new direction and new policies of the United States, including a new direction in security and foreign policy starting in 2025.[11] The new American administration will contribute to a loss of trust fueled by American economic measures and rhetoric, which will call into question the commitment to shared security and trade norms. Tariff threats, issues such as Greenland, and support for Ukraine have posed a fundamental dilemma regarding sovereignty, support for international law, partnership, and the common future of transatlantic cohesion.[12] Such relations will be further confirmed by the National Security Strategy of the United States, which will redirect its own geopolitical interests to other parts of the world, leaving the issue of European security to Europe itself. What is significant for Croatian strategic interests, given the historical political and military partnership with the United States, is that the same Strategy observes a redefinition of the American role toward the Western Balkans, which should serve as a clear signal for the Croatian redefinition of strategic decisions in the context of global positioning and alliance building.[13]

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10 Tatalović, S., *Koncepti sigurnosti na početku 21. stoljeća*, Međunarodne studije, Vol. 6, No. 1, 2006, pp. 67, 68.

11 European Council on Foreign Relations, *MAGA goes global: Trump's plan for Europe*, Available at: [https://ecfr.eu/publication/maga-goes-global-trumps-plan-for-europe/], Accessed 17 January 2026.

12 MeCleary, P.; Kayali, L.; Schwartz, F., *The transatlantic alliance is down but not out*, Politico, Available at: [https://www.politico.com/news/2026/02/11/the-transatlantic-alliance-is-down-but-not-out-007715 04], Accessed 22 January 2026.

13 National Security Strategy of the United States of America, Available at: [https://www.whitehouse.gov/wp-content/uploads/2025/12/2025-National-Security-Strategy.pdf.], Accessed 20 February 2026.
In his analysis, Nick Witney states that the new American National Security Strategy has shaken European leaders, making them aware of the end of the transatlantic alliance as they know it, and that it represents the herald of the "death of the West"—the geopolitical framework that has ensured European security and prosperity since the Second World War. For more on this, see: Witney, N., *The Death of the West*, European Council on Foreign Relations, Available at: [https://ecfr.eu/article/the-death-of-the-west/], Accessed 22 February 2026.

In addition to classical military threats, current circumstances shape the security paradigm through other, non-military threats. This fact is noted by Zgurić and Petek, who, citing Williams and McDonald, conclude that modern security policy deals with an increasing number of non-military threats. In this context, they consider the Copenhagen School of security studies to be a theory that relies on constructivism, where security threats are whatever we perceive and construct as such.[14] The significance of the Copenhagen School of security is that it identified societal, political, economic, and environmental security alongside traditional military security,[15] and the primary theorist of said school, Barry Buzan, along with a group of authors, introduced a sectoral approach to studying security (political, environmental, economic, societal, and military security).[16] This theory fully fits into the processes of the energy crisis that engulfed Europe after the start of the war in Ukraine and continued with the crisis toward Iran. Here we observe the presence of energy geopolitics which, unlike classical geopolitics focused on territory, emphasizes energy flows, infrastructure, and technological superiority. The issue of energy sources, energy, and the transport of oil and gas is not merely an economic issue but represents a matter of protecting national interests. Thus, energy, once primarily considered an economic or resource issue, is now viewed through a strategic lens. In this context, the EU and Croatia banned the import of Russian energy products transported by sea in response to the aggression.[17] Such measures directly affect Croatian strategic interests and national security, particularly in the context of the energy sector's operation and companies such as the Adriatic Oil Pipeline (JANAF) and the LNG terminal.[18] The role of this

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14 Williams, M. C., *Words, images, enemies: Securitization and international politics*, International Studies Quarterly, Vol. 47, No. 4, 2003, pp. 511–531 and McDonald, M., *Securitization and the construction of security*. European Journal of International Relations, Vol. 14, No. 4, 2008, pp. 563–587 as cited, in: Zgurić, B.; Petek, A., *Analiza ciljeva hrvatske sigurnosne politike*, HKJU-CCPA, Vol. 22, No. 4, 2022, pp. 735–764.

15 Emmers, R., *Sekuritizacija,* Suvremene sigurnosne studije, Politička kultura, Zagreb, 2010, pp. 133 – 150.

16 The sectoral approach to security studies undoubtedly warrants examination within a contemporary context; for a more comprehensive discussion on this framework, see: Buzan, B.; Waever, O.; Wilde, J., *Security: A New Framework for Analysis*, Boulder, London, 1998, pp. 33-42.

17 Concerning the restrictive measures in the energy sector adopted by the EU against the Russian Federation, reference is made to the European Commission's website, specifically the *Sanctions in the field of energy section*, Available at:
[https://commission.europa.eu/topics/eu-solidarity-ukraine/eu-sanctions-against-russia-following-invasion-ukraine/sanctions-energy_hr.], Accessed 17 March 2026.

18 The Minister of Economy of the Republic of Croatia, Ante Šušnjar, asserts that the Adriatic Oil Pipeline (JANAF) holds broader significance, functioning as a stabilizing factor and a pivotal stakeholder in the energy security of both Croatia and the wider region. For further details, refer to the official website of the Government of the Republic of Croatia: *Šušnjar: Our objective is for JANAF to fulfill its role as a key stakeholder in the energy security of Croatia and the region*, Available at:

sector is crucial because energy security and affordability are becoming foreign policy priorities and a means of gaining political power.[19] We witness this thesis in Croatia's foreign policy relations with Hungary and Slovakia regarding the transport of oil to Hungarian and Slovak refineries.[20] Croatia's transformation into a regional energy hub necessitated a strong securitization of resources. By applying the Copenhagen School model, Croatian national security actors have successfully transposed energy dependence from the economic domain into the domain of an existential threat, thereby justifying investments in critical infrastructure and stricter legal protection of energy flows. Securitization theory, which defines the process of assigning security significance to issues that originally do not belong to that field, is clearly visible in the example of the strategic positioning of the Adriatic Oil Pipeline.[21]

Simultaneously, as the Republic of Croatia is situated within a specific space between Central Europe and the Western Balkans—and if we view the region, according to Musladin, as a group of states that are geographically close to one another—regional security should, in the broadest sense, be viewed as security achieved through state cooperation.[22] In this sense, the theory of regional security or the Regional Security Complex (RSC) has developed, which can be viewed in parallel with securitization theory. Regarding this theory, Buzan and Waever note that a state's security should be viewed as inextricably linked to the stability of its neighborhood.[23] Musladin, referring to Buzan, Waever, Lake, and Morgan,

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[https://vlada.gov.hr/susnjar-cilj-nam-je-da-janaf-ostvari-svoju-ulogu-kao-kljucni-dionik-energetske-sigurnosti-hrvatske-i-regije/45927], Accessed 16 January 2026.

19 Goldthau, A., *The Handbook of Global Energy Policy*, Wiley-Blackwell, Oxford, 2013, pp. 1–13 and Dekanić, I., *Geopolitics of Energy: The Role of Energy in the Contemporary Globalized Economy*, Golden marketing – Tehnička knjiga, Zagreb, 2011, pp. 110-125.

20 It has been underscored by the Government of the Republic of Croatia that the State shall continue to facilitate the delivery of non-Russian oil to Hungary and Slovakia, pursuant to the prevailing European and United States restrictive measures concerning Russian oil. Further details are available on the Government of the Republic of Croatia's official portal, under the statement, *Croatia is fully prepared to ensure oil supply to Hungary and Slovakia*, Available at: [https://vlada.gov.hr/hrvatska-je-potpuno-spremna-osigurati-opskrbu-naftom-madjarske-i-slovacke/46242], Accessed 1 March 2026.

21 Securitization is defined as an extreme iteration of politicization, characterized as a speech act through which a designated actor frames a subject of debate as an existential threat to a referent object (including the State, the government, territory, or society). This framing serves to justify the implementation of emergency measures. Further elaboration on this theoretical framework can be found in Buzan, B.; Waver, O.; Wilde, J., *op. cit.,* note 16, pp. 33-42 as cited in Žutić, I., *Važnost koncepta sekuritizacije u okviru uspostave vojske Europske unije*, Doctoral dissertation, 2020, p. 57.

22 Musladin, M., *Republika Hrvatska u kontekstu regionalne sigurnosti: izazovi i prednosti*, Suvremeni Mediteran, Vol. 4, No. 1, 2025, pp. 58, 58-70.

23 Buzan, B.; Wæver, O**.,** *Regions and Powers: The Structure of International Security*, Cambridge University Press, Cambridge, 2003, pp. 43 – 51.

highlights the premise that states most often perceive their geographically close neighbors as primary sources of threats or potential protection.[24] In this context, the area of Croatia's southeastern neighborhood or part of the Western Balkans poses a challenge for Croatian foreign and security policy and the strategic determination of foreign policy and security goals. Political events in Bosnia and Herzegovina and the geopolitical interactions of Serbia and Russia require the maintenance of careful diplomacy, not only regarding Bosnia and Herzegovina and Serbia but also in the context of joint action with other EU members within the framework of the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP) toward the Western Balkans and the policy of providing support for their faster socio-economic convergence.[25] This is further supported by the adoption of the Regulation of the European Parliament and of the Council on establishing the Reform and Growth Facility for the Western Balkans in 2024, as well as the joint Declaration of the EU-Western Balkans Summit of December 17, 2025.[26] Further significance of regional security theory and its impact on Croatian foreign policy and security actions—and thus through the possible redefinition of strategic acts—is seen through the issue of Bosnia and Herzegovina, which, according to McAuliffe, is an example of a post-conflict state that still faces numerous political and security challenges.[27] Such a state status reflects on the constitutional-legal status of Croats in Bosnia and Herzegovina, whereby the position of the Croatian people as a constituent people within Bosnia and Herzegovina ceases to be exclusively a foreign policy issue and becomes a first-order security priority. Consequently, any erosion of the Dayton Agreement

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24 Buzan, B., Wæver, O., et al., *Regional Orders: Building Security in a New World*, American Political Science Review, Pennsylvania State University Press, Vol. 92, 1997, pp. 752, 753 as cited in Musladin, *op. cit.*, note 22, p. 58.

25 The cautious nature of Croatian policy toward the aforementioned region is influenced by the fact that the Republic of Serbia has maintained its policy of balancing between the West, Russia, and China. In his research, Weissmann observes this strategic balancing, describing Serbia's friendly stance toward Russia and China, as well as the expansion of their influence—particularly China's—into the Western Balkans as an 'entry into Europe's backyard.' For further details, see: Security and Intelligence Agency, *Public Report for 2025*, p. 19. Available at: [https://soa.hr/hr/javno-izvjesce-za-2025-godinu/327], Accessed 30 January 2026 as well as in Weissmann, M., *Chinese and Other Foreign Influence in Serbia and the Western Balkans: A Tale of Cooperation, Competition, and Distrust?* Connections QJ, Vol. 22, No. 4, 2023, p. 14.

26 Regulation (EU) 2024/1449 of the European Parliament and of the Council establishing the *Reform and Growth Facility for the Western Balkans* PE-CONS 80/24, Bruxelles, April 25, 2024 as well as in Brussels Declaration, 2025. For the more see in EU-Western Balkans Summit**,** *Serbia did not participate, EU-Western Balkans Summit: Enlargement is the right choice*, Available at: [https://europeanwesternbalkans.com/2025/12/18/eu-western-balkans-summit-enlargement-is-the-right-choice/], Accessed 17 March 2026.

27 McAuliffe, P., *The post-conflict security dilemma and the incorporation of ethno-cultural diversity* in Pentassuglia G. (ed.), *Ethno-cultural diversity and human rights*, Brill, Vol. 122, 2018, pp. 337-369.

directly affects the protection of the survival of the Croatian people in Bosnia and Herzegovina as a constituent people, as well as the actions of the international community in the context of protecting general regional stability.[28]

3. DETERMINATION AND HARMONIZATION OF NATIONAL INTERESTS WITH STATUTORY ACTS – A STRATEGIC IMPERATIVE

As demonstrated in the preceding chapter, geopolitical and theoretical frameworks serve as determinants for the (re)definition, significance, and meaning of Croatian strategic acts. In addition to these factors, it is necessary to extend the analysis to the identification of national interests and objectives. The definition and precise articulation of national interests constitute the axiological starting point for the stability and development of a modern state. Indeed, clear definition and precise articulation of national interests are considered key factors in the process of shaping state policies, and consequently, the strategic acts arising from such policies. Thus, the determination of national interest represents an ontological priority, without which strategic acts remain devoid of coherence and purpose. Based on clearly established national interests, the legislator's task becomes the challenge of identifying and (re)defining strategic acts capable of protecting these interests and facilitating their realization. Therefore, the definition of a state's national interests represents the foundation of state decision-making, as it enables the direction, legitimation, and support of reform activities through the clear identification of priorities.

According to Cvrtila, the process of shaping national interests must account for various variable and invariable factors, such as the structure of the international system, the domestic situation, the interests of different social strata, and the perceptions of the political elite.[29] Thus, national interest is not merely a static construct but a dynamic category serving as the basis for shaping strategic acts and the entire legal order. In his seminal work, *A Grand Strategy for America*, Art defines national interest as "what a state seeks to protect and promote in relation to other states... It is the starting point for any rational foreign and domestic policy".[30]

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[28] According to the 2025 Public Report of the Security and Intelligence Agency, the significance of Croatia's southeastern frontier—the Western Balkans—is of primary importance for the protection of the national security of the Republic of Croatia, the preservation of the Croat people in Bosnia and Herzegovina as a constituent people within that state, and for the engagement of the international community in maintaining overall regional stability. For a more detailed analysis of such threats, see: Security and Intelligence Agency, *Public Report*, *op. cit.*, note 25, pp. 19-24.

[29] Cvrtila, V., *Nacionalni interesi i nacionalna sigurnost,* Politička misao, Vol. 32, No. 2, 1995, pp. 62-69.

[30] Art, R. J., *A Grand Strategy for America*, Cornell University Press, Cornell, 2003, p. 45.

Similarly, Tatalović views national security and national interests as an inseparable fabric, where interests are values aimed at community development, and security is the mechanism for their protection.[31] In his research, Popović, citing Morgenthau—the founder of international studies and political realism—delves into an even deeper analysis of the meaning of national interest. He conceptualizes national interest as a "guidepost" or a "map" that imposes "intellectual discipline" in the articulation and systematization of empirical facts. This process serves to enable meaningful reflection on a specific political subject—which, in this particular case, refers to a strategic act.[32]

The intentional reflection on a specific subject—namely, a strategic act or a law that requires (re)definition within today's profoundly dynamic era and international landscape, where staying abreast of all developments remains a significant challenge—is viewed by Morgenthau through the lens of power. He posits that national interest is inseparable from power, asserting that states must define their interests in terms of power to ensure survival within an anarchic international system. Consequently, he maintains that "the main signpost that helps realism find its way through the landscape of international politics is the concept of interest defined as power".[33] Consequently, without a clear determination of interests, a state cannot rationally allocate resources or generate power. The adoption or amendment of strategic acts and laws should not be a mere administrative response to transient crises; rather, it must emerge from previously articulated vital interests. According to Huntington, such articulated vital interests—national interests—are rooted in national identity. The author establishes a fundamental link between identity and interest, arguing that national interests are derived from national identity. In this view, we must first define "who we are" before we can determine what our interests are.[34]

Such scientific reflections regarding the nexus between national interests and national identity must be examined within the context of the measurability and determination of Croatian national interests. Primarily, it must be acknowledged that Croatian national interests are not unequivocally or comprehensively defined

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31 Tatalović, S., *Nacionalni interesi i nacionalna sigurnost Hrvatske*, Međunarodne studije, Vol. I, No. 1, 2000, pp. 53-64.

32 Popović, P., *Towards a Theory of International Politics of Hans J. Morgenthau*, Anali Hrvatskog politološkog društva, Vol. 14, No. 1, 2017, pp. 0, 178 as well as Morgenthau, H. J. *Politics Amon Nations*, *The Struggle for Power and Peace,* Alfred McGraw Hill, New York, 1948, p. 10.

33 Morgenthau, H. J., *Politics Among Nations: The Struggle for Power and Peace,* Alfred A. Knopf, New York, 1985, p. 5.

34 Huntington, S. P., *The Erosion of American National Interests,* Foreign Affairs, Vol. 76, No. 5, 1997, p. 28.

within a single legislative act. Instead, they represent a collective of fundamental objectives and values that the Republic of Croatia seeks to achieve and preserve to protect its sovereignty, territorial integrity, security, identity, and the well-being of its citizens. These interests are derived from the Constitution of the Republic of Croatia and key strategic documents, most notably the 2017 National Security Strategy of the Republic of Croatia.[35] In a substantive sense, the Constitution of the Republic of Croatia does not explicitly employ the term "national interests." However, in its Historical Foundations (*Izvorišne osnove*) as well as in Articles 1 through 5, it establishes the foundations from which the meaning of national interests emerges. These include sovereignty, democracy, human and civil rights and freedoms, equality, national equality, the rule of law, economic and cultural progress, peace-building, social justice, the inviolability of ownership, environmental preservation, and a democratic multi-party system. Furthermore, Chapter II of the National Security Strategy explicitly states that the Republic of Croatia derives its national interests from the fundamental values defined by the Constitution and its vision, predicated on its own geostrategy and geopolitical position, as well as international trends. These interests include: The security of the population, alongside the territorial integrity and sovereignty of the Republic of Croatia; The welfare and prosperity of its citizens; National identity; The equal status, sovereignty, and survival of the Croat people in Bosnia and Herzegovina as a constituent nation, as well as the position of the Croatian national minority in other states.

From the aforementioned theoretical definitions concerning the significance and importance of national interests, it is evident that policymakers and legislators face a profound legal and legislative challenge. This entails establishing a legal framework capable of responding to geopolitical challenges while providing competent authorities with the necessary legal and political legitimacy to act in the protection of these interests.

4. LEGAL ASPECTS OF GEOPOLITICIZATION: BETWEEN STRATEGIC, PLANNING AND LEGISLATIVE ACTIVISM – *DE LEGE LATA VS. DE LEGE FERENDA*

We are witnessing a period in which geopolitics has taken centre stage in shaping both the domestic and foreign policies of nation-states. This relentless trend largely aligns with the principles of political realism and neorealism, whereby states strive for survival within an anarchic or erosive international order by maximising

[35] Constitution of the Republic of Croatia, Official Gazette, No. 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 58/10, 5/14, and National Security Strategy of the Republic of Croatia, Official Gazette, No. 73/2017.

power—both military and political—and wealth, while simultaneously minimising losses. In the view of the author, such geopolitical realities have precipitated a form of 'geopoliticisation of law', posing complex legal challenges for states. Although no established definition of the term 'geopoliticisation of law' exists in scientific literature, its interdisciplinary nature links the fields of security studies, political processes, and legislative action.

Some authors, such as Charles J. Dunlap Jr., perceive the role of law as a response to geopolitical circumstances as part of a defensive mechanism, viewing the operation of law (*Lawfare)* as an instrument of strategic power, a weapon substituting for conventional military force. Dunlap argues that states design laws through lawfare to achieve strategic objectives; that is, the use of law serves as a „tool of statecraft", thereby underscoring its indispensable role in contemporary security governance.[36] Owing to the connectivity between law and security studies, some scholars refer to this process of legal response to security challenges as the 'securitisation of law'. Securitisation represents a process in which a specific issue is shifted from the sphere of routine politics into the sphere of security urgency, thereby creating a justification for the use of exceptional measures.[37] In a contemporary context, these exceptional measures may be observed through the operationalisation of legislative acts as a strategic practice aimed at achieving social and, consequently, security effects.[38]

Therefore, the geopoliticisation of law is not merely a matter of technical harmonisation; it is a normative response by the state to existentially defined security challenges. This implies that the geopoliticisation of law must address the need for an effective transposition of identified interests into strategic acts, which are subsequently implemented through concrete legal frameworks.

In this process, prior to the (re)definition of strategic acts, it is essential to apply a teleological approach with a clear definition of purpose (*ratio legis* or *ratio actus*) to avoid a loss of coherence and consistency. Visković, states that teleological interpretation establishes the meaning of a legal norm in relation to the objectives it seeks to achieve. This prevents the reduction of acts to a mere positivist understanding of norms—specifically, the risk of a formal-dogmatic approach that yields socially inadequate solutions.[39]

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[36] For more on the concept and meaning of *Lawfare* see in Dunlap, J. C., *Lawfare today,* Yale Journal of Internationals Affairs, 2008, pp. 146-154.

[37] Buzan, B.; Waever, O.; Wilde, J., *op. cit*, note 16, p. 21.

[38] Balzacq, T., *Securitization Theory: How Security Problems Effectively Shape Policy*, Routledge, 2011, pp. 3, 10.

[39] Visković, N., *Teorija države i prava*, Narodne novine, Zagreb, 2006, p. 251.

The recognition of the objective sought to be achieved constitutes the *condicio sine qua non* of every legal act. This is further affirmed by Barak, who posits that the objective purpose of a legal text encompasses the values, goals, interests, policies, and functions that the law is bound to realize within a democratic society. Consequently, it is crucial to establish a subordination between the content of the act and its normative effect under a clear teleological intent. This ensures coherence between political objectives and legal instruments.[40]

Furthermore, a teleological approach facilitates the legitimate adoption of strategic acts and their transparent implementation through comprehensive legal frameworks that provide measurable criteria for enforceability. It can be concluded that the synthesis of geopolitical interests should strive for a consensus between teleological interpretation and pragmatic execution. Since a state's strategic acts must not be static documents but rather dynamic instruments of adaptation, their (re)definition implies alignment with democratic values, the public interest, and the obligations arising from the Republic of Croatia's membership in European economic and security alliances. Therefore, the recognition of geopolitical realities must not be merely a descriptive exercise for scholars or political enthusiasts; rather, it is a necessary prerequisite for a meaningful reform of the security system. In support of this, it can be argued that geopolitics serves as the primary driver for updating strategic acts and revising legal frameworks, as nations and organizations adapt to shifting power dynamics, economic instability, and security threats. The deterioration of the global security landscape has compelled a transition from the facilitation of open markets toward prioritizing national economic security and strategic autonomy.

The analysis of legal acts that operationalize such determinants primarily originates from those pertaining to the national security and defense sectors. In this regard, the point of departure is the 2017 National Security Strategy of the Republic of Croatia.[41] Although this Strategy is now nine years old, its significance lies in its primary reliance on a sectoral approach to identifying national interests and threats. Zgurić and Petek observe that Croatian security policy, at least declaratively, follows contemporary trends focused on non-military threats.[42] The authors link the shift in focus from international to internal security to the achievement of key foreign policy objectives—namely, accession to the EU and NATO—which created an illusion of permanent security.[43] One can agree with

40 Barak, A., *Purposive Interpretation in Law*, Princeton University Press, 2005, p. 148.

41 National Security Strategy of the Republic of Croatia, *loc. cit.,* note 35.

42 Zgurić; Petek, *op. cit.*, note 14, p. 755.

43 *Ibid.*

these authors within the temporal context of their research (conducted in 2022). However, given the global dynamics—specifically the Russian aggression against Ukraine, the instability of Croatia's southeastern neighborhood, cyber threats, the emergence of energy geopolitics, and geopolitical circumstances shifting almost daily—this assertion, and the very fact of Croatia's reliance on transatlantic alliances, necessitates new strategic redefinitions. This reliance on transatlantic relations and alliances requires revision, as these ties have been strained since Donald Trump's return to the White House. This is evidenced by his rhetoric concerning Greenland's status as United States territory and his stance on the war in Ukraine, where the European Union and the United States maintain diverging positions.[44]

Further deviation from historical alliances will be confirmed by the United States National Security Strategy. The same strategy identifies the primary interest—or rather, the global power shift of the United States—moving from the Atlantic toward Asia. Such facts of allied distancing, coupled with the classic threat of conventional conflict, indisputably affirm the urgency of a pro futuro revision of Croatia's National Security Strategy. The Republic of Croatia must define its own foreign policy and security position in real time within its strategic security document, without reliance on bygone eras.

Thus, the role of defining foreign and security policy is essential for assuming the state's societal position vis-à-vis other states, which, according to Michalski and Parker, collectively structure the international social order; in other words, per the same authors, the national role in such circumstances must be constructed from a collective understanding of history, values, and the state's place in the world.[45] Such facts, along with the geopolitical situation in Europe and globally—which is complex, subject to rapid changes, and influenced by economic pressures, political instability, and disrupted international relations—should, alongside recognition of non-military threats (informational, energy-related), serve as an additional argument for redefining the National Security Strategy. This would also encompass acknowledgment of the unstable southeastern neighborhood, wherein the Republic of Croatia should assume a greater role in regional security than previously.

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44 BBC, *Why does Trump want Greenland and what could it mean for Nato and the EU?*, [https://www.bbc.com/news/articles/c74x4m71pmjo], Accessed February 27, 2026 and Ash, T. G., Only *Europe can save Ukraine from Putin and Trump – but will it?* The Guardian, Available at: [https://www.theguardian.com/commentisfree/2025/dec/06/europe-ukraine-putin-trump-eu], Accessed 15 March 2026.

45 Michalski, A.; Parker, C. F., *The EU's Evolving Leadership Role in an Age of Geopolitics: Beyond Normative and Market Power in the Indo-Pacific*, European Journal of International Security, Vol. 9, No. 2, 2024, pp. 268, 263–280.

All the aforementioned has been recognized through the redefinition and adoption of the new Defence Strategy of the Republic of Croatia. This strategy demands the redefinition of long-term defence priorities, including increased investment in defence, development of strategic capabilities, strengthening of the domestic defence industry, and enhancement of the state's resilience. Furthermore, shifts in the global balance of power necessitate the redefinition of strategic priorities, while the United States' new sphere of interest requires bolstering NATO's capabilities and the European Union's capacity for autonomous action, thereby concretizing the concept of strategic autonomy.[46]

Furthermore, the security threats identified as factors in the adoption of the new Defence Strategy have also influenced the fact that the Ministry of Defence of the Republic of Croatia proposed the adoption of the Long-term Development Plan of the Armed Forces of the Republic of Croatia, as a response to challenges through the development of military capabilities and resources. On the basis of such a proposal, and in accordance with the Act on the System of Strategic Planning and Management of the Development of the Republic of Croatia of 2017 as *lex generalis*, the Croatian Parliament adopted the Long-term Development Plan of the Armed Forces of the Republic of Croatia 2025–2036.[47] The emergence of "conventional fear", stemming from a neorealist foundation triggered by Russia's aggression against Ukraine and an unstable southeastern neighbourhood, has thrust military security and "hard power" back into the focus of public policies.[48] In this regard, the further legal response to the disrupted security architecture will manifest multidimensionally: through an increase in the military budget and modernisation of the defence sector, but also through normative action—namely,

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46 Defence Strategy of the Republic of Croatia, Official Gazette, No. 104/2025.

47 Long-term Development Plan of the Armed Forces of the Republic of Croatia 2025–2036, Official Gazette, No. 104/2025.

48 One of the authors of this paper, in their earlier research, precisely observed that the issue of security served as key rhetoric and political narrative during the super-election year of 2024, both in many EU member states and in the Republic of Croatia. Assigning importance to security—in all its forms, including conventional and military security—was crucial for electoral success. For more on the work and research itself, see in Dagen, T., *Framing Security: Right-Wing Narratives in the 2024 European Super-Election Year* // Proceedings of the Defense and Security Conference / Smiljanić, Dražen (ed.), Sveučilište obrane i sigurnosti "Dr. Franjo Tuđman", Zagreb, 2025, pp. 26-45. Furthermore, at the time of writing this paper, an additional factor accelerating not only the arms race in Croatia's neighbourhood, the return to "hard power", and the emergence of security challenges for the Republic of Croatia—as well as the formulation of public policies in response to such challenges—is represented by the appearance in the Serbian army of a supersonic quasi-ballistic missile with a range of at least 250 kilometres. For more details, see Tportal, *Plenković o novoj kineskoj raketi u Srbiji; Upozorit ćemo saveznike*, Available at:
[https://www.tportal.hr/vijesti/clanak/plenkovic-o-novoj-kineskoj-raketi-u-srbiji-upozorit-cemo-saveznike-20260312#:~:text=CM%2D400], Accessed 22 March 2026.

the concept of the geopoliticisation of law.[49] The geopoliticisation of law is evident in the amendments to the Defence Act and the Act on Service in the Armed Forces of the Republic of Croatia, through which basic military training is reintroduced into the legal order of the Republic of Croatia as an integral component of the defence system.[50] The introduction of this training represented a profound political and societal challenge, as evidenced by the voting in the Croatian Parliament. Instead of political consensus, a division in political worldviews emerged, irrespective of geopolitical realities.[51]

In the context of energy geopolitics and the energy sector itself, at the time of writing this article, energy has become the "first line of defence" of national interests due to the wars in the Persian Gulf/Middle East.[52]Setting aside current events, the war in Ukraine has triggered the issue of Europe's energy independence—and thereby that of the Republic of Croatia—a matter we have addressed in this article in establishing the geopolitical realities influencing the geopoliticisation of law, energy geopolitics, and energy security. As the first legislative response to such challenges, we see the adoption of the Act Implementing Council Regulation (EU) 2022/1854 on an Emergency Intervention to Resolve Issues of High Energy Prices. As the rationale for adopting the aforementioned act, the Government states in its proposal that Russia's aggressive war against Ukraine has resulted in insecurity regarding the supply of other raw materials, such as coal and crude oil,

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49 The Republic of Croatia allocated 2.10% of GDP to defence in 2025, thereby meeting the NATO target. For more on defence allocations, see Republic of Croatia, Ministry of Defence, *Minister Anušić: Croatia has 2.1 percent allocation for defence, we are equipping the Croatian army and have introduced basic military training*, Available at:
[https://www.morh.hr/267671/], Aaccessed 20 March 2026.

50 *Amendments to the Defence Act and Amendments to the Act on Service in the Armed Forces of the Republic of Croatia,* Official Gazette, No. 136/2025.

51 HRT, *Parliament approves introduction of military service, call-up for review by early December*, Available at:
[https://vijesti.hrt.hr/hrvatska/sabor-izglasao-uvodenje-vojnog-roka-12395318], Accessed 24 February 2026.
Sacchi, Buzzelli, and De La Porte argue that the issue of defence and the actions of the current government in the context of increased military activities and defence spending represent a socio-sociological divide, both between the right-wing and left-wing political spectra and between the highly qualified segment of the population and others. For more on the research itself, see Sacchi, S.;, Buzzelli, G.;, Porte, C., *Guns versus Butter' in Public Opinion: The Politicization of the Warfare-Welfare Trade-Off,* Journal of European Public Policy, Vol. 33, No.4, 2026, pp. 1199–1225.

52 Government of the Republic of Croatia, *We will intervene regarding the prices of fuel, electricity, and gas*, Available at:
[https://vlada.gov.hr/intervenirat-cemo-u-pogledu-cijene-goriva-struje-i-plina/46391], Accessed 21 March 2026.

which are used in facilities for the production of electrical energy.[53] The Russo-Ukrainian war will drive Europe's pivot towards energy independence, as well as the securitisation narrative surrounding the energy sector. This is evidenced by the adoption of the Decision of the Government of the Republic of Croatia on the expansion of the Krk LNG terminal, whereby energy—as an economic activity—is transformed from a purely economic project into one of national and European security.[54]

For an energy system to endure, resilience theory focuses on the system's capacity to absorb shocks. According to Bourbeau, resilience constitutes a response to persistent uncertainty; thus, public policies through legislative activism must identify solutions to such "shocks".[55] This theory finds support in the Proposal of the Act on the Development of Nuclear Energy for Civil Purposes, which systematically regulates the legal framework for nuclear energy development in the Republic of Croatia for the first time. Presenting the act to parliamentarians, the Minister of the Economy of the Republic of Croatia, Ante Šušnjar, emphasised that Croatia thereby establishes the foundations of a long-term energy policy oriented towards system stability, secure energy supply, and technological development, and that the act constitutes one of the most important strategic decisions of the Republic of Croatia in this decade.[56]

In conclusion of this chapter, the authors point to the legal anachronism inherent in certain laws pivotal to national security. This primarily concerns the Act on the Security-Intelligence System of the Republic of Croatia, particularly the provisions pertaining to the operations of the National Security Council (Articles 3 and 4). The significance of these provisions within the context of Croatian political disputes manifests in the requirement that sessions of the Council be jointly convened and their agenda determined by the President of the Republic and the

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53 Act Implementing Council Regulation (EU) 2022/1854 on an Emergency Intervention to Address High Energy Prices, Official Gazette, No. 71/23, as well as Government of the Republic of Croatia, *Draft Proposal of the Act Implementing Council Regulation (EU) 2022/1854 on an Emergency Intervention to Address High Energy Prices*, Available at: [https://vlada.gov.hr/UserDocsImages/2016/Sjednice/2023/Lipanj/226%20sjednica%20VRH/226%20-%203.docx], Accessed 23 March 2026.

54 Decision of the Government of the Republic of Croatia on Enhancing Gas Supply Security through the Construction of the Zlobin–Bosiljevo Pipeline and Increasing the Capacity of the LNG Terminal to 6.1 Billion Cubic Metres of Gas Annually, Official Gazette, No. 96/2022.

55 Bourbeau, P., *Resilience and International Politics: Premises, debates, agenda*, *International Studies Review*, Vol. 17, No. 3, 2015, pp. 374–395.

56 Republic Croatia, Ministry of Economy, *Strategic Shift in Croatian Energy Policy: Minister Šušnjar Presents the Act on the Development of Nuclear Energy for Civil Purposes in Parliament*, Available at: [https://mingo.gov.hr/vijesti/strateski-zaokret-hrvatske-energetske-politike-ministar-susnjar-u-saboru-predstavio-zakon-o-razvoju-nuklearne-energije-u-civilne-svrhe/10278], Accessed 6 March 2026.

Prime Minister.[57] In light of the Croatian political reality and the phenomenon of "hard cohabitation," wherein political or personal animosities are prioritised over the disrupted international security architecture, the fact that the last session was held on 9 November 2021 constitutes a national security challenge.[58] Given that we live in an era of disrupted security architecture and the erosion of the international legal order, the existing Act must be revised to prevent national security issues from becoming a subject of political contention between the two pillars of the executive branch.[59] Likewise, the Act on Defence, in the textual provisions concerning the convening of the Defence Council as the coordinating body of state authority for harmonising positions and adopting conclusions and recommendations in the field of defence, requires revision. This is due to the fact that Article 11, paragraphs 1 and 2, stipulate that sessions of the Defence Council shall be jointly convened by the President of the Republic and the Prime Minister, and that the President of the Republic and the Prime Minister shall jointly determine the areas to be considered by the Defence Council.[60] The aforementioned statutory provision demonstrates that a branch of government may, in the absence of political or other interests, utilize its inaction or the withholding of consent as a

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57 Act on the Security-Intelligence System of the Republic of Croatia, Official Gazette, No. 79/06, 105/06.

58 The media currently describe the relationship between the President of the Republic of Croatia and the Prime Minister of the Republic of Croatia as "hard cohabitation." See further: N1, *Plenković explains the term "hard cohabitation"*, Available at: [https://n1info.hr/vijesti/a475567-Plenkovic-objasnio-pojam-andquottvrde-kohabitacijeandquot/], Accessed 21 March 2026.
According to data available to the author of this paper, verified through the website of the Office of the National Security Council of the Republic of Croatia, the last session of the said body took place on 9 November 2021. For more details, see the website of the National Security Council, Office of the National Security Council, Available at: [https://www.uvns.hr/hr/aktualnosti-i-obavijesti/odrzana-sjednica-vijeca-za-nacionalnu-sigurnost-1532], Accessed 21 March 2026.

59 The President of the Republic, Zoran Milanović, proposed to the Prime Minister of the Republic of Croatia, Andrej Plenković, the convening of a session of the National Security Council (NSC) due to an extraordinary and unforeseen situation in the Croatian judicial system, which negatively impacts—and could in the future negatively impact—the coordinated functioning and stability of state authority, as well as the national security of the Republic of Croatia. Office of the President of the Republic of Croatia, *President Milanović Proposes Convening of National Security Council Session to Prime Minister*, Available at: [https://www.predsjednik.hr/vijesti/predsjednik-milanovic-predlozio-je-predsjedniku-vlade-sazivanje-sjednice-vijeca-za-nacionalnu-sigurnost/], Accessed 25 January 2006 and Telegram, *The government refused to convene a session of the National Security Council at which Plenković and Milanović would meet,* Available at: [https://www.telegram.hr/politika-kriminal/vladajuci-odbili-sazivanje-sjednice-vijeca-za-nacionalnu-sigurnost-na-kojoj-bi-se-sastali-plenkovic-i-milanovic], Accessed 18 January 2026.

60 Act on the Defence of the Republic of Croatia, Official Gazette, No. 73/13, 75/15, 27/16, 110/17, 30/18, 70/19, 155/23,136/25.

mechanism to obstruct the convening of said session. This occurs notwithstanding the previously noted geopolitical circumstances and security imperatives that demand prompt resolution. Furthermore, while such a provision embodies the principle of 'bicephalism' (dual leadership) - which, in a democratic context, is fundamentally constructive - it facilitates political arbitrariness when the President of the Republic and the Prime Minister represent opposing political factions and prioritize partisan interests over national security. This is exemplified by the fact that the last session of the Defense Council was held on May 23, 2025, following a prolonged hiatus since November 9, 2021.[61]

In light of the foregoing, it is evident that the Republic of Croatia's response to contemporary geopolitical realities has been only partial. Future challenges pertain to the adoption of a new National Security Strategy and the necessary amendments to the Security-Intelligence System Act and the Defense Act, aimed at preventing the obstruction of key institutional sessions for political reasons. Consequently, in concluding this chapter, the authors align themselves with the proposition of Koskenniemi, who maintains that 'social reality' is a foundational prerequisite for understanding the legal and political character of statutory provisions at the critical moment when action is required.[62]

5. EUROPEAN LEGAL SYSTEMS FACING THE CHALLENGES OF NEOREALISM AND SECURITIZATION

In order to demonstrate that Croatian political reality and legislative action—within the context of the response to current geopolitical circumstances, observed in regional, broader European, and global terms—do not constitute an isolated case, it is necessary, for the purpose of a more precise scientific determination and the emphasizing of its importance, to examine the phenomenon of the geopoliticization of law through a comparative analysis of selected European states. Numerous European countries have recognized the geopoliticization of law as a response to the neorealist conception of the return of conventional threats, which has been primarily caused by the Russian aggression against Ukraine, but also by the redefinition of the American vision of national security directed toward the Indo-Pacific region, as previously stated in this paper. In this sense, the geopoliticization of law becomes a strategic reaction of individual European states within

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61 Government of the Republic of Croatia*, Session of the Defense Council held on*, Available at: [https://vlada.gov.hr/vijesti/odrzana-sjednica-vijeca-za-obranu-44489/44489?lang=hr], Accessed, 30 January 2026.

62 Koskenniemi, M., *From Apology to Utopia The Structure of International Legal Argument,* Cambridge University Press, Cambridge, 2005, p. 613.

the framework of their own security operations and the pursuit of achieving the strategic autonomy of Europe. This process takes place without nostalgia for former Euro-Atlantic relations and the traditional American security partnership that has defined the European order since the end of the Second World War.[63]

In the comparative analysis of national legislative and strategic acts, we observe the responses of the majority of European states to the aforementioned challenges through the redefinition of their own interests within strategic acts and statutory provisions. The most striking example of the impact of conventional war on European soil (the Russian aggression against Ukraine) and of conventional threats to the territorial integrity and sovereignty of states—which have become a geopolitical reality—is the historic departure of Sweden and Finland from the policy of military neutrality and their accession to NATO: Finland on April 4, 2023, and Sweden on March 7, 2024.[64] To access the Union, Finland had to amend a number of laws and thereby incorporate the strategic shift into its legislative framework, including the Penal Code, the Border Guard Act, the Policy Act, the Income Tax Act, as well as other statutory instruments related to such a strategic policy change.[65] The most significant legislative change refers to the amendments to the Nuclear Energy Act, which permit the import, transport, supply, or possession of nuclear devices in Finland within the context of homeland defense, NATO collective defense, or defense cooperation.[66] We also observe a legal response to geopolitical realities in Germany. The German model is notable for its historical adoption of a constitutional reform of the national fiscal framework. Three key innovations were introduced, among other measures, enabling a substantial increase in defense spending.[67] The key change is manifested in the establishment of a new

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63 Beaucillon, C., *Strategic Autonomy: A New Identity for the EU as a Global Actor*, European Papers, Vol. 8, 2023, pp. 417-428, also in Fiott, D., *The Three Images of EU Strategic Autonomy: Perspectives on Wedging, Binding and Hedging*, Journal of European Integration, Vol. 47, No. 6, 2025, pp. 825–842. and on the website of the European Commission, *Open strategic autonomy, economic and research security in EU foreign policy*, Available at: [https://cordis.europa.eu/programme/id/HORIZON_HORIZON-CL2-2025-01-DEMOCRACY-04], Accessed 2 March 2026.

64 NATO, *Enlargement and Article 10*, Available at: [https://www.nato.int/en/what-we-do/partnerships-and-cooperation/enlargement-and-articlev10#:~:text=They%20completed%20accession%20talks%20on%204%20July%2C,April%202023%20and%207%20March%202024%2C%20respectively], Accessed 15 March 2026.

65 Ministry of Justice of Finland, HE 90/2023, Available at: [https://www.finlex.fi/fi/hallituksen-esitykset/2023/90], Accessed 21 March 2026.

66 Finnish Government, Ministry of Defence, *Finnish Government proposes to amend Nuclear Energy Act and Criminal Code to strengthen NATO's deterrence and defence*, Available at: [https://valtioneuvosto.fi/en/-/236553176/finnish-government-proposes-to-amend-nuclear-energy-act-and-criminal-code-to-strengthen-nato-s-deterrence-and-defence], Accessed 21 March 2026.

67 Bundesgesetzblatt, Year 2025, Part I, No. 94, issued in Bonn on March 24, 2025.

infrastructure fund valued at EUR 500 billion (representing 11.6% of the 2024 GDP), which has been placed outside the scope of the constitutional "debt brake" (*Schuldenbremse*). The fund is intended to finance critical projects in the areas of transportation, health, energy, education, research, digitalization, and primarily defense.[68] This German historical precedent has also generated new legislative activism. Although Germany has not reintroduced a classic compulsory military service (which existed until 2011), on 5 December 2025 amendments to the Military Service Modernisation Act (*Wehrdienst-Modernisierungsgesetz*) were enacted. The Act introduces a framework for the "New German Military Service" (*Neuer Deutscher Wehrdienst*), which is based on voluntary participation. Nevertheless, the law imposes an obligation for males born in 2008 or later to participate in the military registration process, which entails completing a questionnaire and undergoing a medical examination by Bundeswehr personnel.[69]

A similar trend of treating conscription as a matter of supreme national importance is also evident in Lithuania, which, in response to geopolitical instability and inadequate staffing of the armed forces, addressed parliament (Seimas) with a decision to reintroduce mandatory military service.[70] In the realm of strategic documents, an indicative example is Poland, where the process of adopting the Government's National Security Strategy was halted by a veto from President Karol Nawrocki. The reason for the veto was the need to revise the document to achieve full alignment of Polish doctrines with the newly issued American Security Strategy.[71]

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68 The "debt brake" is a German constitutional fiscal rule embedded in the Basic Law for the Federal Republic of Germany. Prior to the reform, it limited federal net new borrowing to 0.35% of GDP per year. More information on the fund itself can be found in European Commission, *The potential economic impact of the reform of Germany's fiscal framework*, Available at: [https://economy-finance.ec.europa.eu/economic-forecast-and-surveys/economic-forecasts/spring-2025-economic-forecast-moderate-growth-amid-global-economic-uncertainty/potential-economic-impact-reform-germanys-fiscal-framework_en], Accessed, 23 March 2026.

69 In his speech to the Bundestag, the Federal Minister of Defence of the Federal Republic of Germany, Boris Pistorius, cited as a rationale for the introduction of the "New Military Service" and the accompanying amendments to the legislation: "Sweden, Latvia, Lithuania, Croatia: In response to the threat posed by Russia, several EU member states have reformed their conscription models — now Germany is following suit." Federal Minisry of Defence, *Stärkung der Verteidigungsbereitschaft: Bundestag beschließt Neuen Wehrdienst*, Available at: [https://www.bmvg.de/de/aktuelles/bundestag-beschliesst-neuen-wehrdienst-6048520], Accessed 20 February 2026.

70 Lithuanian Armed Force, *Military Service*, Available at: [https://kariuomene.lt/en/who-we-are/military-service/23649], Accessed 18 March 2026.

71 TVP World, *EU in 'chaos': Nawrocki says Poland's security strategy should align with US*, Available at: [https://tvpworld.com/90504757/nawrocki-eu-in-chaos-poland-should-align-with-us-security-roadmap], Accessed 22 February 2026.

Almost identical motives can be found in the French National Strategic Review. In this document, primary analytical attention is given to Russia, which is identified as the main threat to European security. The Review proceeds from the assumption that by 2030, France and its allies must be fully prepared to wage high-intensity warfare. Simultaneously, the document emphasizes the strengthening of the European pillar within NATO as a response to the American strategic distancing from Europe. China is also identified as a source of threat due to activities that undermine Western cohesion, including the development of military capabilities, economic expansion, and control over supply chains and technological development.[72]

As previously stated, securitization theory defines the process of assigning security significance to issues that do not originally belong to that domain. In this sense, the issue of energy within EU member states, alongside conventional threats, assumes primary national security importance. Such a conclusion stems from the first energy crisis caused by the Russian aggression against Ukraine, as well as the new crisis provoked by conflicts in the Persian Gulf.[73] Energy thus becomes a key factor in the strategic survival of Europe, which is manifested in the promotion of energy independence through the revitalization of nuclear energy production.[74] The President of the European Commission, Ursula von der Leyen, clearly articulated this pivot at the Paris summit, stating that the abandonment of civil nuclear energy was a strategic mistake that exposed the continent's vulnerability to fossil fuels.[75] The reflection of these policies is visible in the transformation of national legislations, such as that of Italy. On October 2, 2025, the Council of Ministers of Italy approved a bill delegating responsibility to the government for the reintroduction of sustainable nuclear energy within the framework of European decarbonization policies by 2050.[76] The significance of this change and the

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72 Republique Francaise - *National Stretegic Review*, Available at: [https://www.sgdsn.gouv.fr/files/files/Publications/20250713_NP_SGDSN_RNS2025_EN_0.pdf], Accessed 17 March 2026 and Defence24, *France's New Strategic Review 2025,* Available at: [https://defence24.com/geopolitics/frances-new-strategic-review-2025], Accessed 18 March 2026.

73 European Comission, *Sanctionos on Energy*, Available at: [https://commission.europa.eu/topics/eu-solidarity-ukraine/eu-sanctions-against-russia-following-invasion-ukraine/sanctions-energy_en], Accessed 20 March 2026.

74 European Comission, *EU to invest €330 million to accelerate fusion energy and support nuclear technologies and skills*, Available at: [https://ec.europa.eu/commission/presscorner/detail/en/ip_26_651], Accessed 24 March 2026.

75 Le Monde, *EU chief calls Europe shift from nuclear energy a 'strategic mistake'*, Available at: [https://www.lemonde.fr/en/energies/article/2026/03/10/eu-chief-calls-europe-shift-from-nuclear-energy-a-strategic-mistake_6751287_98.html], Accessed 13 March 2026.

76 Senato della Repubblica,Delega al Governo in materia di energia nucleare sostenibile, A.C. 2669, and Ministero dell'Ambiente e della Sicurezza Energetica, Nucleare sostenibile: MASE, via libera al disegno

geopoliticization of law is even more pronounced given that Italy had abolished the production of nuclear energy via a referendum in 2011.[77]

From the excerpts above it is evident that contemporary legal systems cannot be considered in isolation from geopolitical realities. These realities primarily pertain to the reemergence of conventional threats to territorial integrity and sovereignty, as well as to the erosion of confidence in the international legal order that has characterized the post-World War II era. Shifts in United States foreign and security policy toward Europe directly influence the public policies of EU Member States, which respond to these challenges by enacting new strategic instruments and legislative solutions. Legislative activism, therefore, is not merely an administrative act but a direct response to geopolitical circumstances through which states seek to operationalize the protection of their national security.

6. CONCLUSION

Through the conducted research, the authors of this article confirm the fundamental hypothesis that the contemporary security architecture—disrupted by the Russian aggression against Ukraine, the loss of confidence in international law, the crisis in the Middle East, and the paradigm shift in American foreign policy at the beginning of 2025—demands an urgent and comprehensive adaptation of the Croatian strategic and legislative framework, which we have termed in this research as the geopoliticization of law. The analysis has shown that the international order, established after the Second World War, is in a phase of deep erosion, whereby trust in international legal institutions and international law is being replaced by the politics of power and deterrence; this theoretically correlates with the return of neorealism from the historical domain as the dominant theory in the security realities of today. Under such circumstances, which change almost on a daily basis, the geopoliticization of law ceases to be merely a theoretical construct and becomes a necessary doctrine of public policy in the process of normatively organizing issues of national security and the protection of democratic values. The research has identified several key areas that require normative intervention by the Croatian executive and legislative authorities — *de lege ferenda*.

Firstly, there is an urgent need for a strategic redefinition of the field of national security, as the existing National Security Strategy, adopted in 2017, established

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di legge delega, Available at: [https://www.mase.gov.it/portale/-/nucleare-sostenibile-mase-via-libera-al-disegno-di-legge-delega], Accessed 19 March 2026.

77 BBC, *Italy nuclear: Berlusconi accepts referendum blow*, Available at: [https://www.bbc.com/news/world-europe-13741105], Accessed 17 March 2026.

a sectoral model of threats. While a sectoral threat model was an understandable form of strategic planning in past years, given the current geopolitical circumstances and the return of conventional threats, such an approach to threat identification is becoming anachronistic. Therefore, factual geopolitical realities necessarily require the (re)definition of national security interests through the prism of strategic autonomy within the European Union and NATO, taking into account—as we have stated in the paper and research—the global instability of the southeastern neighborhood, as well as the shift of American interest toward Asia and the Indo-Pacific region.

Regarding the energy sector, specifically the securitization of energy, if we apply the model of the Copenhagen School, the research has determined that energy has moved from the energy policy sector into the security and existential sector; it represents a security priority that requires more decisive legal protection and continuous legislative activism in order to strengthen resilience against geopolitical challenges. In this sense, the executive and legislative branches, precisely through the geopoliticization of law (*de lege ferenda*), have responded in a fully timely manner to the aforementioned geopolitical threats and realities.

What has been established in this paper and the research itself is the urgent need to remove institutional blockades in favor of national security protection. Here we refer primarily to the legal anachronism identified within the normative framework (*the Act on the Security-Intelligence System of the Republic of Croatia* and *the Defense Act of the Republic of Croatia*) which regulates the work of the National Security Council and the Defense Council. Current legal solutions, which require the consensus of the two pillars of executive power under conditions of "hard cohabitation," represent a direct risk to national security, as political disputes are prioritized over national interests in times of a disrupted security architecture and the return of conventional threats. Therefore, the authors are of the opinion that a revision of these laws is essential to ensure the functionality of the system and prevent the political blockade of strategic decision-making in times of crisis.

In conclusion, the Republic of Croatia has transformed certain strategic acts in accordance with existing, current, and predicted future challenges, while others specifically require deeper revision and redefinition in line with such recognized challenges. The legal standardization of security policy must not be merely an administrative response to the recognition of geopolitical realities and threats; rather, it should be a reflection of a teleological approach that places the *ratio legis* of protecting sovereignty and the security of citizens at its center. Thus, we can say that the recognition of geopolitical realities—and consequently legal standardization and legal certainty—must be primarily grounded in democratic values and

the rule of law. It is our opinion that on such principles, the state—and in this case, the Republic of Croatia—could successfully respond to the challenges of a fragmented and insecure world order in the 2020s.

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Review article

ATTITUDES TOWARDS IMMIGRANT WORKERS, THEIR POSITION ON THE LABOR MARKET AND EXPERIENCES OF INTEGRATION IN CROATIA: A SEMI-SYSTEMATIC LITERATURE REVIEW AND THEMATIC ANALYSIS*

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ABSTRACT

This paper analyses the existing scientific literature on labour migration in Croatia through a semi-systematic literature review and thematic analysis, with the aim of synthesising knowledge about migration trends, the position of foreign workers on the labour market, their integration experiences, and public attitudes. The analysis includes 22 scientific papers published in Croatian social science journals in the period from 2013 to 2025, and the interpretation of the findings is based on the theoretical frameworks of intergroup threat and group position theory. The results indicate a continuous increase in the need for foreign labour, especially in sectors with significant labour shortages, such as construction, tourism, and the service sector. Foreign workers are generally concentrated in lower-paid and lower-skilled occupations, although a smaller group of highly educated workers is also present. Despite the growing demand, they face numer-

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ous challenges, including higher unemployment, administrative obstacles, and limited access to rights and services. The analysis of public attitudes reveals a pronounced ambivalence: although there is awareness of the economic need for foreign workers, there are also negative attitudes, high social distance, and a perception of migrants as socioeconomic and sociocultural threats. These attitudes are linked to socio-demographic and socio-cultural characteristics and the broader socio-political context, which confirms the relevance of the applied theoretical approaches. Migrants' integration experience points to the important role of employers, but also to shortcomings in the form of weak institutional support, especially in the areas of language, information, and access to rights. In conclusion, the paper points to the need for further development of integration policies based on empirical findings as well as strengthening interdisciplinary cooperation. It also highlights the need for additional qualitative research in order to better understand the everyday experiences of immigrants and improve the effectiveness of integration policies in Croatia.

Keywords: *Attitudes, Croatia, Labour market, Immigrant workers, Integration, Semi-systematic literature review, Thematic analysis*

1. INTRODUCTION

International labour migration has become a structural and enduring feature of contemporary European societies experiencing both emigration and immigration, shaping political and public discourse, demographic trends, labour markets and cultural diversity. According to Eurobarometer data, approximately 37 million individuals born outside the European Union reside within its borders, accounting for around 8% of the total population.[1] At the same time, immigration is consistently perceived as one of the key social and political issues, with approximately 25% of EU citizens ranking it among the three most important societal concerns.[2] These figures highlight not only the demographic significance of migration but also its pronounced political and social relevance.

Over the past decade, labour migration has become increasingly significant in the Croatian context as well. The intensification of global migration flows, driven by structural inequalities, armed conflicts, demographic changes, geopolitical instability, and processes of globalisation, has led to increased cross-border labour mobility. In the context of population ageing and labour shortages, many EU Member States, including Croatia, are becoming increasingly dependent on migrant workers to sustain economic activity in key sectors such as construction, transport, industry, tourism, and services[3].

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1 European Commission, *Integration of Immigrants in the EU*, Special Eurobarometer 519, 2022, Available at:
[https://www.integrazionemigranti.gov.it/AnteprimaPDF.aspx?id=3524], Accessed 25 March 2026, p. 5.

2 *Ibid.*

3 Government Office for Human Rights and Rights of National Minorities., *Izvješće o politikama integracije: Prava vezana uz rad državljana trećih zemalja u Republici Hrvatskoj*, Vlada Republike Hrvatske, 2022, p. 9.

Traditionally characterised as a country of emigration, Croatia has in recent years experienced a rapid increase in labour immigration.[4] This shift has been particularly pronounced following its accession to the EU in 2013[5] and subsequent changes in labour market regulation, including the liberalisation of the work permit system and the abolition of quotas in 2021. According to data from the Ministry of the Interior of the Republic of Croatia, the number of residence and work permits issued increased significantly – from approximately 66,655 in 2020 and 81,000 in 2021, to more than 124,000 in 2022; 172,000 in 2023; 206,000 in 2024, and 170.000 in 2025.[6] According to the same sourse, foreign workers in Croatia are predominantly employed in sectors characterised by labour shortages, such as construction, agriculture, tourism and hospitality, transport, and industry. Most originate from Southeast Europe and Asia, reflecting broader regional and global migration patterns.[7] At the same time, analyses by the Ombudsperson[8] and reports from institutions specialising in human rights in Croatia point to numerous challenges in the integration of foreign workers, including administrative barriers, limited access to information, insufficient institutional support, and difficulties in exercising labour and social rights.[9] In this context, public attitudes towards immigrants represent a key factor in the integration process. They shape the social environment in which migrants live and work and influence their opportunities for social inclusion, in-

4 OECD, *Reviews of Labour Market and Social Policies: Croatia 2025*, OECD Publishing, Paris, 2025, Available at:
[https://doi.org/10.1787/90b78cc3-en], Accessed 27 March 2026.

5 Croatia has also implemented significant changes in its migration-related legislation. During the EU accession process, Croatian legislation was harmonised with the EU acquis, including in the area of labour migration. The Foreigners Act (Official Gazette No. 133/20, 114/22, 151/22, 40/25) constitutes the central legal framework governing the entry, movement, and residence of foreign nationals, as well as procedures for issuing visas and residence and work permits, the rights and obligations of foreign nationals, irregular migration, and return. The rights of asylum seekers and persons under international or temporary protection, and their access to the labour market, are regulated by the Act on International and Temporary Protection (Official Gazette No. 70/15, 127/17, 33/23, 17/25). In addition, the provisions of the Labour Act (Official Gazette No. 93/14, 127/17, 98/19, 151/22, 64/23) and the Occupational Safety and Health Act (Official Gazette No. 71/14, 118/14, 154/14, 94/18, 96/18) apply to all workers in Croatia, including foreign workers with a legally regulated employment status.

6 Ministry of the Interior of the Republic of Croatia, *Statistics of issued residence and work permits for2020, 2021, 2022, 2023, 2024 and 2025,* Available at:
[https://mup.gov.hr/gradjani-281562/moji-dokumenti-281563/stranci-333/statistika-169019/169019], Accessed 25 May 2026.

7 *Ibid.*

8 Ombudswoman of Croatia, *What Problems are Most Frequently Reported by Foreign Workers in Croatia?*, 2023, Available at:
[https://www.ombudsman.hr/en/what-problems-are-most-frequently-reported-by-foreign-workers-in-croatia/], Accessed 25 March 2026.

9 *Ibid., op. cit.,* note 4, p. 12 – 15.

tegration, and equal treatment.[10] Comparative research demonstrates significant variation across European societies in public perceptions of immigrants, with attitudes closely linked to economic conditions, levels of education, age, migration history, and broader socio-political contexts.[11] While some societies emphasise the economic contributions of migrants, others express concerns related to labour market competition, pressure on welfare systems, and cultural change.[12] At the global level, findings based on Gallup World Poll data indicate the ambivalence of public perceptions, whereby potential economic benefits of migration are recognised alongside concerns about its social and economic consequences.[13]

Research on migration trends in Croatia has the long history, but it has even expanded during last years, especially since the rise in the inflow of foreign workers in 2021 onwards (not only from neighboring, Western Balkan countries, but including workers from Asian nations such as Nepal, India, Phillippines, Bangladesh etc.)[14], and since Croatia recorded "positive net migration" for the first time in 2022 after "years-long negative net migration" (after a population decline of around 10% population between 2011 and 2021 population censuses, accelerated population aging and fertility decline, and after more than 15% of working age population have emigrated since joining the EU in 2013). [15]

The Croatia's migration transition from a emigration to an immigration society brings new challenges for the whole society, as well as a possiblities for economic sustainability because "foreign workers have become essential in key sectors such as

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10 Čačić-Kumpes, J.; Gregurović, S.; Kumpes, J.; *Migracija, integracija i stavovi prema imigrantima u Hrvatskoj.* Revija za sociologiju, Vol. 42, No. 3, 2012, pp. 305-336.

11 Goubin, S.; Ruelens, A.; Nicaise, I.; *Trends in attitudes towards migration in Europe. A comparative analysis.* HIVA – Research Institute for Work and Society, 2022, p. 21.

12 Goubin, S.; Ruelens, A.; Nicaise, I., *op. cit.*, note 13, pp. 21, 23.

13 Esipova, N. B.; Ray, J.; Pugliese, A., *How the World Views Migration*, IOM, 2017, Available at: [https://publications.iom.int/system/files/pdf/how_the_world_gallup.pdf], Accessed 26 March 2026.

14 A selective collection and review of the revelant academic publications, contemporary national and international research projects and initiatives, as well as expert reports about foreign workers can bee seen in: Hornstein Tomić, C.; Budimir, Župić, A. *Labour migration and demographic change in Croatia. Mapping conditions and potentials for a cohesive migration transition,* 2025, pp. 17-20. [doi.org/10.6084/m9.figshare.30383041], Review of the studies of local migration specialist, media analysis and industrial relations about foreign workers can also bee seen in: Butković, H.; Samardžija V.; Rukavina, I. *Strani radnici u Hrvatskoj: izazovi i mogućnosti za gospodarski i društveni razvoj,* Institut za razvoj i međunarodne odnose, Zagreb, 2022, pp. 114-124.; Review and analysis of different researhc on attitudes towards immigrants can be seen in: Gregurović, M. *Stavovi prema tražiteljima azila i izbjeglicama u Hrvatskoj: pregled istraživanja u razdoblju 2005.-2020.*, u: Gregurović, S.; Klempić Bogadi, S. Neminovnost ili izbor? Povijesni i suvremeni aspekti migracija u Hrvatskoj, Naklada Jesenski i Turk, Institut za migracije i narodnosti, Zagreb, 2023, pp. 127-148.

15 Hornstein Tomić, C.; Budimir, Župić, *op. cit.*, note 14, pp. 2-3.

construction, tourism and services due to persistant labour shortages".[16]Moreover, managing challenges and opportunities of the migration transition, supporting social integration of a heterogeneus group of foreign workers coming from culturally diverse countries, as well as preparing and building a democratic, open and inclusive society will remain to be a current and important, scientific-theoretical and empirical, as well as practical-political issue in the future. Namely, due to some UN estimates for Croatia, a "further decline to 3,3 million inhabitants is projected by 2050.", while according to Croatian Employer's association estimates "the total number of foreign workers in Croatia could reach 400,000 to 500,000 by 2030".[17] In this regard, we emphasize the importance of scientific approaches that enable theoretical and empirical insights and consider it as the main basis for managing Croatia's migration transition, for developing inclusive integration policies and building sustainable, labour market. Therefore this paper addresses the following research question: *What insights does the selected scientific literature provide regarding labour migration in Croatia in terms of trends, labour market dynamics, integration, and public attitudes towards foreign workers?*

This paper aims to synthesise research on attitudes towards foreign workers in Croatia, their labour market position, and integration experiences, while identifying key challenges and implications for integration policies. To achieve this, a semi-systematic literature review and thematic analysis were combined to identify dominant patterns, methodological approaches, and research gaps in the existing literature.

2. THEORETICAL FRAMEWORK: SOME PERSPECTIVES AND INSIGHTS

A review and analysis of the broader theoretical framework that enables a better understanding and interpretation of contemporary migration processes is beyond the scope of this chapter. Various migration theories can be broadly divided into those explaining the causes of migration and those analysing its impacts on countries of origin and destination[18]. These also include functionalist and historical-structural approaches, as well as theories emphasising migrants' agency and identity, and migration transition theories[19]. Among these, migration transition theories are particularly significant, as they view migration as part of broader pro-

[16] *Ibid*., p. 31.

[17] *Ibid*., pp. 2-5.

[18] Castles, S.; de Haas, H.; Miller, J. M. *The Age of Migration: International Population Movements in the Modern World* (5th ed). New York: Palgrave Macmillan, 2014, p. 26.

[19] *Ibid.,* pp. 25-54.

cesses of development, social transformation, and globalisation[20]. In this perspective, migration is understood as an integral component of wider developmental change and as a process with its own internal, self-sustaining, and potentially self-undermining dynamics. [21]

The concept of migration transition is an old one, and it could be recognized in the hypothesis about the *mobility transition* first developed by Zelinski (1971.) who analyzed spatial mobility with the degree of social-economic and demographic development and modernization, and distinguished five phases of the development of societies: 1. the premodern traditional society 2. the early transitional society; 3. the late transitional society; 4. the advanced society, and 5. a future superadvanced society.[22] A similar theory according to which each European country is in a specific stage of the immigration cycle is developed by Okolski (2012), and this transformation from the country of emigration to the country of immigration is termed the *migration transition*.[23] Okolski identifies five stages of migration patterns. He argues that a country transitions from emigration to immigration when emigration declines sharply, demographic transition occurs (including population ageing and falling fertility), and the number of foreign workers exceeds the number of domestic workers who emigrate. This shift marks a new phase of national development.[24]

Analysing the link between development and migration has a long theoretical tradition, with de Haas (2010) distinguishing between *migration optimists* and *migration pessimists*. This divide reflects broader tensions in social theory (functionalist vs. structuralist), development theory (balanced growth vs. asymmetrical development), and political economy (neoliberal vs. state-centrist perspectives).[25] In contrast to these opposing views, *migration pluralists* emphasise the heterogeneous and non-deterministic relationship between migration and development. They integrate both agency and structure and highlight diverse mechanisms through which migration affects development, including the new economics of labour migration, household livelihood strategies, and transnational perspectives.[26] Pluralistic ap-

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20 *Ibid.,* pp. 47.

21 De Haas, H. *Migration and Development: A Theoretical Perspective*, The International Migration Review, Vol. 44, No. 1, 2010, p. 228.

22 Zelinsky, W. *The Hypothesis of the Mobility Transition*, Geographical Review, Vol. 61, Issue 2, 1971, pp. 230-231.

23 Okolski, M. *Transition from Emigration to Immigration: Is it the Destiny of Modern European Countries?,* in: Okolski, M. (ed.) European Immigrations: Trends, Structures and Policy Implications. Amsterdam University Press, 2012, p. 23.

24 *Ibid.,* p. 40.

25 De Haas, H., *op. cit.*, note, 21, p. 229.

26 *Ibid.,* pp. 241.-248.

proaches view migration as an integral part of broader processes of economic and social development and modernisation. They emphasise the need to analyse both the causes and consequences of migration across macro, meso, and micro levels. However, the question of whether migration promotes or hinders development remains unresolved.[27] Overall, different theoretical perspectives highlight different aspects of migration, leading to varying approaches and policy frameworks.[28] In this context, it is important to note that contemporary migration optimism also has a strong ideological dimension, as it aligns with the dominant neoliberal political philosophy.[29]

An analysis of the migration transition that contemporary Croatian society is undergoing would not be complete without research into how the "host" society responds to these changes. Therefore, in a theoretical sense, attitudes towards immigrants and foreign workers are particularly examined. These attitudes are most commonly explained through the frameworks of intergroup threat theory, group position theory, and realistic conflict theory. These approaches are used complementarily to explain how economic, symbolic, and discursive factors jointly shape attitudes towards foreign workers. They share the underlying assumption that negative attitudes towards out-groups stem from perceived threats to the interests, resources, or identity of the dominant social group.

Intergroup threat theory posits that prejudice arises primarily from subjective perceptions of threat rather than objective conditions. Stephan and Stephan distinguish between two main types of threat: realistic and symbolic.[30] Realistic threats refer to the perceived loss of economic and political resources, such as employment opportunities, income and social influence.[31] Even in the absence of objectively grounded threats, the mere perception of competition can generate negative attitudes towards other groups. Symbolic threats, by contrast, are associated with perceived differences in values, norms, and cultural identity, and often involve fears related to the erosion of social norms or the moral order.[32] In situations of direct contact between groups of different cultural identities, a lack of knowledge of the cultural specificities of the other group can result in discomfort and fear, which can consequently contribute to the formation of negative stereotypes and

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27 *Ibid.*

28 Castels, p. 52.

29 De Haas, p. 257.

30 Stephan, W. G.;Stephan, C. W., *An integrated threat theory of prejudice*, in: Oskamp S. (ed.), *Reducing prejudice and discrimination.* Lawrence Erlbaum Associates Publishers, 2000, pp. 23 - 45.

31 Stephan, W. G.; Ybarra, O.; Morrison, K. R., *Intergroup threat theory*, in: T. D. Nelson (ed.), *Handbook of prejudice, stereotyping, and discrimination*. Psychology Press, 2009, p. 43-59.

32 *Ibid*.

increased social distance.[33] Realistic conflict theory emphasises that competition over limited resources can generate intergroup tensions and negative attitudes.[34] In the context of labour migration, members of the host population may perceive foreign workers as competitors for jobs and wages. The integration of intergroup threat theory and realistic conflict theory allows for the analysis of both the material and symbolic dimensions of prejudice.

At the macro level, group position theory**,** developed by Blumer, provides an additional explanatory perspective. According to him, prejudice is not merely an individual psychological phenomenon but a product of collective processes and perceptions of the dominant group's social position. Prejudice is conceptualised as a sense of group position, reflecting how the dominant group perceives its relationship to other groups. This includes a sense of in-group superiority, perceptions of hierarchical ordering, and concerns over the potential loss of privileges.[35]

Empirical research further supports the relevance of these theoretical frameworks. Anti-immigrant attitudes tend to increase when members of the dominant group perceive higher levels of threat, particularly in contexts characterised by a growing share of migrant populations and economic insecurity (job loss or increased competition for resources).[36] Broader societal conditions, such as adverse economic circumstances and increasing numbers of migrants or foreign workers, contribute to heightened perceptions of threat and, consequently, to stronger prejudice and negative attitudes.

In short, these theoretical approaches – migration transition, intergroup threat, and group position theory – enable a more nuanced understanding and interpretation of findings derived from the thematic analysis.

3. METHODOLOGY

In this paper, a semi-systematic literature review was combined with thematic analysis[37] with the aim of synthesising existing scientific knowledge about labour migrants in Croatia. The review followed predefined guidelines for searching, se-

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33 Stephan, W. G.; Ybarra, O.; Morrison, K. R., *op. cit.*, note 19, p. 48.

34 Sherif, M., *Group Conflictand Co-operation: Their Social Psychology*. Routledge& Kegan Paul, 1966, p. 156.

35 Blumer, H., *Race Prejudice as a Sense of Group Position*. Pacific Sociological Review, Vol. 1, No.1, 1958, pp. 4-5.

36 Quillian, L., *Prejudice as a response to perceived group threat: Population composition and anti-immigrant and racial prejudice in Europe*, *American Sociological Review*, Vol. 60, No.4, 1995, p. 589.

37 Snyder, H. *Literature Review as a Research Methodology: An Overview and Guidelines*. Journal of Business Research, Vol. 104, 2019, p. 335.

lecting, and evaluating sources to ensure transparency and reproducibility, while also allowing some interpretative decisions in the inclusion and assessment of studies, in line with the flexibility of semi-systematic approaches. In the second phase, an adapted thematic analysis was used for reading and interpreting the data, initial coding, and the identification, organisation, and categorisation of themes, leading to the formulation of relevant conclusions.[38] This approach was chosen for its flexibility in combining different analytical perspectives and enabling continuous researcher reflection and contextual interpretation. [39]

3.1. Selection strategy and data sources

For this paper, the literature search was conducted using the following academic databases: WOS, Scopus, and HeinOnline, ensuring that all peer-reviewed scientific papers published in Croatian scientific journals were included. These journals, according to the Portal of Croatian Scientific and Professional Journals (Hrčak), were active at the time of this analysis, have operated continuously for the past fifteen years, and cover the field of social sciences, particularly sociology, law, and political science. This ensured the inclusion of a representative sample of domestic scientific production published in relevant academic journals.

The following twelve (12) scientific journals are listed alphabetically: "Croatian Academy of Legal Sciences Yearbook", "Croatian Journal of Social Policy", "Croatian Political Science Review", "Croatian Sociological Review", "Collected Papers of Zagreb Law Faculty", "Collected Papers of the Faculty of Law of the University of Rijeka", "Collected Papers of the Faculty of Law in Split", "Journal for General Social Issues", „Journal of law and social sciences of the Law Faculty of University J. J. Strossmayer in Osijek", "Migration and Ethnic Themes", "Sociology and Space" and "Social ecology".

In defining the time frame for the selection of literature, 2013 was chosen as the starting year, as it marks Croatia's accession to the EU. All articles published up to the end of 2025 that contain the following key words in the title, abstract, or key word list (in Croatian and English) were included: "migrants", "immigrants", "labour (im)migrants", "economic (im)migrants", "foreign workers", "attitudes toward (im)migrants", "integration of (im)migrants", "(im)migration policy", and "labour market integration".

The study selection process was carried out in three phases. In the first phase, database searches identified an initial pool of papers (N=33), which were then screened

[38] Braun, V.; Clarke, V. *Thematic Analysis: a practical guide*. SAGE Publications, 2021.

[39] *Ibid.*

by title and abstract after excluding studies not published in Croatian scientific journals in sociology, law, or political science within the last 15 years, or not relevant to the topic. In the second phase, full-text screening was conducted to assess eligibility according to inclusion and exclusion criteria. Full-text reading was necessary due to inconsistent terminology in the literature, which uses terms such as migrants, immigrants, asylum seekers, and refugees. This study focuses on labour or economic migration (foreign workers, labour/economic migrants), distinguishing it from political or forced migration (refugees and asylum seekers), while acknowledging that migration flows may overlap and include both voluntary and forced forms depending on the reasons or motives for migrating (that are also often manifold).[40]

3.2. Inclusion and exclusion criteria

Inclusion criteria included: (1) scientific articles (original, review and preliminary), (2) period 2013–2025, (3) focus on Croatia or inclusion of Croatia in comparative analysis, and (4) thematic relevance for attitudes towards migrants, labor market, integration or migration policies. The exclusion criteria referred to papers dealing exclusively with refugees and asylum seekers, professional and non-peer-reviewed papers, and papers without empirical or analytical contribution. The selection process was carried out in three stages: (1) initial search and removal of irrelevant works, (2) review of abstracts and keywords, (3) detailed analysis of complete texts. After applying the criteria, the final sample included 22 scientific papers from 9 Croatian journals, which were subjected to further thematic analysis: *Migration and Ethnic Themes* (8), *Journal for General Social Issues* (4), *Croatian Sociological Review* (3), *Sociology and Space* (2), and one paper each from the *Croatian Academy of Legal Sciences Yearbook*, *Croatian Journal of Social Policy*, *Croatian Political Science Review*, *Collected Papers of the Faculty of Law in Split*, and *Collected Papers of Zagreb Law Faculty*.[41]

3.3. Data analysis

Selected papers were analysed using thematic analysis, enabling the identification of recurring patterns and conceptual connections across studies. The analytical

[40] Castles, S.; de Haas, H.; Miller, J. M. 2014., *op. cit.*, note 18, p. 26.; Vukorepa, I. *Migracije i pravo na rad u Europskoj uniji.* Zbornik Pravnog fakulteta u Zagrebu, Vol. 68, No. 1, 2018, p. 85.; Kalebić Maglica, B.; Švegar, D.; Jovković, M. *Odnos osobina ličnosti, efekta okvira i stavova prema migrantima*. Društvena istraživanja, Vol. 27, No. 3, 2018, p. 496.

[41] One paper was included in the analysis because even though it was published in 2012 and based on a survey of attitudes towards foreign workers in Croatia conducted in 2009, it is significantly related to the understanding of other papers used in the thematic analysis.

process consisted of four phases of thematic analysis: (1) familiarisation with the data, (2) initial coding, (3) identification of themes and (4) categorisation and interpretation. Based on this process of thematic analysis, four main analytical categories were identified: (1) attitudes toward foreign workers in Croatia, (2) foreign workers and the Croatian labour market, (3) integration experiences of immigrants in Croatia and (4) migration and integration policies in Croatia and the EU.

3.4. Limitations and value of the study

The chosen methodological approach offers several advantages. It enables the integration of diverse sources, provides insight into the development of the research field over time, and facilitates the identification of recurring thematic and conceptual patterns across studies. At the same time, several limitations should be acknowledged. First, the review is restricted to papers published in Croatian scientific journals, which means that some relevant studies and research reports were not included in the analytical corpus, although selected international literature was incorporated into the theoretical framework. Second, given the substantial changes in migration trends after 2021, the findings of earlier studies should be interpreted within their specific social and migration contexts. Third, the methodological heterogeneity of the included studies limits direct comparability but also allows for a broader and more nuanced understanding of the phenomenon.

Despite these limitations, the combination of a semi-systematic literature review and thematic analysis provides a comprehensive and theoretically informed synthesis of the existing scientific literature on labour migration in Croatia. Overall, this analytical framework enabled an integrated examination of public attitudes towards foreign workers, labour market dynamics, integration experiences, and migration policies, thereby offering a comprehensive understanding of contemporary immigration processes in Croatia.

4. RESULTS OF THEMATIC ANALYSIS

4.1. Attitudes towards foreign workers in Croatia

The reviewed studies indicate that attitudes towards foreign workers in Croatia are structured around three interrelated themes: (1) perceptions of economic, cultural and security-related threats, (2) social distance towards migrants and foreign workers, and (3) socio-demographic and ideological determinants of attitudes. The findings further reveal important temporal changes associated with Croatia's

transition from a predominantly emigration country to an increasingly immigration-oriented society.

An overview of Croatian citizens' attitudes towards economic or labour immigrants (foreign workers) is based on ten scientific papers presented in chronological order, reflecting the time- and context-dependent nature of these attitudes.

A 2009 survey[42] conducted on a representative sample of Croatian adults (N = 1300) found high levels of resistance towards foreign workers and reluctance to establish closer contact with them, despite Croatia not yet being an EU member and experiencing little labour immigration at the time. [43] Greater social distance was associated with gender (women), age (aged 30 and over), lower education, poorer socioeconomic status, residence in smaller communities, right-wing political orientation, stronger religiosity, religious practice, and the belief that religious and national identities are closely linked.[44] Foreign workers were widely perceived as both socioeconomic and sociocultural threats, with perceptions of sociocultural threat being particularly pronounced among older (men aged 70 and over), less-educated, and socioeconomically disadvantaged respondents.

A similar study conducted shortly after Croatia's accession to the EU in 2013 (N = 1,100 from Osijek-Baranja and Vukovar-Srijem counties)[45] reported somewhat more positive attitudes towards immigrant workers, but cultural threat perceptions and social distance remained significant. Nevertheless, immigrant workers continued to be perceived as a cultural threat, and considerable social distance remained present. Negative attitudes were more common among older, politically right-oriented, conservative, and less-educated respondents, whereas more liberal, tolerant, and better-educated individuals expressed more positive views. Socioeconomic and employment status had no significant effect. [46]

A highly consistent finding across almost all studies concerns the socio-demographic and ideological predictors of negative attitudes. Older age, lower educational attainment, stronger religiosity, right-wing political orientation, nationalism and authoritarian values repeatedly emerge as factors associated with greater social distance and stronger perceptions of migrant threat. The consistency of these findings across different samples and time periods suggests that attitudes

42 Čačić-Kumpes, J.; Gregurović, S.; Kumpes, J., *op. cit.,* note 10, p. 305.

43 *Ibid.,* p. 326.

44 *Ibid.,* p. 306.

45 Gregurović, M.; Kuti, S.; Župarić-Iljić, D. *Attitudes towards Immigrant Workers and Asylum Seekers in Eastern Croatia: Dimensions, Determinants and Differences*. Migracijske i etničke teme, Vol. 32, No. 1, 2016, p. 91.

46 *Ibid.,* p. 112-115.

towards migrants in Croatia are closely connected with broader value orientations rather than solely with direct contact or labour-market competition.

The ISSP National Identity module conducted in 2013 and 2014 in seven Central and Eastern European countries, including Croatia, [47] revealed somewhat negative attitudes towards immigrants as an economic threat, while support for perceiving immigrants as a cultural threat was low. [48] Migration research in Croatia, both before and during the COVID-19 pandemic, also identified immigrants as a perceived health threat, with the pandemic contributing to restrictions on labour migration and fostering xenophobia, cultural racism, Islamophobia, and anti-Asian or anti-Chinese attitudes globally and within the EU.[49] However, Eurobarometer data from 2020 indicate no increase in anti-immigrant attitudes or xenophobia in Croatia; instead, they suggest a positive shift, with 52–70% of respondents expressing positive feelings towards immigrants from outside the EU and 50% reporting positive attitudes compared to 45% negative.

Across studies conducted before the large-scale increase in labour immigration, migrants were predominantly perceived through the lens of symbolic and cultural threat. Economic concerns were present, but attitudes were largely shaped by perceptions of cultural difference, concerns about social cohesion and exclusivist understandings of national identity. Notably, these attitudes emerged in a period when Croatia had relatively limited experience with immigration, suggesting that perceptions were often formed in relation to imagined rather than directly experienced migrant populations.

Attitudes towards immigrants in Croatia, analysed through the European Social Survey (ESS) from 2010/2011 to 2023/2024[50], have generally remained more negative than the European average regarding perceived immigration threat.[51] Data from 2020/2021 and 2023/2024 indicate a statistically significant shift towards more negative attitudes following the increase in the immigrant population, particularly in perceptions of immigrants as a cultural threat and towards immigration of people from different racial or ethnic backgrounds, while perceptions of economic threat remained unchanged. Negative attitudes are more common

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47 Petrović, N.; Mrakovčić, M.; Fila, F. *Anti-EU Backlash from Below or Above? Public Opinion in Central and Eastern Europe Prior to the 2015 Migration Crisis*. Revija za sociologiju, Vol. 51, No. 3, 2021, p. 317.

48 *Ibid.,* p. 323.

49 Gregurović, M., *et al.*, *Pandemic Management Systems and Migration.* Migracijske i etničke teme, Vol. 36, No. 2-3, 2020, p. 218.

50 Čačić-Kumpes, J.; Kumpes, J.; Klempić Bogadi, S.; Podgorelec, S. *Europska »migracijska kriza« i stavovi prema imigrantima i imigraciji u Hrvatskoj*. Migracijske i etničke teme, Vol. 40, No. 2, 2024, p. 217.

51 *Ibid.,* pp. 251-252.

among older, less-educated, rural, more religious, socioeconomically disadvantaged, politically right-leaning, and more nationalistic respondents.

The findings suggest two distinct phases in the development of public attitudes towards migrants in Croatia. The first phase, extending roughly from the 1990s until 2020, corresponds to Croatia's position as a predominantly emigration country characterised by relatively low levels of immigration and limited direct contact with foreign workers. During this period, negative attitudes towards migrants were present, but migrants remained a relatively abstract social category. The second phase begins with the rapid increase in labour immigration after 2020. Migrants and foreign workers became increasingly visible in everyday social life, particularly through the arrival of workers from South and Southeast Asia. Contrary to expectations that increased contact might automatically foster acceptance, recent findings indicate growing social distance and stronger perceptions of cultural threat. This trend may reflect broader processes associated with migration transition, in which societies adjust to their new role as immigration destinations.

Two surveys examined attitudes of Croatian law students towards migrants from the Middle East in 2019 and 2024.[52]The 2019 study (N = 667) found slightly negative to neutral attitudes, with more negative views among right- and centre-right-oriented, more religious students, those from Split and Osijek, and students in higher years. [53] Voluntary migrants were more often perceived as economic opportunists, while forced migrants (asylum seekers and refugees) elicited greater empathy and support.[54]

The 2024 study (N = 590) showed a significant increase in social distance towards most migrant groups compared to 2019, particularly foreign workers. [55]. The highest social distance was expressed towards asylum seekers, refugees, Roma, foreign workers, and migrants from the Middle East and Africa, while migrants from former Yugoslavia were perceived as less culturally distant. Higher social distance was associated with clerical, nationalist, conservative, and authoritarian attitudes, opposition to multiculturalism and European integration, and higher religiosity, whereas pro-European orientations predicted lower social distance.

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52 Mrakovčić, M.; Gregurović, M. *Neprijatelj pred vratima? Ili kako studenti prava iz četiriju najvećih hrvatskih gradova doživljavaju azilante i migrante s Bliskog istoka*. Sociologija i prostor, Vol. 58, No. 3, 2020, p. 291.

53 *Ibid.,* pp. 304-305.

54 *Ibid.,* p. 310.

55 Mrakovčić, M.; Gregurović, M.; Miočić, M. *Studenti prava i društvena distanca prema migrantima u Hrvatskoj – što se promijenilo između 2019. i 2024. godine?.* Politička misao, Vol. 62, No. 3, 2025, pp. 96-99.

Additional studies on Croatian adolescents and university students highlight the role of personality traits and media exposure. A 2017 survey of high school students in Karlovac (N = 102) found that extraversion, agreeableness, and openness were linked to lower perceived threat, while authoritarianism was the strongest predictor of perceived social, cultural, and health-economic threats; negatively framed media increased these perceptions.[56] A 2019 study of university students in Zagreb (N = 601) examining attitudes towards migrant criminalityshowed that respondents distinguished between legal and illegal migrants, supported stricter sanctions for the latter, and generally did not express strong xenophobic or racist attitudes, indicating more favourable views than in earlier studies. [57]

Overall, the literature reveals a pattern of persistent ambivalence towards migrants and foreign workers. While economic necessity increasingly legitimises labour immigration, social acceptance remains conditional and uneven. Cultural concerns, social distance and perceived threats continue to shape public attitudes, indicating that societal adaptation to Croatia's new migration reality remains incomplete.

4.2. Foreign workers and the Croatian labour market

Three main themes emerge from the literature concerning foreign workers in the Croatian labour market: (1) the changing structure of labour immigration, (2) labour-market segmentation and vulnerability of migrant workers, and (3) the growing economic dependence on migrant labour.

Five scientific papers provide insight into the position of immigrants, or foreign workers, in the Croatian labour market.

An analysis of Labour Force Survey (LFS) data for 1998–2012 showed that immigrants became increasingly concentrated in the working-age population (25–49) during 2006–2012[58], indicating predominantly work-related migration. Although foreign citizens had a higher share of tertiary education than the domestic population in the later period, immigrants were on average less educated than domestic workers[59], suggesting that Croatia mainly attracts lower-educated migrants who fill less desirable jobs. Foreign workers were more likely to be employed in elemen-

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56 Kalebić Maglica, B.; Švegar, D.; Jovković, M. *Odnos osobina ličnosti, efekta okvira i stavova prema migrantima.* Društvena istraživanja*,* Vol. 27, No. 3, 2018, p. 499.

57 Vuk, M.; Doležal, D.; Jovanović, E. *Utjecaj karakteristika imigranata počinitelja kaznenih djela na stavove studenata prema kriminalitetu imigranata*. Društvena istraživanja*,* Vol. 30, No. 1, 2021, p. 56.

58 Botrić, V. *Immigrants' Characteristics and the Croatian Labour Market: an Explorative Study*. Migracijske i etničke teme*,* Vol. 31, No. 1, 2015, pp. 39-41.

59 *Ibid.,* p. 52-53.

tary, craft, service, and other low-skilled occupations. While there were no major differences in average net wages between foreign and domestic workers within the same occupations, immigrants consistently experienced higher unemployment rates. According to 2014 Ministry of the Interior data, most work-related immigrants originated from former Yugoslav countries (70.93%), followed by China, Russia, the USA, and Ukraine.

A separate study using LFS data from 2007 and 2012 examined the labour market position of permanent immigrants, who represented 9.6% of the population in 2012[60], with most originating from Bosnia and Herzegovina (70%)[61]. In both years, employed and unemployed immigrants most commonly had upper secondary education[62] and there were no large differences in average net wages within the same occupations[63]. Their occupational structure shifted from craft-related occupations in 2007 towards service, sales, and professional occupations in 2012 while unemployment increased among those employed in elementary occupations, crafts, and plant and machine operation.[64] The reviewed evidence suggests a gradual transformation of labour immigration patterns. Earlier immigration flows were dominated by workers from neighbouring former Yugoslav countries, while recent studies indicate increasing diversification of countries of origin and a growing reliance on non-European labour markets.

Compared to the reference group (aged 35-44), predictors of unemployment among foreigners in 2007 included service and sales occupations and individuals older than 55[65], while in 2012 they also included elementary occupations, plant and machine operators, and younger individuals (15–24) .[66] Predictors of long-term unemployment were lower secondary education and ages 45+ in 2007, and lack of prior work experience and age 55+ in 2012. These findings highlight the need for a more active immigration policy and targeted labour market integration measures[67].

A 2013 survey of foreign workers in Zagreb, Karlovac, and Rijeka (N=61) [68] found that most respondents originated from Bosnia and Herzegovina, had secondary

60 Botrić, V. *Nezaposlenost i dugotrajna nezaposlenost doseljenih u Hrvatsku*. Migracijske i etničke teme, Vol. 32, No. 1, 2016, p. 63.

61 *Ibid.,* p. 68.

62 *Ibid.,* p. 87.

63 *Ibid.,* pp. 54-55.

64 *Ibid.,* pp. 87-88.

65 *Ibid.,* pp. 72-73.

66 *Ibid.,* p. 79.

67 *Ibid.,* p. 82.

68 Božić, S.; Kuzmanović, B.; Barada, V. *Strani radnici u Hrvatskoj: porijeklo, status, orijentacije*. Migracijske i etničke teme, Vol. 29, No. 3, 2013, p. 371.

or primary education, and worked in Croatia primarily for higher earnings and geographical proximity. The sample was almost entirely male, predominantly aged 30–50, with incomes below the Croatian average. Many maintained strong transnational ties and most intended to remain in Croatia either permanently or for as long as possible.

A 2022 interview study with stakeholders in the long-term care sector (N=13) found broad agreement that immigration is an inevitable response to labour shortages.[69] Nearly „all respondents viewed immigration as an inevitable solution to labour shortages" in a sector affected by "care drain"[70], although they expressed concern that migrant workers would remain only temporarily before moving to more developed economies. Croatia was seen as particularly attractive to workers from Bosnia and Herzegovina and other former Yugoslav countries due to geographic and linguistic proximity, although this labour pool is shrinking and future recruitment is expected to increasingly target Asian and African countries. Respondents also expressed concerns about the temporary nature of migrant employment and the readiness of Croatian society, particularly older populations, to accept greater diversity.

An important paradox emerges from the reviewed studies. Although migrant workers are increasingly recognised as indispensable for addressing labour shortages, Croatia remains a relatively unattractive destination compared with Western European countries. As a result, the country faces a dual challenge: retaining domestic workers while simultaneously attracting and retaining foreign labour. This finding reflects Croatia's intermediate position within European migration systems, functioning both as a sending and a receiving country.

Overall, Croatia is perceived as less attractive than countries such as Austria and Germany due to lower wages and weaker working conditions, highlighting the need to address „care drain, retain domestic workers, and develop comprehensive integration measures, including professional training, language education, and evidence-based immigration policies.

Research on Croatian counties (2005–2013) further shows that social and cultural diversity positively contributes to entrepreneurship, innovation, and economic growth.[71] More innovative regions, such as the City of Zagreb, Split-Dalmatia,

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69 Bađun, M., *Long-Term Care Workforce in Croatia: A Qualitative Study on the Potential Role of Immigration.* Revija za socijalnu politiku, Vol. 31, No. 3, 2024, p. 261.

70 *Ibid.,* pp. 270., 275.

71 Stojčić, N.; Bečić, M.; Vojinić, P., *The Impact of Migration Movements on Innovation Activities in Croatian Counties*. Društvena istraživanja, Vol. 25, No. 3. 2016, p. 292.

and Primorje-Gorski Kotar counties, also record higher immigration levels. Highly educated immigrants positively affect innovation, while low-educated immigrants may have a negative impact, alongside broader positive interregional effects of migration on innovation activity.

Overall, the findings demonstrate that labour immigration has evolved from a marginal phenomenon into a structural component of the Croatian labour market. The increasing reliance on foreign labour appears closely linked to demographic decline, labour shortages and continuing emigration, suggesting that immigration is becoming an essential mechanism for sustaining economic activity.

4.3. Integration experiences of immigrants in Croatia

The analysed studies identify three key dimensions of migrant integration in Croatia: labour-market integration, institutional integration and socio-cultural integration.

Two scientific papers provide insight into the integration experiences of foreign workers in Croatia.

A 2024 study based on nine semi-structured interviews with Indian workers living and working in Zagreb or Zagreb County examined their migration motives and integration experiences.[72] Participants varied in age, education, occupation, and length of stay, with some employed in their professions and others in delivery services or agriculture[73]. All had secured employment before arrival and highlighted the importance of migrant networks and digital platforms such as Facebook, WhatsApp, and LinkedIn in finding work. Key migration motives included financial difficulties, unemployment, lack of opportunities in India, and, among higher-educated participants, professional advancement and international work experience. Regardless of education level, participants emphasised better working conditions in Croatia, particularly shorter working hours and more free time. Regarding integration, all participants stressed the crucial role of employers, who provided accommodation and administrative support upon arrival, including residence and work registration and assistance with opening bank accounts.

A recurring finding concerns the central role of employers in facilitating integration. Rather than functioning solely as labour-market actors, employers frequently

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72 Rajković Iveta, M.; Magdalenić Vincek, A., *Uzroci migracija i integracijska iskustva suvremenih migranata iz Indije u Zagrebu i Zagrebačkoj županiji*. Migracijske i etničke teme, Vol. 40, No. 2, 2021, p. 337.

73 *Ibid.,* pp. 341-345.

perform responsibilities typically associated with public institutions, including administrative assistance, accommodation arrangements and initial orientation. This suggests that integration processes in Croatia remain highly employer-dependent. English was the primary language of communication for all participants. While some wished to learn Croatian and had access to employer-supported language courses, others were unaware of or faced difficulties accessing available courses. Limited motivation to learn Croatian may reflect intentions to remain in Croatia only temporarily.

The findings further indicate that labour-market integration often occurs more rapidly than socio-cultural integration. While most participants reported positive employment experiences, language acquisition, broader social participation and long-term settlement intentions appeared considerably more limited. This suggests that participation in the labour market does not automatically lead to broader integration into Croatian society, particularly when migrants perceive their stay as temporary or when institutional support for integration remains limited.

The cultural diversity of India was reflected among participants, who spoke five different mother tongues and practised Hinduism or Islam. Hindu participants generally practised their religion at home, while Muslim participants considered mosque attendance important and were supported by employers in doing so. Most participants were satisfied with living and working conditions in Croatia, and their future plans depended mainly on employment opportunities and family considerations. The findings highlight the need for a socially and culturally inclusive integration policy, as institutional integration - including access to information, rights, education, language learning, and healthcare - should be the responsibility of public institutions rather than employers alone.

Additional insights are provided by research on Zagreb as an "arrival city"[74]. Beyond providing housing and employment Zagreb is expected to support the structural, cultural, and social integration of immigrants[75], as part of inclusive and sustainable urban development, while also encouraging entrepreneurship, creativity, and innovation[76]. Due to its stronger institutional infrastructure, Zagreb offers greater integration opportunities than other parts of Croatia[77]. However, as

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74 Jurčević, K.; Podgorelec, S.; Bušić, K., *Migracije i urbana transformacija Zagreba: Integracija, digitalizacija i održivost kroz koncepte pametnog grada, grada budućnosti i grada dolaska*. Sociologija i prostor, Vol. 63, No. 2, 2025, pp. 271-291.

75 *Ibid.,* pp. 280-281.

76 *Ibid.,* p. 273.

77 *Ibid.,* p. 282.

elsewhere in the country, migrant social integration remains constrained by local attitudes that fluctuate between limited support and latent distrust.

Overall, the reviewed evidence suggests that integration in Croatia remains predominantly functional and employment-oriented, while broader social and institutional dimensions of integration remain less developed.

4.4. Migrant integration policies in Croatia and the EU

Two main themes emerge from the literature on integration policies: (1) the influence of European integration frameworks on Croatian migration governance and (2) the gap between formal rights and practical implementation of integration measures.

Five scientific papers provide insight into integration policies in the EU and Croatia. Two papers analyse the legal and institutional framework of migrant integration, including the European integration model. EU integration policy is not binding for Member States and remains their responsibility; however, common basic principles (eleven principles confirmed in 2014), pre- and post-arrival measures, relevant directives transposed into national law, and funding programmes shape national approaches[78]. Although non-binding, the European model operates as a mechanism of mutual influence between the EU and Member States.

For Croatia, key conditions for improved integration include strengthening migrants' educational, socio-economic, civil, cultural, and health-related rights. Two prerequisites are also emphasised: public awareness campaigns to address negative attitudes and perceptions of migrants as a socio-economic and cultural threat, and enhanced cooperation among institutions and experts involved in integration processes.[79] Another paper highlights legal differences in the right to work between EU citizens and third-country nationals and situates this within Croatia's broader context of emigration and "brain drain", "youth drain", and "care drain".[80]. This underscores the need for both integration policies to attract migrants and retention policies to reduce labour outflow.

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78 Lalić Novak, G.; Giljević, T., *Pravno i institucionalno uređenje integracije migranata u Republici Hrvatskoj – prema europskom modelu*. Godišnjak Akademije pravnih znanosti Hrvatske, Vol. X, No. 1, 2019, pp. 166-168.

79 Blagojević, A. *Pravni i institucionalni okvir integracije migranata u hrvatsko društvo*. Zbornik radova Pravnog fakulteta u Splitu, Vol. 57, No. 3, 2020, pp. 731-732.

80 Vukorepa, I., *Migracije i pravo na rad u Europskoj uniji*. Zbornik Pravnog fakulteta u Zagrebu, Vol. 68, No. 1, 2018, p. 86.

A comparative study using MIPEX2020 and ESS2018[81] data across 27 European countries classifies Croatia in the "slightly unfavourable equality on paper" group, indicating partial provision of rights and a lack of full integration, which may reinforce perceptions of migrants as unequal.[82] ESS2018 data further show that countries with more comprehensive integration policies tend to report more positive attitudes towards immigrants, while those with weak or only formal policies show more negative attitudes and lower perceived migrant contribution.[83]

A notable discrepancy emerges between the growing economic importance of migration and the relatively modest development of integration policies. While labour migration has expanded rapidly, institutional mechanisms supporting long-term integration have developed at a considerably slower pace. This discrepancy is particularly visible in Croatia, where increasing reliance on foreign labour coincides with a migration policy framework that remains focused primarily on labour-market needs rather than broader social integration.

An analysis of key EU documents on migrant integration[84] highlights their limited consideration of migrants' social realities and the specific characteristics of host societies.[85] These documents are criticised for assuming a simplified model of full integration that is not consistent with sociological concepts such as segmented integration and migrants' transnational ties, nor with the multidimensional nature of adaptation in contemporary European societies[86]. It is therefore argued that EU integration policy should adopt a more pragmatic approach grounded in social science evidence and empirical "field experiences" of researchers and practitioners involved in integration processes. [87]

Taken together, the findings suggest that Croatia's migration governance remains largely focused on regulating labour-market entry rather than facilitating long-term social integration. This imbalance may become increasingly important as the country continues its transition towards a more permanent immigration regime.

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81 Gregurović, M., *Integration Policies and Public Perceptions of Immigrants in Europe: ESS Meets MIPEX in the Aftermath of the European "Migration Crisis".* Revija za sociologiju, Vol. 51, No. 3, 2021, p. 347.

82 *Ibid.,* p. 361.

83 *Ibid.,* p. 366.

84 Božić, S.; Kuti, S., *Europska politika integracije migranata: od standardiziranja mjera za zemlje Europske unije prema integracijskom servisu utemeljenom na društvenoznanstvenim spoznajama*. Revija za sociologiju, Vol. 48, No. 1, 2018, p. 49.

85 *Ibid.,* p. 70.

86 *Ibid.*

87 *Ibid.*

5. DISCUSSION

The findings indicate that attitudes towards foreign workers and migrants in Croatia cannot be understood independently of the broader demographic, economic, and social changes that have taken place over the last two decades. The reviewed studies suggest that Croatia is undergoing a process of migration transition. Traditionally characterised as a country of emigration, Croatia has increasingly become a country of immigration, particularly since 2021, when labour shortages, population ageing, the emigration of domestic workers, and economic growth created substantial demand for foreign labour. The rapid increase in work permits issued to third-country nationals indicates a structural shift in the migration system, suggesting a transition from a historically dominant emigration model towards a more mixed migration regime in which immigration has become an increasingly important component of labour market functioning.

The reviewed studies show that this transition has been accompanied by considerable social ambivalence. On the one hand, migrants are increasingly recognised as necessary participants in the Croatian economy, particularly in sectors affected by labour shortages, such as hospitality, construction, retail, and long-term care. On the other hand, public attitudes towards migrants and foreign workers continue to be characterised by varying degrees of social distance, cultural concerns, and perceptions of threat. This discrepancy suggests that economic integration is progressing more rapidly than social integration. In other words, foreign workers are increasingly accepted as labour market participants, while their broader social inclusion as members of society remains considerably more limited.

The identified gaps in the reviewed studies point to several important directions for future research while simultaneously reflecting certain methodological and temporal limitations of this study. First, the analysed corpus includes a substantial number of studies conducted before 2021, that is, before the intensification of labour migration. Although these studies make an important contribution to the development of migration research in Croatia and provide valuable insights into the formation of attitudes towards migrants during earlier stages of migration processes, their findings must be interpreted within the social and migration context of the period in which they were conducted. At that time, migrants and foreign workers were significantly less present in everyday Croatian society than they are today. Consequently, these findings cannot be fully equated with the circumstances characterised by the rapid increase in foreign workers and the greater visibility of migration after 2021, highlighting the need for further research in the contemporary context. Second, qualitative studies of the everyday experiences of foreign workers remain relatively rare, despite their potential to provide deeper insights

into processes of integration, barriers, and adaptation strategies. Third, there is a lack of comparative research explicitly linking the Croatian context with broader European trends, despite the fact that migration patterns, public discourse, and regulatory frameworks are increasingly shaped within the wider European political context.

The methodological limitations of this study are also related to corpus selection, which primarily focused on papers published in Croatian scientific journals. Consequently, certain relevant studies and research reports, such as the Centre for Peace Studies surveys on Croatian citizens' attitudes towards foreigners and minorities conducted in 2013, 2017, and 2024, were not included in the analysis, despite their important contribution to the scientific literature and understanding of attitudes towards migrants in Croatia. It should therefore be acknowledged that this review does not encompass the entire field of migration and migration-attitude research, but rather a clearly defined and methodologically bounded segment of it.

The temporal dimension of the findings is particularly important. Migration processes in Croatia can be divided into two phases. The first phase (2013–2021) was characterised by a increase number of foreign workers, limited employment opportunities, and low institutional capacities for migration management. The second phase, beginning after 2021, was marked by the abolition of labour quotas and a sharp increase in residence and work permits, leading to the diversification of the migrant population, intensified public debate, and increased pressure on integration mechanisms. The findings indicate that studies published before 2021 reflect a substantially different social and institutional context from that which emerged after 2021. Research conducted before the significant rise in labour immigration generally recorded negative attitudes towards migrants; however, these attitudes developed in a context in which migrants largely represented an abstract social category. By contrast, studies conducted after 2021 suggest that attitudes became more negative precisely when migrants became more visible in everyday life. Particularly relevant are ESS findings showing an increase in perceptions of cultural threat and greater social distance following the rise in immigration. These results suggest that direct exposure to migration does not automatically lead to greater acceptance. Rather, increased visibility of cultural diversity may initially stimulate concerns regarding cultural change and social cohesion, especially in societies with limited historical experience of large-scale immigration.

These findings correspond to theoretical approaches emphasising perceived group threat and securitisation processes, according to which security threats are not defined solely by objective circumstances but are socially constructed through politi-

cal and public discourse in which particular phenomena are framed as security-relevant. Within the analysed literature, migrants and foreign workers are frequently associated with economic, cultural, and security concerns. Although perceptions of economic threat remain present, cultural threat appears to be a more persistent and influential dimension of public attitudes. During the COVID-19 pandemic, and following increased immigration from more distant regions such as South Asia, concerns related to cultural differences, social cohesion, and national identity became more pronounced than concerns about labour market competition. These findings are largely consistent with symbolic threat theory, suggesting that concerns related to cultural change, social cohesion, and collective identity may play a more significant role in shaping attitudes towards migrants than concerns related to economic competition. This interpretation corresponds with the recent findings of Župarić-Iljić and Lalić, which demonstrate that cultural threat, social distance, and value orientations are more important predictors of attitudes towards migrants than economic factors.[88] This suggests that perceptions of migrants as a security threat are shaped more strongly by public discourse, media representations, and broader social insecurities than by direct experiences or empirically verified security risks.

At the same time, the analysed studies provide only limited empirical support for perceiving migrants as a security threat. Research on Croatian students' attitudes towards migrant indicates that respondents generally distinguish between legal and illegal migration[89], and when in comes to attitudes towards migrant criminality, they do not express strongly xenophobic or racist attitudes[90]. Nevertheless, the findings also suggest that perceptions of migrants as a threat are not entirely rejected but are selective and conditioned by value orientations and migration type. More negative attitudes are expressed among more religious, nationally oriented, and conservative students, whereas greater empathy is shown towards refugees than towards economic migrants. Furthermore, comparisons between the 2019 and 2024 findings indicate an increase in social distance in the more recent period.[91]

The analysis of the reviewed studies and comparison with the recent findings of Župarića-Iljića and Lalić (2024) demonstrate that attitudes towards migrants are neither uniformly positive nor uniformly negative. While some citizens recognise

88 Župarić-Iljić, D.; Lalić, S., *Stavovi prema strancima i manjinama u hrvatskom društvu u 2024. godini: prijetnja, susret, suživot?*, Centar za mirovne studije, Zagreb, 2024.

89 Mrakovičić; Gregurović, *op. cit.*, note 52.

90 Vuk, Doležal; Jovanović, *op. cit.*, note 57.

91 Mrakovčić, Gregurović, Miočić, *op. cit,.* note 55.

the economic contribution of foreign workers and support their presence in the labour market, others continue to perceive them primarily through the lens of cultural difference and social distance. The recurring influence of religiosity, nationalism, conservatism, and political orientation identified across numerous studies further confirms that attitudes towards migrants are embedded within broader ideological and identity-based frameworks.

Despite Croatia's increasing need for foreign workers, the reviewed studies indicate that institutional responses have not kept pace with labour market demands. Employers frequently assume responsibilities that would normally belong to public institutions, such as assistance with accommodation, administrative procedures, and initial adaptation, suggesting that Croatia's integration system remains insufficiently developed and poorly coordinated.

Regarding the relationship between integration policies and public attitudes, comparative European evidence shows that countries with more developed integration policies generally display more positive attitudes towards migrants. Croatia's classification within the MIPEX category of "equality on paper" suggests that formally guaranteed rights are not always accompanied by effective implementation and long-term integration measures. The experiences of Indian workers analysed in the reviewed literature further illustrate the consequences of this situation. Although participants generally expressed satisfaction with their working conditions, many aspects of their integration depended primarily on employers rather than systematic institutional support. These findings point to the need for more comprehensive language, educational, and social integration programmes.

The Croatian context is largely comparable to the experiences of other European countries during earlier phases of migration transition. Similar patterns of labour demand, increased migrant visibility, social ambivalence, and policy adaptation were observed in Southern European countries such as Spain, Italy, and Portugal during their transition from emigration to immigration countries. Croatia therefore, appears to be following a trajectory already observed elsewhere in Europe, albeit under contemporary conditions shaped by EU membership, global labour mobility, and demographic decline. From the perspective of migration transition theories, Croatia appears to be entering a stage of positive *net migration* associated with the later phases of demographic and migratory development (Zelinsky; Okólski). However, migration transition should not be understood as a linear or irreversible process. Although these theories associate socioeconomic development with increasing migration over the long term, the relationship is multidimensional, context-dependent, and potentially reversible. The findings suggest that institutional and integration capacities have not developed at the same pace as

immigration, indicating that the long-term demographic and economic benefits of migration depend not only on migration inflows but also on effective social and institutional adaptation.

Overall, the findings suggest that Croatia is entering a new phase of migration development in which immigration is becoming a structural component of demographic and economic sustainability. Nevertheless, the reviewed literature indicates that social acceptance, institutional integration, and public perceptions have not yet fully adapted to this transformation. Future research should therefore devote greater attention to the consequences of migration transition, integration policies, and the relationship between economic dependence on migrant labour and public perceptions of migrants in Croatian society. Greater emphasis should also be placed on qualitative research capable of providing deeper insights into the everyday integration processes and experiences of foreign workers.

6. CONCLUSION

These findings, interpreted through intergroup threat and group position theory, indicate that perceived economic and especially sociocultural threats - shaped by broader sociopolitical contexts, increased migration visibility, and dominant public discourse—are central to attitudes towards foreign workers. The results suggest that greater exposure to migration does not necessarily reduce social distance, particularly where large-scale immigration is recent and integration frameworks remain underdeveloped.

The scientific contribution of this paper lies in synthesising a fragmented literature on labour migration in Croatia and identifying key analytical patterns and research gaps. These include the limited scope of qualitative research on migrants' lived experiences and weak conceptual and empirical links between studies on public attitudes, labour-market dynamics, and integration outcomes. Overall, the findings position Croatia within an ongoing migration transition marked by rapidly increasing labour immigration and incomplete social and institutional adaptation.

Results further show that economic integration of foreign workers progresses faster than socio-cultural integration, highlighting a persistent gap between labour-market inclusion and broader social acceptance. Migrants are increasingly viewed as functional economic actors, while their societal acceptance remains conditional.

The findings highlight the need for more comprehensive integration policies that extend beyond labour-market demands and address social, cultural, and institutional dimensions. This includes strengthening evidence-based policy design, improving institutional coordination, and incorporating migrants' and practitioners'

lived experiences to support more effective and sustainable integration frameworks in Croatia.

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Chapter 6

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Review article

CONSUMER PROTECTION AS A GEOPOLITICAL TOOL: THE EUROPEAN UNION'S POWER EXERCISED THROUGH LAW IN DIGITAL MARKETS

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ABSTRACT

The spread of disruptive technologies has fundamentally transformed B2C relationships, creating new opportunities as well as new forms of vulnerability. Digital platforms, algorithms and data-driven services have reshaped market dynamics and generated new power relations affecting states, businesses and individuals. In this context, the European Union occupies a distinctive position due to its economic weight and regulatory capacity, which increasingly exert global influence.

This study examines how the European Union indirectly shapes technological development and global business models through law, with consumer protection, particularly in digital and financial markets, serving as a key instrument of geopolitical significance. It argues that EU regulatory frameworks, including the GDPR, DSA, DMA, DORA, the AI Act and PSD3/PSR, not only structure the internal market but also compel global service providers to adapt, thereby producing effects beyond the Union's borders.

The analysis demonstrates that digital consumer protection extends beyond its classical function of individual rights protection. By addressing risks arising from algorithmic systems, data-driven influence and manipulative practices, it contributes to shaping market structures and establishing a distinctive European regulatory model. At the same time, in digital financial markets, consumer protection performs a stabilising function: by maintaining trust in financial systems, it supports the resilience and global position of the European Union.

Methodologically, the study is based on doctrinal legal analysis combined with an interdisciplinary approach. It examines key EU legal instruments in consumer protection, digital regulation and financial law, and evaluates their cross-border and international effects.

The paper concludes that the geopolitical significance of EU digital consumer protection lies not in its explicit objectives, but in its indirect effects: through ensuring a high level of consumer protection and internal market functioning, it contributes to shaping global market practices and strengthening the European Union's regulatory influence.

***Keywords**: Consumer protection, Digital finance, Digital markets, Extraterritorial scope, Personal data*

1. INTRODUCTION

The intensive innovation processes characterising our era have fundamentally transformed the functioning of the economy. Within the European Union (hereinafter referred to as „EU"), a decisive turning point in the evolution of digital regulation was the adoption of the Digital Single Market Strategy in 2015.[1] From this period onwards, the EU gradually established a complex and multi-layered regulatory framework in order to address the challenges arising from digitalisation.

As digital markets evolved, it became increasingly evident that many of these challenges could no longer be reduced exclusively to traditional business-to-consumer (hereinafter referred to as "B2C") relationships and revealed that traditional consumer protection mechanisms may no longer, in themselves, provide adequate responses to the specific risks arising in digital markets. As a result, a new generation of digital regulation may be observed within the EU. A notable characteristic of this regulatory framework is that the legislator frequently associates consumer protection objectives with legal instruments that are not, in their primary nature, consumer protection measures. While classical consumer protection law focuses predominantly but not exclusively on consumer rights, unfair commercial practices or contractual imbalances arising in B2C relationships, the new generation of such consumer protection-oriented regulation centres on the governance of digital services.

In connection with the above, it should be emphasized that, the present paper does not seek to provide a comprehensive analysis of the consumer protection legal framework. Rather, its primary objective is to examine those legislative instruments adopted following the Digital Single Market Strategy that, although not formally belonging to the field of consumer protection law and primarily regulating other policy or regulatory areas, nevertheless explicitly identify consumer protection as one of their regulatory objectives.

In light of the above, the central research question of this paper is to what extent does the EU's digital consumer protection regulation contribute to shaping global market functioning and influencing the operation of economic actors outside the EU.

[1] European Commission, A Digital Single Market Strategy for Europe, COM(2015) 192 final, Brussels, 6 May 2015.

In order to answer this question, firstly, the paper identifies the legal instruments relevant from the perspective of the research and subsequently evaluates them on the basis of a uniform analytical framework. In each case, the analysis examines:

- the regulatory technique applied (directive or regulation);
- the consumer protection objective pursued by the legal instrument;
- the territorial scope of application;
- the personal scope of applications, specifically, the obligated market actors
- and the protected category of persons;
- as well as the international and geopolitical effects resulting from the regulation.

The research is based on doctrinal legal analysis, with particular regard to the interrelationship between consumer protection law, digital regulation and financial regulation. To determine which legislative acts should form the subject of the analysis, I searched the EU's official legal database, EUR-Lex, for regulations and directives adopted since 2015, using the keyword "consumer protection" in the full text of the acts. The search results obtained were then reviewed and narrowed down to those legislative acts that address issues related to digital markets.

2. CONSUMER PROTECTION LAW IN THE DIGITAL ECONOMY

Although the origins of consumer protection can be traced back to antiquity, its institutionalized form only emerged in the 20th century.[2] Despite its relatively late emergence, consumer protection has undergone rapid development, which resulted in a regulatory framework that incorporates both private-law and public-law mechanisms.

Private-law characteristics of consumer protection law governs legal relationships between natural persons and businesses with the contractual relationship constituting its central focus. It encompasses, *inter alia*, general terms and conditions and the prohibition of unfair contract terms, warranty and guarantee rules relating to defective performance, as well as breach of consumer contracts.[3] The enforce-

[2] Van de Grift, L.; van Zon, K., *The European Parliament and the origins of consumer policy*, 2024, Available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2024/757647/EPRS_STU(2024)757647(SUM01)_EN.pdf], Accessed 03 April 2026.

[3] Fazekas, J.: *A fogyasztóvédelem magánjogi keretei – a fogyasztói szerződések sajátosságai*, in: Hámori, A, Hamar, F.; Neszmélyi, Gy.; Veres, Z. (eds.) Fogyasztóvédelem – Fogyasztóvédelmi jog, Budapest, 2025, pp. 164-189.

ment of these rules is typically initiated by natural persons themselves through judicial proceedings or alternative dispute resolution mechanisms. By contrast, public-law characteristics of consumer protection law relies on regulatory oversight and public enforcement mechanisms aimed at ensuring the proper functioning of markets and preventing practices that may harm natural persons as a group. Public-law characteristics of consumer protection law includes, among others, rules concerning unfair commercial practices, advertising, product safety, and market surveillance. Compliance with these requirements is monitored by designated public authorities, which may impose administrative sanctions in the event of infringements.[4]

Actors in the traditional consumer protection legal relationship are clearly identifiable actors, namely the consumer (natural person) and the trader (business). According to consumer protection laws, the trader is any natural or legal person who is acting for purposes relating to his trade, business, craft or profession and the consumer means any natural person who is acting for purposes which are outside his trade, business, craft or profession.[5]

Although numerous EU legal instruments exist in the field of traditional consumer protection, the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market,[6] the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights[7] and the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts[8] are generally regarded as the core pillars of the EU consumer protection acquis.

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4 Tóth, T.: Fogyasztóvédelmi közjog, 2022, Available at: [https://jak.ppke.hu/uploads/articles/12239/file/Fogyik%C3%B6zjogjegyzet%20-%20T%C3%B3th%20Tiham%C3%A9r.pdf], Accessed 30 May 2026.

5 It should be noted that certain traditional consumer protection rules contain slight variations in these definitions. The above concepts are based on the definitions provided by the traditional consumer protection framework.

6 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22 (Unfair Commercial Practices Directive).

7 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64 (Consumer Rights Directive).

8 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29 (Unfair Contract Terms Directive).

Examining these legal instruments, it should be noted that they were predominantly adopted in the form of directives. While the Unfair Commercial Practices Directive and the Consumer Rights Directive are maximum harmonisation directives, the Unfair Contract Terms Directive is a minimum harmonisation directive. The primarily focus on the directives of B2C relationships and their aim is to ensure a high level of consumer protection. Accordingly, the parties defined in the cited directives are the consumer and the trader in the traditional sense. It is also a common characteristic in the directives that they do not contain an explicit extraterritorial dimension; consequently, their international and geopolitical effects remain largely indirect and stem primarily from the attractiveness and regulatory influence of the EU internal market.[9]

The emergence of digital markets has fundamentally transformed the environment in which traditional consumer protection rules operate. Recognising these challenges, the European Commission launched the Fitness Check on Consumer and Marketing Law[10] to assess whether the existing consumer protection acquis remained fit for purpose in the digital economy.[11] The evaluation found that, while the core principles of EU consumer protection law remained valid, parts of the framework required modernisation to address emerging digital market practices. These findings contributed to the New Deal for Consumers initiative,[12] which aimed to strengthen enforcement and adapt consumer protection rules to the digital environment.[13] One of the most significant legislative outcomes of this process was the adoption of the Omnibus Directive[14] as regards the better enforcement and modernisation of Union consumer protection rules.[15]

Since the adoption of these instruments, new forms of abuse have emerged in digital markets, posing significant risks to consumers, including algorithmic manip-

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9 The above findings are based on the Art 1-3. of the cited legal instruments.

10 Commission Staff Working Document, Executive Summary of the Fitness Check of EU Consumer and Marketing Law, SWD(2017) 208 final, Brussels, 23 May 2017.

11 European Commission, Commission Staff Working Document – Executive Summary of the Fitness Check, SWD(2017) 208 final, Brussels, 23 May 2017.

12 European Commission, A New Deal for Consumers: Questions and Answers, MEMO/18/2821, 11 April 2018.

13 European Commission, A New Deal for Consumers: Questions and Answers, MEMO/18/2821, Brussels, 11 April 2018.

14 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council [2019] OJ L328/7 (Omnibus Directive).

15 Davida, Z., *Consumer Decision-Making Autonomy in the Digital Environment: Towards a New Understanding of National Courts' Obligation to Assess Ex Officio Violations of Fair Commercial Practices*, European Journal of Risk Regulation, Vol. 15, No. 4, 2024, pp. 1034-1037.

ulation, dark patterns and data-driven marketing.[16] Reflecting these challenges, the European Commission adopted the Digital Fairness Fitness Check,[17] which suggests that the consumer protection reforms may require further adaptation to emerging digital practices and environment.[18]

Nevertheless, the evolution of the digital economy has created new market phenomena and risks that traditional consumer protection instruments cannot always adequately address. Innovation-driven solutions, such as crypto-assets, decentralised systems, data-driven mechanisms, have become increasingly significant in digital markets. These solutions often operate outside the traditional consumer–trader relationship. Consequently, the EU has gradually developed a new generation of regulatory instruments which, while frequently pursuing consumer protection objectives, extend beyond traditional B2C relationships to cover innovation-driven market solutions.

3. THE GEOPOLITICAL DIMENSION OF EU REGULATION

The above mentioned approach enables EU rules to apply to businesses outside the EU and extends the EU's regulatory influence beyond its borders. Although this approach is most described, in formal terms, as a manifestation of extraterritorial legislation, critical perspectives argue that it should rather be understood as a market-based extension regulatory influence. This critical approach explains the phenomenon by the so-called Brussels Effect. According to the theory developed by Bradford, the effects of EU legislation frequently extend beyond the territorial borders of the EU, as multinational businesses adopt EU rules and apply them across their operations. This mechanism is based on the economic significance of the EU internal market, as access to that market often requires compliance with EU regulatory standards.[19] The Brussels effect manifests in two forms: *de iure* and *de facto*. The *de iure* effect occurs when third countries incorporate EU rules into their own legal systems. By contrast, the *de facto* effect refers to situations where market actors outside the EU comply with EU rules even in the absence of a legal

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16 Castro, L., *User manipulation: thinking beyond dark patterns,* 2020, Available at: [https://uxdesign.cc/user-manipulation-thinking-beyond-dark-patterns-3d17cf408753] Accessed 03 April 2026.

17 Commission Staff Working Document, Fitness Check of EU Consumer Law on Digital Fairness, SWD(2024) 230 final, Brussels, 3 October 2024.

18 European Commission, Questions and Answers on the Digital Fairness Act, QANDA/24/4909, Brussels, 3 October 2024.

19 Bradford, A., *The Brussels Effect: How the European Union Rules the World*, Oxford university Press, New York, 2020, pp. 25-66.
Gstrein, O.; Zwitter, A., *Extraterritorial application of the GDPR: promoting European values or power?* Internet Policy Review, Vol. 10, No. 3, 2021, pp. 4-5.

obligation to do so. In such cases, businesses may find it more economically efficient to operate under a single set of standards across multiple jurisdictions than to adapt their activities to different regulatory regimes.[20] Similarly to Bradford, Gstrein and Zwitter interpret the expansive legislative activity as a power-based process. In their view, the spread of rules is driven not primarily by shared values, but by economic interests and constraints.[21] Considering the above, it may be evident that maintaining different operational standards across multiple jurisdictions would impose significant costs on multinational companies. From both an economic and an administrative perspective, it is often more efficient and predictable to apply EU regulatory standards across all markets in which they operate.[22]

The legal foundation of this regulatory approach can be found in the Treaty on the Functioning of the European Union.[23] Article 169 TFEU expressly requires the Union to ensure a high level of consumer protection and, through Article 169(2)(a)[24], links this objective to Article 114 TFEU, which provides the legal basis for internal market harmonisation measures.[25] Consumer protection is therefore not conceived as an isolated policy objective, but as an integral component of the functioning of the internal market, where goods, services, capital and persons circulate freely.[26] This relationship is further reinforced by Article 114(3) TFEU, which requires harmonisation measures to ensure a high level of consumer protection. Read together, a coherent legal framework must be established in which the internal market is created and maintained through harmonisation, while a high level of consumer protection remains a fundamental objective of that process.

The above developments may suggest that consumer protection in the digital environment extends beyond the protection of individual consumers. Although the primary objective of EU regulation remains the effective protection of consumers

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20 Bernat, M.; Spera, F., *The De Jure "Brussels Effect": Current Legal Trends in the EU's Unilateral Regulatory Globalisation,* Studia Europejskie – Studies in European Affairs*,* Vol. 28, No. 4, 2024, p. 82.

21 Gstrein, O.; Zwitter, A., *op. cit.,* note 15, pp. 4-5.

22 European Commission, *"Once-Only" steers Europe towards simpler cross-border processes for a better Single Market, in line with the EU Competitiveness Compass,* 2025, Available at: [https://ec.europa.eu/digital-building-blocks/sites/pages/viewpage.action?pageId=881984524&navigatingVersions=true], Accessed 03 April 2026.

23 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union Consolidated version of the Treaty on European Union Consolidated version of the Treaty on the Functioning of the European Union Protocols Annexes to 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 [2016] OJ C202/1 (TFEU).

24 Article 169 TFEU (Lisbon).

25 Article 114 TFEU (Lisbon).

26 Article 26 TFEU (Lisbon).

and the proper functioning of the internal market, the cross-border spread of EU regulatory standards may generate significant geopolitical effects by influencing market behaviour and regulatory developments beyond the territorial borders of the Union. The following sections examine this phenomenon in greater detail.

4. ANALYSIS OF SELECTED LEGAL INSTRUMENTS

The growing scope of EU consumer protection regulation raises the question of whether consumer protection has evolved beyond its traditional function and has become a broader regulatory tool. To explore this issue, the following section analyses selected EU legislative instruments on the basis of the criteria outlined above, with particular attention to their potential geopolitical implications and extraterritorial effects.

These are:

- Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers[27]
- Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services[28]
- Directive (EU) 2015/2366 of the European Parliament and the Council of 25 November 2015 on payment services in the internal market [29]
- Proposal for a Directive of the European Parliament and of the Council on payment services and electronic money services in the Internal Market[30]
- Proposal for Regulation of the European Parliament and of the Council on payment services in the internal market[31]

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27 Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers and repealing Directive 2008/48/EC [2023] OJ L 2023/2225 (Consumer Credit Directive 2).

28 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1 (Digital Content Directive).

29 Directive (EU) 2015/2366 of the European Parliament and the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L337/35 (Payment Services Directive 2).

30 European Commission, *Proposal for a Directive of the European Parliament and of the Council on payment services and electronic money services in the Internal Market amending Directive 98/26/EC and repealing Directives 2015/2366/EU and 2009/110/EC* COM(2023) 366 final (Payment Sevices Directive 3).

31 European Commission, *Proposal for a Regulation of the European Parliament and of the Council on payment services in the internal market and amending Regulation (EU) No 1093/2010* COM(2023) 367 final (Payment Services Regulation).

- Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector[32]
- Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets[33]
- Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services[34]
- Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data[35]
- Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector[36]
- Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828[37]
- Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence[38]

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32 Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011 [2022] OJ L333/1 (Digital Resilience Act).

33 Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 [2023] OJ L150/40 (Markets in Crypto Assets Regulation).

34 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC [2022] OJ L277/1 (Digital Services Act).

35 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L119/1 (General Data Protection Regulation).

36 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 [2022] OJ L265/1 (Digital Markets Act).

37 Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 [2023] OJ L 2023/2854 (Data Act).

38 The Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 [2024] OJ L 2024/1689 (AI Act).

4.1. Low Geopoliticial Effects

4.1.1. Consumer Credit Directive 2

The digitalisation of financial services has transformed consumer credit markets, creating new products and risks for consumers, such as buy-now-pay-later (BNPL) models. In response, the EU adopted Consumer Credit Directive 2, a predominantly maximum harmonisation instrument designed to ensure a high level of consumer protection in the digital credit market.[39] It should be noted that it may only have limited extraterritorial relevance, as it primarily governs credit relationships within the EU internal market.[40] Unlike general consumer protection legislation based on the consumer–trader relationship, the Consumer Credit Directive 2 reflects the specific characteristics of the financial sector by regulating the relationship between consumers and creditors or credit intermediaries, while imposing extensive information, conduct and creditworthiness assessment obligations on market actors.[41] By doing so, it uses the traditional consumer definition.[42]

Based on the above, it can be concluded that from a geopolitical perspective, the Consumer Credit Directive 2 has only limited significance. Nevertheless, it reflects the EU's ambition to establish high consumer protection standards in digital financial services, potentially increasing the international attractiveness of the European regulatory model.

4.1.2. Digital Content Directive

The rapid growth of the digital economy and cross-border e-commerce has created new opportunities, while also exposing legal fragmentation and uncertainty regarding digital content and digital services. At the same time, consumers have faced increasing difficulties related to the quality, accessibility and contractual protection of such services, undermining trust in the digital market.[43] To resolve this situation, the EU has adopted the Digital Content Directive that harmonises key aspects of contracts for the supply of digital content and digital services and aims to strengthen the digital single market while ensuring a high level of consumer protection.[44] Although it does not contain a general extraterritorial clause, it contributes to the development of a coherent regulatory framework for cross-border

39 Consumer Credit Directive 2 Preamble (1)-(13).

40 Consumer Credit Directive 2 Art. 2.

41 Consumer Credit Directive 2 Art. 3-5.

42 Consumer Credit Directive 2 Art. 3 (1).

43 Digital Content Directive Preamble (1)-(6).

44 Digital Content Directive Preamble (2).

digital services within the EU.[45] The Digital Content Directive enhances legal certainty and establishes uniform consumer rights regarding conformity requirements, updates, remedies and contract modifications. The instrument regulates traditional consumer–trader relationships and applies not only where consumers pay a price, but also where they provide personal data as consideration. By doing so, it uses the traditional definitions of consumer and trader.[46]

In light of the above, the conclusion may be drawn that, the Digital Content Directive has only limited significance from a geopolitical perspective, as its primary objective is the functioning of the digital single market. However, the establishment of uniform contractual standards for digital services may indirectly influence non-EU providers seeking access to the European market.[47]

4.2. Medium Geopolitical Effect

4.2.1. Payment Services Directive 2, and the Proposed Payment Services Directive 3 and Payment Services Regulation

The rapid digitalisation of payment services has led to the emergence of innovative payment solutions that were not adequately covered by the existing regulatory framework. At the same time, technological developments have increased market fragmentation, legal uncertainty and security risks, highlighting the need for harmonised rules and stronger consumer protection in the digital payments sector.[48] To solve such issues, the EU has established the Payment Services Directive 2 in a form of a maximum harmonisation directive, leaving Member States only limited discretion in the transposition of its provisions into national law.[49] Although the regulatory framework primarily governs payment services and the functioning of the payment market, consumer protection remains one of its explicit objectives. As stated in the preamble, the rules aim to ensure a high level of consumer protection in the use of payment services throughout the EU.[50]

From a territorial scope perspective, Payment Services Directive 2 applies to payment services provided within the EU, particularly where the payment service

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45 Digital Content Directive Art 1-4.

46 Digital Content Directive Art 2 (5)-(6).

47 Wiśniewska, K.; Pałka, P., *The impact of the Digital Content Directive on online platforms' Terms of Service*, Yearbook of European Law, Vol. 42, 2023, pp. 388–406.

48 Payment Services Directive Preamble (1)-(7).

49 European Banking Federation, *PSD2 Guidance*, 2016, Available at: [https://www.ebf.eu/wp-content/uploads/2017/05/EBF_PSD2_guidance_September_2016.pdf] Acessed 31 May 2026.

50 Payment Services Directive 2 Preamble (4).

providers involved are located in the EU.[51] From a personal scope perspective it should be noted that, unlike traditional consumer protection instruments, it does not primarily regulate consumer–trader relationships but focuses on payment service providers.[52] Nevertheless, as these entities provide services on a professional and commercial basis, the relationship between payment service providers and payment service users retains several characteristics of traditional consumer protection law. The consumer protection dimension of Payment Services Directive 2 is reinforced by its express incorporation of the consumer concept. Article 4(20) defines a consumer as a natural person acting outside his or her trade, business or profession,[53] mirroring the traditional definition used in EU consumer law. Payment Services Directive 2 also requires the provision of clear, accessible and free information on consumer rights,[54] as well as substantive rights relating to payment accounts.[55]

The inclusion of both a consumer definition and consumer-specific safeguards demonstrates that consumer protection forms an integral part of the regulatory framework. Accordingly, Payment Services Directive 2 may be regarded as sector-specific legislation that combines market regulation with consumer protection objectives.

In light of the above, the conclusion may be drawn that Payment Services Directive 2 has only limited significance from a geopolitical perspective. Nevertheless, it reflects the EU's ambition to establish high standards of security, transparency and consumer protection in the digital payments sector, potentially increasing the international attractiveness of the European regulatory model.[56]

Since the adoption of Payment Services Directive 2, the retail payments market has undergone significant digital transformation. In order to establish a harmonised regulatory framework for digital payment services, the Commission prepared the Payment Sevices Directive 3 and the Payment Services Regulation. The Payment Sevices Directive 3 and the Payment Services Regulation modernise the EU framework for payment services and further harmonise the applicable rules across the EU. While Payment Sevices Directive 3 leaves limited discretion to Mem-

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51 Payment Services Directive 2 Art. 2-3.

52 Payment Services Directive 2 Art. 1.

53 Payment Services Directive 2 Art. 4 (20).

54 Payment Services Directive 2 Art. 106.

55 Payment Services Directive 2 Art. 85.

56 Zetzsche, D.; Buckley, R.; Arner, D.; Barberis, J., *From FinTech to TechFin: The Regulatory Challenges of Data-Driven Finance*, SSRN Electronic Journal, 2017, pp. 21-26, Available at: [https://www.researchgate.net/publication/317999278_From_FinTech_to_TechFin_The_Regulatory_Challenges_of_Data-Driven_Finance], Accessed 03 April 2026.

ber States, primarily in relation to authorisation and supervision, both instruments pursue the objective of ensuring a high level of consumer protection and supporting the functioning of the internal market.[57] The territorial scope of Payment Sevices Directive 3 and Payment Services Regulation would cover services provided within the EU,[58] and the personal scope would not rely on the traditional consumer–trader dichotomy, but primarily regulate payment and electronic money service providers.[59] Nevertheless, the concept of the consumer remains relevant, being defined as a natural person acting outside their trade, business or profession.[60] The proposed framework also introduces a range of user protection measures, particularly in relation to fraud prevention, transparency and access to redress mechanisms.[61]

The geopolitical impact of Payment Sevices Directive 3 and the Payment Services Regulation should be considered moderate. While their primary objective is the functioning of the internal market and the protection of payment service users, the establishment of uniform standards for a large integrated market may indirectly influence non-EU providers and encourage the adoption of similar regulatory approaches beyond the EU.[62]

4.3. High Geopolitical Effect

4.3.1. Digital Resilience Act

The Digital Resilience Act was adopted in response to the increasing digitalisation and interconnectedness of the financial sector, which have significantly amplified ICT-related risks and vulnerabilities.[63] Although the Digital Resilience Act is not primarily a consumer protection instrument, the objective of ensuring a high level of consumer protection is also reflected in its provisions.[64] Consumer protection is pursued indirectly through the enhancement of cybersecurity, operational resil-

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57 Payment Sevices Directive 3 Preamble (37), (42), (73); Payment Services Regulation Preamble (40).

58 Payment Sevices Directive 3 Art. 2, Payment Services Regulation Art. 2.

59 These entities are subject to authorisation requirements, supervisory obligations, consumer information duties and operational resilience requirements.

60 Payment Sevices Directive 3 Art. 2 (21).

61 Payment Services Regulation Art. 50, Art. 81-85, Art. 56-60.

62 What PSD3 Could Mean for Your Payment Strategy (Even If You're Not in Europe), 2025, Available at: [https://www.linkedin.com/pulse/what-psd3-could-mean-your-payment-strategy-even-youre-europe-z022c], Accessed 03 April 2026.

63 Digital Resilience Act Preamble (1)-(2).

64 Digital Resilience Act Preamble (11).

ience and the reduction of ICT-related risks, thereby ensuring the reliable provision of financial services to consumers.

The territorial scope of Digital Resilience Act primarily covers financial entities and ICT third-party service providers supporting their activities operating within the EU.[65] It should be noted that the Digital Resilience Act does not contain a general extraterritorial clause. Nevertheless, its practical effects may extend beyond the EU, particularly where ICT service providers established in third countries provide services to financial entities operating in the EU.[66] From a personal scope perspective, Digital Resilience Act does not regulate the traditional consumer–trader relationship. Instead, it applies to a broad range of regulated financial entities, including credit institutions, payment institutions, electronic money institutions, investment firms, insurance undertakings, crypto-asset service providers and certain ICT third-party service providers.[67] The Digital Resilience Act does not identify consumers as a distinct protected category. Rather, it seeks to protect the stability and operational resilience of the financial ecosystem. Consumers may indirectly benefit from Digital Resilience Act, as secure and resilient financial services are essential for participation in the digital economy.[68]

From a geopolitical perspective, Digital Resilience Act has a significance that extends beyond the traditional objectives of financial regulation, given that it contributes to strengthening the EU's digital and financial resilience. Its geopolitical relevance is further reinforced by the fact that certain obligations may affect ICT third-party service providers established outside the EU. In particular, critical ICT third-party service providers established in third countries may continue to provide services to EU financial entities only if they establish a subsidiary within the EU.[69] This requirement may be viewed as reflecting the EU's broader objective of reducing strategic dependencies and enhancing regulatory oversight over critical digital infrastructure. Consequently, Digital Resilience Act may form part of the

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65 Digital Resilience Act Art. 2.

66 According to Art 31 (12) of the DORA: „Financial entities shall only make use of the services of an ICT third-party service provider established in a third country and which has been designated as critical in accordance with paragraph 1, point (a), if the latter has established a subsidiary in the Union within the 12 months following the designation.".

67 Digital Resilience Act Art. 2.

68 European Insurance and Occupational Pensions Authority (EIOPA): *Digital Operational Resilience Act (DORA)*, Available at: [https://www.eiopa.europa.eu/digital-operational-resilience-act-dora_en], Accessed 31 May 2026.

69 Digital Resilience Act Art. 31(12).

EU's wider geopolitical strategy aimed at increasing resilience and control in an increasingly digitalised and interconnected environment.[70]

4.3.3. Markets in Crypto Assets Regulation

The adoption of Markets in Crypto Assets Regulation was driven not only by the objective of protecting consumers and investors, but also by the EU's strategic interest in promoting innovation and the development of digital financial technologies. As recognised in the preamble of the Markets in Crypto Assets Regulation, EU financial services legislation should adapt to the requirements of the digital age and contribute to the development of a future-oriented and human-centred economy.[71] Markets in Crypto Assets Regulation therefore simultaneously pursues consumer-protection, innovation and competitiveness objectives.

The Markets in Crypto Assets Regulation establishes a uniform framework for the crypto-asset market. The aim of the Markets in Crypto Assets Regulation is the providing high-level of protection for consumers[72] and investors, the enhancement of transparency and the prevention of market abuse.

The Markets in Crypto Assets Regulation was adopted in the form of a regulation, ensuring the direct and uniform application of its provisions throughout the European Union. It establishes a harmonised regulatory framework for the issuance, offering and admission to trading of crypto-assets, as well as for the provision of crypto-asset services.

The territorial scope of Markets in Crypto Assets Regulation covers crypto-assets issued, offered to the public or admitted to trading within the EU, as well as crypto-asset services provided in the EU.[73] The applicability of the Markets in Crypto Assets Regulation depends not only on the place of establishment of the service provider, but also on whether crypto-assets or crypto-asset services are offered to participants in the EU market. Consequently, Markets in Crypto Assets Regulation may have practical effects on issuers and crypto-asset service providers established outside the EU where they seek access to the EU market or target EU

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70 KPMG, *DORA – ICT Third-Party Service Providers*, 2024, Available at: [https://assets.kpmg.com/content/dam/kpmgsites/ie/pdf/insights/consulting/ie-dora-ict-third-party-service-providers.pdf], Accessed 31 May 2026.

71 Markets in Crypto Assets Regulation Preamble (1)-(9).

72 Markets in Crypto Assets Regulation Preamble (79), (80), (85), (89), (109).

73 Markets in Crypto Assets Regulation Art. 2.

investors. Accordingly, Markets in Crypto Assets Regulation may be regarded as having a limited but explicit extraterritorial effect.[74]

From a personal scope perspective, it should be noted that MiCA does not primarily regulate the traditional consumer–trader relationship. Instead, it focuses on the actors participating in the crypto-asset ecosystem and the provision of crypto-asset-related services.[75] The primary addressees of Markets in Crypto Assets Regulation are crypto-asset issuers and crypto-asset service providers, which are subject to authorisation, governance, disclosure and conduct-of-business obligations.[76] Unlike traditional consumer protection instruments, Markets in Crypto Assets Regulation does not contain a specific definition of the consumer. The protected category under Markets in Crypto Assets Regulation is therefore primarily retail crypto-asset holder rather than consumers in the traditional sense.[77] Nevertheless, retail holders occupy a functionally comparable position to consumers in traditional consumer protection law, as they are typically non-professional market participants exposed to significant informational asymmetries in their relationship with issuers and service providers.[78] In this respect, Markets in Crypto Assets Regulation extends the logic of consumer protection into the field of crypto-assets by granting retail investors safeguards similar to those traditionally afforded to consumers, particularly through extensive disclosure obligations, the requirement to provide a crypto-asset white paper, clear risk warnings and restrictions on misleading marketing communications.[79]

From a geopolitical perspective, Markets in Crypto Assets Regulation represents one of the first comprehensive regulatory frameworks for crypto-assets. Given the cross-border nature of crypto-asset markets, issuers and service providers seeking access to the EU market are required to comply with its rules, potentially contributing to the international diffusion of EU regulatory standards and strengthening the EU's influence in digital finance.[80]

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74 Zetzsche, D. A.; Annunziata, F.; Arner, D. W.; Buckley, R. P., *The Markets in Crypto-Assets Regulation (MICA) and the EU Digital Finance Strategy,* European Banking Institute Working Paper Series No. 2020/77, 2020, pp. 10-18.

75 Markets in Crypto Assets Regulation Art. 2.

76 Markets in Crypto Assets Regulation Art. 4-6, 59-75.

77 Markets in Crypto Assets Regulation Art. 3. point 37: 'retail holder' means any natural person who is acting for purposes which are outside that person's trade, business, craft or profession;

78 Mantzouni, F., *Consumer Protection under MiCAR*, 2024, Available at: [https://pergamos.lib.uoa.gr/uoa/dl/object/3448071/file.pdf], Accessed 31 May 2026.

79 Markets in Crypto Assets Regulation Art. 5-9.

80 LLPO Law Firm, *The Impact of MiCA on Cross-Border Operations for Non-EU Crypto Businesses,* 2023, Available at:

4.3.4. Digital Services Act

The rapid expansion of online platforms has fundamentally transformed the digital economy. In response to the growing risks associated with the platform economy, the Digital Services Act establishes a comprehensive regulatory framework.

The Digital Services Act was adopted in the form of a regulation, ensuring the direct and uniform application of its provisions throughout the EU. The Digital Services Act recognises that responsible and diligent behaviour by providers of intermediary services is essential for the attainment of a high level of consumer protection.[81] It also exhibits an extraterritorial dimension, since it applies not only to intermediary service providers established within the EU, but also to intermediary services offered to recipients located in the EU, regardless of where the provider itself is established.[82]

It should be noted that the regulatory logic of the Digital Services Act differs from that of traditional consumer protection law. While conventional consumer protection rules are based on the bilateral relationship between the consumer and the trader, the Digital Services Act reflects the reality of digital markets, where access to goods, services and information is increasingly mediated by online platforms and other intermediary service providers.[83] Consequently, rather than regulating the consumer-trader relationship directly, the Digital Services Act primarily imposes obligations on the intermediaries that shape and influence that relationship. From a personal scope perspective, the Digital Services Act applies to a broad range of intermediary service providers. The obligated market actors include intermediary service providers, hosting service providers, online platforms and very large online platforms (VLOPs),[84] which exert a particularly substantial influence on the functioning of digital markets.[85] The Digital Services Act introduces, *inter alia*, a specific prohibition of manipulative interface design techniques (dark patterns),

[https://www.llpolawfirm.com/2023/11/17/the-impact-of-mica-on-cross-border-operations-for-non-eu-crypto-businesses/], Accessed 31 May 2026.

81 Digital Services Act, Preamble (3).

82 Moravcova, D., *Impact of the DSA Regulation on Very Large Online Platforms,* Central European Journal of Comparative Law, Vol. 4, No. 2, 2023, p. 166.; Rudohradská, S.: *Practical Application of the Digital Services Act – The Case of the Slovak Republic,* EU and Comparative Law Issues and Challenges Series (ECLIC*)*, Vol. 9, No. 1, 2025, pp. 521–540.

83 Digital Services Act Preamble (1)-(2).

84 European Commission, *Supervision of the designated very large online platforms and search engines under DSA*, 2026, Available at:
[https://digital-strategy.ec.europa.eu/en/policies/list-designated-vlops-and-vloses], Accessed 03 April 2026.

85 Digital Services Act Preamble (76)-(79).

and transparency requirements for algorithmic systems.[86] The protected persons primarily consist of recipients of intermediary services, particularly consumers, defined in accordance with the traditional consumer law concept as natural persons acting outside their trade, business, craft or profession.[87] However, the Digital Services Act extends protection beyond consumers to all users participating in the digital economy through intermediary services.[88] Overall, the Digital Services Act establishes a sector-specific regulatory model in which consumer protection forms an integral part of platform regulation.[89]

From a geopolitical perspective, the Digital Services Act should be considered significant due to its extraterritorial scope. By applying to intermediary services offered to recipients located in the EU irrespective of the provider's place of establishment, the Digital Services Act may influence the practices of global platform operators seeking access to the EU market.[90]

4.4. Very High Geopolitical Effect

4.4.1. General Data Protection Regulation

Although the General Data Protection Regulation is closely connected to digital consumer protection and has significantly influenced the development of subsequent digital regulatory frameworks, it does not form the subject of detailed examination in the present research. One of the principal criteria for the selection of the analysed legal instruments was the explicit appearance of consumer protection, in particular the objective of ensuring a high level of consumer protection, within the regulatory framework. Unlike the legal instruments analysed in detail, the General Data Protection Regulation primarily pursues data protection objectives and does not expressly identify consumer protection as an autonomous regulatory goal. Nevertheless, its relevance cannot be overlooked, as it introduced several regulatory techniques that subsequently became characteristic features of new-generation digital regulation, including the use of a directly applicable regu-

86 Digital Services Act Art. 25, Art. 27.

87 Digital Services Act Art. 3(c).

88 Digital Services Act Preamble (2).

89 Mohanlal, C., *Investigation: Platforms still use manipulative design despite DSA rules*, 2025, Available at: [https://dsa-observatory.eu/2025/08/07/investigation-platforms-still-use-manipulative-design-despite-dsa-rules/#:~:text=This%20is%20prohibited%20by%20Article%2025%20of,design%2C%20structure%2C%20or%20functions%20of%20the%20platform], Accessed 3 April 2026.

90 Sonkova, M., *Brussels Effect Reloaded? The European Union's Digital Services Act and the Artificial Intelligence Act,* pp. 15-21, Available at: [https://www.coleurope.eu/sites/default/files/research-paper/EDP_4_24%20Sonkova_0.pdf], Accessed 3 April 2026.

lation, the protection of natural persons as the central regulatory subject, and the application of an extended territorial scope capable of producing effects beyond the borders of the EU. For this reason, the General Data Protection Regulation is considered only to the extent necessary to illustrate the relationship between data protection and digital consumer protection, as well as the emergence of regulatory techniques later adopted by digital consumer protection legislation.

From a geopolitical perspective, the General Data Protection Regulation should be considered significant due to its extraterritorial reach and its influence on the data governance practices of organisations operating both within and outside the EU.[91]

4.4.2. Digital Markets Act

A significant new-generation legal instrument in the field of platform regulation is the Digital Markets Act, which sets out obligations for so-called gatekeeper platforms[92] with the aim of preventing distortions of competition and protecting users.[93] Although the Digital Markets Act does not identify the attainment of a high level of consumer protection as an autonomous regulatory objective, it expressly refers to the objective of ensuring a high level of data protection.[94] Given that the protection of personal data constitutes a traditional safeguard for natural persons and forms an increasingly important element of consumer protection in digital markets, the Digital Markets Act may also be examined from a digital consumer protection perspective. While the Digital Markets Act is primarily competition-law oriented, its provisions on data protection and its impact on market functioning and access to digital services affect consumers. Accordingly, consumer protection appears not as an autonomous regulatory objective but as a consequence of preserving contestable and fair digital markets.

The Digital Markets Act was adopted in the form of a regulation, ensuring the direct and uniform application of its provisions throughout the European Union. The territorial scope of the Digital Markets Act is broad, as it applies whenever core platform services are provided or offered to business users or end users in the EU, irrespective of the gatekeeper's place of establishment.[95]

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91 Schwartz, P.M.: *Global Data Privacy: The EU Way*, New York University Law Review, Vol. 94, No. 4, 2019, pp. 771–818.

92 European Commission, *Gatekeepers Portal***,** Available at: [https://digital-markets-act.ec.europa.eu/gatekeepers-portal_en], Accessed 3 April 2026.

93 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) OJ L 265/1.

94 Digital Markets Act Preamble (64).

95 Digital Markets Act Art. 1 point 2.

From a personal scope perspective, unlike traditional consumer protection legislation, the Digital Markets Act does not focus on the bilateral relationship between consumers and traders. Instead, it regulates designated gatekeepers whose market position enables them to influence the conditions under which the protected persons, namely end users and business users access digital markets.[96] These platforms are subject to a range of obligations and prohibitions aimed at preventing unfair practices and preserving market contestability. The Digital Markets Act therefore protects a broader group of market participants than traditional consumer protection legislation. Furthermore, it does not employ the traditional concept of the consumer but instead uses the notion of the "end user", defined as any natural or legal person using core platform services other than as a business user.[97] This demonstrates that the Digital Markets Act departs from the classical consumer–trader framework and adopts a market-structure-oriented regulatory logic.

From a geopolitical perspective, the Digital Markets Act may be regarded as an example of the EU's use of regulation as a strategic instrument. By imposing obligations on gatekeeper platforms and applying to services offered to business users and end users in the EU irrespective of the provider's place of establishment, the Digital Markets Act may influence the conduct of globally operating digital platforms.[98] Furthermore, the broad territorial and personal scope of the Digital Markets Act may make territorial separation difficult in practice, thereby extending its practical effects beyond the EU. This is particularly relevant in the case of globally dominant platforms, such as Google, Apple, Meta, Amazon and Microsoft, whose operations are subject to the conditions laid down by the Digital Markets Act for access to the internal market.

4.4.3. Data Act

In recent years, digitalisation and the growing use of connected products have significantly increased the economic and social importance of data. As a result, data has become a key resource for consumers, businesses and public actors alike.[99] In order to meet the needs of the digital economy and remove obstacles to the functioning of the internal data market, the EU adopted the Data Act, which establishes a framework governing access to and use of data generated by connected

96 Digital Markets Act Art. 2(16), Art. 2(20).

97 Digital Markets Act, Art. 2(16) and (20).

98 Nestoras, A., *The 'Brussels Effect' in Digitalisation and the Future of Transatlantic Relations,* European Liberal Forum, Policy Brief No. 4, Available at: [https://liberalforum.eu/wp-content/uploads/2022/01/Policy-Brief-4-The-Brussels-Effect-Digitalisation-and-the-Future-of-Transatlantic-Relations.pdf], Accessed 3 April 2026.

99 Data Act Preamble (1).

products and related services.[100] The Data Act was adopted in the form of a regulation, ensuring the direct and uniform application of its provisions.

The territorial scope of the Data Act is broad and several of its provisions have practical effects beyond the EU. It applies to market actors whose products, services or activities concern the EU market, irrespective of their place of establishment.[101] The personal scope of the Data Act differs significantly from that of traditional consumer protection legislation, since it focuses not on the consumer–trader relationship but on the interactions among participants in the data economy. The obligated actors include, inter alia, manufacturers of connected products, providers of related services, data holders and providers of data processing services.[102] The protected category extends beyond consumers to all users of connected products and related services, including both consumers and business users. Although the Data Act places the concept of the "user" at the centre of its regulatory framework, it also contains a definition of the consumer. It defines a user as „a natural or legal person that owns a connected product or to whom temporary rights to use that connected product have been contractually transferred, or that receives related services,"[103] while a consumer is defined as a „natural person who is acting for purposes which are outside that person's trade, business, craft or profession."[104] Consequently, the concept of the user is broader than that of the consumer and encompasses both consumers and business users. Accordingly, the key protected actor is not exclusively the consumer as a contracting party, but the user as a data-generating actor whose access to, control over and ability to share data are to be ensured by the Data Act.

From a geopolitical perspective, the Data Act may be considered significant because several of its provisions apply irrespective of the place of establishment of the relevant market actor. As a result, it may affect the conduct of entities operating outside the EU where their products, services or data-related activities concern the EU market. The Data Act demonstrates how consumer protection in digital markets is increasingly pursued through data governance rather than solely through the regulation of individual consumer transactions.[105]

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100 Data Act Preamble (4).

101 Data Act Art (1) point 3.

102 Data Act Art.

103 Data Act Art. 2(12).

104 Data Act Art. 2(23).

105 Schwartz, P.M.: *Global Data Privacy: The EU Way*, New York University Law Review, Vol. 94, No. 4, 2019, pp. 771–818.

4.4.4. AI Act

The AI Act was adopted in response to the growing use of artificial intelligence and the risks it may pose to individuals and society. As the first comprehensive horizontal framework for AI regulation, it seeks to promote trustworthy and human-centric AI while ensuring a high level of protection of health, safety and fundamental rights.[106]

Adopted as a regulation, the AI Act establishes harmonised rules for the development, placing on the market and use of AI systems throughout the EU. Unlike traditional consumer protection instruments, its primary objective is not consumer protection but the protection of fundamental rights and public interests.[107] Nevertheless, several of its provisions may be considered relevant from a consumer protection perspective, particularly those addressing manipulation, the exploitation of vulnerabilities, algorithmic bias and harmful automated decision-making.

The AI Act has a broad territorial scope. It applies not only to actors established within the EU but also to certain providers and deployers outside the EU where AI systems are placed on the EU market or their outputs are used within the EU.[108]

Its personal scope extends beyond the traditional consumer–trader relationship. The obligated actors include providers, deployers, importers, distributors and other actors involved in the development, placement on the market and use of AI systems.[109] Similarly, the protected category is broader than the consumer in the traditional sense, as the AI Act seeks to protect all natural persons whose health, safety or fundamental rights may be affected by AI systems.[110] Unlike traditional consumer protection instruments, the it does not employ the concept of the consumer as a central regulatory category.

From a geopolitical perspective, it should be noted that the AI Act has a high level of significance. It applies not only to providers established within the EU but also to certain actors operating outside the EU. As a result, the AI Act may influence the practices of global AI developers and providers seeking access to the EU market. In addition, by establishing the first comprehensive regulatory framework for artificial intelligence, the EU may position itself as a global standard-setter in

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106 AI Act Preamble (1).

107 AI Act Preamble (1); Fossati, C.: *AI Systems and Product Liability in the EU: A Private International Law Analysis*, EU and Comparative Law Issues and Challenges Series (ECLIC), Vol. 9, No. 1, 2025, pp. 545–566.

108 AI Act Art. 2 point 1.

109 AI Act, Arts. 3(3), 3(4), 3(6), 3(7), 3(8).

110 AI Act Art. 1(1), Preamble (1) and (27).

this field.[111] The AI Act demonstrates how the protection of consumers and other affected persons is increasingly pursued through the regulation of digital technologies and AI systems rather than solely through traditional consumer–trader relationships.

5. EVALUATION AND SUMMARY

The analysis confirms that the geopolitical effects of EU digital consumer protection legislation are not uniform. Rather, the examined legal instruments may be categorized according to the intensity of their capacity to influence market actors beyond the borders of the EU.

The first category consists of provisions with limited geopolitical significance, such as the Consumer Credit Directive 2 and the Digital Content Directive. Although these measures contribute to the functioning of the internal market and may indirectly influence non-EU market actors seeking access to the EU market, their primary effects remain largely confined to contractual relationships within the EU.

The second category includes provisions with moderate geopolitical effects, namely Payment Services Directive 2 and the proposed Payment Services Directive 3 and Payment Services Regulation. These measures establish harmonised standards for digital payment services and consumer protection in a large integrated market, which may indirectly encourage the adoption of similar regulatory approaches by market actors operating outside the EU.

The third category comprises instruments with significant geopolitical effects, including Digital Resilience Act, Markets in Crypto Assets Regulation and the Digital Services Act. A common feature of these regulations is that they regulate sectors characterised by strong cross-border activity and impose obligations on actors whose services may be provided across national borders. As a result, they may influence the conduct of market participants operating outside the EU and contribute to the international relevance of EU regulatory standards.

The strongest geopolitical effects can be identified in the General Data Protection Regulation, the Digital Markets Act, the Data Act and the AI Act. These instruments combine broad territorial scope with regulatory models capable of influencing globally operating undertakings. Their practical significance extends beyond the EU because access to the internal market frequently requires compliance with the standards established by these regulations.

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[111] Sonkova, *Brussels Effect Reloaded? The European Union's Digital Services Act and the Artificial Intelligence Act*, pp. 21-26.

The examined legal instruments suggest that EU digital consumer protection regulation may contribute to shaping market behaviour beyond the borders of the Union. At the same time, the analysis suggests that the geopolitical effects of the examined legal instruments should not be understood as autonomous regulatory objectives. Rather, they appear to stem from factors such as the broad territorial scope of certain instruments, the economic significance of the internal market, and the pursuit of objectives including consumer protection, market integrity, data governance, operational resilience and the protection of fundamental rights. In this respect, the geopolitical dimension of digital consumer protection may be regarded as a consequence of the regulatory design of the examined instruments rather than an expressly declared policy objective.

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Review article

CONTINUING LEGAL EDUCATION AS A CONDITION OF PROFESSIONAL COMPETENCE IN THE PUBLIC FUNCTION OF ATTORNEYS – THE CASE OF THE REPUBLIC OF NORTH MACEDONIA IN A COMPARATIVE PERSPECTIVE*

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ABSTRACT

The legal profession plays a vital role in upholding the rule of law and ensuring the proper administration of justice. Its functions extend beyond representing private interests and include safeguarding fundamental rights and maintaining public trust in legal institutions. In Europe, attorneys increasingly fulfil these responsibilities in a context marked by deeper integration, cross-border legal practice and the growing complexity of legal regulation. These developments underscore the importance of professional competence, expertise and ethics as prerequisites for the effective fulfilment of the legal profession's public function.

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This paper examines the significance of continuing legal education as a key instrument for maintaining high professional standards and competence of attorneys, with particular focus on the Republic of North Macedonia. Admission to the profession marks the beginning of a lawyer's professional trajectory. Our position is that it should be assured that further down that professional road, attorneys remain capable of responding to evolving legal, institutional and societal challenges. Continuing Legal Education is therefore essential in enabling lawyers to develop, adapt and refine their professional competence throughout their careers.

The analysis primarily focuses on the legal and institutional framework of continuing legal education for attorneys in North Macedonia. The system is evaluated to see if it effectively promotes professional growth and maintains quality standards in the legal profession.

The study further situates the Macedonian framework within a comparative European perspective, drawing on examples from selected EU Member States, notably Croatia and Germany. These jurisdictions illustrate different approaches to regulating continuing legal education and to balancing professional self-governance, regulatory oversight and academic involvement. While common European values emphasise the public role of attorneys, significant differences remain in institutional design and in the methods employed to ensure sustained professional competence.

The research is based on doctrinal legal analysis and comparative law, complemented by empirical findings from a survey conducted among practising attorneys, representatives of professional organisations, and justice-sector representatives. These insights are used to assess the practical functioning of the existing framework and perceptions of the effectiveness of continuing legal education, and to inform policy recommendations.

The authors conclude that a coherent, principle-based system of continuing legal education is indispensable for preserving public trust, professional credibility and the long-term quality of the legal profession in the Republic of North Macedonia and throughout the broader European legal space.

Keywords: *Attorneys' function, Competence, Continuing legal education, Legal profession, Rule of law*

1. INTRODUCTION

The legal practice in Europe has transformed in ways that have fundamentally altered the conditions under which professional competence is acquired and maintained. The increased regulatory density, the expansion of supranational legal orders and the practical realities of cross-border legal services have reshaped expectations of attorneys, not only regarding their expertise but also their broader public function. In this context, it is no longer acceptable for professional qualifications to be secured once and remain static throughout a legal career. Competence becomes a dynamic, continuously evolving attribute, directly linked to legal professionals' capacity to respond to ongoing normative, institutional and societal change.

This shift has brought renewed attention to the role of Continuing Legal Education as a structural component of the legal profession. While lifelong learning has long been recognised as a general policy objective within the European educational area,

the need to further develop and implement it within the legal profession remains unmet.[1] Its operationalisation within regulated professions – particularly law – remains uneven and, in many instances, conceptually underdeveloped. Existing systems frequently prioritise formal compliance, measured by participation requirements, over substantive engagement with learning outcomes and demonstrable competence. Such approaches raise legitimate concerns about whether they can effectively support the professional development required in contemporary legal practice.

Within this broader context, the regulation and practice of continuing legal education in the Republic of North Macedonia presents a particularly instructive case. As a jurisdiction undergoing internal reforms and aligning with European standards, it highlights many tensions inherent in existing CLE models. These include balancing formal requirements with substantive skills and dividing responsibilities between regulators and educational providers. This analysis is based on these themes, situating North Macedonia's system within the wider European landscape and assessing its ability to maintain the ongoing competence of legal professionals.

The paper is organised into six further parts. The next section sets out the methodological approach, which combines doctrinal and comparative legal analysis with an empirical component based on a structured survey of practising attorneys and other legal professionals. The third section develops the conceptual foundations of the analysis, examining the public function of attorneys, the evolving notion of professional competence, and the regulatory rationale for continuity in competence development. The fourth section situates the discussion within the European Union legal context, considering the primary and secondary EU sources relevant to attorneys' position, the Court of Justice of the European Union's case law on the legitimacy of professional regulation, and the European Qualifications Framework as part of the EU's broader lifelong-learning architecture. The fifth section turns to a comparative analysis of Germany and Croatia, selected for the contrasting models they offer — a differentiated, principle-driven competence regime on the one hand, and a formal, bar-managed mandatory CLE system on the other. The sixth section examines the Macedonian framework in detail, addressing both the legal foundations of the attorneys' function and the empirical findings on attorneys' positions and experiences with CLE. The final section brings these strands together in a discussion that assesses the Macedonian system against the comparative and European benchmarks and identifies the structural reforms required to move towards a coherent, competence-based model of continuing legal education.

[1] Kasap, J.; Lachner, V.; Ziha, N., *Through Legal Education towards European Education Area*, in: Petrašević T.; Duić, D.; Novokmet, A. (eds.), EU and Comparative Law Issues and Challenges Series, 2, 2018, pp. 266-267.

2. METHODOLOGICAL APPROACH

The key point of this paper is not to prove that EU law contains a single express rule requiring "lawyers must undergo CLE" that must be transposed into the national context. It does not. The argument is that the various EU legal sources together create a normative environment in which continuous professional competence is indispensable for the performance of attorneys' public function. This is especially relevant for the Republic of North Macedonia, an accession country expected to align with EU rule-of-law and justice-sector standards.

Thus, the methodological approach adopted in this paper is primarily doctrinal and comparative. It is based on an analysis of the legal and institutional framework governing attorneys' continuing legal education, interpreted in light of broader European standards and policy developments, including the conceptual foundations of lifelong learning and competence-based qualification systems. This normative assessment is complemented by a comparative perspective, drawing on selected EU Member States to contextualise the Macedonian model and identify points of convergence and divergence in the regulation and implementation of Continuing Legal Education..

In addition to the doctrinal and comparative analyses, the research incorporates an empirical component to capture the system's practical functioning and the perceptions of its key stakeholders. To this end, a structured questionnaire was designed to examine the attitudes, experiences, and needs of legal professionals regarding continuous professional development and lifelong learning. The survey was distributed to a broad range of legal actors in the Republic of North Macedonia, including judges, prosecutors, attorneys, enforcement agents, corporate lawyers, law clerks, notaries and legal apprentices. It remained open for responses from 1 December 2025 to 28 February 2026, yielding 143 valid responses. Of the respondents, 61 (43%) are attorneys, while 29% are from the judiciary, including 15% judges and 14% court clerks. The majority of respondents are women (64%). In terms of age distribution, the predominant group is 36–45 years (46%), followed by 46–55 years (28%), those over 55 years (15%) and 25–35 years (10%).

Within the group of attorneys (n = 61), most respondents fall into the 36–45 age group (31, 50.8%), followed by 6 respondents (9.8%) aged 25–35, 18 (29.5%) aged 46–55, and 6 (9.8%) over 55 years of age. The majority are women, accounting for 35 respondents (57.4%), while 26 (42.6%) are men. In terms of professional experience, most respondents have 7 to 15 years of experience (22, 36.1%), followed by 21 respondents (34.4%) with 15 to 25 years, 13 (21.3%) with over 25 years, 4 (6.6%) with between 3 and 5 years, and 1 respondent (1.6%) with less than 3 years of experience in the legal profession.

Several limitations of the empirical component of this study should be noted. The sample size is modest relative to the total number of practising attorneys in the country[2] and respondents were not drawn through probability sampling, which limits representativeness across years of practice, specialisation, and geographic location. As the data were collected via a self-administered questionnaire, the findings are also subject to self-reporting bias, including social desirability and subjective interpretation of CLE-related concepts. For these reasons, generalisability to the wider attorney population is limited. To mitigate this, semi-structured interviews were conducted with practising attorneys to validate the findings. The results are therefore presented as indicative rather than conclusive, but they provide a relevant basis for assessing attorneys' positions towards CLE.

3. PROFESSIONAL COMPETENCE IN THE PUBLIC FUNCTION OF ATTORNEYS

The legal profession is constantly evolving from 'traditional advocacy to a more nuanced function centred on systemic governance.'[3] On the one hand, lawyers manage cases, offer legal aid and resolve others' legal issues and disputes. On the other hand, they develop ideas to resolve conflicting values that are significant to individuals and communities and provide guidelines for public life through norm-setting activities.[4] This shift requires legal professionals to move beyond the narrow "hired gun" role focused solely on maximising client interests and to actively contribute to building accountable and responsive systems of governance,[5] thereby fulfilling their public function.

3.1. Attorneys as Actors in the Administration of Justice

Attorneys perform a dual role as they are hired to represent and advance their clients' interests, while also serving as officers of the legal system and public citizens who bear a special responsibility to uphold and enhance the quality of justice.[6]

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2 The total number of registered practicing attorneys, according to the Bar Chamber database, is estimated to be over 3000, Available at: [https://www.mba.org.mk/index.php/mk/imenik-advokati/imenik-aktivni-advokati;], Accessed 13 March 2026.

3 Dube, I.; Assumi, S Elika., *Cultivating Versatility in Legal Education: Comprehensive Institutional Development Initiatives*, NLUJ Law Review, Vol. 11(1), No. 178, 2024, p. 183.

4 Karsai, K., *The Future of Legal Education - Legal Education for the Future: Lectio Magistralis - An Edited Version*, Revista Facultatii de Drept Oradea, Vol. 2022, No. 2, 2022, pp. 7-15.

5 Romeo, A., *The Attorney-Client Privilege: Grounding Confidentiality in Legal Theory*, Rechtstheorie, Vol. 48, No. 2, 2017, p. 253.

6 See: Romeo, A., *op. cit.* note 6, p. 236; Wald, Eli., *Law, Lawyers and the Battle Against Antisemitism*, 2025, Available at:

This approach requires lawyers to balance their clients' goals with ethical duties and the fundamental values of a democratic society. Accordingly, professional competence is a crucial prerequisite for the effective administration of justice and the protection of human rights.[7]

Legal practitioners are seen as key contributors to systems that operate transparently, responsibly and fairly, moving beyond a narrow focus on individual client interests toward working with others to solve problems and uphold the public good.[8] Their public function is emphasised especially in transitional societies where the legal system helps promote democratisation and social progress.[9]

Continuing legal education is crucial in that regard, as it maintains the competencies lawyers need to defend human rights effectively and support the legal system's role in promoting democratisation and social progress. This is especially important, as legal practice nowadays increasingly requires skills in policy design, stakeholder negotiation and the ability to adapt to evolving circumstances.[10]

Within the public function of a lawyer, competence serves as a condition of access to justice, primarily because a client's mere presence would be insufficient if the lawyer lacked the required skills. Furthermore, to provide effective access to justice, lawyers must continuously improve professionally to integrate international standards and the practice of European bodies. Therefore, continuous professional development is viewed not just as a tool for career enhancement but as a responsibility to ensure the fair administration of justice.[11]

3.2. The Concept of Professional Competence

In today's legal environment, professional competence is gradually seen as a degree of an individual's capacity to carry out demanding duties, rather than as a binary condition of being "qualified" or "unqualified".[12] This evolution reframes compe-

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[https://legalpro.jotwell.com/law-lawyers-and-the-battle-against-antisemitism/], Accessed 6 April 2026.

7 Dryshliuk, V., *et al., Application of the practice of the ECHR in legal education: impact on the formation of judicial culture and the protection of human rights*, Revista Eduweb, 2025, Vol. 19, No. 2, pp. 107-121, p. 108.

8 Dube, I.; Assumi, S Elika., *op. cit.* note 4, p. 183.

9 Dryshliuk, V, *et al., op. cit.* note 8, p. 110.

10 Dube, I.; Assumi, S Elika., *op. cit.* note 4, p. 183.

11 Counsel Pulse, *Staying Ahead of the Curve: The Role of Continuous Learning in Legal Professional Development*, Available at:
[https://counselpulse.com/staying-ahead-of-the-curve-the-role-of-continuous-learning-in-legal-professional-development/], Accessed 7 April 2025.

12 Harris, Jonathan F., *Credentialism at Work*, Georgetown Law Journal, Vol. 113, No. 6, June 2025, p. 1435.

tence and the concept of an education pursued throughout life as 'a continuous process of forming whole human beings - their knowledge and aptitudes, as well as the critical faculty and the ability to act.[13]

To remain relevant, lawyers are expected to adapt to a model of dynamic competence by cultivating 'learning agility', understood as the capacity to continuously acquire new skills, unlearn outdated ones and adapt effectively to evolving circumstances as a lifecycle professional responsibility.[14]

The distinction between static qualification (e.g. passing a bar exam) and dynamic competence is crucial. Although initial qualifications indicate skill at a certain time, the 'half-life of knowledge' guarantees that both fundamental and specialised information is always being surpassed or rendered inaccurate.[15]

3.3. Continuity in Competence Development as a Regulatory Necessity and Instrument

The evolving nature of law means that a one-off certification at the start of a career may not be sufficient to guarantee effectiveness throughout a lifetime. By comparison, the regulatory framework of the legal profession is shifting from a focus on initial admission to lifestyle regulation. This transition is also essential to lawyers' public function, as it requires continuous development rather than a one-off demonstration of competence. Given that lawyers perform a public function in the administration of justice, professional competence must be treated as a condition of that function. In other words, legal education must extend beyond graduation. Practitioners who depend exclusively on their prior education risk becoming susceptible to errors and ineffective in an evolving landscape of changing laws and new technology.[16] Therefore, regulatory frameworks must include a lifecycle strategy that mandates continuous learning to guarantee that attorneys remain socially responsible and competent at addressing challenging legal situations.[17]

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13 Delors, J. *et al.*, *Learning: the treasure within: report to UNESCO of the International Commission on Education for the twenty-first century*, UNESCO Publishing, 1996, p. 21.

14 Singapore Academy of Law, *Lifelong Learning and Learning Agility: Essential Skills for Modern Lawyers*, 2025, Available at: [https://sal.org.sg/articles/lifelong-learning-and-learning-agility-essential-skills-for-modern-lawyers/], Accessed 7 April 2025.

15 Brink, S., *The Longevity Dividend*, Springer Charm, 2023, p. 65.

16 Hewitt, A., *Give Me a Fish or Teach Me to Fish?: Developing Law Students' Capacity for Lifelong Learning*, in: Alternative Law Journal, Vol. 37, Issue 4, 2012, p. 259.

17 See: Dube, I.; Assumi, S Elika., *op. cit.* note 4, p. 193.

As a vital regulatory instrument, continuing legal education may serve as both a preventive (*ex ante*) and a disciplinary (*ex post*) mechanism. On the one hand, CLE serves a preventive function because it enables attorneys to remain up to date with the latest developments and thereby maintain their professionalism and effectively serve the justice system, while on the other hand, it has a disciplinary function, as failure to comply with mandatory requirements may lead to sanctions. However, to be effective, continuing legal education must move beyond formal participation requirements toward models that develop substantive competence to prepare lawyers for issues that may arise in practice.

Therefore, professional development is the responsibility of lawyers to the public, not merely a means of advancing their careers. It is about both serving clients effectively and upholding the integrity of the legal profession by committing to the highest standards of legal representation and the fair administration of justice.[18]

4. THE POSITION OF THE ATTORNEYS WITHIN THE EU LAW CONTEXT

4.1. Primary EU law: the anchor for competence

The importance of effective judicial protection and the rule of law is grounded in Article 2 and Article 19 of the Treaty on European Union (TEU)[19], with Article 2 establishing the Union's foundational values[20] and Article 19 ensuring their practical enforcement through effective judicial remedies.[21] In this context, Article 47 of the Charter of Fundamental Rights of the European Union guarantees the right to an effective remedy and to a fair trial.[22] These provisions do not directly regulate the competencies of attorneys and their continuing legal education, but provide the essential framework linking the rule of law, effective judicial protection, and

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18 Counsel Pulse, *op. cit.* note 12.

19 Consolidated version of the Treaty on European Union, *OJ C 202* 7 July 2016, p. 13.

20 Article 2 TEU: '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 which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

21 Article 19(1) TEU: '[...]Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'.

22 Charter of Fundamental Rights of the European Union, OJ C 202, 7 July 2016, pp. 396–396*;* Article 47, Right to an effective remedy and to a fair trial: Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

the proper functioning of justice. In this framework, attorneys should be viewed not just as private service providers, but as key actors in ensuring effective judicial protection, making their professional competence a fundamental requirement rather than simply a market quality.

4.2. The (secondary) legal framework for the position of the attorneys

The most important, specific EU-law source in the context of the legal profession is Directive 2005/36/EC on the recognition of professional qualifications,[23] particularly Article 22, which requires Member States to encourage continuing professional development for professions covered by the system.[24] While the legal profession is, in many respects, regulated by its own sectoral rules rather than solely by this directive, Article 22 retains significant value, as it demonstrates that EU law no longer regards professional qualification as a one-off event but instead embraces a life-cycle understanding of professional competence. Therefore, in European regulatory thinking, professional competence is not exhausted upon initial admission but must be continuously maintained.

Directive 98/5/EC[25] allows lawyers to practice permanently in a Member State other than the one where they were originally qualified.[26] This directive is significant because it reflects the reality that lawyers increasingly work across borders, making it hard to defend a model in which the knowledge gained at admission is deemed permanently sufficient. It assumes a professional environment in which lawyers must stay capable of operating under different legal systems and evolving conditions. Case law from the Court of Justice of the European Union has reinforced this by interpreting the directive as granting European lawyers the right to engage in the same professional activities as host-state lawyers, within the directive's limits, thereby supporting the idea that competence cannot remain static.[27]

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23 Council Directive 2005/36/EC on the recognition of professional qualifications [2005] OJ 255 (hereinafter: Directive 2005/36/EC).

24 Directive 2005/36/EC, Article 22: 'With regard to the training referred to in Articles 24, 25, 28, 31, 34, 35, 38, 40, 44 and 46: (a) Member States may authorise part-time training under conditions laid down by the competent authorities; those authorities shall ensure that the overall duration, level and quality of such training is not lower than that of continuous full-time training; (b) in accordance with the procedures specific to each Member State, continuing education and training shall ensure that persons who have completed their studies are able to keep abreast of professional developments to the extent necessary to maintain safe and effective practice'.

25 Directive 98/5/EC of the European Parliament and of the Council to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained [1998] OJ L 77 (hereinafter: Directive 98/5/EC).

26 Directive 98/5/EC, Article 1.

27 See: Case C-168/98 *Grand Duchy of Luxembourg v European Parliament and Council of the European Union* [2000] ECLI:EU:C:2000:598, paras. 20, 23-25; Case C-431/17 *Monachos Eirinaios kata kos-*

Alongside the establishment, Directive 77/249/EEC[28] should also be taken into account. This directive is the earlier instrument for the freedom to provide services for lawyers and has a slightly different significance than Directive 98/5/EC. While Directive 98/5/EC supports the argument for permanent cross-border professional integration, Directive 77/249/EEC underlines that lawyers' work is already situated within a European framework of temporary and cross-border service provision. The directive demonstrates that the profession is not confined to national boundaries. Viewed in this light, continuing legal education can be defended as a necessary condition for maintaining professional readiness in a mobile, European legal environment.

4.3. The public role of lawyers and the legitimacy of professional regulation through the lens of the CJEU case law

Wouters v Algemene Raad van de Nederlandse Orde van Advocaten[29] remains one of the most important judgments for conceptualising the legal profession as playing a special role in the administration of justice. The Court recognised that lawyers are not ordinary market actors and that certain restrictions connected to professional ethics and the proper practice of the profession may be justified.[30] This reasoning provides a strong basis for the argument that continuing legal education can legitimately be understood as a professional-regulatory instrument serving the public function of attorneys.

Further, the case *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*[31] provides the foundational framework for freedom of establishment in the context of the legal profession, providing that "… Member States must take account of the equivalence of diplomas and, if necessary, proceed to a comparison of the knowledge and qualifications required by their national rules and those of the person concerned."[32] While the case does not specifically concern continuing legal education, it is indispensable for the argument that national measures af-

mon Antonios Giakoumakis tou Emmanouil v Dikigorikos Syllogos Athinon [2019], par. 36; Joined Cases C-58/13 and C-59/13 *Angelo Alberto Torresi* (C-58/13), *Pierfrancesco Torresi* (C-59/13) *v Consiglio dell'Ordine degli Avvocati di Macerata*, [2014], par. 52.

28 Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services [1977] OJ L 78 (hereinafter Directive 77/249/EEC).

29 Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECLI:EU:C:2002:98.

30 Case C-309/99, paras. 97-100.

31 Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECLI:EU:C:1995:411.

32 Case C-55/94, para. 39.

fecting professional practice can be justified if they pursue legitimate objectives and are proportionate. Within this framework, CLE obligations - if appropriately designed - can be defended as measures that promote professional competence, protect clients, enhance the quality of justice and support the rule of law.

Also relevant are the cases *Graham J. Wilson v Conseil de l'ordre des avocats du barreau de Luxembourg*[33] and *Commission of the European Communities v Grand Duchy of Luxembourg*,[34] which, while more technical, deepens the discussion of lawyers' mobility. The former addresses access to the profession under Directive 98/5/EC and reinforces the importance of fair and objective professional-regulatory mechanisms.[35] The latter confirms that Member States may not introduce national barriers incompatible with the directive's harmonised framework.[36] Together, these cases support the argument that professional regulation is legitimate only when it is structured, lawful and justified.

4.4. The European Qualification Framework and EU lifelong-learning architecture: Competence as a Measure of Successful Completion of Education

Since the early 2000s, the EU has promoted qualifications frameworks — most notably the European Qualifications Framework (EQF) — as a means to help Member States adapt their education and training systems to the pressures of globalisation. Building on the Council Resolution of 27 June 2002 on lifelong learning[37] and developed within the Copenhagen process, the EQF was established by the Recommendation of the European Parliament and of the Council of 23 April 2008[38] and subsequently consolidated by the Council Recommendation of 22 May 2017.[39] It provides a common reference framework of eight learning-outcomes-based levels[40], designed to function as a translation device between na-

[33] Case C-506/04 *Graham J. Wilson v Conseil de l'ordre des avocats du barreau de Luxembourg* [2006] (hereinafter: Case C-506/04).

[34] Case C-193/05 *Commission of the European Communities v Grand Duchy of Luxembourg* [2006] (hereinafter: Case C-193/05).

[35] Case C-506/04, para. 88.

[36] Case C-193/05, paras. 58-61.

[37] Council Resolution of 27 June 2002 on lifelong learning [2002] OJ C 163, p. 1.

[38] Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning [2008] OJ C 111, p. 1.

[39] Council Recommendation of 22 May 2017 on the European Qualifications Framework for lifelong learning and repealing the Recommendation of the European Parliament and of the Council of 23 April 2008 [2017] OJ C 189, p. 15 (hereinafter: Council Recommendation [2017] OJ C 189).

[40] The lower levels (1–4) typically cover general education and lower-level vocational training. With regard to higher education, EQF Level 5 corresponds to the higher-education short cycle; Level 6 to the

tional qualifications systems and to improve the transparency, comparability and portability of citizens' qualifications across the Member States, in support of lifelong learning and the modernisation of education and training systems.

The EQF is non-binding, and its purpose is neither to replace existing national legislation nor to create an obligation to adopt new national legislation.[41] Still, at its core, is the stipulation of the 'learning outcomes' as statements regarding what a learner knows, understands and is able to do on completion of a learning process, which are defined in terms of knowledge, skills and responsibility and autonomy.[42] The EQF's eight reference levels are described entirely through learning-outcome descriptors, not through inputs (such as years of study, type of institution, or curriculum content). This is what allows the EQF to function as a translation device: qualifications from very different national systems can be compared because they are all expressed in the same output-based terms. A key consequence of the learning-outcomes approach is that, in principle, the same outcomes can be achieved through formal, non-formal or informal learning, which is why the EQF is explicitly linked to the validation of non-formal and informal learning.[43] Thus, the 'outcome' becomes 'measure' for successful completion – the acquisition of competencies. Thus, the outcome provides a means of regulating through quality indicators.[44]

The Council Resolution of 27 June 2002 on lifelong learning, the EQF Recommendation of 2017, and the 2022 Recommendation on micro-credentials[45] together construct a policy environment in which all regulated professions are expected to participate in continuous learning across the working life. The 2022 micro-credentials Recommendation is particularly relevant for legal practice: it explicitly envisages micro-credentials as a means of "upskilling and reskilling" workers, including for "mandatory requirements for upskilling and reskilling in certain

first cycle (typically a bachelor's); Level 7 to the second cycle (typically a master's); and Level 8 to the third cycle (typically a doctorate).

41 Sokol, T.; Staničić, F., *Europski pravni okvir u području obrazovanja: treba li nam uopće zakon o hrvatskom kvalifikacijskom okviru?*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 42, No. 1, 2021, pp. 1-20.

42 Council Recommendation [2017] OJ C 189, p. 15, Annex I(e). The earlier formulation in the 2008 Recommendation defined learning outcomes in terms of "knowledge, skills and competence", Annex I(f) [2008] OJ C 111, p. 1.

43 *Ibid.*, recital 4 and Annex I(j).

44 Cort, P., *Stating the Obvious: The European Qualifications Framework is Not a neutral evidence-based policy tool*, European Educational Research Journal, Vol. 9, No. 3, 2010, pp. 304-316.

45 Council Recommendation of 16 June 2022 on a European approach to micro-credentials for lifelong learning and employability [2022] OJ C 243, p. 10.

jobs and types of work (e.g. for licences, required training and permits)"[46]. This captures the typical structure of CLE obligations and positions CLE programmes as well-suited for delivery as micro-credentials — quality-assured, referenced to the EQF, capable of accumulation, and portable across jurisdictions.

5. COMPARATIVE PERSPECTIVE: GERMANY AND CROATIA

Germany and Croatia illustrate contrasting approaches to continuing legal education. Germany does not impose a single, universal, highly formalised CLE system for all lawyers. Instead, it combines a strong conception of the lawyer's public role and professional independence with a differentiated, partly decentralised approach to professional development. Croatia, in contrast, has adopted a more explicit statutory and rule-based model of mandatory continuing professional training, organised by the Bar and implemented through the Bar's Academy and a dedicated rulebook. This contrast is analytically valuable because it allows a comparison between a principle-driven, competence-focused system (Germany) and a formalised, mandatory CLE model (Croatia).

5.1. Germany

The starting point in Germany is the Federal Lawyers' Act (Bundesrechtsanwaltsordnung – BRAO),[47] which establishes the attorneys' core professional identity. Section 1 BRAO declares that the attorney is an "independent organ of the administration of justice," while Section 43 sets out the general professional duty: attorneys must practice their profession conscientiously and maintain the respect and trust required by their status, both within and outside professional life. These provisions are foundational because they frame competence as an essential part of the attorneys' institutional role in the justice system and of conscientious professional conduct.

The law shows that continuing education is integrated into the attorneys' role and ethical duties rather than imposed as a separate technical requirement. Professional associations (bar chambers), specialist committees, and courts guide and supervise the maintenance of competence through advisory rules, voluntary advanced qualifications, and recognised specialist titles.[48] Institutionalised seminars, peer

[46] *Ibid.*, paragraph 12(g).

[47] Bundesrechtsanwaltsordnung (BRAO), published in the Federal Law Gazette Part III, Classification Number 303-8, as last amended by Article 4 of the Act of 22 December 2025 (Federal Law Gazette 2025 I No. 349), Available at: [https://www.gesetze-im-internet.de/brao/BJNR005650959.html] Accessed 26 March 2026.

[48] BRAO, § 43c.

consultation, and jurisprudence updates serve as practical mechanisms to ensure that lawyers remain capable of performing their duties conscientiously.

This reveals an important feature of the German system: continuing competence is present, but not centralised. It appears across rules, §§43a–43f BRAO in particular, governing the core professional duties of attorneys, including independence, confidentiality, conflicts of interest, advertising, specialist qualifications, organisational aspects of practice and the obligation of continuous professional development, as well as in professional rules such as Professional Code for Lawyers (Berufsordnung für Rechtsanwälte – BORA),[49] which require demonstration of knowledge in designated practice areas and provide for a reasonable time for further training. This makes Germany an example of a system in which continuing education is embedded in the profession's normative frame and linked to the lawyer's role in the administration of justice.

The next key source in the German system is the Specialist Lawyers' Regulation (Fachanwaltsordnung – FAO),[50] which translates the general competence expectations of BRAO and BORA into a concrete, measurable continuing-education framework. Under §15 FAO, attorneys who hold a specialist title must complete a minimum hours of continuing education per specialist field.[51] This model is significant because it quantifies the continuing-education duty, allows some flexibility in learning formats, enforces quality through controlled self-study and links the obligation directly to the lawyer's claim to specialist status.

This highlights that Germany's approach to CLE is not static. In 2024, the Statutory Assembly of the German Bar (Satzungsversammlung) explicitly called for the legislature to provide a clearer legal basis for a more concrete and enforceable continuing-education duty applicable to all lawyers.[52] The notice from the Federal Bar of Germany (Bundesrechtsanwaltskammer – BRAK) emphasises that the

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[49] Professional Code of Conduct for Lawyers Adopted by the General Assembly of the German Federal Bar Association. Last amended by resolution of the General Assembly of 26 May 2025, published on brak.de on 8 September 2025, effective 1 December 2025., Available at: [https://dejure.org/gesetze/BORA], Accessed 26 March 2026.

[50] *Fachanwaltsordnung*, 1.10.2023, Available at: [https://www.anwaltakademie.de/fachanwaltslehrgaenge/fachanwaltsordnung], Accessed 26 March 2026.

[51] Attorneys who hold a specialist title must complete a minimum of fifteen hours of continuing education per specialist field, where up to five hours may be completed through self-study, provided there is a system of learning control and proof of compliance must be submitted to the relevant bar chamber proactively. If the required hours are not met, the chamber grants a period for completion.

[52] *Resolution beschlossen – Satzungsversammlung dringt auf Konkretisierung*, 2024, Available at: [https://www.brak.de/newsroom/news/resolution-beschlossen-satzungsversammlung-dringt-erneut-auf-konkretisierung/?utm_source=chatgpt.com], Accessed 15 April 2026.

profession itself seeks authority to define and operationalise the continuing legal education obligation (Fortbildungsverpflichtung) within the BRAO.

The German CLE framework can be understood as a multi-layered system. At its foundation, the BRAO establishes the attorney's professional identity and imposes a broad duty of conscientious practice. Building on this, the BORA distributes competence-related obligations across specific professional contexts, such as the lawful use of expertise titles, mediation and employment conditions. The FAO then introduces the most concrete and measurable continuing-education requirements, but these apply only to lawyers holding specialist titles. Finally, ongoing professional debates, including the 2024 discussions in the Satzungsversammlung, suggest that Germany may move toward a clearer, enforceable general CLE duty for all lawyers in the future.

This layered structure shows that Germany is not a country without CLE; instead, it regulates professional competence in a selective and contextual manner. Analytically, Germany ensures lawyer competence mainly through a mix of professional status, practice duties, specialist-title regulation and a robust self-regulatory professional culture.

5.2. Croatia

Croatia presents a model that has advanced in the legal operationalisation of continuing legal education. The Croatian Law on the Bar (Zakon o odvjetništvu)[53] provides the statutory foundation - Article 1 defines advocacy as an independent and autonomous service, ensuring legal assistance to natural and legal persons in the exercise and protection of their rights and legal interests. Article 2 reinforces this independence by organising the profession through the Croatian Bar Association as an autonomous and self-governing body. Article 7 imposes a duty on lawyers to provide legal assistance conscientiously and in accordance with the Constitution, laws, the Bar's statute, other general acts and the Code of Ethics. Critically for continuing education, Article 15a explicitly requires lawyers to pursue ongoing professional development and empowers the Bar to prescribe, by rules, both the programme and the method for implementing this professional development. Unlike systems that imply CLE through ethical or cultural norms, Croatian law directly enshrines the duty of continuous professional improvement, offering a clear operational and statutory framework for competence maintenance.

[53] *Zakon o odvjetništvu*, pročišćeni tekst zakona Offical Gazette 09/94, 117/08, 50/09, 75/09, 18/11, 126/21, 98/25 na snazi od 12 July 2025, Available at: [https://www.zakon.hr/z/176/zakon-o-odvjetnistvu], Accessed 26 March 2026.

Croatia is particularly instructive because it illustrates a more developed statutory model of continuing legal education within a civil-law bar system. The Croatian Law on the Bar explicitly links the lawyer's public role, the duty to provide conscientious professional service and bar self-regulation to a clear obligation of continuous professional development. Unlike Germany, where formal CLE is concentrated on specialist lawyers, Croatia embeds continuing education directly in the statute for all members of the profession. This makes it a highly relevant benchmark for North Macedonia, showing how a legal system can mandate bar-managed continuing education while maintaining professional autonomy and self-governance.

The next key layer is the Statute of the Croatian Bar Association (Statut Hrvatske odvjetnicke komore),[54] which sets out the Bar's role in overseeing continuing professional development.[55] The statute assigns the Bar responsibility for supporting the ongoing training of lawyers and trainee lawyers, including through professional and scientific cooperation with courts, notaries, administrative bodies, law faculties and legal associations.[56] It specifies that the Bar's governing board and the Lawyers' Academy (Odvjetnička akademija) are tasked with delivering seminars, courses, lectures, round tables, publications, online materials and formal training programmes.[57] These activities may be organised in collaboration with courts, public bodies, faculties, the Judicial Academy, or foreign bar associations.[58] Importantly, the statute also establishes the Lawyers' Academy as a dedicated body within the Bar,[59] governed by its own rulebook, providing a concrete institutional mechanism to implement CLE rather than leaving it as a mere abstract duty.

The third and most operationally significant source is the Rulebook on the Continuing Professional Training of Lawyers of 2022 (Pravilnik o trajnom stručnog usavršavanja odvjetnika).[60] This rulebook gives Croatia's CLE system its concrete structure. Article 1 establishes that lawyers are obliged to participate in continuing professional training and clarifies that the rulebook governs how this obligation is fulfilled, its implementation, the associated rights and duties and the monitoring and record-keeping system, all aimed at systematically enhancing the quality of

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54 Statute of the Croatian Bar Association, Offical Gazette 151/22; NN 82/2024, Available at: [https://www.hok-cba.hr/propisi-i-akti/statut/], Accessed 26 March 2026.

55 Statute of the Croatian Bar Association, Article 4.

56 Statute of the Croatian Bar Association, Article 21.

57 Statute of the Croatian Bar Association, Articles 18, 21.

58 Statute of the Croatian Bar Association, Article 21(2).

59 See: Statute of the Croatian Bar Association, Section XI.

60 Pravilnik o trajnom stručnog usavršavanja odvjetnika, 17 March 2022, Available at: [https://narodne-novine.nn.hr/clanci/sluzbeni/2022_04_51_650.html] Accessed 26 March 2026.

the profession in the interests of clients and the administration of justice. Article 2 defines continuing professional training as the upgrading and acquisition of knowledge through various forms of learning, both live and online, in accordance with the Bar Academy's programme. Article 3 links the purpose of such training to improving lawyers' knowledge, keeping up with legislative developments and developing both foundational and advanced knowledge acquired during prior formal education. These provisions demonstrate a robust conceptual framework: CLE in Croatia is not treated as a mere attendance requirement, but as a structured mechanism directly connected to professional competence, the quality of legal services and the effective functioning of justice.

The Croatian rulebook is also noteworthy for the principles it establishes. Article 4 requires that continuing professional training be guided by accessibility, educational quality and the lawyer's free choice of content within the Bar Academy's programme. Article 5 recognises a broad range of learning formats – lectures, seminars, courses, study visits, conferences, round tables and other activities – and allows both in-person and online participation. Article 6 integrates the learning management system, giving lawyers access to all e-courses on the Bar's platform. These design features are significant: Croatia enforces a mandatory CLE system that balances obligation and flexibility, enabling lawyers to shape their continuing education while maintaining professional standards.

The core quantitative requirements are set out in Articles 7, 8, 10 and 13 of the Rulebook. Lawyers are obliged to maintain the knowledge necessary for practising advocacy and must complete at least 12 school hours of training each year, either through the Bar Academy's LMS system or live educational activities. The monitoring period runs annually from 1 January to 31 December. Lawyers receive an annual certificate upon completing the required hours, which cannot be carried over to the next year. These provisions demonstrate that Croatia has adopted a clearly structured compliance model: a mandatory annual minimum, a defined programme and provider, formal certification and no carry-over. This system is considerably more formalised than Germany's general framework and, in some respects, more precise than what is publicly apparent in North Macedonia's legal architecture.

What makes the Croatian system particularly noteworthy is that it combines a formal minimum-hour requirement with built-in quality control and oversight mechanisms. Article 10 allows some e-courses to include a knowledge check or written test, while Article 11 obliges the Bar to maintain records of lawyers' continuing education and gives the Lawyers' Academy the role of supervising compliance. If a lawyer fails to meet the annual requirement, the Academy must notify

the disciplinary prosecution service of the Croatian Bar. Article 17 further enables the Academy to cooperate with the Ministry of Justice and Public Administration, courts, universities, institutes and other legal entities. This framework goes well beyond a simple points register: it incorporates annual monitoring, verification of completion, potential disciplinary consequences and structured cooperation with external institutions, making it a highly operationalised and enforceable CLE model.

That said, Croatia's model still leans toward a formal, participation-based system rather than a fully outcome-oriented competence model. The rulebook primarily tracks hours spent in approved educational activities, and the optional knowledge checks are not consistently centralised. Certificates confirm completion of the required annual hours, but they do not verify the achievement of specific competence levels or learning outcomes. In this respect, Croatia represents an intermediate approach: it is more structured, enforceable and operationalised than a minimal seminar-counting system, yet it stops short of a comprehensive, EQF-style framework that systematically links continuing education to demonstrable professional competence.

The Code of Ethics of the Croatian Bar (Kodeks odvjetničke etike)[61] reinforces the idea that continuing professional development is part of the lawyer's ethical duty. The Code opens by stating that lawyers must observe principles and rules of conduct that preserve the dignity and reputation of the profession and fulfil their obligations conscientiously. It also provides that lawyers should "renew, expand and improve their legal and general education,"[62] embedding professional competence directly in the ethical framework of practice.

A further layer of the Croatian system concerns the legal framework for specialisation. The Croatian Law on the Bar devotes an entire chapter to this issue, and Article 69 provides that a lawyer may request recognition of a speciality in a specific field of law, with the fields themselves determined by the Bar's statute and specialisation formally granted by a designated body. In addition, the Bar has issued a Rulebook on the Conditions and Procedure for the Recognition of Specialisations for Lawyers Registered in the Register of the Croatian Bar Association (Pravilnik o uvjetima i postupku za priznanje specijalnosti odvjetnicima upisanim u Imenik

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61 Kodeks odvjetničke etike, "Narodne novine" br. 64/2007., 72/2008., 64/2018., 52/2021., 83/2021., 81/2022, Available at: [https://www.hok-cba.hr/wp-content/uploads/2023/03/Kodeks-odvjetnicke-etike-1.pdf], Accessed 26 March 2026 (hereinafter: Kodeks odvjetničke etike).

62 Kodeks odvjetničke etike, point 16.

odvjetnika Hrvatske odvjetničke komore).[63] Even on the basis of the statutory provisions alone, the significance is clear: Croatia, similarly to Germany, links part of its competence architecture to officially recognised specialist expertise.

Croatia can therefore be characterised as a system in which continuing legal education is clearly embedded in law and professional structures. The Croatian Bar has established a statutory, institutionally organised and annually monitored CLE framework, administered by the Bar and implemented through the Lawyers' Academy. The system requires a mandatory minimum of annual training hours, maintains formal records and certification, and links non-compliance to potential disciplinary consequences. This approach is formalised but still largely relies on participation and compliance with prescribed hours rather than on a fully outcomes-based competence framework.

6. THE CLE OF ATTORNEYS IN THE REPUBLIC OF NORTH MACEDONIA

The status of the Republic of North Macedonia as an EU candidate country frames continuing legal education within a broader accession and rule-of-law context. The Stabilisation and Association Agreement[64] provides the legal basis for cooperation with the EU and for the approximation of legislation. Consequently, it establishes the expectation that national legal and institutional structures will evolve in line with European standards.

The Commission's rule-of-law framework, together with the inclusion of enlargement countries such as the Republic of North Macedonia in the 2024 and 2025 Rule of Law Reports, highlights ongoing monitoring of the country's justice system and explicitly links enlargement efforts to sustainable rule-of-law progress. These reports situate lawyers' professional development within the wider agenda of judicial reform, institutional trustworthiness and the quality of justice. This reinforces the logic that the quality of justice institutions and the legal profession is treated as part of the rule-of-law preparedness for accession.[65] Accordingly, they provide the justification for treating attorneys' sustained professional competence as a require-

[63] Pravilnik o uvjetima i postupku za priznanje specijalnosti odvjetnicima upisanim u Imenik odvjetnika Hrvatske odvjetničke komore, Available at: [https://www.hok-cba.hr/propisi-i-akti/pravilnici/], Accessed 26 March 2026.

[64] Stabilisation and Association Agreement with North Macedonia, Available at: [https://eur-lex.europa.eu/EN/legal-content/summary/stabilisation-and-association-agreement-with-north-macedonia.html], Accessed 25 March 2026.

[65] Commission Staff Working Document, 2024 Rule of Law Report, Country Chapter on the rule of law situation in North Macedonia, Brussels, 24.7.2024 SWD(2024) 830 final (hereinafter: 2024 Rule of Law Report), pp. 1-3; Commission Staff Working Document, 2025 Rule of Law Report, Country

ment of public-law significance. Finally, the IPA III programming framework[66] underlines that justice professionals from beneficiary countries are encouraged to participate in cross-border training alongside EU peers, thereby demonstrating a direct policy connection between accession and professional competence.[67]

Together, these instruments make clear that, while they do not prescribe the form of continuing legal education, they establish that the professional capacity of lawyers is a critical element of North Macedonia's integration into European justice structures and of its alignment with rule-of-law standards.

6.1. The function of the attorneys in the Macedonian context: CLEs legal foundations and institutional positions

The Constitution of the Republic of North Macedonia is clear – "The advocacy is an independent and autonomous public service that provides legal assistance and exercises public powers in accordance with the law."[68]

The single most important domestic source is the Law on the Bar (Закон за адвокатурата),[69] which defines the legal function of the profession, the structure of the Bar, entry requirements, disciplinary rules and the core duties of attorneys. The law explicitly frames advocacy as the provision of legal assistance to protect rights before courts, state authorities, local government bodies and other legal actors.[70] Of particular significance is the language regarding professional responsibility: when taking the oath, an attorney pledges to act conscientiously and to preserve "the reputation of advocacy as a public service"[71] while the law requires that legal assistance be provided "conscientiously and professionally."[72] Crucially for continuing legal education, the law establishes that attorneys have a duty to maintain and improve their professional competence throughout their careers through

Chapter on the rule of law situation in North Macedonia, Strasbourg, 8.7.2025 SWD(2025) 930 final, (hereinafter: 2025 Rule of Law Report), pp. 3-6.

66 Commission Implementing Decision of 10.12.2021 adopting the Instrument for Pre-Accession Assistance (IPA III) Programming Framework for the period 2021-2027, Brussels, 10.12.2021 C(2021) 8914 final (hereinafter: IPA III programming framework).

67 IPA III programming framework, pp. 56-65.

68 Article 53 of the Constitution of the Republic of North Macedonia, Official Gazette No. 52/1991; 1/1992; 1/1992; 31/1998; 31/1998; 91/2001; 91/2001; 84/2003; 84/2003; 107/2005; 107/2005; 3/2009; 3/2009; 13/2009; 49/2011; 49/2011; 6/2019; 6/2019.

69 Law on the Bar, Official Gazette No. 199/2023 from 25.09.2023 (hereinafter: Macedonian Law on the Bar).

70 Macedonian Law on the Bar, Article 1.

71 Macedonian Law on the Bar, Article 11.

72 Macedonian Law on the Bar, Article 30.

mandatory training, seminars, workshops and similar activities organised by the Bar Association's Education Centre.[73] In this respect, the legislation goes beyond a purely ethical or policy-based approach: CLE is not merely encouraged; it is a legal obligation that directly supports lawyers' professional and public functions.

The Macedonian case is interesting because the issue is not whether CLE exists in law, but whether the legal framework effectively ensures professional competence. The Law on the Bar states that maintaining competence, i.e., CLE, is a legal duty. However, it offers limited guidance on how to implement this, leaving much to the Bar's self-regulation. It is precisely at this point that a critical evaluation of the system can be made.

The Statute of the Bar Association of the Republic of North Macedonia (Статут на АКРСМ)[74] demonstrates how the foundation provided by the Law on Bar is institutionalised through professional self-governance. It affirms that the Bar performs its functions independently within the framework of the Constitution, the Law on the Bar, ratified international treaties, the Statute itself, the Code of Ethics and other regulations.[75] Importantly, the Statute recognises advocacy as an independent public service,[76] reinforcing the "public function of attorneys" also within domestic law. The Statute also establishes the Bar's Education Centre and explicitly assigns it responsibility for both the initial training of candidate attorneys and the continuous education of practising lawyers.[77] Moreover, it empowers the relevant bar bodies to determine fees for initial and continuous training.[78] This institutional embedding makes clear that CLE is not incidental: it is a structural feature of the Bar's architecture, reflecting the profession's commitment to sustaining competence as part of its public mission. The Statute is also significant because it reveals the profession's underlying regulatory model, which is based not on professional self-regulation exercised through the Bar's own bodies and acts.

Further, the Code of Professional Ethics of the Bar[79] provides the ethical framework governing the conduct of the attorneys. The Code is formulated as a set of principles that attorneys are required to follow in their professional work, and it

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73 Macedonian Law on the Bar, Article 15.

74 Statute of the Bar Association of the Republic of North Macedonia, Official Gazette 169/2011; 75/2011; 169/2011; 169/2011; 68/2012; 76/2013; 113/2016; 95/2019; 128/2019; 189/2020; 54/2023; 142/2023 (hereinafter: Statute of the Bar Association of the Republic of North Macedonia).

75 Statute of the Bar Association of the Republic of North Macedonia, Article 2.

76 Statute of the Bar Association of the Republic of North Macedonia, Article 2.

77 Statute of the Bar Association of the Republic of North Macedonia, Article 8.

78 Statute of the Bar Association of the Republic of North Macedonia, Article 23.

79 *Code of Professional Ethics of Attorneys, Professional Associates and Trainee Lawyers of the Bar Association of the Republic of Macedonia*, Available at:

expressly provides that non-compliance by attorneys, professional associates and trainees constitutes a disciplinary breach subject to sanctions under the Bar's regulatory framework.[80] This gives the Code a dual significance. On the one hand, it establishes the ethical dimension of professional competence, presenting it as integral to the lawyer's professional identity rather than merely a matter of administrative compliance. On the other hand, by linking these principles to disciplinary responsibility, it ties ethical standards to enforceability. Taken together with the Law on the Bar and the Statute, the Code demonstrates that the Macedonian framework already recognises competence as a legal, institutional and ethical obligation. The central issue, therefore, is the extent to which those standards are translated into a coherent, outcome-oriented system of continuing legal education. Closely connected to this framework is the Rulebook on Disciplinary Responsibility (Правилник за дисциплинска одговорност)[81], which gives practical effect to the enforcement of professional standards.

Another aspect that merits particular attention is the regulation of admission and entry into the profession under the Law on the Bar and the Statute. Both sources make clear that candidates seeking enrolment must provide proof of completed initial training at the Education Centre of the Bar Association, with the Statute expressly requiring such training as a condition for entry.[82] This demonstrates that the Macedonian system already adopts a training-based approach to professional access, going beyond a model based solely on academic qualification, the judicial exam and formal registration.[83] In effect, it reflects an understanding that these elements alone are insufficient to ensure professional readiness. Once this premise is accepted at the point of admission, it supports the further conclusion that the same logic should apply throughout the professional career, requiring the continuous maintenance and development of competence through continuing legal education.

There is also practical evidence that the Bar's CLE system is active, not merely formal. The Bar's training archive shows repeated announcements for "continuing le-

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[https://www.mba.org.mk/index.php/mk/akti/kodeks-etika] Accessed 26 March 2026 (hereinafter: Code of Professional Ethics of Attorneys, Professional Associates and Trainee Lawyers of the Bar Association of the Republic of Macedonia].

80 Code of Professional Ethics of Attorneys, Professional Associates and Trainee Lawyers of the Bar Association of the Republic of Macedonia, Preamble.

81 *Rulebook on Disciplinary Responsibility*, Available at: [https://www.mba.org.mk/index.php/mk/akti/2018-09-18-13-27-36], Accessed 26 March 2026.

82 Macedonian Law on the Bar, Articles 12 and 34; Statute of the Bar Association of the Republic of North Macedonia, Articles 33 and 66.

83 However, at present, the training consists of a one-week internship during which trainees carry out routine tasks at the Bar Association.

gal education" activities.[84], often run in cooperation with external partners. While these materials are not primary legal sources, they serve as a strong institutional indicator that the Bar is actively implementing its statutory mandate through organised training programmes.

6.2. CLE of Attorneys: positions and experiences

Overall, the survey revealed that attorneys find continuing legal education useful for their legal and professional development; however, existing opportunities are not used as frequently as one might expect.

There is no doubt that attorneys find that continuous professional development and lifelong learning in the legal profession (CLE) very useful for their profession, with 67% finding it completely useful and 23% largely useful (see Graph 1).

Graph 1. Results on question: In your opinion, how useful is continuous professional development and lifelong learning in the legal profession (CPD) for your profession?

Source: Authors

[84] *Bar Association training archive*, Available at: [https://www.mba.org.mk/index.php/mk/obukii] Accessed 26 March 2026; *Training in cooperation with the U.S. National Center for State Courts: 'Ethical Dilemmas for Defense Lawyers in North Macedonia*, Available at: [https://www.mba.org.mk/index.php/mk/obukii/item/1011-obuka-vo-sorabotka-so-nacionalniot-centar-za-drzhavni-sudovi-na-sad-etichki-dilemi-za-advokatite-braniteli-vo-severna-makedonija] Accessed 26 March 2026; *Archive notices*, [https://www.mba.org.mk/index.php/mk/obukii/arhiva], Accessed 26 March 2026.

However, it should be noted that respondents do not appear to have a clear understanding of whether participation in the CLE is mandatory or voluntary for their professions. Specifically, just over half of respondents (57%) identify the CLE as a voluntary activity, while 28% believe it is mandatory and 15% are unsure. This makes it difficult to assess the quantity of training activities they participate in, as they report on the frequency of participation in both mandatory and voluntary training activities. In our view, these responses show that although attorneys find CLE activities very useful, participation in them is low: on average, approximately one quarter of respondents did not participate in any training activity in the past 3 years, and equally, only one quarter have attended CLE activities (see Table 1 and Table 2).

Table 1. Participation in CLE if it is voluntary

If it is not mandatory, how often have you participated in CLE activities in the last three years?		
	No.	%
Not once	11	18%
Once a year, but not every year	12	20%
Once a year	2	3%
Twice a year	15	25%
More than twice a year	16	26%
No response	5	8%

Source: Authors

Table 2. Participation in CLE if it is mandatory

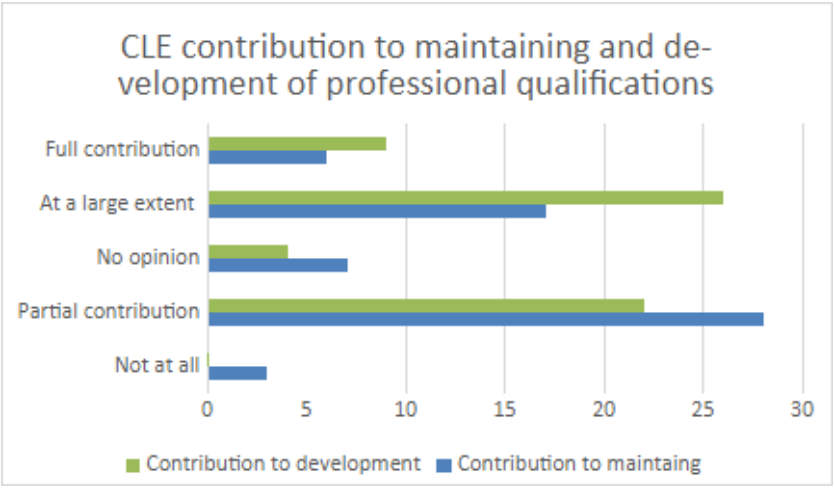
If it is mandatory, to what extent have you participated in CLE activities in the last year?		
	No.	%
Not once	19	31%
Less than the minimum required	4	7%
Exactly the minimum required	14	23%
More than the minimum required	15	25%
No response	0	0%

Source: Authors

The main reason for participating in CLE, cited by 77% of respondents, is the development of knowledge, followed by the need for professional development (66%) and skills development (64%), with most respondents selecting all of these reasons. Interestingly, 7 respondents (11%) stated that they participate in CLE due to legal obligations, presumably indicating their understanding of the legal framework that necessitates their continuous professional development, as described above. On the other hand, non-participation is justified by lack of time (48% of respondents) and financial reasons (31%), with lack of motivation cited by 15% (personal motivation 5% and professional motivation 10%). The majority of respondents find the topics covered by the offered CLE activities relevant to their work: 21% find them always relevant and 41% find them sometimes relevant. One quarter of respondents have no opinion on the relevance of the topics, while 13% find them rarely relevant.

The CLE is recognised as a contributing factor to the development of attorneys' professional qualifications, including knowledge, skills and competence. Almost half of the respondents (46%) believe that the CLE only partly contributed to maintaining their qualifications, while a total of 38% feel it contributed more significantly—28% to a large extent and 10% fully. This perception increases notably when considering the potential of the CLE. Nearly 60% of respondents see the CLE as having high potential to influence the future development of their qualifications—43% to a large extent and 15% believing it can fully contribute.

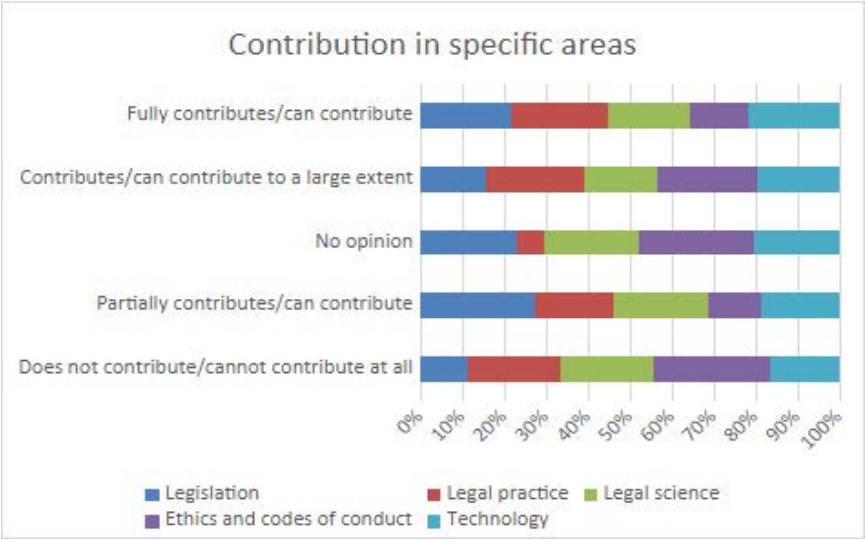
Graph 2. Responses to Question 1: To what extent does participation in CLE contribute to maintaining your professional qualifications (knowledge, skills, competencies)? and Question 2: To what extent can participation in CLE contribute to the development of your professional qualifications (knowledge, skills, competencies)?



Source: Authors

Since it was particularly important to identify where this contribution is and may be most relevant—considering changes in the legal environment and society at large—the respondents were asked to evaluate the relevance of CLE in five areas: legislative developments, legal practice, legal science, ethics and codes of conduct and technology. Based on the results shown in graph 3, we believe that legal practice—assuming the practical aspects of implementing and enforcing laws—is of the highest significance for respondents, with 77% indicating that CLE significantly contributes or could significantly contribute to their knowledge and understanding in this area. This is followed by technology (64%) and ethics and codes of conduct (62%), while 59% of respondents consider ongoing education on new legislative developments and legal science important.

Graph 3. Response to Question: To what extent does participation in continuing legal education (CLE) contribute/can contribute to the development of your professional qualifications in line with developments in the following areas?



Source: Authors

The survey indicates that, in principle, the training activities for attorneys have specified learning outcomes: 14 respondents (23%) reported that the outcomes were fully defined, while 30 respondents (49%) reported that they were partially defined. For a total of 7 respondents (12%), the learning outcomes were not defined, and 10 respondents (16%) did not have a position.

These results should also be considered in light of the fact that 62% of respondents believe the CLE only partially meets the current needs of the legal, social, and business systems; 26% feel it fully meets these needs; and 12% believe it does not meet these needs at all. This underscores the necessity of developing customised CLE activities that address current issues within the legal and socio-economic infrastructure.

Last but not least, 59% of respondents believe that the CLE should be mandatory. Among them, 26% support frequent training activities, while 33% prefer occasional activities. Conversely, 41% of respondents think participation should be voluntary.

7. DISCUSSION

Germany and Croatia illustrate two distinct approaches to regulating professional competence. In Germany, the starting point is the lawyer's status as an independent

organ of the administration of justice and the general duty to practise conscientiously. This is supplemented by distributed competence obligations and a strong formal CLE regime, but only for specialist titles. In contrast, Croatia begins with the lawyer's status as an independent and autonomous provider of legal services and explicitly legislates a duty of continuing professional development, supported by a dedicated institutional and procedural framework through the Bar and the Lawyers' Academy. Germany thus exemplifies a differentiated, principle-driven competence model, while Croatia exemplifies a formal, mandatory CLE system with clear institutional implementation. This distinction is particularly valuable for analysing North Macedonia. Germany demonstrates that professional competence can be secured without a universal attendance-based requirement, provided the system contains credible mechanisms for ensuring expertise. Croatia shows how a bar-managed system can codify annual training obligations, operate a central academy, issue certificates, maintain records, and link non-compliance to disciplinary consequences.

The Republic of North Macedonia can therefore be assessed against both models: Germany for the conceptual embedding of competence in the attorney's public role and Croatia for the operational design of a mandatory CLE framework.

Taken together, the legal framework regulating the profession of attorney in the Republic of North Macedonia — the Law on the Bar, the Statute, the Code of Professional Ethics and the disciplinary framework — constitutes a coherent structure in which statutory obligations, ethical principles and disciplinary mechanisms operate in conjunction. Within this structure, continuing legal education does not appear as an isolated training requirement, but as part of a broader system of professional accountability. The Macedonian model is, in a sense, both front-loaded and continuous, though not equally developed in both respects. Entry into the profession is relatively clearly organised, combining formal conditions, the bar examination and mandatory initial training. The law also explicitly requires ongoing professional education after admission. What is less clearly defined, however, are the standards governing that continuous education — its quality, scope, depth and the manner of its assessment. This makes it possible to move beyond the simple claim that North Macedonia lacks CLE. The issue is not the absence of such a system, but the risk of a gap between the existence of a formal obligation and the presence of a framework that genuinely ensures the maintenance of professional competence over time.

Although not part of the legal set-up of the legal profession in a strict sense, the Law on Higher Education[85] is highly relevant as an external structural source, since

[85] Law on Higher Education, Official Gazette 82/2018; 154/2019; 178/2021; 58/2024; 124/2025 (hereinafter: Macedonian Law on Higher Education).

it provides the legal basis for universities and law faculties to participate in lifelong and continuing education.[86] The law defines lifelong learning as a continuous process aimed at improving, supplementing, deepening and updating knowledge and treats it as both a guiding principle and an objective of higher education.[87] It also explicitly allows universities to establish centres for research and continuing education and to organise programmes of professional development and non-formal learning, including courses, seasonal schools and workshops, with the possibility of issuing certificates.[88] This source is further significant because it anchors the idea of law faculties contributing to CLE in an existing legal framework rather than presenting it as a mere policy proposal. The Law on Higher Education already enables universities to organise programmes of continuing and non-formal learning, issue certificates and run centres for professional development. This means that stronger cooperation between the Bar and the law faculties is not merely aspirational — it builds on the faculties' established legal capacity to provide lifelong learning. The gap, therefore, lies not in any legal impossibility, but in the absence of integration between the Bar's CLE mandate and the existing structures of the higher-education system — an integration that would ensure professional competence is systematically maintained throughout an attorney's career.

Another key source that supports moving the discussion toward a competence-based approach is the Law on the National Qualifications Framework.[89] This law explicitly links the national framework to the European Qualifications Framework, defines knowledge, skills and understanding and treats lifelong learning as a combination of formal, non-formal and experiential learning aimed at improving competences throughout life.[90] It also introduces a clear quality-assurance dimension: the framework must operate according to measurable goals, standards and guidelines, and qualifications are subject to periodic evaluation, review every five years, revision and adjustment.[91] The law additionally refers to certificates and micro-credentials.[92]

Taken together, these provisions provide a strong domestic basis for critiquing a CLE system focused solely on attendance, demonstrating that Macedonian law

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86 Macedonian Law on Higher Education, Articles 3, 4, 85, 141.

87 Macedonian Law on Higher Education, Articles 2-4.

88 Macedonian Law on Higher Education, Articles 85, 141.

89 Law on the National Qualifications Framework, Official Gazette No. 3/2025 from 03.01.2025 (hereinafter: Law on the National Qualifications Framework).

90 Law on the National Qualifications Framework, Articles 1, 2.

91 Law on the National Qualifications Framework, Article 22.

92 Law on the National Qualifications Framework, Articles 2, 9, 12, 13, 16, 21.

outside the Bar already embraces a qualification-, outcome- and quality-oriented model of professional development.

This creates an interesting contrast within the domestic system. On the one hand, the Law on the Bar requires mandatory continuing education through the Bar's Education Centre. On the other hand, the national qualifications framework brings a much richer vocabulary: standards, quality assurance, periodic review, lifelong learning, micro-credentials, measurable objectives and alignment with the EQF. Together, these developments support a compelling domestic argument: the law governing the attorneys' profession in North Macedonia does not operate in a normative vacuum; it coexists with a national qualifications regime that makes it increasingly difficult to justify CLE solely as attendance at seminars, without a stronger competence-based rationale.

Overall, the findings indicate a system that is normatively recognised as important but remains functionally underutilised. While continuing legal education is perceived as essential for maintaining and developing professional competence, participation levels remain inconsistent and relatively low. This gap between perceived value and actual engagement points to structural limitations, including issues of accessibility, cost, time constraints and a lack of clarity regarding the regulatory framework.

At the same time, the survey results reveal significant potential. Respondents clearly recognise the capacity of CLE to contribute more meaningfully to their professional development, particularly in practice-oriented areas. The perception that CLE only partially meets the needs of the broader legal and socio-economic environment further highlights a misalignment between existing training provision and real-world demands. These findings support the case for a shift towards a more structured, competence-based approach, combining clearer regulatory expectations with flexible and targeted learning opportunities, in order to enhance both participation and the substantive impact of continuing legal education.

To conclude, the comparative analysis, the domestic legal framework and the empirical findings together point to a system in the Republic of North Macedonia that is formally established but substantively incomplete: continuing legal education exists as an implicit legal obligation, yet lacks the systemic design needed to function as an effective mechanism for ensuring professional competence over time. Addressing this gap requires a move towards a structured, competence-based framework. Such a framework should include clearly defined learning outcomes aligned with professional roles, differentiated and specialised training pathways, and measurable standards and quality-assurance mechanisms, including periodic

programme evaluation. It should also ensure greater accessibility through flexible formats, address structural barriers, and strengthen institutional coordination between the Bar, the law faculties and other relevant actors. Taken together, these measures could transform continuing legal education into a coherent instrument of competence assurance, thereby strengthening the position of attorneys as holders of a public function and reinforcing their role in safeguarding the rule of law.

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Original scientific paper

SUSTAINABILITY AND HUMAN RIGHTS BY MANDATE - THE PROMISE AND PITFALLS OF THE CSDDD

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ABSTRACT

The Corporate Sustainability Due Diligence Directive (CSDDD) represents a central pillar of the European Green Deal's effort to integrate sustainability and human rights obligations into corporate governance.

By imposing mandatory due diligence obligations on large EU and non-EU companies operating within the internal market to identify, prevent, mitigate, and account for adverse human rights and environmental impacts of their activities, subsidiaries, and value chains, the CSDDD marks a paradigm shift from voluntary corporate social responsibility frameworks toward enforceable legal duties.

However, its adoption has been significantly shaped by the introduction of the so-called Omnibus I package, which recalibrated the scope, obligations, and enforcement mechanisms of the original Commission proposal.

The analysis in the first part of the paper shows how the Omnibus I adjustments influenced the final adopted text of the CSDDD, assessing the implications for regulatory ambition, legal certainty, and corporate accountability. Based on a theoretical analysis of legislative documents and a comparative evaluation of pre- and post-Omnibus provisions, the paper argues that while the adopted CSDDD maintains the Green Deal's core objectives, Omnibus I reflects a pragmatic move toward regulatory simplification and political feasibility.

The second part of the paper examines the normative and practical implications of both legislative instruments, emphasizing the mechanisms through which they operationalize the protection of human and environmental rights. Further, it explores the challenges and opportunities associated with their implementation, including corporate compliance, liability and the intersection of EU law with international human rights norms. The analysis underscores the importance of integrating legal mandates with corporate governance to achieve tangible reductions in environmental degradation and human rights violations, thereby advancing the EU's strategic objectives of sustainable and responsible economic development.

The paper concludes that the CSDDD, even modified through Omnibus I, represents a significant step toward integrating sustainability, human rights and environmental protection into the core of EU corporate law, though its ultimate effectiveness will depend on careful legislative design and robust implementation. Together, these instruments address the historical inadequacies in corporate accountability that have often resulted in the reduction or violation of human rights and environmental rights.

***Keywords**: Directive 2024/1760 (CSDDD), European Green Deal, Human and environmental rights, Omnibus I, Sustainability*

1. INTRODUCTION

After two unsuccessful attempts, the EU Directive on Corporate Sustainability Due Diligence[1] (CSDDD, also known as CS3D) entered into force on 25 July 2024, making it mandatory for in-scope companies domiciled or operating in the European Union (hereinafter: EU) to undertake corporate sustainability due diligence[2] throughout their production activities.

Pursuant to Article 2 of the Treaty on the EU (hereinafter: TEU), "the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights". The EU is taking steps to strengthen its commitment to fairer and more transparent supply chains, thereby addressing the main goals outlined in Articles 3(5) and 21(2) TEU.[3]

The CSDDD is based on Article 50 (1) and (2), in point (g), and Article 114 of the Treaty on the Functioning of the European Union (TFEU). Pursuant to its dual legal basis, the Directive aims to harmonise legislation to ensure a level playing field within the EU internal market and avoid distortions of competition.

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1 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 (Text with EEA relevance) [2024] OJ L, 2024/1760, Accessed 10 February 2026, (CSDDD).

2 The CSDDD also refers to corporate sustainability due diligence as "risk-based human rights and environmental due diligence". The two terms are used synonymously.

3 Hoffmeister, F., *The European Regulatory Approach on Supply Chain Responsibility*, Zeitschrift für Europargechtliche Studien, 25 February 2022, p. 248.

Both provisions give the EU the competence to legislate internally: Article 50 TFEU contains the powers of the EU to adopt legislative measures in the field of coordinating company law, while Article 114 TFEU enables the EU to adopt measures concerning the approximation of laws affecting the internal market.

The CSDDD's main goals are to ensure that European and third-country companies conduct due diligence to identify, prevent, and address environmental and human rights impacts, and to establish complaint procedures in case of adverse impacts related to the company's operations and their subsidiaries, as well as to their entire value chain.

Hence, the CSDDD creates a framework of specific measures that in-scope companies are required to adopt, but it also assigns various responsibilities to EU Member States, including implementing accompanying measures (Article 20) and supervising compliance by creating national supervisory authorities (Article 24).[4]

By aligning[5] the legal framework in Europe with international soft law, including the UN Guiding Principles on Business and Human Rights[6] (UNGPs), the OECD Guidelines for Multinational Enterprises[7] (OECD Guidelines), and the OECD Due Diligence Guidance for Responsible Business Conduct[8], the CSDDD aims to create a fair, competitive environment. In some parts, the CSDDD directly references these instruments as Guidance (e.g., Recitals 20, 37, 51, 59) or in a general manner a (e.g., Recitals 5, 6, 14, 62). In this way, companies are encouraged to interpret and apply the CSDDD in accordance with the globally recognized standards, promoting trust in its legitimacy.

The CSDDD offers harmonization of a fragmented legal landscape[9] on sustainability due diligence of EU Member States. By doing so, it reflects the EU's idea

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4 Garbellini Filho, L.H., *The EU Corporate Sustainability Due Diligence Directive: Migrant Workers and Emerging Challenges in Respecting Human Rights*, Spanish Yearbook of International Law, 28, 2025, p. 401

5 Villiers, C., *New Directions in the European Union's Regulatory Framework for Corporate Reporting, Due Diligence and Accountability: The Challenge of Complexity*, European Journal of Risk Regulation, Vol. 13, No. 4, 2022, p. 560

6 UN Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (HR/PUB/11/04), New York and Geneva, 2011 [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf].

7 OECD, OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, OECD Publishing, Paris, 2023 [https://doi.org/10.1787/81f92357-en].

8 OECD, OECD Due Diligence Guidance for Responsible Business Conduct, OECD Publishing, Paris, 2018[https://doi.org/10.1787/15f5f4b3-en].

9 Buhmann, K.; Feld, L., *Shifting boundaries: a transnational legal perspective on the EU Corporate Sustainability Due Diligence Directive*, Transnational Legal Theory, Vol. 15, No. 3, 2024, p. 371.

that "all businesses have a responsibility to respect human rights, which are universal, indivisible, interdependent and interrelated."[10]

This is obvious already from Article 1 of the CSDDD, which obligates companies to conduct human rights and environmental due diligence ("HREDD") on their own operations, subsidiaries, and business partners throughout their "chain of activities." In addition to the sustainability due diligence requirement and related liability, Article 1 also mandates the adoption of a climate change transition plan. The CSDDD will encourage companies to undertake stronger climate actions and align with the Paris Agreement's[11] goal of limiting global warming to 1.5°C.

This makes the CSDDD an essential tool for aligning corporate behavior with the Union's sustainability objectives under the EU Green Deal[12] and the EU Action Plan on Human Rights and Democracy.[13] The EU Green Deal, introduced in December 2019, is the European Union's master plan to transform its economy into a climate-neutral, circular, resource-efficient, and socially inclusive system by 2050. It provides a comprehensive roadmap for economic growth alongside environmental sustainability to address the climate crisis. Its key goals include reducing greenhouse gas emissions by at least 55 per cent by 2030 compared to 1990 levels, restoring biodiversity, transitioning to clean energy, and redesigning industrial, agricultural, and transport systems to operate within planetary boundaries.[14]

The Green Deal was influenced by increasing climate science warnings, the EU's commitments under the Paris Agreement, rising geopolitical pressures on energy security and raw material dependence, and the need to develop a more resilient, competitive, and innovation-driven economy.[15]

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10 European Parliament, CSDDD - P9_TA (2024)0329 of (COD)(2022)0051 & (COM(2022)0071, (Recital 7),
[https://www.europarl.europa.eu/RegData/seance_pleniere/textes_consolides/2022/0051/EP-PE_TC1-COD(2022)0051_EN.pdf], Accessed 11 February 2026.

11 Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104., Available at:
[https://unfccc.int/sites/default/files/resource/parisagreement_publication.pdf], Accessed 11 February 2026

12 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. The European Green Deal, COM/2019/640 final, Available at:
[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019DC0640], Accessed 10 February 2026.

13 Joint Communication to the European Parliament and the Council EU Action Plan on Human Rights and Democracy 2020-2024, JOIN/2020/5 final, Available at:
[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52020JC0005], Accessed 11 February 2026

14 See more on TraceX, Sustainability and Compliance Platform for Food and Agri supply chains, Available at:
[https://tracextech.com/eu-green-deal-guide/], Accessed 11 February 2026.

15 *Ibid.*

Since the launch of the Green Deal in 2019, the EU has steadily increased regulation of ESG and human rights issues in supply chains, introducing complementary instruments such as the EU Taxonomy for Sustainable Activities[16], the EU Deforestation Regulation[17], the EU Forced Labour Regulation[18], and finally CSDDD.

By fostering a culture of sustainability and social responsibility, encouraging transparency and ethical practices, and strengthening the Green Deal's approach to transforming the European Union's economy to achieve climate neutrality by 2050, the CSDDD advances the Green Deal.[19]

2. OMNIBUS I

On 29 January 2025, the European Commission presented its Communication titled A Competitiveness Compass for the EU[20], which is to "guide the work in the coming five years and lists priority actions to reignite economic dynamism in Europe".[21]

This plan includes the Omnibus[22] Simplification Package (also known as Omnibus I), which aims to reduce reporting burdens for all companies by at least

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16 Talala, A.; Pereira, E.; al-Masry, M.; Fowler, Richard M.E., *The EU corporate sustainability due diligence directive: implications and the Qatari case study*, The Journal of World Energy Law & Business, Vol. 18, Issue 4, 2025, p. 8.

17 Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making Available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 (Text with EEA relevance) [2023] OJ L 150.

18 Regulation (EU) 2024/3015 of the European Parliament and of the Council of 27 November 2024 on prohibiting products made with forced labour on the Union market and amending Directive (EU) 2019/1937 (Text with EEA relevance), [2024], OJ L, 2024/3015.

19 Butt, J.; Kousar, F., *Driving Sustainable Growth: The Corporate Sustainability Due Diligence Directive as a Catalyst (CSDDD) for Public Administration Reform and Corporate Accountability in the European Green Deal*, Journal of Accounting and Management, Vol. 14, 2022, p. 12.

20 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, A Competitiveness Compass for the EU, Brussels, 29.1.2025 COM(2025) 30 final, Available at: [https://commission.europa.eu/document/download/10017eb1-4722-4333-add2-e0ed18105a34_en], Accessed 11 February 2026.

21 Described by the President of the European Commission, Ursula von der Leyen, as a "roadmap", the Competitiveness Compass sets out an approach and a selection of flagship measures to translate" the recommendations of former European Central Bank President Mario Draghi "into reality in the coming years.

22 An omnibus is a legislative approach that the European Commission uses to simplify related European Union rules and reduce administrative burden. Between January and December 2025, the European Commission presented ten "Omnibus" packages as its main legislative tool for a collective review of various areas of EU policy. The first, dedicated to sustainability, was followed by those on investments

25% and for small and medium-sized companies (SMEs) by at least 35%.[23] The Commission's Work Program for 2025, published on 12 February 2025, further emphasized the importance of simplifying the EU's sustainability regulatory environment.

As a result of these plans, the EU Commission published the proposal for an Omnibus I on 26 February 2025, as part of its mission to improve the competitiveness of the European Union and to simplify EU sustainability due diligence regulation Namely, the CSDDD has been portrayed as a burden on businesses, and the Omnibus I should be understood as the Commission's U-turn from the European Green Deal to a Competitiveness Compass.

However, the EU business community does not seem to agree with the Commission's position on the CSDDD. According to them, the Commission disregards strong evidence from multiple studies that show that CSDDD benefits European companies.[24] One such research was conducted by the independent association of European business experts #WeAreEurope[25] and revealed that companies in the EU, including in Croatia, take corporate sustainability seriously and do not support the introduction of Omnibus I.

An additional reason behind the Omnibus I. is the strong geopolitical pressure coming from the EU–US trade agreement from August 2025 which explicitly commits the EU to take steps to ensure that the CSDDD does not impose undue restrictions on transatlantic trade. Namely, the EU commits to address US concerns regarding the imposition of CSDDD requirements on companies of non-EU countries with relevant high-quality regulations.[26]

(Omnibus II), agriculture (Omnibus III), the single market (Omnibus IV), defense (Omnibus V), chemicals (Omnibus VI), and the digital world (Omnibus VII), on environmental legislation (Omnibus VIII), on the automotive industry (Omnibus IX), and on the food and feed simplification package (Omnibus X), Available at:
[https://commission.europa.eu/document/download/9e358345-31e8-4cdd-8816-a30138ed07fe_en?filename=2025_%20Omnibus%20packages_List_for_Europa.pdf], Accessed 11 February 2026.

23 EU Commission, "A Competitiveness Compass for the EU", *op. cit.*, note 20, p. 17.

24 For more information see: Jäger, J., Durán, G., Schmidt, L., *Expected economic effects of the EU corporate sustainability due diligence directive (CSDDD), 2023,* Available at:
[https://www.sustainablesupplychains.org/wp-content/uploads/2024/03/AC16942622.pdf], Accessed 11 February 2026.

25 Omnibus Survey 2025, Available at:
[https://www.weareeurope.group/2025-cs3d-survey-download-page], Accessed 11 February 2026.

26 Joint Statement on a United States-European Union framework on an agreement on reciprocal, fair and balanced trade (Press release). Brussels: Directorate-General for Trade and Economic Security, 21 August 2025, Available at:
[https://policy.trade.ec.europa.eu/news/joint-statement-united-states-european-union-framework-agreement-reciprocal-fair-and-balanced-trade-2025-08-21_en], Accessed 11 February 2026.

According to the US in order for the EU to recover and reindustrialise, it must have access to secure, reliable and affordable energy. That access will materialise only if the EU succeeds in the ongoing effort to repeal or neuter its growth-killing Corporate Sustainability Due Diligence Directive (CS3D).[27]

This view seems to imply that the CSDDD would be a "giant regulatory apparatus" that makes compliance "practically impossible." But for whom? ExxonMobil is reportedly already reducing its workforce in Europe[28], while Qatar has threatened to suspend LNG shipments if the CSDDD is not repealed or significantly diluted.

However, some argue that the former stance reflects pressure from some large US companies to weaken the CSDDD by fragmenting Member States and exploiting trade negotiations, to protect interests linked to Europe's dependence on fossil fuels and limit the liability of their supply chains.

The Omnibus I includes three Commission proposals[29]: (i)"stop the clock" directive[30] on postponement of the implementation of CSDDD for one year, (ii) amendments to the Corporate Sustainability Reporting Directive (CSRD) and the CSDDD; (iii) amendments to the Carbon Border Adjustment Mechanism.[31]

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27 On December 2, 2025, the US ambassador to the EU, Andrew Puzder, wrote in the Financial Times, Available at: [https://www.ft.com/content/039868b5-d2d2-43d0-a2e1-aa654529d9f0]. In response to Puzder's editorial, Lindsay Hooper, executive director of the University of Cambridge's Institute for Sustainable Leadership, reacted on the same pages, Available at: [https://www.ft.com/content/526f6300-ccf1-4a8a-b9c7-aa756a548d27], Accessed 11 February 2026.

28 See more: Our business transformation continues with a reorganization of our business in Europe, centralizing the majority of EU employees at key locations, Available at: [https://corporate.exxonmobil.com/locations/european-region/european-newsroom/2025/reorganizing-our-footprint-in-the-european-union-and-norway#:~:text=This%20series%20of%20proposed%20changes,a%20divestment%20later%20this%20year.], Accessed 11 February 2026.

29 Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirement, Available at: [https://commission.europa.eu/publications/omnibus-i_en#files], Accessed 11 February 2026.

30 The European Council and Parliament adopted the Stop the Clock Directive without changes. The Stop the Clock Directive entered into force in April 2025 with an accelerated approval process through EU regulatory authorities. Member States must transpose the Stop the Clock Directive into national law by 31 December 2025, and some have already done so by the date of this article. Directive (EU) 2025/794 of the European Parliament and of the Council of 14 April 2025 amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements (Text with EEA relevance) OJ L 2025/794.

31 See: European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2023/956 as regards simplifying and strengthening the carbon border adjustment mechanism, COM(2025) 87 final and the Annexes thereto.

The Omnibus I aims to adjust the scope and the content of the CSRD and CSDDD in terms of simplifying the green reporting rules and sustainability due diligence obligations under the CSRD and the CSDDD. One frequently cited justification for cutting corporate sustainability rules is to reduce compliance costs for businesses, estimated by the Commission at around 320 million euros[32] under the CSDDD.[33]

On 9 December 2025, the EU Council and the European Parliament reached a provisional agreement on the revision of the CSRD and the CSDDD[34]. The European Parliament adopted the text on 16 December 2025[35], and the EU Council adopted the final Omnibus I text on 24 February 2026.[36]

In the next chapter, we will compare the main changes between the CSDDD and the Omnibus I.

2.1. The Personal Scope

The scope of application of the CSDDD is laid out in Article 2 and is defined by legal form, size, and place.

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[32] Commission staff working document accompanying the documents proposal for a directive of the European parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements Proposal for a directive of the European parliament and of the Council amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements and specifying further steps, SWD/2025/80 final, Available at:
[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52025SC0080], Accessed 15 February 2026.

[33] It is even more under the Parliament's position, as claimed by the Omnibus I rapporteur, Jörgen Warborn, Available at:
[https://multimedia.europarl.europa.eu/en/webstreaming/press-conference-by-jorgen-warborn-epp-se-rapporteur-on-simplified-sustainability-reporting-and-due_20251113-1330-SPECIAL-PRESSER], Accessed 15 February 2026.

[34] Council of the European Union, Press release, Council and Parliament strike a deal to simplify sustainability reporting and due diligence requirements and boost EU competitiveness, 9 December 2025, Available at: [https://www.consilium.europa.eu/en/press/press-releases/2025/12/09/council-and-parliament-strike-a-deal-to-simplify-sustainability-reporting-and-due-diligence-requirements-and-boost-eu-competitiveness/], Accessed 15 February 2026.

[35] European Parliament legislative resolution of 16 December 2025 on the proposal for a directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements (COM(2025)0081 – C10-0037/2025 – 2025/0045(COD)), Available at:
[https://www.europarl.europa.eu/doceo/document/TA-10-2025-0324_EN.html], Accessed 15 February 2026.

[36] Directive (EU) 2026/470 of the European Parliament and of the Council of 24 February 2026 amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting requirements and certain corporate sustainability due diligence requirements (Text with EEA relevance) [2026], OJ L, 2026/470, (Omnibus I).

The personal scope of the CSDDD extends to "companies," which are defined in Article 3(1)(a) of CSDDD as legal persons constituted as one of the legal forms in Annexes I and II of the EU Accounting Directive[37]. Annex I of the EU Accounting Directive lists corporate entities, whereas Annex II lists partnerships.

In the Member States, not all entities listed in the annexes to the EU Accounting Directive have legal personality under their national laws and may therefore not be treated as "legal persons". Considering that at the EU level, attribution of legal personality is not harmonized, the scope of application can vary from one Member State to another.

The CSDDD applies to very large EU companies of 1000 employees and an annual turnover of 450 million euros (Article 2(1) (a)). In the case of non-EU companies[38] with activities in the EU, the criterion of the number of employees is not relevant, only the annual turnover of 450 million reached in the EU (Article 2(2)(a)). It will also apply to companies which do not meet these thresholds, but are the ultimate parent company of a group which reaches these thresholds (Article 2(1)(b) and 2(2) (b)), as well as companies that have entered into franchising or licensing agreements in the EU in return for royalties amounting to more than EUR 22.5 million in the EU, and a net turnover of more than EUR 80 million (Article 2(1)(c) and 2(2)(c)). Altogether, the European Commission estimates that the CSDDD covers 6,900 companies[39] or approximately 0.05% of EU companies and business activities.[40]

Although micro-companies and SMEs are excluded from the scope, they can be indirectly affected by human rights due diligence processes if commercially linked to in-scope companies.[41]

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37 Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC Text with EEA relevance [2013] OJ L 182, Accessed 15 February 2026.

38 Note that for practical reasons, the CSDDD does not define an employee threshold for non-EU companies in the personal scope.

39 European Commission, 'Directive on Corporate Sustainability Due Diligence: Frequently asked questions' (July 2024) (CSDDD FAQ), , pp. 6 and 7, Available at: [https://wp.table.media/assets/wp-content/uploads/2024/07/30160952/240719_CSDD_FAQ_final.pdf], Accessed 12 February 2026.

40 Overview of the Corporate Sustainability Due Diligence Directive; Advancing Corporate Responsibility, European Coalition for Corporate Justice, 2024, p. 12., Available at: [https://corporatejustice.org/wp-content/uploads/2024/10/Overview-of-the-Corporate-Sustainability-Due-Diligence-Directive-Advancing-Corporate-Responsibility-ECCJ-2024.pdf], Accessed 19 February 2026.

41 Garbellini Filho, *op. cite.*, note 4, p. 404.

The CSDDD has a clear extraterritorial reach[42], requiring in-scope companies to address the adverse impacts of their operations, regardless of the territory where they occur.

The CSDDD must be transposed into national law by Member States within two years. Pursuant to Article 37, the provisions will apply gradually, starting with companies of 5,000 employees and a turnover of 1.5 billion EUR from 26 July 2027, followed by companies of 3,000 employees and a turnover of 900 million EUR from 26 July 2028, and finally with companies of 1,000 employees and a turnover of 450 million EUR from 26 July 2029.

The text specifies that the CSDDD only applies to companies that have met these thresholds for two consecutive financial years.[43] Conversely, it will cease to apply to companies if the conditions specified in the CSDDD are not met for each of the last two relevant financial years.

Finally, the review clause under Article 36 envisages potential future adjustments in regard to the personal scope, in terms of whether different corporate forms need to be considered, whether sector-specific approaches are needed, and whether employee or turnover thresholds need to be revised, providing clarity on the direction of further amendments.

The CSDDDs' size criteria for in-scope companies have been keenly debated in Omnibus I. The Commission had not originally proposed any changes to the scope of CSDDD; nonetheless, the Council and the Parliament both supported higher thresholds.

With the adoption of the Omnibus I the scope of the CSDDD has been significantly restricted.

The CSDDD will now apply only to large EU companies with more than 5,000 employees and a net turnover exceeding 1.5 billion Euros.[44] The thresholds for franchising and licensing have also been increased, rising to 75 million euros in licensing fees and 275 million euros in worldwide net turnover for EU companies, or 75 million euros in licensing fees in the EU and 275 million euros in EU turnover for non-EU companies.

The threshold for non-EU companies was also increased, from 450 million euros to 1.5 billion euros in EU turnover.[45] Omnibus I does not specify how Mem-

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42 Bueno, N. *et al.*, *The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise*, Business and Human Rights Journal, Vol. 9, No. 2, 2024, p. 298.

43 Article 2(5) CSDDD.

44 Article 4(2)(a) Omnibus I.

45 Article 2(2) Omnibus I.

ber State authorities will oversee enforcement of the CSDDD against non-EU companies lacking physical presence in the EU, which may raise compliance and enforcement concerns.

The in-scope companies must implement the measures from 26 July 2029, while Member States must designate their national competent authorities and transpose the directive into their national law before 26 July 2028.[46]

2.2. Material Scope

Companies subject to the CSDDD are expected to perform risk-based HREDD within their own operations, subsidiaries, and business partners, covering the company's entire value chain, including both direct and indirect business relationships. It also requires companies to adopt and implement, to the best of their ability, a transition plan for climate change mitigation that aligns their business models and strategies with the goals of the Paris Agreement and a net-zero economy.[47]

To identify the adverse impact during HREDD processes, the CSDDD opts to refer to the rights, prohibitions, and international instruments in the annex, divided into two parts. Part I consists of two sections: "rights and prohibitions included in international human rights instruments" and "human rights and fundamental freedoms instruments". Part II focuses on "prohibitions and obligations included in environmental instruments".

The CSDDD defines 'adverse human rights impact'[48] as the impact resulting from an abuse of selected human rights, tailored to corporate conduct[49], and other human rights such as employment and social rights[50] enshrined in a list of international instruments.[51] Furthermore, Member States must also ensure that any abuse of a human right not listed in Part I, Section 1 of the Annex but which is enshrined in one of the human rights instruments listed in Part I, Section 2 of the Annex also constitutes an adverse human rights impact, if:

- the right concerned can be abused by a company or legal entity;

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46 *Ibid.*

47 Radchenko, M., *Greening the Supply Chain: CSR Clauses and Codes of Conduct in Light of the Corporate Sustainability Due Diligence Directive (CS3D),* Journal of Law and Commerce, Vol. 43, No. 2, 2025, p. 363.

48 Article 3(1)(c) CSDDD.

49 Annex I, Part I, Section I, CSDDD.

50 Article 1(2) CSDDD.

51 Annex I, Part I, Section I CSDDD.

- the abuse directly impairs a legal interest protected in the human rights instrument; and
- the company could have reasonably foreseen the risk that such a human right may be affected, taking into account the circumstances of the specific case.[52]

The CSDDD defines "environmental adverse impacts"[53] in two ways. Firstly, if environmental degradation affects certain human rights set out in Part I, Section 1 of the Annex.[54] Secondly, adverse environmental impacts can result from breaches of a selection of international environmental obligations and prohibitions listed in Part II of the Annex.

The CSDDD requires businesses to conduct due diligence with respect to specific human rights listed in an Annex. This includes the right to life; the prohibition on torture; the right to liberty and security; rights to privacy and freedom of thought; various core labour protections such as the right to just and favourable work, prohibition of child labour and forced labour, the right to freedom of association and collective bargaining and the prohibition of unequal treatment in employment; and certain land rights such as harmful soil change, water or air pollution.

Companies are also required to consider rights derived from specific human rights instruments listed in the Annex. Annex, Part I, Section 2 expressly cites the ILO's core conventions. The ILO's core conventions comprise the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87); Right to Organise and Collective Bargaining Convention, 1949 (No 98); Forced Labour Convention, 1930 (No 29) and its 2014 Protocol; Abolition of Forced Labour Convention, 1957 (No 105); Minimum Age Convention, 1973 (No 138); Worst Forms of Child Labour Convention, 1999 (No 182); Equal Remuneration Convention, 1951 (No 100); Discrimination (Employment and Occupation) Convention, 1958 (No 111).

International labour standards prohibit child labor and force labour. Yet ILO statistics reveal that there are 27,6 million global victims of forced labour world-

52 Article 3(1)(c)(ii) CSDDD.

53 Article 3 (1)(b) CSDDD.

54 Point 15 of Part I, Section 1, of the Annex captures measurable environmental degradation or other impacts on natural resources that lead or may lead to negative impacts on one or more of the following: the rights to food, water, sanitation, health, safety and property, and ecosystem services contributing to human well-being. Point 16 of Part I, Section 1 of the Annex captures unlawful land-grabbing or natural resource appropriation, including by deforestation, that leads or may lead to negative impacts on the rights of individuals, groups, and communities to lands and resources, or the right not to be deprived of means of subsistence.

wide.[55] The report by Hodu and others[56], on the potential impact of the CSDDD on least developed countries, notes that the Democratic Republic of Congo has ratified the ILO's core conventions, signalling its opposition to child labour, slavery, and forced labour.

The due diligence obligation also covers addressing adverse impacts on the environment resulting from breaches of prohibitions and obligations under environmental conventions listed in the Annex (such as the Stockholm Convention on Persistent Organic Pollutants, Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal or the Convention Concerning the Protection of the World Cultural and Natural Heritage), as well as environmental degradation, such as harmful soil changes, water or air pollution, the prohibition on the discharge into the sea of noxious liquid substances or excessive water consumption.

As for Omnibus I, it does not affect the material scope of the CSDDD.

2.3. The Due Diligence Obligation

The due diligence requirements should promote meaningful engagement by companies to build trust and transparency when identifying and taking actions to prevent and address adverse human rights impacts.

At the core of the CSDDD are the "risk-based"[57] HREDD obligation that the companies will have to conduct by carrying out the following seven core actions[58]: i) integrating due diligence into corporate policies and risk management; ii) identifying and assessing actual and potential adverse impacts; iii) preventing such impacts; iv) providing remediation; v) meaningfully engaging with stakeholders; vi) establishing a notification mechanism; vii) monitoring the effectiveness of due diligence measures; and publicly communicating.

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55 ILO, Walk Free and International Organization for Migration, Global Estimates of Modern Slavery, Forced Labour and Forced Marriage (Geneva: ILO, Walk Free, IOM, 2022), p. 2, Available at: [https://academic.oup.com/ilj/advance-article/doi/10.1093/indlaw/dwaf029/8251871], Accessed 3 March 2026.

56 Ngangjoh-Hodu, Y., *et al.*, *The proposed EU Corporate Sustainability Due Diligence Directive and its impact on LDCs : A Legal Analysis*, Ministry for Foreign Affairs of Finland, Available at: [https://julkaisut.valtioneuvosto.fi/handle/10024/164784], Accessed 3 March 2026.

57 Ciacchi, S., *The newly-adopted Corporate Sustainability Due Diligence Directive: an overview of the law-making process and analysis of the final text*, ERA Forum 25, 2024, pp. 29–48.

58 Article 5(1) CSDDD. As laid down in Articles 7 to 16.

The above obligations are largely phrased as "obligation of means", not "obligations of result"[59], as such companies are not expected to guarantee that adverse impacts will not occur, nor that they will always be prevented; however, they are obliged to take appropriate measures that are capable of achieving the objectives of due diligence.[60]

Mapping all activities and impacts at the entity level is limited with Omnibus I to Tier-1 suppliers, reducing the reporting scope for indirect suppliers without contractual ties.

Companies should base their research only on 'reasonably available information.' This aims to avoid overburdening small business partners with information requests whenever possible. The scoping exercise should produce a risk index that highlights the 'general areas' where negative impacts are most likely or significant. These areas should then be examined further to identify specific potential or actual negative impacts. Information requests to business partners should be made only when necessary. Additionally, if the business partner has fewer than 5,000 employees, only information that cannot reasonably be obtained otherwise should be requested. If companies identify risks of adverse impacts that are equally likely or significant for both direct and indirect business partners, they may prioritize impacts among direct business partners when conducting further due diligence.[61]

Periodic assessments of operations and the adequacy and effectiveness of due diligence procedures are now required every five years[62] (previously annually), or when there are reasonable grounds to believe the measures are inadequate.

2.4. Climate transition plan

Article 22 of the CSDDD introduced a clear behavioral standard, explicitly requiring companies to adopt and put into effect a transition plan for climate change mitigation which aims to ensure, through best efforts, that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5° C in line with the Paris

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59 Pietropaoli, I., *et al.*, *Towards New Human Rights and Environment Due Diligence Laws: Reflections on Changes in Corporate Practice*, British Institute of International and Comparative Law, 2024, p. 17., Available at: [https://www.biicl.org/documents/186_final_towards_new_hredd_laws_reflections_impacts_on_corporate_practice.pdf], Accessed 27 February 2026.

60 *Ibid.*, Recital 19.

61 Article 4 (6) (b) Omnibus I.

62 Article 4(11) Omnibus I.

Agreement and the objective of achieving climate neutrality (…) by 2050. Therefore, in-scope companies that are not required to submit sustainability reports under the CSRD will still have a duty to develop a climate transition plan. These plans must include greenhouse gas (GHG) emission-reduction targets for their Scope 1, Scope 2, and, in certain cases, Scope 3 emissions. They should also define measures, assign internal responsibilities for achieving these targets, and outline how they will finance these measures.

The requirement for in-scope companies to adopt and implement transition plans to mitigate climate change in accordance with the Paris Agreement has been removed. The Omnibus I now deletes the phrase "and put into effect." This change was introduced based on an assessment that the requirement was overly burdensome and disproportionate.

However, already the CSDDD in Recital 73 clarified that while companies should strive to achieve the GHG emission reduction targets contained in their plans, specific circumstances may lead to companies not being able to reach these targets, where this is no longer reasonable. Thus, the deletion of "and put into effect" merely clarifies that companies are only subject to an obligation of conduct, not of result.

2.5. Civil Liability

Both EU and non-EU companies within the scope of CSDDD may face considerable liability risks. The central provision introducing a civil liability framework is Article 29.

Companies can be held liable for damages caused to a natural or legal person's interests if they intentionally or negligently fail to meet the CSDDD's due diligence requirements to prevent or stop adverse effects (Articles 10 and 11). The claimant must demonstrate that the breach caused damage[63]. These due diligence duties apply only to a company's operations and subsidiaries, not to business partners in the supply chain.[64]

However, liability does not apply to all obligations under the CSDDD. Notably, the CSDDD itself does not provide for any liability associated with a company's climate plan obligations under Article 22.

[63] Article 29 (1)(b) CSDDD.

[64] *Ibid*., Article 29 (1).

The CSDDD facilitates private enforcement by empowering trade unions and NGOs in a Member State to act on behalf of individuals who may be based abroad and/or lack the resources, knowledge, or motivation to initiate legal proceedings on their own (Article 29(3)(d)). Where damage is caused to many people (e.g., all workers in a factory), there is scope under the CSDDD for a trade union or NGO to represent some or all the injured parties. Unlike the mechanism under which collective redress was introduced, the CSDDD expressly clarifies that the Member States can, but are not expected to, extend the provisions of their national law on representative actions.[65]

The lack of a collective redress mechanism is a result of national business associations' pressure to limit access to justice to the directly affected victims, which they saw merely as a risk of creating excessive litigation.[66] But, at the same time, the removal of the possibility of bundling the victims' claims might lead to a larger number of individual court cases. Not only will that lead to a higher litigation cost for both litigants, but it will also create a more fragmented case law and higher legal insecurity.

Under the CSDDD, companies may be ordered to disclose evidence to the claimant, provided the latter presents a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of their claim for damages and indicates that additional evidence lies in the control of the company (Article 29(3)(e) and Recital 83). Such (pre-action) disclosures, which are foreign to most EU civil law jurisdictions, are limited to what is necessary and proportionate to support a (potential) claim for damages. In determining whether a disclosure order is proportionate, courts shall consider the initial justification of the claim, the scope and cost of disclosure, and whether the evidence to be disclosed contains confidential information.

Courts can order the company to disclose evidence according to national procedural law[67]. Such a court order only requires the claimant to provide reasonably available facts and evidence that make his claim plausible and to indicate that further evidence is in the defendant's control.

This could cause significant problems and probably require changes to Croatia's civil procedural law, especially the introduction of a special regime for evidence

65 Recital 84 CSDDD.

66 Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements and specifying further steps, Brussels, 26 February 2025, SWD(2025) 80 final.

67 Recital 83 CSDDD.

discovery. In Croatian procedural law, the party that needs to prove a fact is also responsible for providing the necessary evidence. The Croatian procedural code does specify some exceptions to this rule. For example, it permits the court to order any party to produce documents and records (Article 233(1) of the Civil Procedure Law), but only if the opposing party cites those specific documents. Since claimants in supply chain lawsuits generally cannot identify the necessary documents ahead of time, their chances of success are limited.

A possible solution should be found in the provisions of Article 6 of the Act on Procedures for Compensation of Damages for Violations of Market Competition[68], which governs the disclosure of evidence in Croatian law.

The (pre-action) disclosure regime under the CSDDD is mandatory, even if the applicable law to the claims is not that of a Member State.

Civil liability can attach to a parent company or to a specific subsidiary within a group. A subsidiary might be held liable for damage, regardless of whether the due diligence obligations were supposed to be observed by the subsidiary or by the parent company on behalf of the subsidiary. If the damage is caused jointly by the company and its subsidiary, or direct or indirect business partners, they are jointly and severally liable.

Limitation periods for bringing civil liability claims must be at least five years and, in any case, should not be shorter than the limitation period under national civil liability rules[69]. The limitation period shall not start to run before (i) the relevant infringement has ceased and (ii) the claimant knows or should reasonably be expected to know about the infringement, the harm caused by it, and (iii) the identity of the infringer.

The CSDDD mandates that the laws of Member States transposing the CSDDD's liability regime are overriding and mandatory.[70] The overriding mandatory character would only manifest itself when the law of a third country would otherwise govern the claims,[71] including requirements as to who can bring a claim, the statute of limitations, and the disclosure of evidence.

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68 Act on Procedures for Compensation of Damages for Violations of Market Competition, Official Gazette No. 69/17.

69 Article 29 (3)(a) CSDDD.

70 The doctrine of overriding mandatory rules is based on Article 9 of the Rome I Regulations and Article 16 of the Rome II Regulations.

71 Article 29 CSDDD.

The EU-wide harmonised liability regime has also been removed from the CS-DDD with Omnibus I. Regarding 'effective legal protection', Member States must ensure that liability for violations of the CSDDD is enforceable, but this may be done under their chosen usual or specific national liability regime[72]. As is customary with this type of legislation, it is therefore up to the Member States themselves to determine the conditions for liability, such as causality and attribution. As a result, the success of a claim may differ across Member States.

Furthermore, Member States are no longer required to prioritize precedence to national law provisions arising from the CSDDD in cases where claims are not governed by national law[73]. The requirements for collective action have also been removed.[74]

3. OMNIBUS I, SLASHES HUMAN RIGHTS AND ENVIRONMENTAL PROTECTIONS

Since there are major differences between CSDDD and the Omnibus I, the most relevant among them being the reduced scope in terms of the number of companies affected, the limited focus on Tier 1 suppliers and the reduced scope of due diligence requirements, the dilution, respectively the abandoning, of civil liability, and the abandoning of climate transition plans. The effects on achieving human rights goals, environmental goals, and economic change are expected to differ substantially between these laws. Each of them will be examined separately in the next part of the paper.

3.1. Limited Focus on Tier 1

The Omnibus I limits the legal mandate to conduct HREDD to Tier-1 suppliers only, i.e., those directly supplying manufacturers or businesses, requiring in-depth assessments only for them - unless in-scope companies have plausible information that suggests an adverse impact at the level of an indirect business partner. By limiting the scope mainly to the Tier-1, the Omnibus I reduces the due diligence costs[75] that firms would incur if they also covered lower tiers.

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72 Article 4 (20)(a) Omnibus I.

73 Article 4 (20)(e) Omnibus I.

74 Article 4 (20)(c) Omnibus I.

75 The German BAFA has noted that not systematically examining risks with Tier 2 or 3 suppliers raises costs for companies in the long term: "In short, companies that consider the risks in the extended supply chain from the very beginning will not have to bear the high costs of ad hoc risk analyses or modify their preventative measures as a result., See more at Federal Office for Economic Affairs and Export Control (2025), Available at:

However, this shift significantly weakens corporate responsibility by limiting accountability to direct business partners (own operations, subsidiaries, and direct relationships) rather than to the full value chain. Since the most severe human rights and environmental violations typically occur further upstream, beyond Tier-1 suppliers,[76] this provision incentivizes companies to overlook deeper supply chain risks.

To better understand the implications of limiting due diligence to Tier-1, a real case from the Chilean mining sector will be examined.

KGHM Chile is a subsidiary of KGHM Polska Miedz SA, a Polish mining company that owns 55% of the Sierra Gorda mine in Antofagasta, north of Chile. The company states that it employs 1,513 direct workers and 2,669 outsourced "contratistas," totaling 4,182 employees. Essentially, 60% of the company's operations rely on contractors from other entities.[77]

By restricting KGHM Polska Miedz SA's responsibility to tier-1 suppliers, more of the 2,669 contracted workers could be sourced externally.

Since 2016, Sierra Gorda has faced accusations of environmental damage that directly threaten the residents of Sierra Gorda and Baquedano. The main issue is air pollution. In 2024, parliamentarians requested a special session of the Cámara de Diputados Environment Committee to address the serious pollution in the area resulting from mining activity, which has led to concerning increases in illnesses in the community, especially cancer cases.

Conduction of HREDD across the entire value chain, which was predicted with the CSDDD KGHM Polska Miedz SA's would be liable for air pollution.

The case study on Chile shows that a focus on tier 1 is highly problematic due to outsourcing practices, which are also common in manufacturing sectors such as the textiles industry.[78]

Namely, the narrow focus on tier 1 suppliers would not have prevented the Rana Plaza tragedy, in which 1135 people died, and more than 2400 were injured in a factory in Bangladesh due to a lack of safety standards for workers. Most of the companies involved in the Rana Plaza disaster were beyond tier 1 in European

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[https://www.bafa.de/SharedDocs/Downloads/EN/Supply_Chain_Act/guidance_risk_analysis.pdf?__blob=publicationFile&v=3], Accessed 28 February 2026.

76 Govindan, K., *et al.*, *Social sustainability tensions in multi-tier supply chain: A systematic literature review towards conceptual framework development*, Journal of Cleaner Production, Volume 279, 2021, pp. 1-22

77 Jäger, J. *et al.*, *op. cit.*, note 24.

78 *Ibid*, p. 47.

companies' value chains, as these companies use outsourcing and subcontracting in their value chains.[79]

In contrast, the original approach taken by the CSDDD was regarded as a major step forward. In the above cases, the CSDDD would be required to conduct due diligence using a risk-based approach that covers upstream suppliers (raw materials and production) and specific downstream activities for adverse impacts on human rights and the environment. For example, an EU trader would need to screen subcontractors responsible for production.

The United Nations Working Group on business and human rights recalled in March 2025 that restrictions on human rights due diligence, particularly limiting it to 'direct partners', undermine the comprehensive approach that the United Nations Guiding Principles on Business and Human Rights (UNGPs) require.[80]

3.2. Fragmented Rules on Civil Liability and Access to Justice

Omnibus I dismantles key elements of Article 29, risking both corporate accountability and victims' access to justice. While it doesn't eliminate liability itself, it ends the harmonization of the conditions for companies' civil liability across Member States.

Namely, by invoking the principle of subsidiarity (Recital 49 Omnibus I), the obligation to establish civil liability at the EU level was removed; however, Member States are legally required under international and European law to establish civil liability to ensure access to justice under Article 47 of the EU Fundamental Rights Charter[81]. Member States are free to choose how to implement such rules.

It is expected to create practical problems: EU Member States will enforce their own regulations, exposing companies to different liability conditions and risks across various jurisdictions, which contradicts any claim of simplification.

Furthermore, Omnibus I eliminates the obligation to enable third-party representative actions[82] and removes the obligation to ensure the overriding mandatory

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79 *Ibid*, p. 47.

80 Statement by the United Nations Working Group on Business and Human Rights on the European Commission's "Omnibus simplification package", 20 March 2025, Available at: [https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/wg-bhr-statement-19-03-2025.pdf], Accessed 27 February 2026.

81 Charter of Fundamental Rights of the European Union [2012] OJ C 326.

82 European Coalition for Corporate Justice, *Suing Goliath: An analysis of civil cases against EU companies for overseas human rights and environmental abuses*, Available at:

application[83] of Article 29 in cross-border cases. This would mean that whenever a national liability regime is not granted overriding mandatory status, EU courts would be required to apply the lex loci damni.[84] Consequently, the regulation of such matters will be left to Member States, creating a fragmented and inconsistent legal landscape across the EU.

As the critics in the legal literature rightly point out, Article 29(7) CSDDD is challenging because it is not entirely clear how the doctrine of overriding mandatory rules (based on Article 9 Rome I, and Article 16 Rome II Regulations) would apply to civil liability claims grounded in the rules implementing the directive. Nonetheless, the CSDDD approach might have had the potential to open new avenues for further practical and conceptual development of this conflict-of-law doctrine.

Currently, as the Omnibus I explicitly rules out the overriding mandatory character of the (remaining parts of) the CSDDD civil liability regime, one would rather not expect from Member States' legislatives or courts to elevate the regular domestic civil liability rules to the semi-public level of overriding mandatory provisions.[85]

Removing the harmonisation of civil liability and certain access-to-justice provisions, Omnibus I risks reintroducing the legal uncertainty and complexity[86] that the CSDDD aimed to eliminate. The experts from the UN Working Group warned that leaving civil liability to the discretion of EU Member States at the national level severely hampers access to justice for victims and can lead to a lack of coherence and consistency in access to remedies across the EU.[87]

Victims will have to navigate a patchwork of national tort laws, which have historically failed to hold corporations accountable for human rights and environmental violations. Furthermore, the Omnibus I contradicts the stated goal of "simplification" for companies. Instead of a single, predictable, harmonized EU-wide regime,

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[https://corporatejustice.org/publications/suing-goliath/], Accessed 27 February 2026, p. 76.

83 *Ibid*., p. 77.

84 Radchenko, M., *op. cit.*, note 47, p. 387.

85 Pannebakker, E., *Under the Omnibus: Corporate Sustainability Due Diligence Directive's rules on civil liability no longer overriding mandatory*, 4 June 2025, Available at: [https://conflictoflaws.net/2025/under-the-omnibus-corporate-sustainability-due-diligence-directives-rules-on-civil-liability-no-longer-overriding-mandatory/], Accessed 1 May 2026.

86 In the recent study by the JARO Institute on Sustainability and Digitalization, approximately half (53%) of the surveyed businesses expect more liability risks now that the CS3D might not be of overriding mandatory application. Yougov survey 15 - 28.04.2025 LKSG and CSDDD in a reality check: opinions of 1,350 business decision-makers, Available at: [https://jaro-institut.de/wp-content/uploads/2025/06/JARO_YouGov_21052025_final3-EN.pdf], Accessed 27 February 2026.

87 Statement by UNWG, *op. cit.*, note 80.

companies will now be exposed to a multitude of legal regimes[88], not only from the EU but also from other countries. The removal of third-party representative action will also further restrict access to courts for victims with limited resources, who can no longer rely on NGOs, trade unions, or national human rights or environmental institutions for support.

3.3. Removal of the Climate Transition Plan

The CSDDD originally contained a strong provision on the climate transition plan. Companies in scope were required not only to adopt but also to implement a climate transition plan to align their business models with the 1.5°C goal of the Paris Agreement. However, Omnibus I removed the climate transition plan requirement from the CSDDD, making it more challenging to mandate the right level of climate action and to reach global climate targets.

The deletion of the obligation to implement climate transition plans would not lead to the simplification, according to a group of 30 legal scholars[89] who believed that mere disclosure, without clear behavioral duties, would lead to heightened legal liability risks for companies and legal fragmentation, inefficiency, and uncertainty.[90]

Thus, the question arises: what will be the implications of Article 22 without the obligation to put the plan into effect, for future corporate climate change litigation addressing a corporate obligation to mitigate?

According to the impact assessment supporting the CSDDD Proposal, "a growing number of companies are being sued in court for causing harm, which may be the consequence of the lack of clear regulatory requirements."[91] Notably, the impact

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88 According to Geert Van Calster, companies would therefore be exposed not to 27 regimes, not even to 206 regimes (this is the number of States currently recognised by the United Nations), but rather to the 206 PLUS any regional divergence that exists in many of them. For more see: Geert Van Calster, *Legal opinion: how the Omnibus creates uncertainty on civil liability for companies*, 2025, p. 8, Available at: [https://gavclaw.com/wp-content/uploads/2025/06/legal_opinion_gvc.pdf], Accessed 27 February 2026.

89 See Legal Scholars Concerned about the Weakening of Article 22 CSDDD on Climate Transition Plans, 02 May 2025, Available at: [https://www.smithschool.ox.ac.uk/sites/default/files/2025-05/Letter_Legal_Scholars_EU_Art_22_CSDDD_2025.pdf], Accessed 27 February 2026.

90 Healy, P.; Bing, J.; Schufft, F. R.; Kleemann, E., *Towards a Balanced Omnibus Proposal: Simplifying the CSDDD and CSRD While Upholding Human Rights and Environmental Standards,* Germanwatch, 2025, p. 16, Available at: [https://www.germanwatch.org/en/node/93274], Accessed 27 February 2026.

91 Commission SWD/2022/42, final, Impact assessment report Accompanying the document Proposal for Directive of the European Parliament and of the Council on Corporate Sustainability Due Dili-

assessment explicitly refers to the climate case of Milieudefensie v Shell,[92] in which the Court concluded that under the Dutch tort law, a corporation may have an obligation to reduce its Scope 1, 2, and 3 GHG emissions.[93]

Beyond highlighting the legal risks businesses face when they fail to properly incorporate climate change considerations into their policies, it also affirms that corporate entities must develop comprehensive climate risk management strategies, including assessing and reporting on emissions across the entire value chain.[94]

4. CONCLUSION

There is little doubt that the CSDDD is a positive step forward and will likely have significant implications for companies and rightsholders worldwide. The effort to address and prevent human rights and environmental impacts outside the EU's jurisdiction is commendable and reflects recent trends in international law. It is also clear that the development of HREDD itself neither started nor ended with the CSDDD and Omnibus I.

The CSDDD represents a compromise between different models, ambitions, and interests. It is far from a perfect legal instrument: some of its instructions are lacking in detail; it is not as progressive as one may have expected it to be; some parts are lacking in ambition, and other features could even be regarded as nonsensical.

Regardless of the above, the CSDDD, warts and all, is a necessary and positive evolutionary step for the EU.

For the EU to maintain its position at the forefront of human rights and environmental regulation, it must follow suit. In some ways, notably with its civil liability mechanism, the CSDDD even raises the bar.

However, the Omnibus I weakens several key provisions in the original text. These changes will have real consequences: overall, they will make it significantly harder for victims of corporate abuse to seek justice and for companies to prevent harm in the first place. We dare to say that Omnibus I is, regrettably, a step backwards, and rather than advancing efforts to promote responsible business and accountability, the EU has decided to dilute existing EU standards that have made it a leader in business and human rights.

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92 *Shell Plc v Stichting Milieudefensie and Others*,, ECLI:NL:GHDHA:2024:2099.

93 *Shell Plc v Stichting Milieudefensie and Others*, ECLI:NL:GHDHA:2024:2099., par. 7.96, 7.99, 7.111

94 Horak, H., *Klimatska odgovornost trgovačkih društava* in: Barbić, J. (ed.) Sporovi o klimatskim promjenama Hrvatska akademija znanosti i umjetnosti, Zagreb, 2025, p. 80.

Fragmented rules on civil liability and access to justice risk eroding one of the CSDDD's core enforcement pillars. However, Member States can go beyond Omnibus I to establish effective liability frameworks. Key priorities for Member States in transition should include reinstating the overriding mandatory application of civil liability and access-to-justice measures in cross-border cases, as well as ensuring third-party representation.

The CSDDD's impact on human rights, the environment, and climate will greatly depend on how Member States implement it, how civil society engages with it, and whether there are sufficient drivers for companies to engage meaningfully with the process.

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Review article

CROSS-BORDER TRANSFERS OF PERSONAL DATA UNDER THE GDPR: SCOPE AND LIMITATIONS OF THE "BLOCKING STATUTE"

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ABSTRACT

The General Data Protection Regulation (GDPR) establishes a comprehensive framework for personal data protection within the European Union, with particular emphasis on cross-border data transfers. The GDPR addresses cross-border data protection through two complementary regulatory approaches. First, the rules on territorial scope extend the GDPR's application to certain processing activities conducted by controllers or processors established outside the EU, provided these activities relate to the data of individuals located within the Union. These provisions are intended to protect EU data subjects from external threats posed by non-EU actors. Second, the GDPR sets forth a regime for transfers of personal data to third countries or international organisations. The transfer regime is preventive in nature, as it requires that personal data exported outside the EU continue to benefit from safeguards that are essentially equivalent to those provided under EU law. Prior to any transfer, the parties involved must ensure that appropriate legal safeguards are in place.

Among the relevant provisions, Article 48 of the GDPR, often referred to as the "blocking statute," plays a distinctive role in regulating transfers of personal data in response to requests from authorities of third countries or international organisations. This provision clarifies that judgments or decisions of courts or administrative authorities of third countries requiring a controller or processor to transfer or disclose personal data do not, in themselves, constitute a legal basis for such transfers. In this way, the EU asserts its legal sovereignty in relation to the laws of third countries, establishing as a general rule that recognition and enforcement of such foreign judgments or decisions may occur only through the application of international agreements.

Throughout the paper, the extraterritorial effects of the GDPR are examined and clarified, with particular emphasis placed on the "blocking statute" rule, as interpreted in relevant legal doctrine, guidance, and the CJEU case law.

Keywords: *Blocking statute, Cross-border, Data, GDPR, Transfer*

1. INTRODUCTION

Modern protection of the right to privacy and personal data faces important challenges due to fast technological development and globalisation. Digital technologies have greatly increased the volume of personal data collected and shared, allowing individuals to enhance their activities using this data.[1] However, this expansion in data processing can conflict with the effective protection of fundamental human rights.[2]

Data privacy rights now have a clear transnational dimension. Previously, data controllers, data subjects, and processing activities were usually within one jurisdiction. Now, international trade, new technology, and multinational corporations have made cross-border data processing and transfers routine. In this borderless environment, data protection frameworks limited to a single territory are no longer enough.[3] Cross-border data transfers have become hallmarks of globalisation and crucial links in the global economy.[4]

To address these challenges, the European Union created a harmonised data protection framework. Its aim is to ensure a consistent level of protection for individuals in all Member States and beyond.[5] It also considers that EU data protection law has evolved to handle risks from outside its borders. This protection is firmly embedded in the General Data Protection Regulation (hereinafter: GDPR) and has its roots in the earlier Data Protection Directive 95/46/EC (hereinafter: DPD).[6] The Court of

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1 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119 (hereinafter: GDPR), Recital 6.; Ausloos, J., *The Right To Erasure In EU Data Protection Law: From Individual Rights To Effective Protection*, Edition: 1, Oxford University Press, Oxford, 2020, pp. 1 - 11.

2 Lopes, D., GDPR – Main International Implications, *European Journal of Privacy Law & Technologies*, Special issue, G. Giappichelli Editore, Torino, 2020, p. 11.

3 Azzi, A., *The Challenges Faced by the Extraterritorial Scope of the General Data Protection Regulation*, Journal of Intellectual Property, Information Technology and E-Commerce Law, Vol. 9, No. 2, 2018, p. 127.; Juliussen, BA; Kozyri, E.; Johansen, D.; Rui, JP., *The third country problem under the GDPR: enhancing protection of data transfers with technology*, International Data Privacy Law, 2023, Vol. 13, No. 3, p. 225.

4 Voss, W. G., *Cross-Border Data Flows, the GDPR, and Data Governance,* Washington International Law Journal, Vol. 29, No. 3, 2020, p. 487.

5 The protection of natural persons in relation to the processing of personal data is recognized as a fundamental right under Article 8(1) of the Charter of Fundamental Rights of the European Union and Article 16(1) of the Treaty on the Functioning of the European Union (TFEU). This objective permeates all areas of EU competence and policy, including those implemented at the national level.

6 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281, (hereinafter: DPD); See: Hustinx, P., *EU Data Protection Law: The Review of*

Justice of the European Union (hereinafter: CJEU) has consistently noted that data protection rights must be safeguarded internationally and are not restricted to the EU's territorial boundaries.[7]

Recent years have seen growing concern regarding threats to the data protection rights of EU individuals arising from third countries. Noteworthy examples include the alleged misuse of EU personal data by companies established outside the EU, the disclosures concerning mass surveillance by foreign intelligence agencies, and legislative measures such as the US CLOUD Act, which may compel the transfer of data stored within the EU.[8] In response, EU data protection law relies on two principal regulatory mechanisms: rules governing its territorial scope and rules restricting international data transfers. The former determine the circumstances under which EU data protection law applies extraterritorially, while the latter impose conditions on the transfer of personal data to third countries. Given the significant global influence of EU data protection law, these mechanisms have far-reaching implications beyond the EU's borders.

Article 48, known as the "blocking statut", is part of the EU's data transfer rules and aims to prevent conflicts between EU data protection law and foreign laws requiring access to personal data. The main argument is that while this mechanism seeks to balance EU privacy requirements with increasing global demands for cross-border evidence and data disclosure, its actual effectiveness is uncertain. This uncertainty stems from the rise of direct-access regimes and large-scale surveillance practices that bypass traditional legal channels.

This paper uses a doctrinal legal research methodology. It examines the extraterritorial effects of the GDPR by analysing the relevant regulatory framework, legal scholarship, regulatory guidance, and the CJEU's jurisprudence. The focus is on the rules governing the territorial scope of EU data protection law and international data transfers. Special attention is given to Article 48 GDPR. By analysing the above-mentioned sources, the paper aims to clarify the role of Article 48 within the GDPR's extraterritorial application. It also provides a preliminary assessment of Article 48's effectiveness in addressing conflicts between EU data protection law and third-country access requests.

Directive 95/46/EC and the General Data Protection Regulation, in: Cremona, M. (ed.), New Technologies and EU Law, Oxford University Press, Oxford, 2017, pp. 148 - 151.

7 E.g. Case C-362/14 *Maximilian Schrems v Data Protection Commissioner* [2015]ECLI:EU:C:2015:650; Case C-311/18 *Data Protection Commissioner v Facebook Ireland Ltd and Maximilian Schrems* [2020] ECLI:EU:C:2020:559; Lynskey, O., *The Foundations of EU Data Protection Law*, Oxford University Press, Oxford, 2025, p. 42.

8 Kuner, C., *Territorial Scope and Data Transfer Rules in the GDPR: Realising the EU's Ambition of Borderless Data Protection*, University of Cambridge Faculty of Law Research Paper No. 20/2021, 2021, p. 3.

2. GDPR'S GLOBAL IMPACT

The EU aims to be a global regulator based on several interrelated factors, among them digitalisation, which plays a central role. The rise of digital technologies has made interactions more immaterial and separated from physical territory. Traditional ideas of territoriality are now less effective in addressing regulatory challenges in the digital environment.[9] The scope of EU's instruments must include activities outside the Member States that could affect or undermine the Union's interests. EU law in this area covers not only individuals and entities in the Union, but also those in third countries whose activities target Member States *via* the internet or digital technologies.[10]

EU rules on privacy and data protection have come to shape the global regulatory landscape in a profound way, both in practice and through formal legal influence, reflecting what is commonly described as the "Brussels Effect". In this sense, data protection law stands out as a key vehicle through which European regulatory standards extend beyond the Union's borders and contribute to broader processes of global Europeanization.[11] Given the global nature of data processing and the critical role of cross-border data flows, not only within the EU but across global markets, the EU has recognised the need to promote international standards for personal data protection. The EU seeks to help shape global data privacy standards. It also underlines the risk that alternative global standards may be less desirable, for instance by imposing data localisation requirements or by using data protection as a tool for censorship and state surveillance.[12] This intention was clear when proposing the GDPR, as the Commission indicated that the 'individuals'

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9 Chia, CW., *Sketching the Margins of a Borderless World: Examining the Relevance of Territoriality for Internet Jurisdiction*, Singapore Academy of Law Journal, Vol. 30, No. 2, 2018, pp. 833 – 870.; Benvenuti, E., *Private International Law as a Means to Project EU Digital Values Abroad*, EU and comparative law issues and challenges series, Special Issue - Law in the Age of Modern Technologies, Vol. 7, 2023, p. 229.

10 Benvenuti, *op. cit.*, note 9, 229.; E.g. provisions on territorial scope in: GDPR, Art. 3, Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJ L, 2024/1689, Art (2)(1); Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277, Art 2(1).

11 Bradford, A., *The Brussels Effect: How the European Union Rules the World*, Oxford University Press, Oxford, 2019, p. 132.; see also: Gstrein, OJ; Zwitter, AJ, *Extraterritorial application of the GDPR: promoting European values or power?*, Internet Policy Review, Vol. 10, No. 3, 2021, p. 1-30.; Hornkohl, L., *The Extraterritorial Application of Statutes and Regulations in EU Law*, Max Planck Institute Luxembourg for Procedural Law Research Paper Series, No. 2022 (1), pp. 3-4.

12 Bradford, *op. cit.*, note 11, p. 137.

rights must continue to be ensured when personal data is transferred from the EU to third countries, and whenever individuals in Member States are targeted and their data is used or analysed by third country service providers.[13] GDPR seeks to achive those ambitious goals by a combination of rules on territorial scope and international data transfers. The following sections of this paper will explore these mechanisms in greater detail.

The CJEU's activism further shapes this policy. The first case on cross-border data transfers was *Lindqvist*, which clarified that uploading personal data to a website hosted within the EU does not count as a transfer to a third country under the DPD.[14] The landmark *Google Spain* judgment of the CJEU established that EU data protection law can apply to a search engine service operated by a company headquartered outside the EU. This judgment illustrates a broader effort to adapt traditional legal concepts to the inherently non-territorial nature of cyberspace.[15] In *Google LLC*, the CJEU further affirmed that the operation of a search engine in a third country, when inextricably linked to an establishment of the company in the EU, could not avoid the protections of the DPD and the GDPR. The Court held that, in its current form, the GDPR does not require the right to be forgotten to extend to all national versions of search engines. However, it noted that the EU legislator could choose to broaden the Regulation's scope in the future. The Court also clarified that national courts and supervisory authorities are not precluded from ordering such an extension.[16]

This expansive approach was reinforced in the *Schrems* litigation, highlighting how individual activism can trigger global regulatory change.[17] Max Schrems,

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13 Kuner, *op. cit.*, note 8, p. 5.; European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Safeguarding Privacy in a Connected World—A European Data Protection Framework for the 21st Century, COM(2012) 9/3, 25 January 2012, p. 10.

14 Case C-101/01, *Bodil Lindqvist* [2003] ECLI:EU:C:2003:596, para 52-71. This position is confirmed in the context of chapter V of the GDPR.; see: Coetzee, J., *Cross-Border Data Flows and the Protection of Personal Information Act 4 of 2013 – Part II: The Data Transfer Provision*, Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad, Vol. 27, 2024, p. 9.

15 C-131/12 *Google Spain* [2014] ECLI:EU:C:2014:317; see: Van A., Brendan; Koekkoek, M., *Internet and jurisdiction after Google Spain: the extraterritorial reach of the 'right to be delisted'*, International Data Privacy Law, Vol. 5, No. 2, 2015, pp. 105 – 120.

16 C-507/17 Google LLC v CNIL [2019] ECLI:EU:C:2019:772., para 51.; Coetzee, *op. cit.*, bilj. 14, p. 10.; Quinn, J., *Google v CNIL: Circumscribing the Extraterritorial Eff ect of EU Data Protection Law*, in: Fabbrini, F.; Celeste, E.; Quinn, J., Data Protection Beyond Borders Transatlantic Perspectives on Extraterritoriality and Sovereignty, Hart Publishing, 2021, pp. 47. – 63; Samonte, M., *Google v. CNIL: The Territorial Scope of the Right to Be Forgotten Under EU Law*, European Papers, Vol. 4, No. 3, 2019, pp. 839-851.

17 Bradford, *op. cit.*, note 11, p. 139.

an Austrian lawyer and data protection activist, challenged Facebook's data practices after discovering how much personal data the company collected on him. His complaints, lodged first with the Irish Data Protection Commission, led to a CJEU reference. In its decision, the Court invalidated the EU–US Safe Harbour framework, emphasising that data transferred outside the EU must be protected at a level essentially equivalent to that within the EU.[18] In *Schrems II*, the Court upheld standard contractual clauses (SCCs) but struck down the EU–US Privacy Shield, Safe Harbour's successor.[19] The Court confirmed that "essential equivalence" under Article 45 GDPR also applies to SCCs under Article 46 and must be assessed under EU law, particularly the Charter, not Member State law.[20] With *Schrems II*, the CJEU strongly reaffirmed the need to ensure a high level of protection for personal data transferred from the EU to third countries, addressing government access not only in the United States but globally. Subsequent decision went beyond *Schrems I* by completing the conceptual framework for data transfers, aiming to prevent circumvention of GDPR standards.[21] The decisions in these cases have significantly influenced the interpretation and application of the GDPR's provisions and have clearly highlighted the need for further discussion on its extraterritorial application.[22]

3. EXTRATERRITORIAL APPLICATION OF THE GDPR REGULATION

The GDPR seeks to protect personal data from external threats primarily through its rules on territorial scope, as set out in Article 3, and through the restrictions on data transfers contained in Chapter V.[23]

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18 C-362/14 *Maximillian Schrems v Data Protection Commissioner* [2015] ECLI:EU:C:2015:650.; see: Catanzariti, M., *Off-line Digital Jurisdiction*, EUI Working paper, RSCAS 2019/03, Robert Schuman Centre for Advanced Studies p. 12.

19 Case C-311/18 *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems* [2020] ECLI:EU:C:2020:559.

20 See: Opinion of Advocate General Saugmandsgaard Øe delivered on 19 December 2019 Case C-311/18 *Data Protection Commissioner v Facebook Ireland Limited, Maximillian Schrems* C-311/18, ECLI:EU:C:2019:1145., paras 111. – 120.

21 Christakis, T., *The "Zero Risk" Fallacy: International Data Transfers, Foreign Governments' Access to Data and the Need for a Risk-Based Approach*, CIPL/CBDF Paper Series, 2024., p 11.; see also: CJEU's *Opinion 1/15* [2017] ECLI:EU:C:2017:592.

22 Tzanou, M., *Schrems I and Schrems II: Assessing the Case for the Extraterritoriality of EU Fundamental Rights*, in: Fabbrini, F.; Celeste, E.; Quinn, J., Data Protection Beyond Borders Transatlantic Perspectives on Extraterritoriality and Sovereignty, Hart Publishing, 2021, p. 116.

23 Significantly, Article 27 prescribes the obligation to designate the Representatives of controllers or processors not established in the Union. That requires a special substantive obligation for undertakings in international situations. It underscores the need for a "guarantor" within the European Union, a repre-

Territorial scope rules are *inward-looking* in that they are designed to protect individuals in the EU from actions taken by actors outside its borders, and they operate reactively, applying when non-EU parties engage in certain activities involving the data of individuals in the EU. By contrast, data transfer rules are *outward-looking*, requiring that personal data transferred to third countries be afforded a level of protection grounded in EU law. They are also proactive in nature, addressing risks before the transfer takes place by requiring the parties involved to ensure an adequate level of protection prior to initiating the transfer.[24]

As the territorial scope is not the main focus of this paper, it will be addressed only briefly, with emphasis on its effects. Article 3 GDPR states that the Regulation applies to data processing in the context of activities of an establishment in the EU, regardless of where the processing occurs. It also applies to non-EU controllers or processors if their processing involves offering goods or services to individuals in the EU or monitoring their behaviour within the Union, as long as the data subjects are located in the EU at the relevant time.[25] Unlike the DPD, which in Article 4 specified the applicable national law to distinguish between Member States, Article 3 of the GDPR defines the territorial scope of its uniform rules to set them apart from third country laws.[26] The name of Article 3, Territorial scope, should not be taken literally. Rather, this provision identifies the types of connections to EU territory that trigger the GDPR's application.

The rules set out in Article 3 are mandatory and cannot be derogated from, meaning that any attempt to alter them, such as through contractual clauses or privacy

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sentative who should not only act on behalf of the controller or the processor but also be addressed by supervisory authorities. Article 27 provides data subjects and supervisory authorities with an additional (or alternative) point of contact (i.e., the representative) for all issues regarding the processing of personal data, while at the same time maintaining their right to initiate legal actions directly against the controllers or processors.; See: Millard, C.; Kamarinou, D., *Article 27. Representatives of controllers or processors not established in the Union*, in Kuner, C.; Bygrave, Lee A.; Docksey, C.; Drechsler, L. (eds.), The EU General Data Protection Regulation (GDPR), Oxford University Press, Oxford, 2020, pp. 589 - 599.

24 Kuner, C. B., *Protecting EU Data Outside EU Borders under the GDPR*, Common Market Law Review, Vol. 60, No. 1, p. 79.

25 For scientific analyses see: Svantesson, D. J. B., *Article 3. Territorial scope*, in: Kuner, C.; Bygrave, Lee A.; Docksey, C.; Drechsler, L. (eds.), The EU General Data Protection Regulation (GDPR), Oxford University Press, Oxford, 2020, pp. 74 -100; Kunda, I., *Prekogranična provedba prava na zaštitu osobnih podataka u Europskoj uniji,* in: Barbić, J.; Župan, M. (eds.), Identitet u prekograničnim privatnopravnim odnosima, Hrvatska akademija znanosti i umjetnosti, Zagreb, 2021, pp. 141.-169.; also see the relevant CJEU practice in: C-131/12 *Google Spain* [2014] EU:C:2014:317; C-230/14 *Weltimmo* [2015] EU:C:2015:639, C-191/15 *Verein für Konsumenteninformation* [2016] EU:C:2016:61, C-210/16 *Wirtschaftsakademie Schleswig-Holstein* [2018] EU:C:2018:388; C-507/17 *Google Inc. vs CNIL* [2019] EU:C:2019:772.

26 Kunda, *op. cit.*, note 25, p. 147.

policies specifying alternative jurisdiction or choice-of-law rules, will be considered invalid by courts or data protection authorities.[27] For this reason, it may be argued that the GDPR could potentially qualify as overriding mandatory provisions within the meaning of Article 9 of the Rome I Regulation.[28] Current doctrine remains divided on whether EU data protection law is mandatory in nature. Some theorists argue that Article 3 can be interpreted as overriding mandatory provisions.[29] Deriving from the Ingmar case, it follows that where EU mandatory rules aim to protect a weaker party, and there is a close connection to the EU, there is a presumption that such rules qualify as overriding mandatory provisions.[30] This is further supported by the fact that there are explicitly prescribed conditions under which the processing of personal data is considered lawful, as well as by the impossibility of derogating from data subjects' rights and the obligations of controllers by agreement. The GDPR was adopted in the public interest, which is also reflected in the way supervision of its application is organised.[31] On the other hand, it is argued that Article 3 cannot be characterised as a rule of direct application, as it merely establishes that the substantive provisions of the GDPR apply in an international context. This can be considered justified, given that rules of direct application are of a substantive nature.[32] Interpreted narrowly, Article 3 should be understood as a provision defining the territorial scope of directly applicable rules.[33]

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27 Svantesson, *op. cit.*, note 25, p. 82.

28 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) [2008] OJ L 177, Article 9(1): "Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.".

29 Thon, M., *Transnationaler Datenschutz: Das Internationale Datenprivatrecht der DS-GVO*, Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law, Bd. 84, H. 1, 2020, p. 41.

30 C-381/98 *Ingmar GB* [2000] ECLI:EU:C:2000:605.

31 Kohler, C., *Conflicts of Law Issues in the 2016 Data Protection Regulation of the European Union*, Rivista di diritto internazionale privato e processuale, Vol. 52, No. 3, 2016, p. 661; Brkan, M., Data Protection and Conflicts of Laws, A Challenging Relationship, European Data Protection Law Review, Vol. 2, No. 3, 2016, p. 333.

32 Melcher, M., *Substantive EU Regulations as Overriding Mandatory Rules*, ELTE Law Journal, No. 1, 2020, p. 24.; Wilderspin, M., *Overriding mandatory provisions*, in: Basedow, J.; Rühl, G.; Ferrari, F.; de Miguel Asensio, P. (eds.), Encyclopedia of Private International Law, Volume 2, Edward Elgar, Cheltenham, 2017, pp. 1331 - 1336.

33 EDPB, Guidelines 3/2018 on the territorial scope of the GDPR (Article 3), Version 2.1, 12 November 2019, p. 5., Vrbljanac, D., *Zaštita osobnih podataka i međunarodno privatno pravo*, in: Barbić, J. (ed.), Međunarodno privatno pravo i globalni trendovi, Hrvatska akademija znanosti i umjetnosti, Zagreb, p. 145.

The GDPR's rules on international data transfers,[34] set out in Chapter V, build upon the framework established under the DPD, retaining its three main transfer mechanisms with only minor modifications. Their overarching purpose remains the prevention of circumvention of EU data protection law. This objective is reflected in Article 44, which requires that transfers be carried out in a manner that does not undermine the level of protection guaranteed by the GDPR, including in the case of subsequent (onward) transfers to other third countries or international organisations. As emphasised by the EDPB in light of the Schrems II judgment, the protection afforded to personal data within the European Economic Area must effectively "travel with the data" wherever it is transferred. Similar to the rules on territorial scope, the data transfer regime extends the reach of the GDPR beyond the EU, thereby imposing obligations on entities located in third countries.[35]

To ensure an essentially equivalent level of protection, the GDPR establishes a three-tiered system of legal bases for transfers: adequacy decisions, appropriate safeguards, and derogations. Adequacy decisions, adopted by the European Commission, confirm that a third country or international organisation ensures an adequate level of protection; in their absence, transfers may rely on appropriate safeguards, such as standard contractual clauses or binding corporate rules; only where neither is available may derogations be invoked as exceptions. This hierarchical structure underscores the priority of systemic and stable transfer mechanisms over exceptional ones.[36] The rationale underlying this regime reflects a balance between enabling the free flow of personal data and ensuring a consistently high level of protection.[37] While international data flows are recognised as essential, they must not lead to a lowering of protection standards. In this sense, the prohibition against undermining the level of protection can be understood as a prohibition of circumvention, preventing personal data from being transferred to jurisdictions where EU safeguards could be effectively bypassed.

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[34] The GDPR does not define what constitutes an international data transfer (just as the DPD did not). This concept is central, as it determines when Article 44 (and the other provisions of Chapter V) applies. By contrast, Article 4(23) defines 'cross-border processing', which might seem similar but actually refers to situations involving a controller or processor with establishments in more than one Member State, or where processing substantially affects data subjects in more than one Member State, specifically to help determine the lead supervisory authority under Article 56.

[35] Kuner, *op. cit.*, note 8, p. 15; EDPB, Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data, (10 November 2020) (version for public consultation), p. 2.

[36] Kuner, C., *Article 44. General principle for transfers,* in: Kuner, C.; Bygrave, Lee A.; Docksey, C.; Drechsler, L. (eds.), The EU General Data Protection Regulation (GDPR), Oxford University Press, Oxford, 2020, p. 765.

[37] GDPR, Recital 101.

4. "BLOCKING STATUTE"

The central focus of this paper is the so-called "blocking statute" mechanism,[38] as embodied in Article 48 GDPR. Entitled "Transfers or disclosures not authorised by Union law," this provision forms part of Chapter V, which governs cross-border data transfers. In contrast to the other provisions of the Chapter V of the GDPR, Article 48 does not constitute a ground for transfer. By contrast, this rule is more appropriately characterised as a transfer safeguard. Consequently, when faced with a request from a third-country authority covered by Article 48, the controller or processor must rely on a separate transfer mechanism provided elsewhere in Chapter V before disclosing the data.[39]

The rationale behind the Article 48 is explained by the Recital 115, emphasizing that laws or decisions of third countries should not undermine the level of data protection guaranteed within the EU. Building on this objective, Article 48 provides that judgments or administrative decisions of third-country authorities requiring the disclosure of personal data are not, by themselves, a valid legal basis for a transfer. This rule reinforces the general principle established in Article 44, according to which any transfer of personal data to a third country must comply with the safeguards of Chapter V GDPR and ensure that the level of protection guaranteed by the Regulation is not compromised.

The rule on "blocking statute" is designed to limit the extraterritorial jurisdiction of courts, tribunals, or authorities in third countries. It does so by stating that any third-country judgment or administrative decision requiring a controller or processor to transfer or disclose personal data can only be recognised or enforced if it is based on an international agreement, such as a mutual legal assistance treaty, in force between the third country and the Union or a Member State.

This chapter will further examine the background and nature, as well as the conditions and consequences of its application, in order to reach a comprehensive conclusion on its scope and limitations, taking into account its regulatory framework and interpretations derived from legal theory and relevant guidelines.

4.1. Nature and Background of the GDPR's "Blocking Statute" Rule

Article 48, despite its title, does not address "transfers or disclosures not authorised by Union law" generally. Instead, it focuses on the recognition and enforcement of

[38] See: Hemler, A., *Deconstructing blocking statutes: why extraterritorial legislation cannot violate the sovereignty of other states, Journal of Private International Law*, Vol. 21, No. 1, 2025, pp. 115-134; Audit, M.; Basedow, J., Blocking Statutes, in: Basedow, J.; Rühl, G.; Ferrari, F.; de Miguel Asensio, P. (eds.), Encyclopedia of Private International Law, Volume 2, Edward Elgar, Cheltenham, 2017, pp. 209 – 214.

[39] EDPB, Guidelines 02/2024 on Article 48 GDPR, Version 2.1, Adopted on 4 June 2025., p. 11.

judgments and decisions issued by courts, tribunals, and administrative authorities from third countries. It is best understood as a "blocking statute" tailored to data protection.[40] "Blocking statutes" are a form of countermeasures in public international law. When one state views another's actions as unlawful, offensive, or against its interests, it may respond with such measures in various forms.[41] The primary purpose of "blocking statutes" is political. They aim to increase pressure on the foreign government whose policies are opposed, using individuals and corporate entities as instruments.[42] "Blocking statutes" have been used rarely, and their application often ceases once the legal conflict is resolved, typically through an international agreement.[43]

The key issue is whether the same can be expected in relation to Article 48, considering that government demands for access to data stored abroad are a global phenomenon, not confined to the United States. Moreover, the challenges associated with Article 48 are likely to be even more significant when such requests originate from third countries not having the same standards of human rights and the rule of law.[44]

Article 48 addresses situations in which conflicts arise between the laws and policies of the EU and those of third countries. Such situations, involving the transfer or access to data from the EU without a lawful basis under EU law, have not been uncommon in the past. An early impetus for such legislation dates back to the period of the Second World War and the Nazi misuse of personal data of Jews and other persecuted minority groups.[45] Significant drivers also arose from situations involving the United States. There are examples of US requirements concerning discovery, the process in civil litigation that enables parties to obtain information and evidence from opposing parties. U.S. courts have interpreted these obligations as extending to discovery conducted outside the United States, even after the US became a party to the Hague Evidence Convention.[46] Speaking of violations of the right to privacy abroad, it is also essential to mention access by governmental au-

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40 See: Christakis, T., *Transfer of EU Personal Data to U.S. Law Enforcement Authorities After the CLOUD Act: Is There a Conflict with the GDPR*, 2019, Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3397047], Accessed 8 April 2026.

41 Basedow, *op. cit*. note 38, p. 209.

42 *Ibid*., p. 214.

43 *Ibid*.

44 Kuner, C., Article 48. *Transfers or disclosures not authorised by Union law*, in: Kuner, C.; Bygrave, Lee A.; Docksey, C.; Drechsler, L. (eds.), The EU General Data Protection Regulation (GDPR), Oxford University Press, Oxford, 2020, p. 828.

45 Bradford, *op. cit*., note 11, p. 136.

46 Kuner, *op. cit*., note 44, p. 826.; see: WP29 2009: Article 29 Working Party, Working Document 1/2009 on Pre-Trial Discovery for Cross Border Civil Litigation, (WP 158, 11 February 2009).

thorities to personal data for law enforcement, anti-terrorism, or national security purposes. The most well-known example is the so-called "Snowden revelations," which exposed extensive electronic surveillance by U.S. intelligence agencies and gained global attention in 2013,[47] nd the recent example of the US Clarifying Lawful Overseas Use of Data (CLOUD) Act 9.[48]

4.2. Conditions to Data Transfer. Two step-approach.

The EDPB introduced the so-called two-step test for data transfers in its Guidance on Article 48. This means that compliance with foreign judgments and decisions under Article 48 is only permissible if there is a legal basis under Article 6 and the provisions of Chapter V of the GDPR. This is clarified by specifying that when data processed in the EU are transferred or disclosed in response to a direct request from an authority in a third country, such disclosure falls under the GDPR and qualifies as a transfer within the meaning of Chapter V. Consequently, as with any GDPR-regulated transfer, there must be a legal basis for processing under Article 6, as well as a valid transfer mechanism under Chapter V. In addition to complying with the GDPR, controllers or processors may also be required to meet further obligations arising from other legal instruments, such as national procedural laws or international agreements governing cooperation with the requesting third-country authority.[49]

Article 48 addresses situations in which a court, tribunal, or administrative authority of a third country requires a controller or processor in the EU to transfer or disclose personal data. Such requests may only be recognised or enforced if they are based on an applicable international agreement that may create a legal obligation for the controller. In such cases, Article 6(1)(c), in conjunction with Article 6(3), may provide the appropriate legal basis for the processing. An "applicable international agreement" refers to one allowing direct requests from third-country public authorities to private entities in the EU. Where no such agreement exists, but cooperation is governed by instruments such as mutual legal assistance trea-

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47 Cate, F. H.; Dempsey, J. X.; and Rubenstein, I. S., *Systematic Government Access to Private-Sector Data*, International Data Privacy Law, Vol. 2, No. 4, 2012, p. 195.; Coyne, H., *The Untold Story of Edward Snowden's Impact on the GDPR*, The Cyber Defense Review, Vol. 4, No. 2, 2019, pp. 65 – 80.

48 Greenwald, G, *No Place to Hide: Edward Snowden, the NSA, and the US Surveillance State*, MacMillan, New York, 2014; Milanovic, M., *Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age*, Harvard International Law Journal, Vol. 56, No. 1, 2015, p. 81.; EDPS Response Cloud Act: European Data Protection Board and European Data Protection Supervisor, 'EPDB-EDPS Joint Response to the LIBE Committee on the impact of the US Cloud Act on the European legal framework for personal data protection (annex)' (10 July 2019).

49 EDPB, *op. cit.* note 39., p. 8.

ties (MLATs), the request should generally be channelled through the competent national authority.[50]

Article 48 does not, in itself, constitute a legal ground for transfer. Instead, it clarifies that foreign decisions cannot have an effect in the EU without an international agreement.[51] Consequently, controllers must identify a valid transfer mechanism under Chapter V before responding to such requests. Article 48 must be read together with Article 44. Article 44 establishes that transfers must comply with all GDPR requirements and ensure the level of protection is not undermined (the so-called two-step test). Chapter V provides a hierarchy of transfer mechanisms: adequacy decisions under Article 45, appropriate safeguards under Article 46, and, only in limited cases, derogations under Article 49. International agreements may qualify as appropriate safeguards[52] if they are legally binding and enforceable instruments between public authorities and include sufficient protections. According to the EDPB, such agreements must ensure a level of protection essentially equivalent to that in the EU. This includes enforceable data subject rights, limitations on onward transfers, and effective supervision and redress mechanisms.[53]

Where no adequate international agreement exists, or where it lacks sufficient safeguards, controllers must rely on another transfer ground. Derogations under Article 49 remain a last resort and must be interpreted restrictively, typically applying only in exceptional and non-repetitive situations.[54] The EDPB has further emphasised that reliance on these derogations to justify transfers in response to foreign requests will generally be difficult in practice.[55]

4.3. The Scope and Limitation of the "Blocking Statute"

Once the conditions for the application of Article 48 are fulfilled, a judgment or decision may be "recognised or enforced" only if, in any manner, it is based on an international agreement. According to the EDPB Guidelines, the application of Article 48 should lead controllers and processors to refuse the transfer of personal

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50 *Ibid*., p. 7 – 9.; Kuner, *op. cit.*, note 44, 831. See also: Shurson, J., *Data protection and law enforcement access to digital evidence: resolving the reciprocal conflicts between EU and US law*, International Journal of Law and Information Technology, Vol. 28, 2020, p. 173.

51 EDPB, *op. cit.*, note 39, p. 9.

52 GDPR, Art 46(2): "a legally binding and enforceable instrument between public authorities or bodies"

53 EDPB, *op. cit.*, note 39, p. 12. See also: See in this regard part 2 of the EDPB Guidelines 2/2020 on Articles 46 (2) (a) and 46 (3) (b).

54 Kuner, *op. cit.*, note 44, p. 831.

55 EDPB, *op. cit.*, note 39, p. 12.

data and instead refer foreign authorities to the relevant international agreement.[56] The provision on the "blocking statute" manifests its effect through the conditions for the recognition and enforcement of a foreign judicial or administrative decision. Therefore, it appears to apply only when such recognition or enforcement is sought. However, the EDPB interprets it somewhat more broadly, namely as a prohibition on data controllers and data processors from disclosing or transferring personal data in response to requests from foreign governments.[57]

Recognition and enforcement of foreign judicial decisions is a field of private international law that deals with extending the legal effects of a foreign court decision to the territory of the state of recognition, allowing the applicant to enforce it using domestic enforcement mechanisms.[58] The term "recognition and enforcement," however, is used in a more formal sense in Article 48; therefore, a data controller or data processor cannot be said to be in a position to "recognise and enforce" a foreign judicial decision merely by transferring personal data to a foreign party that has requested it.[59]

The EDPB adopts a broader reading, relying on the article's title, which suggests a general prohibition on unauthorised data transfers to third countries. However, the actual wording of Article 48 appears much narrower, focusing specifically on the recognition and enforcement of foreign judicial or administrative decisions. Although Recital 115 emphasises that transfers must comply with the GDPR rules on third-country transfers, it largely reiterates Article 44 rather than expanding on Article 48. As a result, the mismatch between the article's broad title and its more limited text creates uncertainty and potential confusion about its true scope.[60]

The formal recognition and enforcement of decisions of third countries is governed by numerous international agreements to which the EU and/or its Member

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56 EDPB, *op. cit.*, note 39, p. 9.

57 EDPB, ANNEX. Initial legal assessment of the impact of the US CLOUD Act on the EU legal framework for the protection of personal data and the negotiations of an EU-US Agreement on cross-border access to electronic evidence, Available at: [https://www.edps.europa.eu/sites/default/files/publication/19-07-10_edpb_edps_cloudact_annex_en.pdf], Accessed 5 May 2026.

58 Gascón Inchausti, F., *Chapter 12, Recognition and Enforcement: Fundamental Issues*, in: Kramer, X.; Voet, S.; Dori, A., *European Civil Procedure*, De Gruyter, Berlin, 2026, p. 239; Domej, T., *Recognition and enforcement of judgments (civil law)*, in: Basedow, J.; Rühl, G.; Ferrari, F.; de Miguel Asensio, P. (eds.), Encyclopedia of Private International Law, Volume 2, Edward Elgar, Cheltenham, 2017., pp. 1472 - 1479.

59 Kuner, *op. cit.*, note 44, p. 833.

60 *Ibid.*, p. 834.

States are parties. This is the case, for example, with formal requests (*Letters Rogatory*) sent by judicial authorities of a state party to the Hague Evidence Convention to the judicial authority of another contracting state, which are then executed in accordance with the methods and procedures provided for under national law.[61]

However, widespread electronic surveillance, which was one of the reasons for introducing such provisions, does not fall within the scope of Article 48, since it involves authorities of third countries that do not, in practice, seek prior recognition and enforcement of their decisions from data controllers or data processors in the EU. In this sense, the intention of EU legislation to fully protect against unauthorised access to personal data has not been entirely realised.[62]

Among other things, the provision requires an international agreement as a condition for a third country's decision to be recognised and enforced. This should mean that such a decision must either be provided for by, or issued in accordance with, an international agreement. The most obvious example is a decision of a national court issued pursuant to the Hague Evidence Convention, which provides for the taking of evidence based on requests from national courts directly addressed to the competent authorities of the contracting states.[63] The question that arises is which international agreements may fall within the scope of Article 48. With regard to agreements concluded between the EU and a third country, it is clear that they must fall within the scope of EU law and meet the definition of an international agreement within the meaning of Title V of the Treaty on the Functioning of the European Union.[64] International agreements in force between a third country and a Member State, such as the Hague Evidence Convention (to which some but not all EU Member States are parties), and MLATs, are expressly covered by Article 48.

The question also arises whether Article 48 covers international agreements that fall within EU law but outside the GDPR's scope. The legislator is not specific, stating only that data transfers to third countries must follow international agreements. This suggests Article 48 should not be interpreted too restrictively.

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61 See: Marshall, B.; de Araujo, N., *Taking of Evidence*, in: Beaumont, P.; Holliday, J. (eds.), A Guide to Global Private International Law, Hart Publishing, 2022, pp. 175 – 191.

62 Kuner, *op. cit.*, note 44, p. 834.; Schantz, P., *Article 48. GDPR Transfers or disclosures not authorised by Union law*, in: Spiecker Döhmann, I.; Papakonstantinou, V.; Hornung, G.; De Hert, P. (eds.), General Data Protection Regulation: Article-by-Article Commentary, Nomos, 2023.

63 HCCH, Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, Art. 1. See: Hartley, T. C., *International Commercial Litigation. Text, Cases and Materials on Private International Law,* Cambridge, 2015, p. 529.

64 See: C-327/91, *French Republic v Commission* [1994] ECLI:EU:C:1994:305, para. 27.

Building on this, Article 48 should also apply to agreements that do not fall within the scope of the GDPR, as long as they are within the scope of EU law and provide "an appropriate level of protection for the fundamental rights of data subjects." This point is particularly relevant given that Article 48 itself does not specify the data protection standards that international agreements must meet. Furthermore, while data protection is not mentioned in most international agreements, it has increasingly begun to appear as a standard in agreements on mutual legal assistance.[65]

5. CONCLUSION

The analysis of cross-border data transfers under the GDPR clearly shows that the EU is keen to establish a high and globally relevant level of data protection through a combination of rules on territorial scope and restrictions on cross-border transfers.

In this context, Article 48, the so-called "blocking statute", plays a significant normative role in maintaining the EU's regulatory sovereignty. It does so by clearly emphasizing that requests or decisions from authorities of third countries cannot, by themselves, serve as a legal basis for the transfer of data from the EU without a relevant international legal framework.

Despite this important role, the actual scope and effectiveness of Article 48 remain quite limited. Its practical application depends on the existence of international agreements that ensure an adequate level of protection. Where such agreements do not exist, data controllers must rely on other mechanisms from Chapter V of the GDPR, often in restrictive and legally uncertain circumstances.

Additionally, contemporary methods of accessing data, such as direct requests by foreign authorities or large-scale mass surveillance, bypass formal mechanisms for the recognition and enforcement of foreign decisions, thereby falling outside the scope of Article 48.

The inconsistency between the title of Article 48, which suggests a broad prohibition of unauthorised data transfers, and its narrower normative content creates legal uncertainty regarding its actual scope. Such a discrepancy leaves room for differing interpretations, particularly as to whether the provision also covers situations beyond the formal recognition and enforcement of foreign decisions. Additionally, the insufficiently precise definition of the scope of international agreements that may serve as a legal basis for data transfers points to the need for a

[65] Kuner, *op. cit.*, note 44, p. 835.

broader and more flexible approach, but at the same time for clearer normative regulation.

Although the "blocking statute" is an important tool for protecting personal data and preventing circumvention of the GDPR, it still cannot fully address challenges posed by the modern digital society. Therefore, further international cooperation and clearer rules are needed to balance the protection of EU citizens' fundamental rights with third-country requests for data transfers. Going forward, the GDPR should more clearly regulate cross-border access requests by third-country authorities and clarify the role of international agreements in data transfers. A clearer Article 48 would help prevent inconsistent interpretations and ensure the provision fits modern digital data flows.

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Review article

PERSONAL DATA AS AN ECONOMIC ASSET: LEGAL LIMITS AND PROTECTION OF FUNDAMENTAL RIGHTS*

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ABSTRACT

Digital business models operating in the online environment are largely based on the systematic processing of personal data as a key economic asset. Models conceived in this way raise a number of fundamental legal issues in practice, particularly with regard to the alignment of the economic objectives of digital service providers with the requirements of protecting the fundamental rights and freedoms of individuals. The intensive use of personal data—characterized by automation, profiling, and cross-border data transfers—increases the risk of non-transparent and disproportionate interference with the right to privacy and the protection of personal data as guaranteed under European Union law.

This paper focuses on identifying and analysing the main practical challenges associated with the use of personal data within online business models, such as personalized advertising, platform services, and data-driven business. Particular attention is devoted to the issue of determining the lawful legal basis and purpose of personal data processing under the General Data Protection Regulation (GDPR), especially the distinction between the data subject's consent and processing based on a contract for digital content or services. The paper also reflects on the issue of conditioning access to online services on the granting of consent and the so-called "take it or leave it" approaches, which in practice raise doubts about the freely given and informed nature of consent.

The aim of the paper is not only to systematize existing practical problems related to the processing of personal data in the online environment, but also to identify the limits of the legitimate use of

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personal data for commercial purposes and to highlight situations in which the economic interests of service providers disproportionately interfere with the fundamental rights of data subjects. At the same time, it seeks to formulate interpretative and application-oriented guidelines that may contribute to greater legal certainty in practice, strengthen the effective protection of individual rights, and support the search for a balanced model of coexistence between personal data protection and the functioning of the digital economy in line with the principles of the rule of law.

Keywords: *Fundamental rights, Personal data protection, Processing of personal data*

1. INTRODUCTION

The digitalization of the economy has fundamentally transformed both the nature and the value of information. Personal data has now become one of the key resources of the digital economy and represents a significant economic asset that enables the development of new business models, personalized services, and targeted advertising strategies. Platform services, online marketplaces, and technology companies systematically utilize large volumes of data to analyse user behaviour, optimize products, and generate economic value. However, this development also raises fundamental legal and normative questions, particularly with regard to the limits of the commercialization of personal data and the protection of individuals' fundamental rights. The tension between the economic potential of data and the requirement to protect privacy and fundamental rights thus becomes one of the key challenges of contemporary digital law.

In the European legal framework, the protection of personal data is firmly embedded in the system of fundamental rights, primarily through the right to respect for private life and the right to the protection of personal data. At the same time, however, the economic reality of digital markets shows that personal data functions as a tradable resource with the potential to generate significant economic value. Legal regulation is therefore faced with the task of finding a balance between supporting innovation and the digital economy on the one hand, and ensuring effective protection of the individual on the other.

The present paper focuses on analysing this balance and examines the extent to which the current legal framework reflects the economic nature of personal data while at the same time preserving its human rights dimension. The aim of this article is to address the question of whether there are currently legal limits to the use of the economic value of personal data without weakening or even violating the protection of individuals' fundamental rights. It also seeks to reflect on the various practical challenges that arise at the intersection of the economic interests of digital platforms and the human rights protection of personal data. This will be achieved through the application of various scientific methods, in particular by analysing current legal regulations of different legal force not only European Unions', but also

from a Slovak environment, as well as relevant soft law instruments and academic and scientific publications in this field. The methods of deduction and synthesis of knowledge derived from the above analyses will also be applied.

Methodologically, the paper is based on a combination of classical methods of legal scholarship, in particular the methods of analysis and synthesis of legal norms, as well as systematic and teleological interpretation.

2. USE OF PERSONAL DATA IN DIGITAL BUSINESS MODELS – HUMAN RIGHTS LIMITS

Personal data in the digital economy has undoubtedly acquired significant economic value and, in many respects, exhibits the characteristics of an economic asset. Digital platforms, online services, and technology companies use data on user behaviour, preferences, and consumer habits to optimize products, personalize content, and, in particular, enable targeted advertising.[1] In this sense, personal data functions as a strategic resource that allows for profit generation, the creation of competitive advantage, and the development of data-driven business models that use such data to generate revenues, to monetise them, either by creating profiles and providing personalised advertisements themselves based on these profiles (linked to their own products or facilitating advertisements of other actors) or by selling/sharing the raw data or the profiles based on these data to other actors.[2]

At present, there are many online platforms that provide digital services that appear to be free of charge. When analysing such digital services, one may consider whether this type of online platform falls within the scope of e-commerce and information society services, as defined by 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 the internal market, in particular electronic commerce, as well as, following its model, the Slovak Act No. 22/2004 Coll. on Electronic Commerce. Pursuant to Section 2(a), an information society service is defined as a *service provided at a distance by electronic means, usually for remuneration and at the request of the recipient (which also includes passive browsing)*. From the attributes of this definition, particular attention is paid to the element "*usually for remunera-*

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1 Rudohradská, S.: *Abuse of a dominant position on the digital markets – case Meta vs. Bundeskartellamt*. in: Petrašević, T.; Duić, D.; Novokmet, A. (eds.), ECLIC, "EU at the Crossroads – Ways to Preserve Democracy and Rule of Law", Osijek: Josip Juraj Strossmayer University of Osijek, 2024, ISBN: 978-95-381-0960-7, p. 478.

2 Kotsios, A., *Paying with data,* A study on EU Consumer Law and the protection of personal data, Uppsala: Department of Law. ISBN: 978-91-506-2919-4, p. 24.

tion." This raises the question of whether the provision of a consumer's personal data can be considered a form of remuneration?

The answer to this question can be found in Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (hereinafter the "DCD"), specifically in Article 3(1).[3] According to this provision, *the Directive applies to any contract under which a trader supplies or undertakes to supply digital content or a digital service to a consumer, and the consumer pays or undertakes to pay a price. The Directive also applies to situations where the trader supplies or undertakes to supply digital content or a digital service to a consumer, and the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer is processed exclusively for the purpose of supplying the digital content or digital service in accordance with the Directive, or for enabling the trader to comply with legal obligations to which the trader is subject, and the trader does not process such data for any other purposes*.[4]

The Directive, despite providing for certain exceptions, generally allows for the possibility that a consumer may provide personal data to a trader in exchange for digital content or a digital service instead of paying a monetary price.

Despite the fact that the possibility of "payment" for digital services or digital content is expressly provided for in the Directive and has become an everyday reality, the concept of personal data being regarded as a form of currency still has its critics. As Bachňáková Rózenfeldová notes, the European Data Protection Supervisor, in the *European Data Protection Opinion 4/2017 on the Proposal for a Directive*, stated in this context that "*it is indeed possible that a market for personal data exists, just as, unfortunately, there is a market for human organs; however, this does not mean that we can or should bless such a market through legislation*."[5]

Similarly, in *Guidelines No. 2/2019 on the processing of personal data under Article 6(1)(b) of the General Data Protection Regulation in the context of providing online services to data subjects* of 9 April 2019 – Version 1.0, it is stated in point 54 that,

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[3] Author's note: Article 3 has been reworded on the basis of comments from the Data Protection Supervisory Authority.

[4] Article 3(1) of Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.

[5] Bachňáková Rózenfeldová, L., *Osobné údaje ako alternatíva peňažného plnenia v zmluvách o dodávaní digitálneho obsahu alebo digitálnych služieb*, in: Bačárová, R., *et al.*, Spotrebitelia a obchodníci na digitálnom trhu. Právne a ekonomické aspekty. 1. vydanie. Praha: Wolters Kluwer ČR, a. s., 2025, p. 80, Available at: [file:///Users/dianatrescakova/Downloads/Spotrebitelia%2520a%2520obchodn%25C3%25ADci%2520na%2520digi%2520trhu_4%20(2).pdf], Accessed 10 April 2026.

given that the protection of personal data is a fundamental right guaranteed under Article 8 of the Charter of Fundamental Rights, and given that one of the main objectives of the General Data Protection Regulation is to give data subjects control over information relating to them, personal data cannot be regarded as a tradable commodity. Although the data subject may consent to the processing of personal data, they cannot, on the basis of such an agreement, trade away their fundamental rights.[6]

At this point, the question arises as to why legal theory and application practice take a dual approach to personal data. The answer lies in the dual nature of the conceptualisation of personal data. The first level is the understanding of personal data as a fundamental right guaranteed by the Constitution, while the second level is their perception as an economic commodity.

The duality in the understanding of personal data also stems from their classification from the perspective of private law. As Pozhodzhuk notes if we talk about 'personal data' as a non-property good that has no economic content and the infringement of rights in respect of which may occur through the use of personal data to the detriment of a person, then this object of civil rights cannot be the object of a contractual obligation. If we consider "personal data" as an information about an individual who can consent to the processing of such information by another person, then we should talk about an intangible good that has economic value. Accordingly, such an object of civil rights can be the object of an obligation. Moreover, this object must be commercialized, as it is a source of profit for the business entity.[7]

2.1. The Conceptualisation of Personal Data Protection as a Fundamental Right of the Individual

It is beyond doubt that the right to the protection of personal data is a fundamental right.[8] The primary legal basis supporting this assertion is the Constitution of the Slovak Republic. Under Article 19(3) of the Constitution of the Slovak Re-

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6 Guidelines No. 2/2019 on the processing of personal data under Article 6(1)(b) of the General Data Protection Regulation in connection with the provision of online services to data subjects of 9 April 2019 – Version 1.0.

7 Pozhodzhuk, R.; Pozhodzhuk, T., *Paying with data: The protection of personal data in consumer contracts in the digital age,* in: Studia Iuridica Cassoviensia, Vol. 16, 2026, No.1, Avilable at: [https://doi.org/10.33542/SIC2026-1-05]. [https://sic.pravo.upjs.sk/ecasopis/142026-1/05_pozhodzuk_pozhodzukova_paying_with_data.pdf.] Accessed 11 April 2026.

8 Rudohradská, S.; Bachňáková Rózenfeldová, L.; Hučková, R.: *When competition meets personal data protection,* in: Petrašević, T.; Duić, D.; Novokmet, A. (eds.), ECLIC, Digitalization and green transformation of the EU: conference book of proceedings, Vol. 7, Osijek: Josip Juraj Strossmayer University of Osijek, 2023. ISBN 978-95-381-0954-6, p. 367.

public, *everyone has the right to protection against the unauthorized collection, publication, or other misuse of data concerning their person.* Likewise, Article 22(1) of the Constitution of the Slovak Republic guarantees the protection of the secrecy of correspondence, the secrecy of transmitted messages and other written communications, including the protection of personal data.[9]

As Bachňáková Rózenfeldová notes, the fact that the protection of personal data belongs among fundamental rights is also confirmed by the case law of the Constitutional Court of the Slovak Republic, according to which "*the essence of the fundamental right to the protection of personal data consists in the protection of the individual, which lies in the principled inadmissibility of the collection, storage, use, or further processing of data relating to the private sphere of their life. Such an understanding of protection is a necessary precondition for the individual's ability to decide which information concerning their private life will be disclosed, thereby ensuring, in a broader context, their ability to freely and responsibly make decisions regarding their private life.*"[10]

If we look beyond the borders of the Slovak Republic, the Charter of Fundamental Rights of the European Union also protects personal data in Article 8(1), stating that "*Everyone has the right to the protection of personal data concerning them*." At the same time, paragraph 2 provides that "*such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning them, and the right to have it rectified.*"[11] As Custers and Malgieri state, the fact that the right to the protection of personal data is enshrined in the Charter of Fundamental Rights of the European Union the EU has created a fundamental right to the protection of personal data, unique in the world. Whereas most nations offer constitutional protection of privacy, traditionally focused on protecting personal life and family life, the EU has added a separate right to the protection of personal data. The fact that the right to personal data protection is included in the list of fundamental rights in the EU makes it an inalienable right.[12]

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9 Article 22(1) of the Constitution of the Slovak Republic.

10 Judgement of Contitutional court of Slovak republic from 9th of December 2010, No. II. US 53/2010 In: Bachňáková Rózenfeldová, L.: *Osobné údaje ako alternatíva peňažného plnenia v zmluvách o dodávaní digitálneho obsahu alebo digitálnych služieb*, in: Bačárová, R., *et al.,* Spotrebitelia a obchodníci na digitálnom trhu. Právne a ekonomické aspekty. 1. vydanie. Praha: Wolters Kluwer ČR, a. s., 2025, p. 80., Available at: [file:///Users/dianatrescakova/Downloads/Spotrebitelia%2520a%2520obchodn%25C3%25ADci%2520na%2520digi%2520trhu_4%20(2).pdf.], Accessed 27 March 2026.

11 Article 8(1) Charter of fundamental rights of the European Union.

12 Custers, B.; Malgieri, G., *Priceless data: why the EU fundamental right to data protection is at odds with trade in personal data,* in: Computer Law & Security Review, Vol. 45, year 2022 ISSN 2212-473X, Avilable at:

Similarly to the Charter of Fundamental Rights of the European Union, Article 16(1) of the Treaty on the Functioning of the European Union also provides for the protection of personal data as a fundamental right.[13]

Recital 1 of the GDPR also states that "*the protection of natural persons in relation to the processing of personal data is a fundamental right. Article 8(1) of the Charter of Fundamental Rights of the European Union (hereinafter the 'Charter') and Article 16(1) of the Treaty on the Functioning of the European Union (TFEU) provide that everyone has the right to the protection of personal data concerning them*."[14]

Concerns regarding the conceptualisation of personal data as an economic asset have also been expressed by the European Data Protection Supervisor, who, in relation to the draft DCD Directive, stated that *the proposal still raises certain concerns with regard to its application in two situations: where digital content is provided in exchange for a monetary payment or in exchange for non-monetary consideration (personal data or other forms of data). The EDPS warns against any legislative provision that would equate payment with personal data to a financial transaction. Such an approach could undermine the fundamental nature of the right to the protection of personal data. Personal data should not be regarded as a tradable commodity, and fundamental rights should not be reduced merely to consumer interests*.[15]

The conceptualisation of personal data as a form of "payment" is also viewed sceptically by various authors; for example, Kotsios states that one of the main considerations concerning such payments is not merely related to the fairness of the exchange as such – even if we may perceive a transaction with personal data as unfair because we provide more data than we believe we actually should provide – but it is also linked to *a possible danger that personal data may be used for malevolent and/or manipulative purposes and/or a loss of privacy*.[16]

2.2. The Conceptualisation of Personal Data as Financial Consideration

Setting aside the expressed views rejecting the perception of personal data as financial consideration, in practice we nevertheless observe that consumers are often exposed to offers of certain benefits in exchange for providing their data. The essence

[https://doi.org/10.1016/j.clsr.2022.105683].

13 Article 16(1) of the Treaty on the Functioning of the European Union.

14 Recital 1 of the GDPR.

15 European Data Protection Supervisor Opinion 4/2017 on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, point 17, Available at: [https://www.edps.europa.eu/sites/default/files/publication/17-03-14_opinion_digital_content_en.pdf], Accessed 10 April 2026.

16 Kotsios, A.: *Paying with data. A study on EU Consumer Law and the protection of personal data*. Uppsala: Department of Law. ISBN: 978-91-506-2919-4.

of these relationships lies in the fact that the consumer is provided with a service or access to intellectual property in a quasi-free manner, while the price for such access consists in exchanging access to the intellectual property for personal data. Subsequently, such personal data may be used by business entities or other actors for specific purposes, particularly for the purpose of generating profit.

This approach is, in a sense, "legitimised" by the DCD Directive, as its adoption has reinforced the perception of personal data as a tradable commodity. In particular, Article 3(1) of the Directive allows the consumer to provide or undertake to provide personal data as consideration for the supply of digital content or a digital service. In simple terms, this reflects the perception of personal data as a substitute for monetary payment. As Midrović notes, through this groundbreaking provision, the consumer who "pays" with personal data as consideration is placed on the same level as a consumer who pays with money.[17]

However, these considerations need to be taken further, as personal data often have a higher value than financial resources, meaning that the collection of consumer data in the online environment is, from an economic perspective, more advantageous for traders than monetary payment. As Metzger notes, in a relationship arising from a contract for the supply of digital services or content, the trader provides digital content or services with the expectation that the consumer will consent to the processing of their personal data, which the trader may subsequently use, for example, to profile consumers for the purposes of personalised advertising.[18] As Midorović and Sekulić note personal data (e.g. name and surname, personal residence, e-mail address, etc.) is no longer valuable only to the person to whom they relate, but are also highly demanded by the companies that supply digital content and digital services to improve the quality of their services, determine the profile of their users, tailoring content to their habits and needs, advertising etc.[19]

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17 Midorović, S.; Sekulić, M.: *A new function of personal data in the light of the contract for the supply of digital content and didgital services*, in Zbornik radova Pravnog fakulteta, Novi Sad, roč. 53, č. 3, 2019, p. 1154, Available at: [https://www.researchgate.net/publication/340232777_A_NEW_FUNCTION_OF_PERSONAL_DATA_IN_THE_LIGHT_OF_THE_CONTRACT_FOR_THE_SUPPLY_OF_DIGITAL_CONTENT_AND_DIGITAL_SERVICES.], Accessed 10 April 2026.

18 Metzger, A.; Efroni, Z.; Mischau, L.; Metzger, J.: *Data-related aspects of the Digital Content Directive*. In JIPITEC 9. 2018, p. 90, in: Bachňáková Rózenfeldová, L.: Osobné údaje ako alternatíva peňažného plnenia v zmluvách o dodávaní digitálneho obsahu alebo digitálnych služieb., in: Bačárová, R. *et al.*, *Spotrebitelia a obchodníci na digitálnom trhu. Právne a ekonomické aspekty*. 1. vydanie. Praha: Wolters Kluwer ČR, a. s., 2025, p. 80 Available at: [file:///Users/dianatrescakova/Downloads/Spotrebitelia%2520a%2520obchodn%25C3%25ADci%2520na%2520digi%2520trhu_4%20(2).pdf.], Accessed 27 March 2026.

19 Midorović, S.; Sekulić, M., *A new function of personal data in the light of the contract for the supply of digital content and didgital services*, in *Zbornik radova Pravnog fakulteta, Novi Sad* [online], roč. 53, č. 3, 2019, p. 1146, Available at:

The use of personal data as consideration in business models brings several advantages for the digital economy. As already noted, this includes consumer profiling and targeted advertising. The purpose of profiling and targeted advertising is not only to increase user satisfaction, but also to maximise advertising efficiency and thereby generate higher revenues from the promotion of various products and services. For this purpose, users' personal data (which, of course, also include data relating to their behaviour in the online environment) are shared in exchange for financial remuneration with entities that are able to "extract" their economic value. This also extends into the area of competition law, where consumers in digital markets are influenced through various personalised prices, offers, and similar practices.[20] The reality of the digital market and the way it operates was also a reason for the adoption of the DCD Directive and for allowing the provision of personal data as consideration for digital services or products.

In this regard, however, not only the tension between the conceptualisation of personal data as a form of "payment" and as a fundamental right of the individual comes to the forefront, but also the question of how the provision of personal data as consideration is legally legitimised. This raises the question of the legal basis on which providers of digital services and content process such personal data. Will it be consent, or is the legal basis the performance of a contract?

Article 3(1) of the DCD Directive provides that the *Directive applies to any contract under which a trader supplies or undertakes to supply digital content or a digital service to a consumer, and the consumer pays or undertakes to pay a price. It also applies to situations where the trader supplies or undertakes to supply digital content or a digital service to the consumer, and the consumer provides or undertakes to provide personal data to the trader*. From the wording of Article 3(1), it follows that the trader's performance is to take place on the basis of a contract for digital performance. This raises the question of whether it is necessary for the consumer to give consent to the processing of their personal data. In this context, the consent of the data subject—the consumer—may appear problematic in cases involving the supply of digital services or digital content.

As defined in Article 4(11) of the GDPR, consent of the data subject means "*any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement*

[https://www.researchgate.net/publication/340232777_A_NEW_FUNCTION_OF_PERSONAL_DATA_IN_THE_LIGHT_OF_THE_CONTRACT_FOR_THE_SUPPLY_OF_DIGITAL_CONTENT_AND_DIGITAL_SERVICES.], Accessed 10 April 2026.

[20] Hutchinson, S. CH.; Trescakova, D.: *The challenges of personalized pricing to competition and personal data protection law,* in: European Competition Journal, No 18, Vol. 1, 2022, pp. 105-128.

to the processing of personal data relating to him or her." Article 7(3) further provides for the possibility of withdrawing consent, stating that "*the data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. Prior to giving consent, the data subject shall be informed thereof. It shall be as easy to withdraw as to give consent*." In the case of the provision of digital content or services based on consent to the processing of personal data, the possibility of withdrawing such consent appears problematic. The question then arises as to the subsequent fate of the digital service or content provided: does the trader have the right to terminate the provision of the digital service?

In this context, it is necessary to emphasise that the different purposes for which personal data are processed must not be conflated. It is submitted that the provision of digital content or digital services between the trader and the consumer is governed by a contract for digital performance. This is also confirmed by German legal scholarship, where authors tend to support the view that the consumer's obligation to provide personal data and the trader's obligation to supply digital content or services are analogous to a synallagmatic (reciprocal) obligation (do ut des).[21]

If we were to accept the view that the provision of digital content or services is carried out on the basis of a contract, the issue of obtaining the data subject's consent, its possible withdrawal, and the subsequent fate of the provision of the digital performance would not arise. The possibility of processing the data subject's personal data would exist for the duration necessary for the performance of the contract.

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[21] E.g. Bräutigam, P., Das Nutzungsverhältnis bei sozialen Netzwerken – Zivilrechtlicher Austausch von IT-Leistung gegen personenbezogene Daten, MMR – Zeitschrift für IT-Recht und Recht der Digitalisierung, vol. 15, no. 10, 2012, p. 640; Metzger, A., Dienst gegen Daten: Ein synallagmatischer Vertrag, Archiv für die civilistische Praxis, vol. 216, no. 6, 2016, p. 834; Specht, L., Daten als Gegenleistung – Verlangt die Digitalisierung nach einem neuen Vertragstypus?, JuristenZeitung, vol. 72, no. 15–16, 2017, p. 763; Zoll, F., Personal Data as Remuneration in the Proposal for a Directive on Supply of Digital Content, in: Lohsse, S.; Schulze, R.; Staudenmayer, D. (eds.), Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps – Münster Colloquia on EU Law and the Digital Economy II, Nomos, Baden-Baden, 2017, p. 180; Langhanke, C.; Schmidt-Kessel, M., Consumer Data as Consideration, EuCML – Journal of European Consumer and Market Law, vol. 4, no. 6, p. 221 *et seq* in: Jernej R., Personal data as means of payment for digital content or digital services in the Slovenian Implementation of the Digital content and Services Directive. [DOI: 10.3935/zpfz.74.56.9.], Available at:
[https://pdfs.semanticscholar.org/2b56/7a484c34775da9fcd713c2c4a8b2cdbd1ed6.pdf?_gl=1*1pzf5wy*_gcl_au*MjEwOTUyNDk5MS4xNzc0NjA3MDQy*_ga*MTUwMjE0NDM0My4xNzc0NjA3MDQy*_ga_H7P4ZT52H5*czE3NzQ2MDcwNDIkbzEkZzAkdDE3NzQ2MDcwNDIkajYwJGwwJGgw.], Accessed 7 April 2026.

3. HOW CAN THIS BE RESOLVED?

In the preceding chapters, we have highlighted certain risks arising both from the perception of personal data as an economic asset and from their provision as consideration under the DCD Directive. A significant risk also lies in the manner in which certain entities operating in the digital environment collect such data, and it may be noted that problematic issues also arise in relation to so-called adhesion contracts, which are based on the principle of "take it or leave it". In many cases, if a consumer wishes to exist in the online environment and access digital content or digital services, they are required to provide their data, even irrespective of the fact that they may also pay for the digital service or content with monetary consideration. As already mentioned above, the issue of perceiving personal data as an economic commodity may conflict both with the protection of the individual from the perspective of fundamental rights and with the protection of the data subject under the GDPR.

In the introduction to this paper, we asked whether there are legal limits to the use of the economic value of personal data without weakening or even infringing the protection of individuals' fundamental rights. The answer to this question lies not only in the conceptualisation of the right to the protection of personal data as a fundamental right, which we examined in the first chapter, but must also be sought in the GDPR itself, which provides the overarching framework for the protection of personal data.

A significant fact is that the DCD Directive itself, in Recital 48, expressly refers to the GDPR with regard to personal data and states that "*the processing of personal data in connection with any contract falling within the scope of this Directive should fully comply with Regulation (EU) 2016/679 or any other Union legal act on data protection. Furthermore, this Directive should be without prejudice to the rights, obligations and non-contractual remedies provided for in Regulation (EU) 2016/679. Circumstances leading to non-compliance with the requirements laid down in Regulation (EU) 2016/679, including fundamental principles such as data minimisation, privacy by design and privacy by default, may, depending on the circumstances of the case, also be considered as non-conformity of the digital content or digital service with the subjective or objective requirements of conformity laid down in this Directive*." Similarly, Recital 37 states that "*the performance of activities falling within the scope of this Directive may also involve the processing of personal data. Union law provides a comprehensive framework for the protection of personal data. In particular, this Directive is without prejudice to Regulation (EU) 2016/679 of the European Parliament and of the Council and Directive 2002/58/EC of the European Parliament and of the Council. That framework applies to any personal data processed in connection with*

contracts covered by this Directive. Personal data should therefore be collected or otherwise processed in accordance with Regulation (EU) 2016/679 and Directive 2002/58/EC. In the event of a conflict between this Directive and Union law on data protection, Union data protection law shall prevail."

As Bachňáková Rózenfeldová notes, this provision expressly establishes the primacy of Regulation (EU) 2016/679 over the provisions of Directive (EU) 2019/770, in view of the comprehensive nature of the regulation contained in the Regulation, which applies to any personal data processed in connection with contracts falling within the scope of that Directive.[22] In simple terms, the contracting parties cannot derogate from the framework of protection provided by data protection and privacy law through different contractual arrangements to the detriment of the data subject, and the provisions of Directive (EU) 2019/770 cannot impose less stringent requirements in this regard.[23] Is also stated that, on the basis of the above, it can be concluded that a trader supplying digital content or a digital service to a consumer in exchange for consideration consisting of the provision of personal data may, in light of the fact that it determines the purposes and means of the processing of the provided personal data, be regarded as a controller within the meaning of Article 4(7) of Regulation (EU) 2016/679.

From the established relationship between the DCD Directive and the GDPR, it can be clearly inferred that even where personal data are processed as consideration, the trader acts as a controller and is obliged to comply with all obligations imposed by the GDPR and to enable the data subject to exercise the rights conferred upon them by the Regulation.

Another aspect that must be assessed is that data subjects who provide their personal data as consideration in the digital environment do not transfer ownership of those personal data, but instead grant the trader a right to use them, i.e., to process them under the strict framework of the GDPR. In this context, Custers and Malgieri state that the right to data protection is an inalienable right and that "paying" with data does not constitute a transfer of ownership of personal data,

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22 Recital 37 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.

23 Efroni, Z. Gaps and Opportunities: *The Rudimentary Protection to 'Data-Paying Consumers' under New EU Consumer Protection Law.* Weizenbaum Series #4. Working Paper. Weizenbaum Institute for the Networked Society –The German Internet Institute. In: Bachňáková Rózenfeldová, L.: *Osobné údaje ako alternatíva peňažného plnenia v zmluvách o dodávaní digitálneho obsahu alebo digitálnych služieb*. in: Bačárová, R. *et al.,* Spotrebitelia a obchodníci na digitálnom trhu. Právne a ekonomické aspekty. 1. vydanie. Praha: Wolters Kluwer ČR, a. s., 2025, p. 80, Available at: [file:///Users/dianatrescakova/Downloads/Spotrebitelia%2520a%2520obchodn%25C3%25ADci%2520na%2520digi%2520trhu_4%20(2).pdf.], Accessed 27 March 2026.

but rather a transfer of rights in relation to personal data—namely, the granting of a right to collect and process them. They therefore reject the concept of ownership of personal data within the EU and accept their transfer only within the limits set by data protection law.[24] For this reason, it may be accepted that personal data can constitute a specific subject matter of an obligation and serve as a means of exchange in the digital economy, albeit in a strictly limited and, in a certain sense, temporary manner. By conceptualising personal data and their protection on the one hand, and the nature of the digital economy on the other, it is possible to acknowledge the flow of personal data within the digital economy as a valuable economic asset, while maintaining strict protection of personal data as a fundamental right of the individual, deriving primarily from the GDPR.

4. CONCLUSION

In the preceding parts of this paper, we have addressed the controversial nature of personal data from the perspective of their "tradability". We have discussed arguments that, on the one hand, reject the idea that personal data constitute an economic commodity provided in exchange for digital content or digital services, as permitted by the DCD Directive. However, the reality of digital markets and the rationale behind the adoption of the DCD Directive present an opposing view of the nature of personal data, perceiving them as a commodity and an economic asset.

It is clear that this question cannot be definitively resolved, nor can the various theories be unified in a way that would allow us to determine with certainty whether personal data have or do not have the nature of a form of payment in the online environment. At the same time, in the current context it is not possible to clearly determine whether personal data can be the subject of an individual's ownership right or merely of a personal right.

Despite these controversies, we must take into account the current state of the digital economy and acknowledge that there is no legislative barrier preventing a data subject acting in the position of a consumer from providing their personal data to a trader acting as a controller for further processing, the result of which may include profiling for targeted and personalised advertising, and even the creation of personalised pricing.

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[24] Custers, B.; Malgieri, G., *Priceless data: why the EU fundamental right to data protection is at odds with trade in personal data.* In: Computer Law & Security Review, Vol. 45, year 2022 ISSN 2212-473X, Available at:
[https://doi.org/10.1016/j.clsr.2022.105683], Accessed 27 March 2026.

We can therefore conclude that personal data undoubtedly have economic value and constitute a significant economic asset, albeit with a specific status stemming from the fact that they are inseparably linked to the identity of a natural person and form part of their private sphere. The European legal order therefore approaches personal data primarily from the perspective of the protection of fundamental rights, rather than as an object of property rights. The protection of personal data within the EU is understood as stringent, meaning that their processing is subject to the principles of lawfulness, transparency, and proportionality.

Moreover, the economic value of personal data must always be limited by the legal framework for the protection of individuals' fundamental rights and freedoms. Accordingly, the circulation and commercialisation of personal data require compliance with the applicable legal regulation and proper oversight of contractual relationships in which personal data constitute the subject matter.

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Chapter 7

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Review article

TRADE AS A TOOL OF MIGRATION GOVERNANCE AND THE LIMITS OF NORMATIVE POWER IN EU-TUNISIA RELATIONS

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ABSTRACT

With the rise of globalisation, the management of labour migration has entered the realm of trade relations. In this context, this article examines how migration-related objectives are embedded and operationalised through trade-based conditionality in EU-Tunisia relations. It asks how trade instruments, particularly within the framework of bilateral trade agreements, contribute to governing labour mobility beyond the boundaries of migration law and policy.

A combined methodological approach based on critical discourse analysis and qualitative content analysis is applied to EU-Tunisia trade-related documents, particularly the Euro-Mediterranean Association Agreement and two chapter proposals from the Deep and Comprehensive Free Trade Agreement negotiations concerning trade and sustainable development, and services and investment. Coding is structured around four forms of external conditionality: positive and negative conditionality, each examined through political and economic dimensions.

The results indicate a clear predominance of positive political and positive economic conditionality. Market access, regulatory cooperation, and liberalisation commitments are closely associated with expectations concerning regulatory approximation and political dialogue. Labour mobility therefore emerges as governed through a hybrid logic, merging trade liberalisation with external relations objectives and norm-based conditionality.

In conclusion, the paper nuances interpretations of EU external action based solely on normative power by showing the parallel relevance of market-based leverage and regulatory approximation. Tunisia's position in migration management for the European Union adds further complexity to this conclusion by reflecting the asymmetry of negotiations and the possibility of reversed conditionality.

***Keywords**: Conditionality, EU external relations, EU-Tunisia Relations, Labour migration governance, Normative power Europe*

1. INTRODUCTION

1.1. Background of the Issue

Relations between Tunisia and the European Union deepened further following the ratification of the EU-Tunisia Association Agreement in 1995. The transition from the cooperation agreement of 1976, which focused primarily on trade exchanges, to a formal association agreement illustrates the broadening scope of Euro-Mediterranean relations. Beyond the liberalisation of trade, the association agreement incorporated political dialogue, economic cooperation, and social dimensions, reflecting the growing importance of regulatory alignment and governance issues within EU-Mediterranean non-member countries. Notably, provisions called for the harmonisation of norms and regulations across several sectors, including transport, telecommunications, customs administration, and financial services. The agreement also addressed practices considered to distort competition, such as state monopolies, subsidies, and preferential treatment for public enterprises. Its social dimension encompassed dialogue on social issues and identified priority areas for collaboration, including the promotion of gender equality in development, the strengthening of social services, and initiatives aimed at addressing migration pressures. In particular, cooperation mechanisms were designed to support regional development policies intended to reduce migration, facilitate the reintegration of irregular migrants, and consolidate the rights of expatriate workers. [1]

The agreement largely reaffirmed the principles of the General Agreement on Trade in Services and included a rendezvous clause requiring the parties to reassess, after a period of five years, the possibility of further liberalisation in the areas of services and establishment[2]. In line with this provision, negotiations on services and establishment were launched between Tunisia and the European Union in 2008. However, as a result of the limited progress, parties agreed to incorporate these issues into a broader negotiating framework under the proposed EU–Tunisia Deep and Comprehensive Free Trade Agreement. In this sense, The DCFTA initiative represents a new phase in EU-Tunisia economic relations, moving beyond conventional trade liberalisation toward deeper forms of economic integration centred on regulatory approximation and the objectives of the EU's neighbourhood policy. It is within this evolving institutional architecture that the paper

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1 Jbili, A.; Enders, K., *The Association Agreement Between Tunisia and the European Union*, *Finance & Development*, Vol. 33, No. 3, 1996, p. 18.

2 Ghanmi, E.; Van der Loo, G., *What Kind of Future for the EU-Tunisia DCFTA?*, in: Cohen-Hadria, E. (ed.), *The EU-Tunisia Privileged Partnership – What Next?*, European Institute of the Mediterranean, Barcelona, 2018, pp. 58–83.

examines how migration-related objectives are embedded and operationalized through trade-based conditionality.

1.2. Literature Review

1.2.1. Economic migration governance through trade instruments

With economic globalization, states increasingly integrate mobility into long-term development strategies, viewing migrant labour as a productive resource in destination countries and as a vehicle for remittances, skills acquisition, and investment in origin states. This economic framing situates migration governance within broader processes of market integration. Trade regulation increasingly shapes domestic labour and market access rules, extending its influence into areas traditionally associated with migration control.[3] As a result, labour mobility becomes partially embedded within trade-related regulatory frameworks. Under the General Agreement on Trade in Services (GATS), Mode 4 defines mobility narrowly as the temporary presence of natural persons in the territory of another World Trade Organization Member for the purpose of supplying a service. It explicitly excludes access to the general labour market, permanent migration, and measures relating to citizenship or long-term residence. The Annex on the Movement of Natural Persons confirms this limitation: labour as such falls outside the scope of GATS. The regime therefore regulates cross-border service provision, not employment migration in the classical sense.

The Annex on the Movement of Natural Persons furthermore provides that requiring a visa for nationals of one Member but not another is not considered to "nullify or impair" benefits under a specific commitment.[4] A closer reading of Article 2 of the Annex, reveals that it addresses measures relating to permanent employment, thereby situating long-term labour market access outside the scope of Members' specific commitments. Article 4, by contrast, clarifies that measures concerning temporary entry and stay remain subject to an important qualification. It introduces a non-nullification and non-impairment condition, according to which Members must not apply such measures in a manner that undermines the commitments they have undertaken. Consequently, even where immigration or temporary employment measures formally fall within domestic regulatory competence, they may be subject to challenge under the dispute settlement

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3 Chaisse, J.; Meng, L., *Labor Migration in a Globalized World: The Human Journey's Challenges for International Law and Policy*, *Emory International Law Review*, Vol. 31, 2016, p. 49.

4 Annex on Movement of Natural Persons Supplying Services Under the Agreement, General Agreement on Trade in Services (GATS) (1994), Annex 1B, 1869 U.N.T.S. 183.

mechanism.[5] As the footnote clarifies, visa requirements alone are not considered nullifying or impairing; however, the associated administrative procedures could potentially be construed as such. This interpretation must be read alongside the progressive liberalization principle. In line with this principle, higher levels of liberalization are expected, as stipulated by Article XIX, to be progressive throughout periodical negotiations.[6] Therefore, access to markets, movement of natural persons and further establishment of the principle of national treatment shall be facilitated through these rounds.

Beyond specific commitments, two general obligations govern the movement of natural persons under the GATS: most-favoured-nation (MFN) treatment and transparency. According to the most-favoured nation (MFN) obligation, a state shall require immediate and unconditional treatment for service suppliers and services to all other countries based on their 'likeliness'In principle, MFN establishes non-discriminatory market access conditions; in practice, however, the regime incorporates multiple layers of flexibility that significantly qualify its reach in mobility-related contexts. In fact, exemptions are permitted under the opt-out approach.[7] Article II paragraph two permits Members to maintain exemptions at the entry into force of the WTO Agreement. New Members acceding to the WTO may similarly list exemptions in their Protocols, thus proving that mobility-related commitments are rather politically negotiated. Other exemptions are statutory in nature and can be explained by economic and labour market integration allowed under article V. Other exemptions, include security exceptions under Article XIVbis, frontier zone exceptions or even preferential treatment for least developed countries under article IV paragraph 3.[8]

Preferential Trade Agreements are a unique type of agreement, in the sense that some might provide rules on migration while others do not.[9] A typical example in this regard is the North American Free Trade Agreement (NAFTA), which introduced the Trade NAFTA visa category allowing high-skilled Canadian and Mexican citizens to work temporarily in the United States. PTAs s constitute in-

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5 Schmitz, J., *The Temporary Movement of Natural Persons in the Context of Trade in Services: EU Trade Policy under Mode 4 (WTO/GATS)*, in: Panizzon, M.; Zürcher, G.; Fornalé, E. (eds.), *The Palgrave Handbook of International Labour Migration*, Palgrave Macmillan, London, 2015, pp. 415–440.

6 Delimatsis, P., *Article XIX GATS: Progressive Liberalization***,** in: Wolfrum, R.; Stoll, P. T.; Feinäugle, C. (eds.), *WTO – Trade in Services***,** Leiden, 2008, pp. 427–444.

7 Annex on Article II Exemptions, General Agreement on Trade in Services (GATS) (1994), Marrakesh Agreement Establishing the World Trade Organization, 1869 United Nations Treaty Series 183.

8 Wolfrum, R.; Stoll, P. T.; Feinäugle, C. (eds.), *WTO—Trade in Services*, Koninklijke Brill NV, Leiden, 2008, pp. 92–107.

9 Chaisse, J.; Meng, L., *Labor Migration in a Globalized World: The Human Journey's Challenges for International Law and Policy*, *Emory International Law Review*, Vol. 31, 2016, p. 49.

stitutionalised exceptions to the most-favourite-nation principle. In fact, the proliferation of PTAs has generated a layered trade architecture in which preferential regimes coexist with, and sometimes displace, MFN-based multilateralism. As a result, an increasing share of international transactions is governed by selective commitments. However, most of the rules regarding labour mobility in the PTAs, are criticized for establishing fast-track entry and remaining heavily skewed toward professionals and specialty occupations. Low-skilled labour mobility is rarely liberalised under trade agreements.[10]

Despite the political sensitivity of labour mobility, the European Union have scheduled broad commitments under Mode 4. The commitments not only reflect the importance of services trade in the EU, but also illustrate the tension between trade liberalisation objectives and the regulatory autonomy of the states.[11] A key characteristic of the EU commitments is their horizontal structure. This is explained by the fact that Mode 4 commitments typically apply across multiple sectors because immigration authorities regulate entry primarily according to the purpose of stay, skill level and employment status rather than according to sectoral activity. The European Commission generally distinguishes between three main categories of service suppliers: intra-corporate transferees (ICTs), business visitors (BVs), and contractual service suppliers (CSSs), with the recent category of independent professionals (IPs).[12]

Empirically, however, EU commitments remain strongly concentrated in high-skilled categories of labour mobility. At the conclusion of the Uruguay Round, the majority of commitments across WTO members, concerned specialists and professionals linked to foreign investment or commercial presence. In practice, this means that many Mode 4 commitments are functionally linked to Mode 3 commercial presence, allowing multinational firms to transfer key personnel necessary for the establishment and operation of subsidiaries abroad. As a result, mobility commitments largely serve the needs of multinational service providers rather than facilitating broader labour mobility.[13] The high-skills' highlight by The

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[10] Panizzon, M., *Temporary Movement of Workers and Human Rights Protection: Interfacing the 'Mode 4' of GATS with Non-Trade Bilateral Migration Agreements*, *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 104, 2010, pp. 131–139.

[11] Opinion of the European Economic and Social Committee on the General agreement on trade in services (GATS) — Mode 4 negotiations (movement of physical persons) [2005] OJ C 286/06.

[12] Tans, S., *Ensuring the return of Mode 4 service suppliers without admitting them in the first place?*, EU Migration Law Blog, Available at: [https://eumigrationlawblog.eu/ensuring-the-return-of-mode-4-service-suppliers-without-admitting-them-in-the-first-place/], Accessed 15 March 2026.

[13] Schmitz, J., *The Temporary Movement of Natural Persons in the Context of Trade in Services: EU Trade Policy under Mode 4 (WTO/GATS)*, in: Panizzon, M.; Zürcher, G.; Fornalé, E. (eds.), *The Palgrave*

EU commitments seems practically easier with the removal of economic need test and the requirement of a university degree. Managers and specialists may therefore enter the EU temporarily when their presence is deemed essential to the functioning of an enterprise. The bypassing of a university degree requirement means that eligibility may be determined by managerial responsibilities or by the possession of specialised knowledge essential to the company's operations. Nevertheless, for categories not linked to establishment, such as contractual service suppliers or independent professionals, a degree or equivalent technical qualifications are required.[14]

1.2.2. Normative Power Europe in the context of trade

Although the European Union lacks statehood in the Westphalian sense, it has emerged as a paradigmatic case of a civilian power. Its influence is most visible in domains where soft-power instruments, such as diplomacy, and institutional cooperation, carry more weight than coercive means. As Howorth argues, the EU's institutional fragmentation is often interpreted as a strategic weakness; however, this very dispersion of authority has enabled the Union to project a distinctive regulatory and normative influence.[15] The EU's global actorness is grounded more in its capacity to externalize legal norms, institutional models, and governance practices. Therefore, operationalising what has come to be known as a normative power. In this sense, the concept of Normative Power Europe refers to the European Union's capacity to shape international norms, through the diffusion of principles grounded in its own historical experience, legal foundations, and political identity. As presented by Manners, it is the EU's ability to define what is considered normal in global affairs through ideational influence. This includes the promotion of peace, democracy, rule of law, and human rights in its external actions.[16]

Scholars increasingly argue that EU trade policy has long been subject to politicization and more recently, to geopoliticization.[17] Drawing on De Wilde's framework,

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Handbook of International Labour Migration, Palgrave Macmillan, London, 2015, pp. 415–440.

14 *Ibid*.

15 Howorth, J., *The EU as a Global Actor: Grand Strategy for a Global Grand Bargain?*, *Journal of Common Market Studies*, Vol. 48, No. 3, 2010, pp. 455–474.

16 Manners, I., *Normative Power Europe: A Contradiction in Terms?*, *Journal of Common Market Studies*, Vol. 40, No. 2, 2002, pp. 235–258.

17 Meunier, S.; Nicolaidis, K., *The Geopoliticization of European Trade and Investment Policy*, *Journal of Common Market Studies*, Vol. 57, No. 6, 2019, pp. 103–113; Schimmelfennig, F.; Leuffen, D.; Rittberger, B., *The European Union as a system of differentiated integration: interdependence, politicization and differentiation*, *Journal of European Public Policy*, Vol. 22, No. 6, 2015, pp. 764–782; De Wilde, P.,

politicization can manifest in three distinct domains: within political institutions, decision-making processes, or specific policy issues. In the context of this paper, politicization is understood primarily at the level of issue-specific contestation. It refers to "an increase in the salience and diversity of opinions on specific societal topics".[18] When particular issues attract heightened public attention and competing societal demands for policy intervention, they are considered politicized in this sense.

The politicization of trade policy has been studied in terms of causes and consequences.[19] It was also proven not to be a recent phenomenon in trade related policy discussions in the EU.[20] The Treaty of Lisbon[21] marked a turning point in the European Union's Common Commercial Policy by making the pursuit of the Union's external action principles and objectives a constitutional obligation, as mentioned by article 207 TFEU.[22] Hence, it redefined the legal and normative foundations of the Common Commercial Policy by embedding non-commercial objectives into the Union's external trade policy. This normative shift is furthermore supported by the Article 21, paragraphs (1), (2) and (3), of the Treaty on European Union, which requires that all external actions, including trade, reflect

*No Polity for Old Politics? A Framework for Analyzing Politicization of European Integration***,** *Journal of European Integration*, Vol. 33, No. 5, 2011, pp. 559–575.

18 De Wilde, P., *No Polity for Old Politics? A Framework for Analyzing Politicization of European Integration***,** *Journal of European Integration*, Vol. 33, No. 5, 2011, pp. 559–575.

19 While early research focused predominantly on 'bottom-up drivers', such reactions of those negatively affected by liberalization or identity-based opposition to integration, recent studies emphasize the strategic role of political entrepreneurs, civil society actors, and EU institutions in shaping both the intensity and trajectory of politicization. Importantly, politicization is not treated as a mere reaction to globalization. It is a process where actors can also attempt to depoliticize contested issues or reframe them in ways that legitimize trade policy choices. See: Dür, A.; Hamilton, S. M.; De Bièvre, D**.,** *Reacting to the politicization of trade policy***,** *Journal of European Public Policy*, Vol. 31, No. 1, 2024, pp. 1–19.

20 Trade has historically been a site of political contestation, both at the intergovernmental level, where member states have clashed over the scope and content of EU trade mandates, such as the cultural exception and resisted the gradual shift of trade powers from national governments to EU institutions. Public protest is also not new: civil society groups were already actively mobilizing in the late 1990s, for example during the campaign against the Multilateral Agreement on Investment and the large anti-globalization protests at the 1999 WTO meeting in Seattle. What has changed more recently is not the existence of politicization, but its visibility. Politicization, thus, became only more apparent, especially after the Lisbon Treaty gave the European Parliament a greater role in trade policy-making. See: Meunier, S.; Nicolaidis, K., *The Geopoliticization of European Trade and Investment Policy*, *Journal of Common Market Studies*, Vol. 57, No. 6, 2019, pp. 103–113.

21 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01.

22 Article 207 TFEU, Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/01.

the Union's core values and "which it seeks to advance in the wider world".[23] Notably, Article 21(3) expands the scope of this obligation to encompass the external dimensions of internal EU policies, thereby reinforcing the coherence between internal policies and external action.

The European Union's trade governance toolkit in its external relations is extensively analysed through the lens of conditionality. Conditionality in this case, serves for promoting non-trade values within trade and association agreements.[24] As outlined by Saurugger and Terpan, the legal weight of this tool can manifest in the normative change that may occur at the level of a policy, act, or norm, involving a hardening of soft-law or an enforcement of a soft obligation.[25] It can be understood, as the practice of tying the provision of benefits, mostly in form of financial assistance, to the adoption of particular policies, reforms, or the achievement of specific objectives.[26] The actions of the aid recipient may be shaped by the promise of incentives or the threat of reduced or withdrawn support, a dynamic known in the literature as positive or negative conditionality. Positive conditionality refers to the promise or granting of additional benefits in exchange for compliance with specified norms or reforms. This might include trade liberalisation measures, increased development aid, or preferential market access. Therefore, the logic underpinning positive conditionality is the alignment of compliance. On the other hand, negative conditionality operates through the threat or imposition of penalties in response to non-compliance. Negative conditionality, as a result, presumes that the cost of non-compliance must outweigh the political or economic cost of policy change for the mechanism to be effective.[27] Conditionality can also be distinguished according to its substantive focus: political or economic. Political conditionality typically requires the fulfilment of criteria related to democracy, rule of law, or human rights. In contrast, economic conditionality is often tied to

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[23] Article 21 TFEU, Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/01.

[24] Martines, F., *EU Political Conditionality as a Tool for the Promotion and Protection of Non-trade Values in Non-EU Countries*, in: Velluti, S. (ed.), *The Role of the EU in the Promotion of Human Rights and International Labour Standards in Its External Trade Relations*, Springer, Cham, 2020, pp. 97–167; Becker, P., *Conditionality as an Instrument of European Governance – Cases, Characteristics and Types*, *Journal of Common Market Studies*, Vol. 63, No. 2, 2025, pp. 402–419.

[25] Saurugger, S.; Terpan, F., *Normative transformations in the European Union: on hardening and softening law*, *West European Politics*, Vol. 44, No. 1, 2021, pp. 1–20.

[26] Becker, P., *Conditionality as an Instrument of European Governance – Cases, Characteristics and Types*, *Journal of Common Market Studies*, Vol. 63, No. 2, 2025, pp. 402–419.

[27] Martines, F., *EU Political Conditionality as a Tool for the Promotion and Protection of Non-trade Values in Non-EU Countries*, in: Velluti, S. (ed.), *The Role of the EU in the Promotion of Human Rights and International Labour Standards in Its External Trade Relations*, Springer, Cham, 2020, pp. 97–167.

macroeconomic reforms, structural adjustment, or compliance with labour and environmental standards, often employed by international financial institutions.[28]

As argued by Francesca Martines, conditionality-setting in the context non-trade provisions, poses a question on the legitimacy of the EU to conclude them. It can be stated that this competence of the EU does not emerge from a general competence but sector-specific rules.[29] In the Context of trade policy and the EU's external agreements, article 208 TFEU on development cooperation and Article 217 TFEU on association agreements are thus recognized as legitimate legal bases for such clauses. That is insofar as they align with the broader objectives of aligning EU external with the EU values, including human rights and sustainable development. In Opinion 2/15 on the *EU-Singapore Free Trade Agreement*, the CJEU offered clarification regarding the competence of the EU to include sustainability-related obligations in its trade agreements. The main logic under which the court argues is that what falls within the scope of the Common Commercial Policy falls under the exclusive competence of the EU under Article 3(1)(e) TFEU. Central to the Court's reasoning was the finding that provisions, relative to trade and sustainable development, function as trade-related commitments. Specifically, the obligations to implement these obligations are presented as preconditions to ensuring fair and sustainable trade, and did not constitute autonomous social or environmental regulation.[30]

The existing literature provides three main analytical foundations: the governance of labour mobility through trade instruments, the normative dimensions of EU external trade policy, and the conditionality mechanisms embedded in association and trade agreements. Yet significant gaps persist at their intersection. First, scholarship on Mode 4 largely centres on labour mobility as an explicit, positively scheduled commitment. Which allows examining who is included, at what skill level, and under what sectoral conditions. What remains underexplored is how migration governance operates not through direct liberalisation commitments but through its implicit embedment in the broader architecture of trade and investment specifically in priveledged partnerships such as the one of Tunisia with the EU. Second, while the conditionality literature has thoroughly examined political and economic conditionality as mechanisms for promoting democracy, human rights, or macroeconomic reform, it has paid comparatively little attention to how

[28] Becker, P., *Conditionality as an Instrument of European Governance – Cases, Characteristics and Types*, *Journal of Common Market Studies*, Vol. 63, No. 2, 2025, pp. 402–419.

[29] Martines, F., *EU Political Conditionality as a Tool for the Promotion and Protection of Non-trade Values in Non-EU Countries*, in: Velluti, S. (ed.), *The Role of the EU in the Promotion of Human Rights and International Labour Standards in Its External Trade Relations*, Springer, Cham, 2020, pp. 97–167.

[30] Opinion 2/15 (EU-Singapore Free Trade Agreement) [2017] ECLI:EU:C:2017:376.

different conditionality logics, such as positive, negative, political, and economic, converge around migration-specific objectives within a single bilateral framework. Third, EU-Tunisia relations have been studied in the context of the European Neighbourhood Policy and migration externalisation, but the Association Agreement of 1995 and the DCFTA negotiations have not been systematically analysed as sites of migration governance through the specific lens of trade relations and conditionality logics. This paper addresses these gaps by qualitatively analysing how migration is embedded, rather than explicitly scheduled, in EU-Tunisia trade relations. By applying a conditionality coding framework to these instruments, the research disaggregates the legal and normative mechanisms through which the EU governs Tunisian migration within a trade relationship, thereby contributing a more granular and legally grounded account of migration-trade nexus governance than the existing literature currently offers.

1.3. Research Questions and Methodology

The study examines how economic migration is governed through trade-based instruments in EU-Tunisia relations. It investigates how migration-related objectives are embedded and operationalized through trade-based conditionality. Therefore it aims to answer the following research question: How does trade-based conditionality embed and operationalize migration-related objectives in EU-Tunisia relations?

In order to answer this question the paper adopts critical discourse analysis and content analysis to examine relative instruments to in EU-Tunisia trade relations. Critical discourse analysis is used to identify how trade and migration are framed within legal and policy documents, paying attention to the language through which obligations, incentives, and regulatory expectations are constructed. Qualitative content analysis complements this by systematically coding the selected corpus in order to identify recurring forms of conditionality and their patterns of co-occurrence across documents. The codes rely on the nature and types of conditionality as explained by the literature[31] and conceptualised in table 1. Regarding the nature of conditionality, a provision is coded as positive when it conditions the granting, maintenance, or expansion of a benefit, upon compliance with a specified norm or reform. These benefits include for example preferential market access, financial assistance, or enhanced cooperation. The operative textual marker is

[31] See: Becker, P., *Conditionality as an Instrument of European Governance – Cases, Characteristics and Types*, *Journal of Common Market Studies*, Vol. 63, No. 2, 2025, pp. 402–419. And See: Martines, F., *EU Political Conditionality as a Tool for the Promotion and Protection of Non-trade Values in Non-EU Countries*, in: Velluti, S. (ed.), *The Role of the EU in the Promotion of Human Rights and International Labour Standards in Its External Trade Relations*, Springer, Cham, 2020, pp. 97–167.

the conditional extension of an advantage. A provision is coded as negative when it explicitly or implicitly reserves the right to suspend, restrict, or withdraw an existing benefit in response to non-compliance, or when it establishes an obligation whose breach triggers a remedial or safeguard mechanism. The operative marker is the conditioned withdrawal or restriction of what has already been agreed. Where a provision contains both logics, for instance, offering additional benefits for compliance while reserving restrictions for non-compliance, it is coded for both.

Regarding the substantive dimension, a provision is political when its primary regulatory object concerns governance arrangements, institutional reform, legal approximation, human rights, labour standards and international law obligations. Conditionality is economic when its primary regulatory object concerns market access rules, trade liberalisation, regulatory standards for goods, services or investment. These criteria are applied at the level of individual provisions, not at the level of entire chapters, in order to preserve analytical granularity.

Table 1. Typologies and Dimensions of External Conditionality

External Conditionality			
Types		Nature	
Positive conditionality	Negative conditionality	Political conditionality	Economic conditionality

Source: Author

Migration often intersects with trade in services and particularly the movement of persons in services provisions. Furthermore, migration related objectives can be found in debates on combatting the root causes of irregular migration, and promoting sustainable development.[32] Based on this logic, the study analyses the available documents published by the European Commission on the DCFTA with Tunisia, in the areas of trade and investment and Sustainable Development.[33] Added to these documents, the paper offers a legal and political analysis of the text of the Euro-Mediterranean association agreement between the EU and Tunisia.[34] Overall, documents were selected on the basis of their legal and policy relevance

[32] Lavenex, S.; Fakhoury, T., *Trade Agreements as a Venue for Migration Governance: Potential and Challenges for the European Union*, Delmi Report 2021:11, Stockholm, 2021.

[33] European Commission, *Services and investment*, CIRCABC, Available at: [https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/a451788b-3eeb-41c0-877f-734aaf733a8f/details], Accessed 15 March 2026. European Commission, *Sustainable development*, CIRCABC, Available at: [https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/b8a5d5b6-0887-407b-a690-9d9c8f4f66ee/details], Accessed 15 March 2026.

[34] Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part [1998] OJ L97/2.

to the governance of migration through trade instruments. The Association Agreement is the foundational bilateral framework, and the DCFTA documents is the most recent and comprehensive expression of the EU's regulatory ambitions in the relationship. The analysis focuses on provisions that explicitly or implicitly govern the movement of persons, establish conditionality mechanisms, or embed migration-related objectives within trade and development frameworks.

2. RESULTS

2.1. Migration Management Through the EUAA and DCFTA

The adoption of the EU-Tunisia Association Agreement shall be situated within the broader framework of Euro-Mediterranean relations initiated under the Barcelona Process. It does not constitute a mere commercial agreement as it forms a part of a wider regional policy through which the European Union sought to stabilize its southern neighbourhood through economic integration, political dialogue, and regulatory approximation. The preamble of the agreement is particularly revealing in this regard, as it refers to "the importance of the traditional existing links" between Tunisia, the European Community, and its Member States, as well as to the "common values" shared by the parties. Therefore, the agreement reflects more than diplomatic continuity: it situates bilateral cooperation within a historical narrative shaped by a colonial past and asymmetrical interdependence, while promising political and economic integration in the "the community of democratic nations".[35]

The invocation of shared values in the agreement also signals the normative vocabulary through which the EU framed its Mediterranean policy during the 1990s. Alongside commitments to liberalization, the agreement reflected the emerging external projection of the EU's own internal market model. Yet this normative framing coexisted from the outset with strategic concerns linked to regional stability as migration became progressively associated with socio-economic issues and later, in the post-2001 atmosphere, with security risks. Later in 2004, the European Neighbourhood Policy, reinforced the idea that economic integration and regulatory convergence would contribute simultaneously to development and to the containment of mobility pressures. Financial instruments supporting Tunisia's adjustment to liberalization were therefore framed as a means to address the socio-economic conditions identified as root causes of irregular migration.[36]

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[35] Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part [1998] OJ L97/2.

[36] Langan, M., *The moral economy of EU relations with North African states: DCFTAs under the European Neighbourhood Policy*, *Third World Quarterly*, Vol. 36, No. 10, 2015, pp. 1827–1844.

Among the stated objectives of the Association Agreement is the establishment of a framework for political dialogue intended to contribute to "peace, security and regional development," as provided in Article 4. The latter, gives the agreement a scope extending well beyond trade liberalization as the political dialogue remains open-ended, allowing cooperation to expand into broader domains of external governance with the evolvement of priorities and "regional developments". In retrospect, this flexibility anticipated later developments within the European Union's external action, particularly the consolidation of migration-related concerns under the emerging Area of Freedom, Security and Justice. The open structure of dialogue also reflects a soft-law preference in which cooperation is progressively shaped through consensus and negotiation rather than precisely binding obligations. Within this framework, the chapter concerning migrant workers introduces an initial rights-based approach through the principle of equal treatment. Tunisian workers legally employed in a Member State are granted treatment equivalent to that of nationals of the host state with regard to working conditions, remuneration, and dismissal, while Tunisia is reciprocally required to accord the same treatment to nationals of Member States employed on its territory. At first sight, these provisions suggest a social dimension within the agreement and appear consistent with the EU's normative discourse on labour protection. However, this protection remains narrowly circumscribed as Article 69 explicitly excludes persons residing or working irregularly from the scope of these guarantees, thereby making access to labour rights conditional upon a regular status. Therefore, the allocation of rights in this sense does not emanate from labour or employment relationships themselves but from conformity with the admission control requirements.

A closer reading of Article 71 reveals that migration is addressed through three analytically distinct categories: the living and working conditions of migrant communities, migration in broader terms, and irregular migration. This differentiation implies that migration is treated as a set of policy areas, relevant to labour integration, migration opportunities and readmission and irregular migration. The reference to migrant communities concerns social integration and protection, while irregular migration introduces a control-oriented dimension. Between these two, the broader category of migration appears to designate regulated or desirable forms of mobility, including potential legal pathways linked to labour and development cooperation. The approach of selective and desired forms of migration appears to be confirmed with the focus on capacity-building and the provision of trainings besides scientific research incentives. From this perspective, the agreement repeatedly reorients migration-related cooperation toward developmental axes in areas identified as sources of emigration, while maintaining a control-focused approach relative to the entry requirements and the regular status of TCNs.

Article 71(a), for example, links migration pressures to employment creation and vocational training in regions from which migrants originate. The same logic extends to subsequent provisions referring to poverty reduction, public health, and social improvement. In this sense, the Association Agreement articulates an early external governance model in which migration is managed simultaneously through selective labour protection based on the legal status of immigrants, and the prioritization of irregular migration as an object of bilateral cooperation.

In conclusion, the migration-related provisions of the Association Agreement reveal a model structured by two interdependent rationalities. The first is developmental: migration pressures are approached through employment generation, vocational training, poverty reduction, and social improvement in regions identified as sources of emigration. The second is control-oriented: labour-related protections are granted only within the boundaries of legal residence and lawful employment, while irregular migration is jointly combatted.

It is possible to note that this model illustrates how the external dimension of migration management progressively became a multi-pillar component of Euro-Mediterranean relations, linking socio-economic cooperation to concerns traditionally associated with internal security.[37]

Analytically, this reflects an early form of politicization of migration within EU external relations: economic cooperation is no longer treated as an autonomous objective, but as an instrument expected to produce stabilizing effects on mobility. Trade expansion, development support, and regulatory cooperation were already framed, in the Seville European Council Conclusions of 2002, not only as instruments of partnership, but also as mechanisms for reducing migratory pressures.[38] In this sense, the agreement anticipates a policy logic that later became central in EU external migration governance: addressing the root causes of migration through external economic cooperation, while preserving asymmetrical control over access to mobility and rights.

The shift towards the Deep and Comprehensive Free Trade Area reflects a broader transformation in the EU's trade agreements, where economic agreements are no longer limited to tariff reduction but increasingly incorporate "deep" and "comprehensive" dimensions. In this sense, the "deep" dimension refers to the progressive incorporation of the partner country into parts of the EU internal market

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37 Geddes, A., *Europe's Border Relationships and International Migration Relations*, *Journal of Common Market Studies*, Vol. 43, No. 4, 2005, pp. 787–806.

38 Council of the European Union, Presidency Conclusions, Seville European Council 21 and 22 June 2002, 13463/02, POLGEN 52, Brussels, 24 October 2002.

through the alignment of national legislation with selected components of the EU acquis. In the services chapter, the movement of persons is addressed through the categories traditionally associated with trade in services, particularly those corresponding to cross-border provision, commercial presence, and the temporary movement of natural persons supplying services. The proposed provisions cover business sellers, business visitors for establishment purposes, contractual service suppliers, independent professionals, and intra-corporate transferees. Hence, the horizontal approach to mode 4 related to the presence of services suppliers noted in comparative EU FTAs[39] is quite similar in the current proposal. The commitment under mode 4 seems to follow as well a utilitarian approach by focusing solely on the labour itself and investment. Less attention seems to be given to the mobility of persons, especially as Tunisia's aspirations build high hopes on the category of independent professionals in ICT. As a result, the apparent opening created by services liberalization does not amount to general labour market access.

Other issues to be highlighted in the proposal concern the social rights of migrant workers. In fact, the draft states that all domestic labour and social security rules of the host party continue to apply, including provisions relating to minimum wages and collective agreements. Consequently, temporary mobility with the services liberalization under the DCFTA does not generate an autonomous social regime at the bilateral level. An additional restriction appears in the clause excluding commitments on entry and temporary stay where the intention or effect would be to intervene in labour disputes, influence collective bargaining, or affect employment outcomes in contexts of conflict between employers and trade unions.[40] Which could mean by reading further into it, that mobility is accepted only insofar as it remains detached from social conflict and domestic industrial relations.

Yet the chapter on Trade and Sustainable Development simultaneously reaffirms the parties' commitment to the objectives of the 2030 Agenda for Sustainable Development, particularly with regard to labour protection and environmental governance.[41] At the normative level, this chapter incorporates the now-standard EU trade policy language linking market integration to sustainable development

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39 Schmitz, J., *The Temporary Movement of Natural Persons in the Context of Trade in Services: EU Trade Policy under Mode 4 (WTO/GATS)*, in: Panizzon, M.; Zürcher, G.; Fornalé, E. (eds.), *The Palgrave Handbook of International Labour Migration*, Palgrave Macmillan, London, 2015, pp. 415–440.

40 Article 4.1, European Commission, *Services and investment*, CIRCABC, Available at: [https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/a451788b-3eeb-41c0-877f-734aaf733a8f/details], Accessed 15 March 2026.

41 Article 1, European Commission, *Sustainable development*, CIRCABC, Available at: [https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/b8a5d5b6-0887-407b-a690-9d9c8f4f66ee/details], Accessed 15 March 2026.

commitments, including references to internationally recognized labour standards and the obligation not to weaken domestic protection in pursuit of competitive advantage.[42] From this angle the EU's discourse seems contradictory. On the one hand, the chapters on services and investment promote broad market opening through expanded commercial access, regulatory facilitation, and investment protection mechanisms designed to deepen liberalization. On the other hand, the movement of natural persons supplying those services remains confined to defined categories and temporary admission. Mobility is therefore treated not as an equivalent dimension of liberalization, but as a carefully filtered exception attached to commercial activity. That is to say that, although the admitted categories of service providers are generally not subject, in principle, to full economic needs tests under the trade framework, their actual entry remains conditioned by domestic labour migration regulations maintained by Member States. In practice, national labour market considerations may still operate through administrative requirements, sectoral reservations, qualification controls, or authorisation procedures that restrict effective access.

2.2. Conditionality design in migration-related clauses in the EMAA and DCFTA

The European Union's trade governance toolkit in its external relations is extensively analysed through the lens of conditionality, which serves as a key mechanism for promoting non-trade values within trade and association agreements. Conditionality may be understood as the practice of tying the provision of benefits to the adoption of particular policies, reforms, or the achievement of specific objectives. It can be classified into four categories: positive or negative, each with either an economic or political orientation. Its use depends on the objective pursued in influencing the behaviour of the partner country. In EU–Tunisia relations, conditionality reflects the requirements imposed by the EU for Tunisia's compliance, whether political or economic in nature.

Positive conditionality links compliance to a compensatory benefit, whereas negative conditionality implies a cost in cases of non-compliance. To illustrate this for example, a case of positive conditionality is when the EU's support of structural policies in Tunisia to restore financial equilibrium and enhance social welfare, is tied to the condition of applying the suggested adjustment programme proposed by the EU and the FMI. Successful application suggests, therefore, support from the EU to national financial institutions and welfare support, as presented in ar-

[42] *Ibid*., Art. 3 and 4.

ticle 76 of the EMAA.[43] Another recent example from the DCFTA includes the need to cooperate on commercial and political aspects related to sustainable development, labour and environmental standards as a precondition to deeper trade cooperation.[44] Negative conditionality; on the other hand, do not include direct punishments per say, however they establish the limits of actions of the parties. For instance, in the DCFTA, respecting fundamental human rights and labour standards, is recognised as a precondition to establishing trade relations. However, the condition is built on a negative obligation, which is not using lower labour standards and working conditions as a comparative advantage. As such "the parties recognise that violation of principles and fundamental rights at work can neither be invoked nor utilised as a legitimate comparative advantage, and that labour standards cannot serve protectionist commercial objectives".[45]

Negative political conditionality, which usually implies reduced cooperation and lower flexibility, appears less prominent because of Tunisia's role as a transit country in EU migration management, which makes cooperation necessary. By contrast, positive political conditionality emerges as the most frequent form across the documents as shown by table 2, indicating that the EU's migration cooperation relies primarily on legal and political incentives. This includes for example facilitated access for selected categories of workers to the EU market. These incentives, however, remain conditional upon political compliance, particularly regarding national migration governance, readmission commitments, and broader alignment with the EU acquis. For instance, the Euro-Mediterranean Association Agreement explicitly states that relations "between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect for human rights and democratic principles which […] constitute an essential element of the Agreement", thereby conditioning the continuation of cooperation on political and normative requirements. The EMAA also links cooperation to migration control objectives through provisions allocating priority in the bilateral relations to "(a) reducing migratory pressure, in particular by creating jobs and developing training in areas from which emigrants come; (b) resettling those repatriated because of their illegal status under the legislation of the state in question". Similarly, the DCFTA in the

[43] Article 76, Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part [1998] OJ L97/2.

[44] Article 14, European Commission, *Sustainable development*, CIRCABC, Available at: [https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/b8a5d5b6-0887-407b-a690-9d9c8f4f66ee/details], Accessed 15 March 2026.

[45] Article 4 (8), European Commission, *Sustainable development*, CIRCABC, [https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/b8a5d5b6-0887-407b-a690-9d9c8f4f66ee/details], Accessed 15 March 2026.

Trade and Sustainable Development chapter conditions deeper cooperation on compliance with internationally recognised labour standards, including the effective implementation of ILO core conventions, labour inspection systems, occupational safety measures, and decent working conditions. In this case, conditionality has another layer that demands broader convergence with EU and international human and labour rights.

Positive economic conditionality is also recurrent, especially in the trade context, where compliance is linked to deeper liberalisation and expanded market access. This is particularly visible in the DCFTA services and investment chapter, where the parties commit to facilitating the temporary admission and stay of business visitors, intra-corporate transferees, and professional sellers within sectors covered by negotiated commitments. The chapter adds further in this regards that the sectoral commitments should not maintain discriminatory restrictions such as the economic needs tests and quotas on the number of foreign business visitors or transferred employees. However, temporal limits exist on the maximum period of stay and employment of the existing categories. At the same time, the EMAA connects financial and technical assistance to broader economic restructuring objectives, including industrial modernisation, financial sector reforms and regulatory approximation especially when it comes to the establishment of investment protection frameworks.

Table 2. Frequency of Codes

Type	Frequency	Percentage
Negative Economic Conditionality	3	8.33%
Negative Political Conditionality	5	13.89%
Positive Economic Conditionality	11	30.56%
Positive Political Conditionality	17	47.22%

Source: Author

The coding distribution demonstrates that political conditionality remains dominant in foundational provisions of the Association Agreement, whereas the DCFTA introduces denser economic and regulatory conditionality through services liberalisation and legislative approximation. Economic conditionality in the DCFTA is equally positive and negative. This adds an affirmative layer to conditionality, as many obligations are framed in terms of facilitating market access and economic integration, while simultaneously prohibiting regulatory practices that could restrict liberalisation. For instance, several provisions concerning the temporary movement of business persons and investors require each party to permit the admission and temporary stay of business visitors, intra-corporate transferees, and sales representatives. The draft agreement further discourages the mainte-

nance or adoption of discriminatory numerical quotas and economic needs tests that would limit the number of foreign service suppliers or employees that investors may temporarily employ.[46]

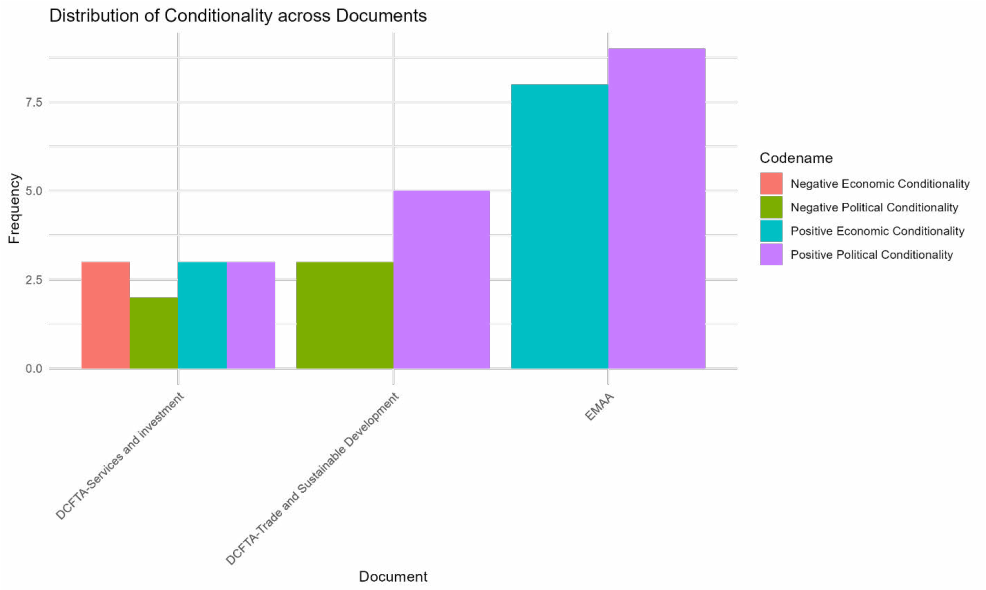
At the same time, these benefits are accompanied by negative economic conditionality in the form of explicit prohibitions on certain practices. Article 4 on market access, prevents parties from imposing conditions on investors such as mandatory technology transfers, restrictions linking imports to exports, or obligations to recruit a specified proportion of domestic workers. Such provision illustrate negative conditionality because they operate through obligations not to adopt or maintain specific regulatory measures.[47] While they ultimately seek to facilitate investment and economic integration, they do so by constraining the policy autonomy of the parties. Examples of political conditionality on the other hand, in the DCFTA, include the non-applicability of commitments regarding the temporary entry and stay of business persons where such entry seeks to interfere with labour disputes or collective bargaining processes.[48] Hence, we see for instance the presence of all types of conditionality in the services and investment chapter proposal. However in the chapter related to trade and sustainable development is only focused on political conditionality indicating a focus on sustainable development policies especially relative to labour standards and environmental standards.

[46] Article 12 and 18, European Commission, *Services and investment*, CIRCABC, Available at: [https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/a451788b-3eeb-41c0-877f-734aaf733a8f/details], Accessed 15 March 2026.

[47] Article 4, European Commission, *Services and investment*, CIRCABC, Available at: [https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/a451788b-3eeb-41c0-877f-734aaf733a8f/details], Accessed 15 March 2026.

[48] Article 4, European Commission, *Services and investment*, CIRCABC, Available at: [https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/a451788b-3eeb-41c0-877f-734aaf733a8f/details], Accessed 15 March 2026.

Figure 1. Distribution of Conditionality across documents



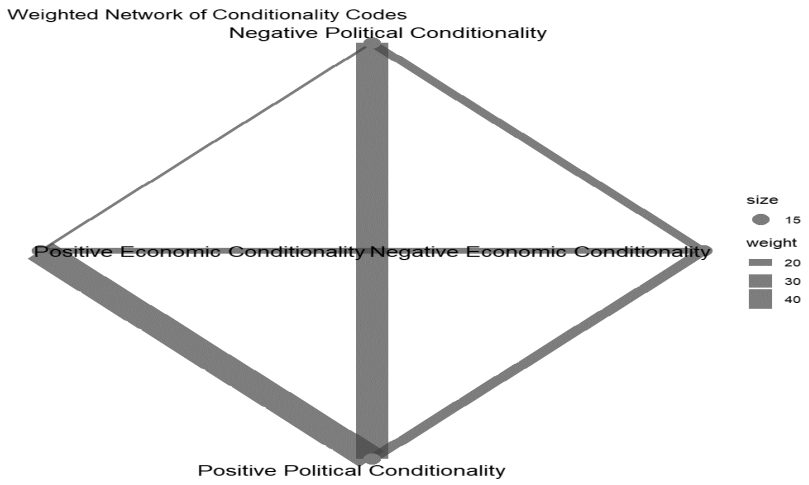
Source: Author

Conditionality types do not operate independently. In many instances, the distinction between political and economic conditionality remains primarily analytical, given that trade negotiations inherently combine political and economic dimensions. In this context, a strong co-occurrence appears between positive political and positive economic conditionality, as shown by Figure 2. Connections between positive and negative codes are weaker, while co-occurrence between the two negative forms remains limited, suggesting that punitive or coercive mechanisms are more isolated and context-specific. The frequent co-occurrence of positive political and positive economic conditionality reflects the broader logic of EU external governance, whereby economic benefits are linked to institutional reforms and regulatory convergence. Several examples from the Association Agreement illustrate this pattern. Provisions on support for Tunisia's structural adjustment programmes combine economic objectives, such as restoring financial equilibrium and promoting growth, with political and social objectives related to governance reforms and social welfare. Similarly, cooperation in the financial sector is linked not only to economic restructuring but also to the adoption of common rules, supervisory mechanisms, and regulatory standards.[49] The same over-

[49] Article 76, Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part [1998] OJ L97/2.

lap is visible in provisions encouraging the establishment of legal frameworks for investment protection and double taxation agreements, where market-oriented objectives are pursued through legal and institutional reforms. Even the political dialogue provisions demonstrate this interdependence, as cooperation on peace, security, and regional development is explicitly connected to broader economic development objectives within the Euro-Mediterranean partnership.[50] The results also show a significant link between negative political and positive political conditionality. This connection reflects a normative logic in which political dialogue is simultaneously encouraged and bounded by political requirements that define both expected conduct and prohibited practices. In the trade context, such requirements relate to non-discrimination principles such as national treatment and most-favoured-nation treatment, the regulation of entry and stay of independent professionals, and the prohibition of lowering fundamental rights standards as a source of comparative advantage. A recurrent example is the parallel reference to the obligation to comply with fundamental rights and labour standards, alongside clauses prohibiting their non-enforcement or neglect, as illustrated in Articles 3 and 4 of the Trade and Sustainable Development chapter. Together, these co-occurrences suggest that conditionality in EU–Tunisia trade relations functions less as a set of isolated incentives or sanctions and more as an integrated governance mechanism in which economic integration, regulatory approximation, and normative commitments mutually reinforce one another.

Figure 2. Network of Conditionality



Source: Author

[50] Article 50, Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part [1998] OJ L97/2.

3. DISCUSSION

The co-occurrence structure of conditionality in EU-Tunisia relations suggests that the legal and policy architecture of mobility governance is not organized through isolated conditions. As proven empirically, the strongest connection identified between positive political and positive economic conditionality indicates that market-related concessions and political expectations are articulated jointly rather than sequentially. At a first glance, the results do not oppose Howorth's argument on EU actorness being based on its normative exportation through its trade and enlargement policies.[51] This pattern reflects broader transformations in international mobility governance under economic globalization, where labour mobility is increasingly regulated through trade policy rather than exclusively through migration law.[52] This embeddedness explains how mobility is formed in trade contexts, whether analysed under EU commitments or as structured under the General Agreement on Trade and Services. In this sense, the empirical prominence of positive conditionality indicates that mobility commitments remain embedded in service liberalisation rather than framed as a right. A further implication of this embeddedness would mean that access is permitted insofar as it serves service provision, and it remains temporary by avoiding entry into the general labour market. The coding results therefore suggest that bilateral EU practice reproduces this multilateral logic produced by the WTO, but with additional political conditionality relative to the neighbourhood policy context.[53]

The study, furthermore, aligns with the literature on Normative Power Europe, as proved by the results showing the important weight of positive political conditionality compared to negative forms of conditionality. In the case of Tunisia, political incentives appear closely linked to commitments concerning regulatory approximation and political dialogue. The relatively weaker presence of negative conditionality does not imply the absence of asymmetry. Rather, it suggests that asymmetry is embedded structurally within the design of cooperation itself. Positive conditionality may formally appear cooperative, yet the unequal distribution of bargaining power means that incentives are often attached to specific compliance expectations.

At the same time, the observed co-occurrence between positive political and negative political conditionality reflects how EU normative power does not merely

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51 Howorth, J., *The EU as a Global Actor: Grand Strategy for a Global Grand Bargain?*, *Journal of Common Market Studies*, Vol. 48, No. 3, 2010, pp. 455–474.

52 Chaisse, J.; Meng, L., *Labor Migration in a Globalized World: The Human Journey's Challenges for International Law and Policy*, *Emory International Law Review*, Vol. 31, 2016, p. 49.

53 Meunier, S.; Nicolaidis, K., *The Geopoliticization of European Trade and Investment Policy*, *Journal of Common Market Studies*, Vol. 57, No. 6, 2019, pp. 103–113.

promote desirable reforms but also defines limits of acceptable conduct. On the other hand, the lower connectivity of negative economic conditionality further indicates that punitive economic mechanisms are not central in the examined corpus. This may be explained by the fact that trade relations with Tunisia are structured less around explicit economic penalties and more around gradual liberalization conditioned by regulatory adaptation. In this regard, positive economic conditionality functions as an instrument of controlled opening.

Overall, the study confirms the findings of previous literature on the types of conditionality of the EU, granting more for more and less for less.[54] It suggests further that labour mobility governance, in EU-Tunisia trade relations, reflects a hybrid logic: formally rooted in trade liberalization, politically shaped by external relations objectives, and normatively justified through ideals-based conditionality.

4. CONCLUSION

To synthesise the results, the study shows that conditionality in EU-Tunisia trade relations operates through a hybrid logic in which trade liberalization, political objectives of external relations, and norm diffusion are intertwined. The coding results demonstrate that positive political and positive economic conditionality form the strongest co-occurrence pattern, indicating that access to economic opportunities is systematically linked to political and regulatory expectations. Rather than functioning as separate categories, economic and political conditionality are combined within the same legal and policy instruments, especially where mobility, market access, regulatory approximation, and migration cooperation intersect. The predominance of positive forms of conditionality reflects the broader logic of EU external action often summarized as more for more, whereby deeper cooperation, facilitated mobility, or economic advantages are offered in exchange for alignment with legal and institutional expectations. At the same time, the observed connections between positive and negative political conditionality indicate that this incentive-based structure remains accompanied by implicit limits corresponding to a less for less logic, where non-compliance may reduce further cooperation.

The findings suggest that the EU's external governance toward Tunisia cannot be fully explained through narratives of Normative Power Europe alone. While the

[54] Becker, P., *Conditionality as an Instrument of European Governance – Cases, Characteristics and Types*, *Journal of Common Market Studies*, Vol. 63, No. 2, 2025, pp. 402–419. And See: Martines, F., *EU Political Conditionality as a Tool for the Promotion and Protection of Non-trade Values in Non-EU Countries*, in: Velluti, S. (ed.), *The Role of the EU in the Promotion of Human Rights and International Labour Standards in Its External Trade Relations*, Springer, Cham, 2020, pp. 97–167.

empirical prominence of political conditionality confirms that the EU continues to project legal norms, institutional models, and values such as regulatory alignment and rights-related commitments, the process through which these norms are advanced reveals some gaps. In Manners' terms, normative projection requires coherence, persuasion, and consideration of external consequences. Yet in practice, the linkage of norms to access, trade advantages, and mobility opportunities means that persuasion often operates under materially asymmetric conditions. That is to say that in this context of trade relations, there is a gap between the normative self-representation of the EU and the use of incentives. In fact, The EU's capacity to shape Tunisian regulatory choices derives not only from value-based discourse but also from the gravitational force of the internal market. Therefore, what appears formally as cooperation may also be understood as regulatory adaptation driven by market interdependence.

To nuance the findings, the study does not allow a general conclusion on the state of conditionality in migration management through trade. In fact, Tunisia's strategic importance in migration governance, particularly as a transit and cooperation partner in the Mediterranean, creates bargaining space that limits the automatic effectiveness of EU demands. In this sense, Tunisia can also have a form of reversed conditionality that shape its capacity to delay commitments and impose its cost-benefits calculations. Therefore, the study leaves avenues for future research to explore how conditionality is understood from the perspective of partner countries and how can it be influenced by negotiations asymmetry. Another theoretical exploration for future research is to examine the limits of Normative Power Europe in this context and the possible application of the Market Power Europe in EU-Tunisia trade relations to govern migration matters.

Overall, the contribution of this study lies in showing empirically how conditionality categories co-occur within legal and policy documents and how trade and migration rationales become intertwined through a shared governance logic. By combining document coding with co-occurrence analysis, the study provides a reading of how positive and negative, economic and political forms of conditionality are articulated in practice, in the case of EU-Tunisia trade agreements.

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Review article

CIVIL STATUS RECOGNITION AND THE EXERCISE OF FREE MOVEMENT RIGHTS IN THE EU*

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ABSTRACT

A significant proportion of the civil status situations of European citizens contain a cross-border element. However, differences between national legal regimes in this field create obstacles to free movement, while raising the question of the extent to which a civil status legally established in one Member State must be acknowledged in others.

EU legislation mainly provide solutions concerning the effects of civil status situations, rather than their existence, creation, or recognition, which remain within the exclusive competence of the Member States. Nevertheless, the absence of unified rules in this area has a direct impact on the effective application of existing EU private international law rules and may hinder the effective exercise of fundamental rights derived from primary EU law.

In response, the Court of Justice of the European Union has developed extensive case law limiting Member States' autonomy in matters of civil status where the exercise of rights conferred by EU law is affected. The Court relies in particular on the principles of non-discrimination, EU citizenship and the free movement of persons, as enshrined in Article 21 TFEU and the Charter of Fundamental Rights of the EU.

The right of EU citizens to move and reside freely within the territory of the Member States is closely linked to their right to family life, especially in cases involving children and diverse forms of family unions, such as same-sex marriages, same-sex parenthood, surrogacy, and other non-traditional family arrangements. While free movement and family reunification should, in principle, be ensured for members of all families, the question arises as to whether, and to what extent, Member States may be required to give effect to civil status situations that are not recognised under their national law, solely for the purposes of ensuring the free movement of people.

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Given that EU instruments regulate only the effects of civil status, the CJEU has adopted a cautious approach, with respect of Member States' competence and intervening only where national rules interfere with the exercise of fundamental rights under EU law, particularly the right to free movement. This paper starts from the hypothesis that such an effects-based and limited approach may leave significant gaps in legal certainty for EU citizens whose civil status is not uniformly acknowledged across the Union, especially in cases concerning children and families in non-standard arrangements.

***Keywords**: Cross-border recognition, EU law, Civil status, Free movement,, The CJEU*

1. INTRODUCTION

The concept of civil status concerns a range of legal issues and relationships, such as legal personality and capacity, but also the marital status, parenthood, the person's name and gender.[1] The continuity of civil status and the issuance of documents attesting to it produce legal effects in both public and private law. They are essential for the creation of a bundle of rights and obligations, both inter parties and vis-à-vis third parties and public authorities.[2] Accordingly, the inability to legally establish civil status may give rise to significant difficulties, including barriers to acquiring citizenship, accessing migration rights (such as family reunification), and determining parental responsibility or maintenance obligations. Still, situations persist in which certain Member States do not recognise civil status validly established abroad. As a result, an EU citizen who moves to a Member State other than the one in which their personal and family relationships were legally established may effectively lose that status.[3]

In this context, non-recognition of parentage emerges as a particularly significant legal issue, a problem mostly faced by so-called "alternative families," including children born to unmarried parents, rainbow families, and those involving surrogacy.[4] Judicial decisions and authentic instruments establishing or attesting to parenthood, even if validly issued in one Member State, may not be recognised

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1 Dutta, A., *Personal Status*, in: Basedow, J. *et al.* (eds.), Encyclopedia of Private International Law, Volume 2, Edward Elgar Publishing, p. 1346.

2 Romano, G. P., *Conflicts and coordination of family statuses: towards their recognition within the EU?*, in: Adoption: cross-border legal issues, European Parliament, 2015, pp. 20, 21.

3 Deana, F., *Cross-border continuity of family status and public policy concerns in the European Union*, DPCE Online, Vol. 40, No. 3, 2019, pp. 1981, 1982.

4 Morel, S. *et al.,* F*inal report: Study to support the preparation of an impact assessment on a possible Union legislative initiative on the recognition of parenthood between Member States*, European Commission, 2022, p. 34, Available at: [https://commission.europa.eu/system/files/2023-01/ICF%20Final%20Report%20-%20Recognition%20of%20parenthood%20between%20MSs%20-%20FINAL.pdf], Accessed 17 March 2026.

or produce legal effect in another.[5] This can lead to situations of "limping status," in which a child is legally recognised as the child of their parents in one Member State but not in another, or faces uncertainty regarding their legal parenthood in cross-border situations.[6]

Moreover, such refusal to recognise a status acquired in another Member State can impede the freedom of movement, which is a fundamental EU value guaranteed by Article 21 of the Treaty on the Functioning of the European Union (TFEU)[7] and the Charter of Fundamental Rights of the EU (Charter).[8] The right to move and reside freely is closely linked to the right to family life, particularly in cases involving children and diverse family structures, since the effective exercise of free movement by EU citizens depends on the integration of their families into the host Member State.[9] Union citizens are entitled to be accompanied by family members under Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Free Movement Directive).[10] Since denial of this right constitutes an obstacle to free movement, cross-border continuity of civil status is essential for the effective exercise of Union citizens' rights.

Against this background, the Court of Justice of the European Union (CJEU) has developed extensive case law, drawing on general principles of EU law, to limit Member States' discretion in matters of personal status. Given that civil status traditionally falls within the competence of Member States and, considering the absence of a fully effective EU framework for cross-border recognition of personal status, this paper examines the evolution of the Court's case law and assesses the extent to which EU law requires Member States to recognise civil status established in another Member State where this is linked to the exercise of free movement rights.

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5 Tryfonidou, A., *Cross-border legal recognition of parenthood in the EU*, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, European Parliament, 2023, p. 18.

6 *Ibid.*

7 Treaty on the Functioning of the European Union (consolidated version) [2012] OJ C 326/47.

8 Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

9 European Law Institute (ELI), Report on *Enhancing Child Protection: Private International Law on Filiation and the European Commission's Proposal COM/2022/695 final,* 2026, p. 31, Available at: [https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Enhancing_Child_Protection_Report.pdf], Accessed 24 March 2026.

10 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

2. THE LEGAL FRAMEWORK GOVERNING CIVIL STATUS IN A BROAD SENSE

To date, the direct influence of EU law on civil status remains limited. The European Union has no competence in civil status matters,[11] nor in harmonising the Member States' substantive family law.[12] This was confirmed by the CJEU multiple times: "Civil status and the benefits flowing therefrom"[13], including "rules governing a person's surname,"[14] "rules on changing the gender identity of a person"[15] and "rules on marriage and parentage, is a matter that falls within the competence of the Member States and EU law does not detract from that competence."[16]

Because of that, issues of the existence, creation or recognition of the civil status situations are left to national law of Member States, while the existing legal framework mainly provide for the effects of civil status situations.[17] Conflict rules are also dealt with by reference to the relevant Hague conventions, which, however, will not be examined in this paper.[18]

2.1. Member State Competence and the Diversity of National Legal Systems

Matters of civil status fall within the scope of domestic law,[19] and each Member State has developed its own concept of civil status, taking into account its history,

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11 Viarengo, I. *et al.*, *Defining Marriage and Other Unions of Persons in European Family Law*, in: Pfeiffer, T.; Lobach, Q. C.; Rapp, T. (eds.), Facilitating Cross-Border Family Life – Towards a Common European Understanding. EUFams II and Beyond, Heidelberg University Publishing, 2021, p. 160.

12 Kohler, C., *Unification of Private International Law in Family Matters in the European Union: Cultural Issues*, in: Viarengo, I.; Villata, F. C. (eds.), Planning the Future of Cross Border Families: A Path Through Coordination, Bloomsbury Publishing, 2020, p. 4.

13 Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECLI:EU:C:2008:179, par. 59.

14 Case C-148/02 *Carlos Garcia Avello v Belgian State* [2003] ECLI:EU:C:2003:539 (*Garcia Avello*), par. 25.

15 Case C-43/24 *K. M. H. v Obshtina Stara Zagora (Shipov)* [2026] ECLI:EU:C:2026:183 *(Shipov)*, par. 37.

16 Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [2018] ECLI:EU:C:2018:385 (*Coman*), par. 37; Case C-490/20 *V.M.A. v Stolichna obshtina, rayon "Pancharevo"* [2021] ECLI:EU:C:2021:1008 (*V.M.A.*), par. 52.

17 Eliantonio, M.; Brunello, S.; von Freyhold, H., *Life in cross-border situations in the EU - A Comparative Study on Civil Status*, Policy Department C, European Parliament, Brussels, 2013, p. 38, Available at: [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474395/IPOL-JURI_ET(2013)474395_EN.pdf], Accessed 15 March 2026.

18 Espinosa Calabuig, R.; Carballo Piñeiro, L., *Child Protection in European Family Law*, in: Pfeiffer, T.; Lobach, Q. C.; Rapp, T. (eds.), Facilitating Cross-Border Family Life – Towards a Common European Understanding. EUFams II and Beyond, Heidelberg University Publishing, 2021, p. 50.

19 Župan, M., *Osobni statut u funkciji kontinuiteta fizičkih osoba*, in: Barbić, J.; Župan, M. (eds.), Identitet u prekograničnim privatnopravnim odnosima, HAZU, Zagreb, 2021, p. 78.

culture and legal system.[20] This is most evident in family matters. Member States seek to retain full control, as family law in matters of status is considered closely linked to national identity and to cultural and moral values.[21] Historically, determining a child's parents was straightforward, leading to broadly consistent legal approaches across EU.[22] In recent decades, however, evolving family structures and advances in medical science have created uncertainty. Divergent national rules on issues such as paternity disestablishment, assisted reproductive technology, surrogacy, same-sex marriages and parenthood[23] have prevented the emergence of an international consensus on establishing and recognising legal parenthood across borders.[24] Apart from this, other elements of civil status also fall within the competence of the Member States. One such example is personal names, the matter in which some states permit a greater number of given names and surnames, while others impose more restrictive limits.[25] Changes to personal names are often triggered by status-related events, such as marriage, divorce or adoption. In recent times, name issues have also been linked to gender changes. This frequently raises the question of which law is applicable in such cases.[26] Precisely the issuse of a personal name was one of the first cases in which the CJEU ruled on the connection between civil status and freedom of movement.[27]

Besides the fact that Member States have different substantive law rules regarding the establishment and recognition of civil status, the problem of non-recognition of civil status in a cross-border context arises also from the fact that they have different private international law (PIL) rules.[28] Civil status on the choice of law level requires differentiated conflict rules; in other words, different elements of the civil status (e.g. marriage, parenthood, names) are subject to special choice-of-law rules.[29] Such combination of legislative disparities and insufficient coordination between the conflicts systems of different States inevitably results in "limping"

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20 Tryfonidou, Cross-border…, *op. cit.*, note 5, p. 17.

21 Garayova, L., *Parenthood without borders – Judicial cooperation for cross-border family security in the EU*, in: Petrašević, T.; Duić, D. (eds.), EU and Comparative Law Issues and Challenges Series (ECLIC), Strong and Secure Europe: Legal and Economic Aspects, No. 9, 2025, pp. 326-347, p. 336.

22 Tryfonidou, Cross-border…, *op. cit.*, note 5, p. 16.

23 Viarengo *et al.*, *op. cit.,* note 11, p. 156.

24 Tryfonidou, Cross-border…, *op. cit*., note 5, p. 17.

25 Medić, I., *Identitet i ime u prekograničnom pravnom prometu*, in: Barbić, J.; Župan, M. (eds.), Identitet u prekograničnim privatnopravnim odnosima, HAZU, Zagreb, 2021, pp. 115-139, p. 117.

26 *Ibid.*

27 See cases *Garcia Avello*, *Grunkin Paul*, *Sayn-Wittgenstein*, *Runevič-Vardyn*, *Freitag* and *Bogendorff von Wolffersdorf*. More about them will follow later.

28 Tryfonidou, Cross-border…, *op. cit.*, note 5, p. 15.

29 Dutta, *op. cit.,* note 1, p. 1347.

situations. Some authors consider this to be one of the most visible deficiencies of the current system of private international law.[30]

2.2. EU Private International Law Instruments Affecting Family and Civil Status Matters

Following the Treaty of Amsterdam, the EU has developed its own private international law policy, which, under the Treaty of Lisbon, has become a component of the judicial cooperation in civil matters within the Area of Freedom, Security and Justice.[31] The legal basis for the adoption of PIL measures is provided in Article 81 TFEU. However, there is a distinction between the adoption of such measures in civil and commercial matters and those in family matters.[32] In the field of family law with cross-border implications, Article 81(3) TFEU requires unanimity in the Council and grants each Member State a right of veto.[33]

The unification of PIL in family matters in the EU has so far been achieved by regulations on the jurisdiction of courts and the recognition and enforcement of decisions. Uniform rules on the applicable law have been adopted in matters of divorce and legal separation, maintenance obligations, matrimonial property regimes, property consequences of registered partnerships, and in the field of succession.[34] But, a distinction should be made between existence, creation, or recognition of the civil status and the effects arising from that status or its dissolution.[35] The effects flowing from civil status are, to a significant extent, currently governed by a number of EU regulations.[36] However, as regards the creation or termina-

30 Meeusen, J., *Cross-Border Mobility of European Union Citizens and Continuity of Civil Status – Balancing National and Individual Identities in an Open Society*, in: Bonomi, A.; Pretelli, I.; Romano, G.P., Yearbook of Private International Law, Vol. XXII – 2020/2021, Verlag Dr. Otto Schmidt KG, Köln and Swiss Institute of Comparative Law, Lausanne, 2022, p. 7.

31 European Law Institute, *op. cit.*, note 9, p. 31; Kohler, *op. cit.,* note 12, p. 4.

32 Luku, H., *Free Movement, Children's Rights and National Identity in the EU Parenthood Proposal*, in: Bonomi, A.; Pretelli, I.; Romano, G. P. (eds.), Yearbook of Private International Law Vol. XXIV – 2022/2023, Verlag Dr. Otto Schmidt, Köln, 2023, p. 357.

33 Yüksel, B., *An Analysis of the Effectiveness of the EU Institutions in Making and Interpreting EU Private International Law Regulations*, in: Beaumont, P. *et al.* (eds.), Cross-Border Litigation in Europe, Hart Publishing, Oxford and Portland, 2017, p. 38.

34 Kohler, *op. cit.,* note 12, pp. 9, 10.

35 Romano, *op. cit.,* note 2, p. 23.

36 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L 7/1; Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201/107; Council Regulation (EU) 2016/1103 of 24 June 2016

tion of the status, EU law does not provide for common rules, with the exception of two regulations:[37] the Brussels II ter Regulation (recast)[38] and the Rome III Regulation,[39] which address the matters of divorce, separation or annulment of marriage. It is interesting to notice that in all above mentioned regulations, each of them has a reference to free movement in their recitals, serving as a foundation for the EU's competence. Some of them expressly mention the specific need to abolish obstacles to free movement, while others mention mobility as a means of justifying choices in relation to connecting factors.[40]

The EU's general competence in the field of PIL has further led to the development of judicial cooperation aimed at facilitating the free movement of public documents,[41] as reflected in Regulation (EU) 2016/1191 of the European Parliament and of the Council on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 (Public Document Regulation).[42] The EU institutions had long recognised difficulties faced by EU citizens in cross-border recognition of their civil status, which the European Commission elaborated in its 2010 Green Paper "Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records."[43] That initiative envisaged ambitious measures including abolishing formalities for the authentication, enhancing administrative cooperation and limiting translations of public documents, as well as the introduction of

implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L 183/1; Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] OJ L 183/30.

37 Romano, *op. cit.,* note 2, p. 17.

38 Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) [2019] OJ L 178/1.

39 Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L 343/10.

40 See more about this in: Lang, A., *Impact of the Regulations on the Free Movement of Persons in the EU*, in: Viarengo, I.; Villata, F. C. (eds.), Planning the Future of Cross Border Families: A Path Through Coordination, Studies in Private International Law, Oxford, Hart Publishing, 2020, pp. 347-370.

41 Župan, *op. cit.*, note 19, p. 81.

42 Regulation (EU) 2016/1191 of the European Parliament and of the Council on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 [2016] OJ L 200/1 (Public Documents Regulation).

43 European Commission, GREEN PAPER Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records, COM (2010) 747 final [2010].

a European civil status certificate and establishing rules on the mutual recognition of civil status records.[44] However, the regulation ultimately adopted shifted focus from the "recognition of the effects of civil status records" provided for in the 2010 Green Paper to merely simplifying the presentation of public documents.[45] Consequently, its scope is limited to removing legalisation requirements and easing translation through multilingual standard forms.[46] But, as some authors predict, the pragmatic approach of Public Document Regulation is nevertheless remarkable and could induce the CJEU to favour the recognition of the family situations of EU citizens certified in their public documents, consolidating a practice that has already been initiated.[47]

Having set aside, at least for now, the creation of a European civil status certificate, the European Commission is now considering the creation of a European certificate of parenthood.[48] In 2022 it adopted the proposal for a regulation concerning the private international law issues deriving from cross-border parenthood and envisaging rules on cooperation and the certificate of parenthood[49] (Parenthood Proposal). This is the first PIL instrument in civil matters which explicitly states the goal of protection of human rights as a priority.[50] Its purpose is to guarantee the recognition of parent-child relations not only for the strict free movement purpose, which is already guaranteed by the case law of the CJEU, but also for any other purpose. In other words, it aims to facilitate the recognition of filiation in all areas, beyond the rights under EU law.[51] However, its adoption remains uncertain due to the unanimity requirement under Article 81(3) TFEU.

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44 Campiglio, C., *Circulation of Public Documents and Recognition of Civil Status Situations – Lights and Shadows*, in: Bonomi, A., Pretelli, I., Romano, G.P. (eds.), Yearbook of Private International Law, Vol. XXIII – 2021/2022, Verlag Dr. Otto Schmidt, Köln, 2022, p. 4.

45 *Ibid.*, pp. 8, 11.

46 González Beilfuss, C., *The recognition of foreign judgments and the acceptance of authentic instruments on parenthood matters*, in: Carpaneto, L.; Maoli, F.; Queirolo, I. (eds.), Towards Universal Parenthood in Europe, Editoriale Scientifica, Napoli, 2025, p. 89.

47 Campiglio, *op. cit.,* note 44, p. 12.

48 *Ibid.*, p. 21.

49 Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in relation to parenthood and the creation of a European certificate of parenthood COM(2022) 695 final [2022].

50 Carpaneto, L.; Maoli, F.; Queirolo, I., *The protection of rights of the children born following an international surrogacy agreement in (EU) private international law*, in: Carpaneto, L.; Maoli, F.; Queirolo, I. (eds.), Towards Universal Parenthood in Europe, Editoriale Scientifica, Napoli, 2025, p. 25.

51 González Beilfuss, C.; Pretelli, I., *The Proposal for a European Regulation on Filiation Matters – Overview and Analysis*, in: Bonomi, A.; Pretelli, I.; Romano, G. P. (eds), Yearbook of Private International Law Vol. XXIV – 2022/2023, Verlag Dr. Otto Schmidt, Köln, 2023, pp. 275-308, pp. 276, 279.

3. AN OVERVIEW OF KEY CASES BEFORE THE COURT OF THE EUROPEAN UNION

Even in the absence of further legislative harmonisation, the CJEU plays a major role in addressing cross-border status problems through its interpretation of the effects of Union citizenship.[52] In other words, the issues relating to, for example, same-sex couples and rainbow families in the EU, fall under the scope of EU law through the rules on fundamental rights protection and free movement, connected with EU citizenship status.[53]

In a series of judgments since the mid-eighties, the CJEU has developed extensive case law assessing the compatibility of the rights deriving from EU law with the application of the Member States' legislation, both its substantive and choice-of-law rules, on various components of citizens' civil status.[54]

3.1. Early Case Law on Free Movement and Civil Status in Relation to Personal Names

The right to maintain continuity of civil status across borders has been shaped by the CJEU through a series of cases, initially focusing on elements of personal identity, particularly civil status records and the determination of names.[55] One of the first cases in which the CJEU affirmed the principle of uniformity of status of Community citizens was case *Micheletti*,[56] where it held that a person's status, as determined by the competent authorities of their Member State, must be uniformly recognised by all other Member States and cannot be subject to divergent assessments.[57] In *Eftalia Dafeki v. Landesversicherungsanstalt Württemberg*[58] the CJEU was called upon to rule on the effects of foreign certificates of civil status, albeit for very limited purposes, with respect to the date of birth in proceedings concerning entitlement to social security benefits. It held that the effective exercise of free movement rights for workers requires the recognition of documents relat-

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52 Meeusen, *op. cit.*, note 30, p. 7.

53 Harasimiuk, D. E., *Rainbow families' rights in the EU – how the Court of Justice of the European Union is juggling fundamental rights, free movement and national identity clause*, Stosunki Międzynarodowe – International Relations 2025, Vol. 5, No. 4, 2025, pp. 1-14, p. 4.

54 Meeusen, *op. cit.*, note 30, pp. 2, 6.

55 Viarengo, I. *et al.*, *op. cit.,* note 11, p. 161.

56 Case C-369/90 *Micheletti and others v Delegación del Gobierno en Cantabria* [1992] ECLI:EU:C:1992:295

57 Opinion of Advocate General La Pergola in Case C-336/94 *Eftalia Dafeki v Landesversicherungsanstalt Württemberg* [1996] ECLI:EU:C:1996:462, par. 7.

58 Case C-336/94 *Eftalia Dafeki v Landesversicherungsanstalt Württemberg* [1997] ECLI:EU:C:1997:579 (*Eftalia Dafeki).*

ing to civil status issued by the Member State of origin.[59] Consequently, national authorities are, in principle, obliged to accept such documents, unless their accuracy is seriously called into question by concrete evidence in the individual case.[60]

In its subsequent case law, the CJEU addressed situations where host states refused to recognise surnames assigned in the Member State of origin and instead registered Union citizens under a different name based on the *lex fori*.[61] The CJEU held that the obligation to recognise such surnames is inherent to the personal status of Union citizens and interpreted this obligation as a condition for the exercise of the fundamental rights and freedoms guaranteed to every EU citizen, as illustrated by *Garcia Avello*.[62] It was a landmark case in the development of EU law, as it was in this case that the CJEU extended the scope of Community freedoms for the first time to questions of personal status in private international law.[63] In later cases, the focus shifted from Article 18 TFEU to Article 21 TFEU. While in *Grunkin and Paul*[64] the CJEU held that Member State must recognise the surname, in cases *Sayn-Wittgenstein*[65] and *Bogendorff von Wolffersdorff*[66] the Member State's refusal to recognise the surname could be justified on grounds relating to the public policy, even if such measure restricted Union citizens' freedom of movement.[67]

3.2. The Evolving Jurisprudence on Recognition of Family Relationships and Parenthood

In more recent case law, the CJEU has gone a step further and examined the continuity of family status and parenthood. The first such case is *Coman*. It con-

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59 See the opinion of Advocate General La Pergola, *op. cit.,* note 57, par. 8.

60 *Eftalia Dafeki*, par. 19, in: Campiglio, *op. cit.,* note 44, p. 14 and Viarengo, I. *et al.*, *op. cit.,* note 11, p. 161.

61 Deana, *op. cit*., note 3, pp. 1983, 1984.

62 *Garcia Avello,* par. 36.

63 Ní Shúilleabháin, M, *Cross-Border (Non-) Recognition of Marriage and Registered Partnership: Free Movement and EU Private International Law*, in: Scherpe, J.; Bargelli, E. (eds.), The Interaction between Family Law, Succession Law and Private International Law: Adapting to Change, Intersentia, 2021, p. 20.

64 Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul* [2008] ECLI:EU:C:2008:559 (*Grunkin and Paul*), par. 23.

65 Case C-208/09 *Sayn-Wittgenstein v Landeshauptmann von Wien* [2010] ECLI:EU:C:2010:806 (*Sayn-Wittgenstein)*, par. 95.

66 Case C-438/14 *Bogendorff von Wolffersdorff v Standesamt der Stadt Karlsruhe* [2016] ECLI:EU:C:2016:401 (*Bogendorff von Wolffersdorff*), par. 84.

67 Both cases examined the relationship between an individual's name and the Member State's decision on the abolition of nobility. However, while stating that the reason for refusal in *Sayn-Wittgenstein* might be justified, in the case *Bogendorff von Wolffersdorff*, the CJEU left it to the national court to assess proportionality by ascertaining whether a refusal of recognition is indeed appropriate and necessary.

cerned the recognition of a same-sex marriage concluded in Belgium between a Romanian and an American citizen. The CJEU based its decision on free movement and residence rights under Article 21 TFEU, which may be infringed by the refusal of a Member State to recognise the same-sex marriage that a Union citizen legally concluded during the period of their genuine residence in another Member State.[68] The CJEU also provided an interpretation of the concept of "spouse" within the meaning of Article 2(2) of the Free Movement Directive,[69] stating that the term is "gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned."[70]

A few years later, the CJEU once again provided an interpretation regarding Article 2(2) of the same Directive, this time in relation to the concept of "direct descendant."[71] In the *V.M.A.* case, the CJEU stated that a child: "…whose birth certificate, issued by the competent authorities of a Member State, designates as her parents two persons of the same sex, one of whom is a Union citizen, must be considered, by all Member States, a direct descendant of that Union citizen … for the purposes of the exercise of the rights conferred in Article 21(1) TFEU."[72] Even more significant is the CJEU's ruling that EU law requires the Member State of a child's nationality to recognise documents issued by the State of birth, in order to enable the child to exercise free movement and residence rights with each parent across the EU[73] and to issue an identity card or passport without first requiring a domestic birth certificate.[74]

The similar conclusion the CJEU brought in the case *Rzecznik Praw Obywatelskich v K.S. and Others*,[75] where the birth certificate issued in Spain mentioned the two women of Irish and Polish nationality as parents.[76] The CJEU had made the same decision as in *V.M.A.,* stating that Article 21 TFEU "precludes the authorities of a

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68 Meeusen, *op. cit.*, note 30, p. 13.

69 Ní Shúilleabháin, *op. cit.,* note 63, p. 17.

70 *Coman*, par. 35.

71 The CJEU has also addressed this topic in some other decisions. In the case C-129/18 *SM v Entry Clearance Officer, UK Visa Section* [2019] ECLI:EU:C:2019:248, the CJEU interprets that a child under the *kafala* guardianship regime cannot be considered a "direct descendant" like a biological child or an adopted child, but can be considered an "other family member". Further, some authors predict that the next step will be the recognition as a "direct descendant" of the child born to a surrogate mother, Campiglio, *op. cit.,* note 44, p. 23.

72 *V.M.A.*, par. 68.

73 Luku, Free Movement…, *op. cit.,* note 32, p. 348.

74 *V.M.A*, par. 69.

75 Case C-2/21 *Rzecznik Praw Obywatelskich v K.S. and Others* [2022] ECLI:EU:C:2022:502 (*Rzecznik Praw Obywatelskich v K.S. and Others*).

76 Luku, Free Movement…, *op. cit.,* note 32, p. 348.

Member State, in applying their national law, from refusing to recognise a child's surname as determined and registered in a second Member State in which the child was born and has been resident since birth."[77] It also stated that, under Article 4(3) of the Free Movement Directive, Polish authorities must issue an identity card or passport to the child, irrespective of whether the Spanish birth certificate has been transcribed into the national civil status register.[78]

3.3. Legal Gender Recognition and Free Movement

In its most recent case law, the CJEU examined the matter of gender identity. First, in case *Mirin*,[79] the CJEU decided that a gender reassignment follows the same path developed regarding recognition of names:[80] both the non-recognition of name and gender count as an obstacle to the right to free movement.[81] The CJEU held that Articles 20 and 21(1) TFEU, read in light of Articles 7 and 45 of the Charter, preclude a Member State from refusing to recognise a change of first name and gender identity lawfully acquired in another Member State.[82]

The case *Shipov,*[83] concerning the amendment of gender data in civil-status registers, pushes the boundaries even further. Unlike in *Mirin*, where the applicant had already completed a legal gender recognition procedure in another Member State, the applicant in *Shipov* has not undergone such a procedure anywhere.[84] A

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77 *Rzecznik Praw Obywatelskich v K.S. and Others,* par. 38.

78 *Ibid.*, par. 39; the same decision the CJEU had in *V.M.A.*, par. 45.

79 Case C-4/23 *M.-A.A. v Direcția de Evidență a Persoanelor Cluj and Others (Mirin)* [2024] ECLI:EU:C:2024:845 (*Mirin*); A Romanian citizen living in the UK and acquiring UK citizenship obtained a gender reassignment in the UK (then still an EU Member State) and requested the Romanian authorities to register this gender in registries. Romanian authorities rejected the request, as under Romanian law, gender reassignments can only be recognized if this change has been authorized by a final court decision (paras. 24-28).

80 Gössl, S. L., *'Mirin' and beyond – gender identity, domestic private international law, and human rights in the EU,* International Journal of Law, Policy and The Family, Vol. 40, No. 1, 2026, p. 16.

81 Luku, H., *The CJEU on the Recognition of a Union Citizen's Change of First Name and Gender Identity*, The EAPIL blog, 2024, Available at: [https://eapil.org/2024/10/15/cjeu-rules-member-states-must-recognise-a-unions-citizen-change-of-first-name-and-gender-identity//], Accessed 2 April 2026.

82 *Mirin*, par. 72.

83 *Shipov*, *op. cit.,* note 15; A Bulgarian national, registered as male at birth but identifying as female, underwent hormone therapy in Italy, where she established a stable personal and family life. Bulgarian courts rejected her request to amend her civil-status data, relying on national law, which defines "sex" strictly in biological terms and provides no procedure for legal gender recognition.

84 Tryfonidou, A., *Legal Gender Recognition and Free Movement in the EU: In Defence of the Advocate General Opinion in Shipov*, VerfBlog, 2025, Available at: [https://verfassungsblog.de/ag-opinion-shipov/], Accessed 2 April 2026.

Bulgarian national, registered as male at birth but identifying as female, underwent hormone therapy in Italy, where she established a stable personal and family life. Bulgarian courts rejected her request to amend her civil-status data, relying on national law, which defines "sex" strictly in biological terms and provides no procedure for legal gender recognition.[85] The CJEU held that refusal to recognise the change of gender may hinder the exercise of free movement[86] and Articles 21 TFEU and 4(3) of the Free Movement Directive, read in light of Article 7 of the Charter, preclude national legislation that prevents individuals who have exercised free movement from amending gender-related civil-status data.[87]

At first glance, *Shipov* seems doctrinally distinct from earlier cases. Although not purely internal, since the applicant had lived in Italy, the cross-border element remained comparatively thin.[88] The dispute concerned amending national records and, unlike previous cases, did not involve recognising a status already established abroad. In essence, it deals with a situation where no formal recognition existed elsewhere, yet domestic rules still hindered free movement by preventing consistency between legal status and lived identity. The CJEU thus expands its approach, acknowledging that obstacles may arise not only from non-recognition but also from the lack of procedures to obtain amendments to civil-status records consistent with their gender identity.[89] The *Shipov* case therefore shifts the focus from mere recognition of statuses established abroad to the imposition of positive obligations on Member States where necessary for the exercise of EU citizenship rights.[90]

4. ANALYSIS OF THE CJEU'S APPROACH TO CIVIL STATUS IN ITS CASE LAW

When addressing issues of civil status, the CJEU seeks to balance individual rights, Member States' regulatory autonomy, and the requirements of EU law, which Member States are bound to respect. Therefore, when deciding on such cases, in particular those concerning the recognition of family relationships and

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85 Pasqua, M., *CJEU: Free Movement and Legal Gender in Shipov (C-43/24)*, The EAPIL blog, 2026, Available at: [https://eapil.org/2026/03/18/cjeu-free-movement-and-legal-gender-in-shipov-c-43-24/], Accessed 23 March 2026.

86 *Shipov*, par. 38.

87 *Ibid.*, paras. 56, 64.

88 Belavusau, U., *Sexual Citizenship via Free Movement: Gender Identity and EU Citizenship after Shipov Case (C-43/24, 2026)*, VerfBlog, 2026, Available at: [https://verfassungsblog.de/sexual-citizenship-via-free-movement/], Accessed 23 March 2026.

89 Pasqua, *op. cit.,* note 85.

90 *Ibid.*

parenthood, the CJEU opted for a functional recognition of civil status, ensuring the effective exercise of Union citizenship rights and the protection of fundamental rights, while at the same time respecting Member States' competences and national identity.[91]

4.1. Relying on Free Movement and EU Citizenship Rights

The CJEU in its case law focuses on the outcome – the free movement of EU citizens – and, from that standpoint, seeks to ensure its effectiveness and prevent discrimination arising from differences between Member States' legislation.[92] Before the introduction of EU citizenship, the CJEU was balancing the exercise of Member States' competences with free movement rights within the framework of the internal market.[93] In its later cases, the decisions were based on the principle of non-discrimination, Union citizenship and the right to freedom of movement. Although the CJEU acknowledges that a civil status falls within the competence of the States and EU law does not detract from that competence, it also emphasises that, in exercising that competence, Member States must comply with EU law, in particular the Treaty provisions on the freedom to move and reside in the territory of the Member States.[94]

Therefore, cross-border mobility of EU citizens is decisive and it requires status continuity insofar as EU law rights are concerned, regardless of the nature of that status.[95] It is expected that Union citizens will be more inclined to fully exercise their free movement rights when they can preserve the personal status or family relationships acquired in their Member State of origin. What emerges is not a general obligation of recognition, but a requirement of functional continuity of civil status where this is necessary for the effective exercise of EU citizenship rights. Besides in Articles 20 and 21 TFEU, this approach is grounded in the prohibition of nationality-based discrimination (Article 18 TFEU) and the principle of sincere cooperation (Article 4(3) TEU).[96] Accordingly, national legislations cannot lead to a non-recognition where this would breach EU law. In other words, EU citizens should be able to legitimately expect that EU law prevents obstacles to free movement or discrimination arising from the application of the *lex fori*.[97]

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91 Luku, Free Movement…, *op. cit.,* note 32, p. 349.

92 Campiglio, *op. cit.,* note 44, p. 18.

93 Meeusen, *op. cit.*, note 30, p. 8.

94 *Coman*, par. 38; also: *Garcia Avello*, par. 25; *Grunkin and Paul*, par. 16; *Bogendorff von Wolffersdorff*, par. 32; *V.M.A.*, par. 52; *Shipov*, par. 37.

95 Meeusen, *op. cit.*, note 30, p. 21.

96 Viarengo, I. *et al.*, *op. cit.,* note 11, p. 160.

97 Deana, *op. cit.,* note 3, pp. 1984, 1985.

In the above-mentioned cases, the CJEU held that whenever a national measure affects the conditions in which Union citizens exercise or seek to exercise free movement rights, the measure may become subject to review, even if it lies within the exclusive competence of the Member States.[98] However, EU law does not impose automatic recognition. The CJEU has never left any doubt that restrictions to the freedom of movement can be justified, though only under very strict conditions: refusal of recognition is permissible if it's "based on objective public-interest considerations, proportionate to a legitimate objective pursued by national law and does not go beyond what is necessary in order to attain that objective."[99] Finally, "a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter."[100]

The CJEU's position on the recognition of names has been guided primarily by the objective of ensuring the effective exercise of free movement rights conferred by Union citizenship, and less by the protection of civil status as such. However, this latter element emerges in *Coman*, where it serves as an additional, or alternative, basis for the Court's reasoning.[101] The CJEU emphasised that the rights guaranteed by Article 7 of the Charter have the same meaning and scope as those in Article 8 European Convention on Human Rights (ECHR), and, referring to the case law of the European Court of Human Rights (ECtHR), recognised that the relationship of a homosexual couple may fall within the notion of 'private' and 'family life' in the same way as the relationship of a heterosexual couple in the same situation.[102] This line of reasoning represents a notable development in the Court's case law.

In a similar vein, the CJEU has continued to invoke fundamental rights in cases such as *V.M.A.*[103], *Mirin*[104] and *Shipov*,[105] interpreting Article 20 TFEU in conjunction with Articles 7 and 45 of the Charter. In doing so, the CJEU draws heavily on Article 8 ECHR and the case law of the ECtHR, embedding its reasoning

98 Tomkin, J., *Citizenship In Motion: The Development Of The Freedom Of Movement For Citizens In The Case-Law Of The Court Of Justice Of The European Union*, in: Guild, E.; Minderhoud, P. (eds.), The First Decade of EU Migration and Asylum Law, Martinus Nijhoff Publishers and VSP, Leiden, Boston, 2012, p. 33.

99 Deana, *op. cit.,* note 3, p. 1988.

100 *Coman*, par. 47; *V.M.A.*, par. 58.

101 Kohler, *op. cit.*, note 12, p. 9.

102 *Coman*, par. 49.

103 *V.M.A.*, paras. 69, 70.

104 *Mirin*, paras. 71, 72.

105 *Shipov,* paras. 56, 65.

within a broader European human rights framework rather than presenting it as a purely EU-law innovation.[106] The *Shipov* case further reflects a shift towards a more individual-centred understanding of legal identity. It acknowledges that inconsistencies in civil-status records affect not only legal recognition but also the everyday lives of Union citizens. Civil status thus emerges as a key element of EU citizenship that must remain coherent across borders. From this perspective, the case illustrates an increasing alignment between the CJEU and the ECtHR.[107]

4.2. The Court's Cautious Approach

The CJEU maintained rather cautious approach on the issue of civil status, by respecting the exclusive competences of the Member States to define its substantive concepts. This is particularly evident in later cases such as *Coman* and *V.M.A.*, where the Court limited recognition of civil status to what is strictly necessary for the exercise of EU citizenship rights and the protection of fundamental rights, notably the right to private and family life.[108] For example, in *Coman*, the CJEU, aware of the controversies that an obligation to recognise same-sex marriages might provoke in some states, sought to limit the perceived impact of its ruling.[109] It did so by emphasising that the obligation concerned "recognition for the sole purpose of granting a derived right of residence"[110] and by explicitly confirming that Member States remain free to decide whether to permit same-sex marriage under their national law.[111] The case thus was not about legalising same-sex marriage in Romania, but about safeguarding an EU citizen's freedom of movement. Refusal to recognise the spouse, even for residence purposes, would deter the exercise of those rights.[112] Accordingly, Romania was required to recognise the same-sex spouse for residence purposes only, without being obliged to recognise the marriage in its domestic law.[113] The Court thus drew a clear distinction between full recognition of civil status and its functional recognition for the purposes of EU law.

The same approach was confirmed in *V.M.A.* Although Member States must recognise a parent-child relationship between a child and two same-sex parents for the purposes of EU law rights, they are not required to provide for such parent-

106 Belavusau, *op. cit.,* note 88.

107 Pasqua, *op. cit.,* note 85.

108 Campiglio, *op. cit.,* note 44, p. 23.

109 Meeusen, *op. cit.*, note 30, p. 13.

110 *Coman*, paras. 36, 40, 45, 46.

111 *Ibid.*, par. 37.

112 Opinion of Advocate General Wathelet in *Coman* [2018] ECLI:EU:C:2018:2, par. 38.

113 Meeusen, *op. cit.*, note 30, p. 21.

hood in their national law or to recognise it beyond what is necessary for the child to exercise those rights.[114] This way the CJEU ensured that Union citizens can effectively exercise their free movement rights under Article 21 TFEU across the Member States, without requiring full recognition of same-sex marriages, partnerships, or parenthood for all other purposes.[115]

While the CJEU remains firmly committed to safeguarding free movement and the fundamental rights protected by the Charter, it also acknowledges the need to preserve Member States' competences and national identities, thereby avoiding the perception that it disregards them.[116] Although this approach is to be expected, it raises additional questions, particularly that of dual identity.

Given that the CJEU requires recognition only to ensure rights under EU law, it does not oblige Member States to give full effect to such status in their domestic law. Thus, recognition does not extend to rights under national law, for example in matters of maintenance, matrimonial property regimes, or inheritance.[117] As for the purposes of private law, the status deriving from foreign civil status documents, as well as its effects, remain subject to the traditional method of conflict of laws, including public policy limits.[118]

This can create paradoxical situations where a person is considered both married and single depending on the legal context.[119] For example, a couple may be recognised as married for EU law purposes, yet treated as unmarried in areas within the host State's exclusive competence.[120]

As a result, considering the same couple to be married for some purposes only creates a situation where the simple question of whether they are married cannot be answered by "yes" or "no". While "limping marriages" are known in private international law, they traditionally arise across different countries, not within the same State.[121] In other words, the foundations have been laid for the emergence of a new form of limping legal relationships, which do not take place, as do the traditional ones, at a transnational level but precisely at a national level (in one

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114 *V.M.A.,* par. 57.

115 Luku, Free Movement…, *op. cit.*, note 32, p. 349.

116 *Ibid.*

117 Bogdan, M., *The relevance of family status created abroad for the freedom of movement in the EU*, Acta Universitatis Carolinae - Iuridica, Vol. 4, 2020, p. 92.

118 Campiglio, *op. cit.,* note 44, p. 23.

119 Oprescu, M. A., *The right to free movement and residence within the EU*, The International Conference, European Union's History, Culture and Citizenship, 14th edition, Pitești, 2022, p. 358.

120 *Ibid.,* pp. 354, 355.

121 Bogdan, *op. cit.,* note 117, p. 91.

State, the same person may be considered married or a parent for the purposes of circulation within the EU, while unmarried or not a parent for civil purposes). This leads to a dual identity: a full national identity and the EU one, whose sole function is to confer on the EU national the rights granted under EU law. Such fragmentation raises concerns regarding compatibility with fundamental rights standards and may disrupt coherence within national legal systems, while also expanding free movement in ways that challenge national laws.[122]

4.3. Protection of Member States' National Identity and Public Policy

In its case law, the CJEU has consistently held that Member States must recognise civil status established in another Member State in order to safeguard freedom of movement as a fundamental value of the Union. However, this obligation raises a central question: to what extent may Member States, on public policy grounds, restrict the legitimate expectations of individuals regarding the stability of a status acquired abroad without breaching EU law?[123] More specifically, do Member States retain discretion in this area, or are they required, under Article 21 TFEU and Free Movement Directive, to recognise family relationships lawfully created in another Member State?[124]

Member States enjoy limited discretion to invoke "legitimate interests" as a counterweight to free movement, allowing them to rely on values considered particularly important at the national level, such as those protected by constitutional provisions or forming part of their national or cultural identity. Such justifications are recognised in EU primary law, notably in Article 4(2) TEU[125] which requires the EU to respect Member States' national identity, inherent in their fundamental structures, both political and constitutional.[126]

On this basis, Member States have sought to justify refusals of recognition, prompting the CJEU to assess whether such refusals align with national identity claims. However, from the examined case law, the impact of the respect that is due to national identity under Article 4(2) TEU appears relatively limited. It seems that the CJEU does not treat this provision as an independent or particularly strong ground of justification.[127] Only in two of the above-mentioned cases, *Sayn-Wittgenstein*

122 Campiglio, *op. cit.,* note 44, pp. 23, 24.

123 Deana, *op. cit.,* note 3, p. 1990.

124 Bogdan, *op. cit.,* note 117, p. 87.

125 Meeusen, *op. cit.*, note 30, p. 17.

126 The same is repated by the CJEU in its case law: *Sayn-Wittgenstein*, par. 92; *Bogendorff von Wolffersdorff*, par. 73; *Coman*, par. 43; *V.M.A.*, par. 54.

127 Meeusen, *op. cit.*, note 30, p. 19.

and *Bogendorff von Wolffersdorff*,[128] did the Court accept that a restriction to the right of free movement could be justified by reference to the national identity of the Member State concerned, at least in cases where the recognition of the surname acquired abroad would violate its constitutional public order.[129] It held that Austria's and Germany's constitutional abolition of nobility is an element of their national identity[130] and refusing to recognise noble titles could be justified on public policy grounds linked to national identity.[131] Host Member States may refuse to recognise the civil status of an EU citizen on the basis of fundamental constitutional objectives, interpreted as public policy considerations,[132] but only where "there is a genuine and sufficiently serious threat to a fundamental interest of society."[133]

In other cases the CJEU did not accept reference to national identity as a justification for non-recognition.[134] Both in *Coman*[135] and *V.M.A.*,[136] it held that recognising same-sex marriages or parent-child relationships for the limited purposes of EU law does not undermine national identity or threaten public policy.[137] Institutions such as marriage and parenthood, even where constitutionally protected, cannot be relied upon under Article 4(2) TEU to override free movement rights.[138] This follows the limited effects of the CJEU's approach: Member States are required to recognise such relationships solely for the purposes of exercising EU law rights, without being obliged to provide for them in their national law. Consequently, such recognition does not affect national identity or public policy.[139]

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128 Only in *Sayn-Wittgenstein* did the CJEU itself find the host Member State's restrictive measure - Austria's refusal to recognise nobiliary elements in a surname - compatible with Article 21 TFEU. It held that the measure was proportionate to the legitimate objective of protecting equality, in line with Article 20 of the Charter and Article 4(2) TEU, given that the republican form of the State forms part of Austria's national identity (paras. 84-94). By contrast, in *Bogendorff von Wolffersdorff*, the CJEU left the assessment of proportionality to the national court, Meeusen, *op. cit.*, note 30, p. 22.

129 Kohler, *op. cit.,* note 12, p. 9.

130 *Sayn-Wittgenstein*, para. 95.

131 Luku, Free Movement…, *op. cit.*, note 32, p. 360.

132 Viarengo, I. *et al., op. cit.,* note 11, p. 161.

133 *Bogendorff von Wolffersdorff*, par. 67; *Coman*, par. 44; *V.M.A.,* par. 55.

134 In the most recent case, *Shipov*, the issue of national identity and public policy was not raised.

135 In *Coman*, the referring court did not invoke Article 4(2) TEU; however, several governments relied on national identity and public policy, arguing that marriage, in some Member States, is constitutionally protected as a union between a man and a woman (par. 42).

136 By contrast, in *V.M.A.,* the referring court expressly invoked Article 4(2) TEU in its questions, asking whether the obligation to recognise could have a negative effect on the public policy and national identity of Bulgaria, since that Member State did not foresee the possibility of listing two parents of the same sex on the birth certificate for the child (par. 32).

137 *Coman*, par. 46; *V.M.A.*, par. 56.

138 Viarengo. *et al.*, *op. cit.,* note 11, p. 163.

139 Campiglio, *op. cit.,* note 44, p. 16.

From this it follows that the CJEU limits public policy in two ways: Member States must prove that the values invoked are sufficiently important (*Sayn-Wittgenstein*), and public policy control does not apply in cases within the scope of EU law (*Coman and V.M.A.*).[140]

In this context, it is also important to look at the case law of the ECtHR. The non-recognition or downgrading of a civil status interferes with the right to private and family life under Article 7 of the Charter, interpreted in light of Article 8 of the ECHR, and therefore requires justification.[141] In *V.M.A.*, Bulgaria relied on public policy and national identity to refuse recognition of a same-sex marriage. While both the CJEU and the ECtHR accept that Member States are not obliged to introduce same-sex marriage,[142] the ECtHR has made clear that same-sex couples enjoy the right to family life and cannot be arbitrarily denied legal recognition and protection (*Schalk and Kopf*[143]; *Oliari and Others*[144]). Consequently, although States retain formal competence in family law, they are under a positive obligation to ensure some form of legal recognition for same-sex couples, such as a registered partnership, including those married abroad.[145] Refusing any recognition therefore breaches Article 8 ECHR. As a result, a Member State cannot rely on Article 4(2) TEU where its national legislation - or lack of it - violates the ECHR.[146] The CJEU, referring in its decisions to the jurisprudence of the ECtHR, confirmed that the rights of the individual may be opposed to the Member States' invocation of its national identity: the cultural identity of the individual takes precedence over the cultural identity of the Member States concerned.[147]

5. CONCLUSION

Within the EU legal order, an implied rule has emerged from the combination of internal market principles and the special status of EU citizens, requiring Member States to recognise civil statuses established in another Member State, insofar as necessary to ensure the effective exercise of EU law rights.[148] In other words, it can

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140 Gössl, *op. cit.,* note 80, p. 15.

141 Deana, *op. cit.,* note 3, pp. 1988, 1989.

142 Harasimiuk, *op. cit.,* note 53, p. 4.

143 Judgment *Schalk and Kopf v Austria* (2010) 51 EHRR 3, par. 94.

144 Judgment *Oliari and Others v Italy*, (2015) 71 EHRR 1, paras. 165-167.

145 De Groot, D., *Special Report, EU law and the mutual recognition of parenthood between Member States: the case of V.M.A. v Stolichna Obshtina*, GLOBALCIT and Robert Schuman Centre for Advanced Studies, European University Institute, 2021, p. 12.

146 *Ibid.*

147 Kohler, *op. cit.,* note 12, p. 9.

148 Carpaneto; Maoli; Queirolo, *op. cit.,* note 50, p. 24.

be considered that the existing Union law obliges the Member States to recognise established civil statuses for the purpose of the rights deriving from EU law, in particular on free movement.[149] Through its case law on civil status, the Court of Justice of the European Union has developed important criteria, establishing that such status must be recognised whenever necessary to ensure the effective exercise of free movement and the rights deriving from EU citizenship. A closer look at the Court's jurisprudence reveals a gradual but clear expansion of its role. From initially addressing relatively straightforward issues, such as personal names, the CJEU has extended its reasoning to far more complex matters, including same-sex relationships, parenthood, and gender identity. In doing so, it has interpreted Free Movement Directive expansively, extending key concepts such as "spouse" (*Coman*) and "direct descendant" (*V.M.A.*) to include same-sex family relationships, thereby bringing these situations within the scope of EU law despite the absence of explicit legislative regulation.[150] In more recent cases, it has also relied on the case law of the ECtHR and fundamental rights under ECHR and Charter. By doing so, the CJEU provided certain protection of fundamental rights, especially the right to private and family life, within the scope of free movement. However, the impression is that the Court is not sufficiently focused on fundamental rights, which it interprets only through the prism of Article 21.

In more sensitive and controversial areas the CJEU has adopted a cautious approach, with respect of Member States' competence and intervening only where national rules interfere with the exercise of fundamental rights under EU law. Member States are required to recognise established relationships solely for the purposes of exercising EU law rights, without being obliged to provide for them in their national law. This functional approach has both strengths and limitations. Most notably, it has served as a ground for public policy limitation. From the Court's case law, it follows that, although recognition may be subject to public policy considerations, it cannot be arbitrarily refused by Member States.[151] The CJEU has interpreted Member States' reliance on national identity as a ground for refusal narrowly, consistently favouring the continuity of civil status. While respect for national identity, often expressed through public policy, remains a core principle of the Treaties, its practical impact in this field is limited. Restrictions on free movement based on national identity must remain exceptional. In practice,

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149 Musseva, B.; Dimitrova, T.; *Applicable Law to Parenthood*, in: Carpaneto, L.; Maoli, F.; Queirolo, I. (eds.), Towards Universal Parenthood in Europe, Editoriale Scientifica, Napoli, 2025, p. 53.

150 Harasimiuk, *op. cit.,* note 53, p. 5.

151 Župan, M.; Drventić Barišin, M., *The role of public policy in the private international law rules on parenthood*, in: Carpaneto, L.; Maoli, F.; Queirolo, I. (eds.), Towards Universal Parenthood in Europe, Editoriale Scientifica, Napoli, 2025, pp. 95-116, p. 109.

the CJEU's case law favours the acceptance of legal and social diversity arising from cross-border mobility, with the protection of individual rights taking precedence over claims of national identity.[152] From all this, the conclusion emerges that the Court established certain criteria under which individuals can expect the continuity of their status, and that Member States, as a rule, have no justified reason to refuse recognition for the purposes of EU law. Although the existing body of case law on civil status remains relatively limited, and the CJEU has yet to address several important issues, such as surrogacy, it is reasonable to expect that it will increasingly be called upon to rule in this field. Based on its current trajectory, it is likely to continue prioritising the interests and rights of individuals over those of Member States.

As already mentioned, this case law-based approach is not without shortcomings. Besides the possible occurrence of mentioned "dual identity" situations, it remains contingent on the existence of a cross-border element linked to the exercise of free movement. The former is particularly problematic as it may lead to significant gaps in legal certainty for Union citizens whose civil status is not uniformly recognised across the EU, especially in cases involving children and families in non-traditional arrangements. Reliance on case-by-case litigation is neither efficient nor fair to individuals, who are often required to engage in costly and lengthy proceedings to vindicate their rights. Further, the Court's protection remains conditional on the existence of a cross-border element. Only individuals who have exercised free movement can rely on EU law; "static" citizens remain dependent on national law and, where applicable, the ECHR. As a result, protection is inherently uneven.[153] The limitation of the right of free movement to EU nationals limits the potential of the CJEU's jurisprudence based on article 21 TFEU to liberalise PIL more generally, i.e. with equal extension to nationals of third countries.[154]

The CJEU operates within the limits of EU primary and secondary law. Given the Union's minimal competences in matters of civil status, the Court has consistently relied on Articles 20 and 21 TFEU as its principal legal basis. While the CJEU's practice is valuable, it still does not provide a uniform solution for ensuring the cross-border continuity and stability of civil status. The persistence of divergent national substantive rules and conflict-of-law approaches continues to hinder such continuity. For the time being, these obstacles have been addressed primarily by

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152 Meeusen, *op. cit.*, note 30, p. 25.

153 Harasimiuk, *op. cit.,* note 53, pp. 5, 7.

154 Van Loon, H., *Ensuring continuity of personal status and family relations across borders: the interaction between private international law and human rights*, in: Muir Watt, H. *et al.*, Global Private International Law: Adjudication without Frontiers, Cheltenham, UK; Northampton, MA, USA: Edward Elgar Publishing, 2019, pp. 530-538, pp. 530, 531.

limiting the discretion of national authorities and prohibiting restrictions on free movement. A more comprehensive and coherent solution would therefore require legislative action at the EU level, through regulations or directives. The proposed Parenthood Regulation represents a step in the right direction, although its adoption remains uncertain.

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Review article

DUE PROCESS RIGHTS IN EU RESTRICTIVE MEASURES: A DOCTRINAL REASSESSMENT OF THE CJEU'S STANDARDS OF EVIDENCE, REASONING, AND JUDICIAL REVIEW

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ABSTRACT

This paper examines the evolution of due process rights in the European Union's (EU) sanctions regime following Russia's 2022 invasion of Ukraine, focusing on the Court of Justice of the European Union's (CJEU) approach to evidence, reasoning, and judicial review. Using a doctrinal legal methodology, the study analyzes the EU legal framework governing restrictive measures, traces the development of judicial standards from the Kadi jurisprudence to recent practice, and assesses whether the Court has maintained or adapted its standards in response to geopolitical pressures.

The analysis demonstrates that while the CJEU formally adheres to core due process principles, recent practice reflects greater tolerance for indirect evidence, generalized reasoning, and deference to the EU's strategic discretion, illustrating the tension between strategic autonomy in foreign policy and constitutional rights protection during periods of geopolitical crisis.

Keywords: *CFSP, Due process, EU restrictive measures, Judicial review, Fundamental rights*

1. INTRODUCTION

The full-scale invasion of Ukraine by Russia in February 2022 did not merely reconfigure the security architecture of the European continent; it fundamentally initiated a transformation within the legal order of the European Union (EU). While the Union has employed restrictive measures, or sanctions, as a primary instrument of its Common Foreign and Security Policy (CFSP) for decades, the scale and velocity of the post-2022 regime represent a fundamental change. His-

torically, EU sanctions were designed as preventative and temporary instruments, intended to bring a specific target back to the negotiating table or to cease a specific violation of international law. The post-2022 measures, however, have evolved into a comprehensive mechanism of economic statecraft aimed at the systemic attrition of an aggressor's war-making capabilities. This transition from "sanctions as diplomacy" to "sanctions as economic warfare" has subjected the Union's constitutional framework, predicated on the rule of law and the strict protection of fundamental rights, to profound and unprecedented stress.[1]

The EU's response to the aggression was immediate and massive. In a series of rapid legislative packages, the Council of the European Union targeted thousands of individuals, entities, and entire economic sectors. These measures included not only the freezing of assets and travel bans on the political and military elite but also extended to oligarchs, business executives, propagandists, and family members, as well as sectoral prohibitions on energy, transport, finance, and dual-use technologies. The speed of this adoption process was driven by a high degree of "emotional resonance," where the imperative to act in solidarity with Ukraine and to signal resolve to the international community arguably took precedence over the deliberative procedural norms that typically characterize EU administrative law.[2]

This phenomenon has created a tension between the effectiveness of the CFSP and the rights of the individual. The central legal problem arising from this era of "total sanctioning" is the preservation of due process rights for targeted individuals and entities amidst armed conflict. The sheer volume of listings executed often overnight based on intelligence assessments and open-source data has raised concerns regarding the evidentiary sufficiency and the individualization of reasons required by EU law. The European Union is a community of law; its external action, even when addressing existential threats, must remain subject to the principles of legality and fundamental rights protection.

Historically, the Court of Justice of the European Union (CJEU) has developed a robust jurisprudence concerning the protection of fundamental rights within the context of sanctions, especially through the landmark *Kadi* decisions. These cases established the constitutional principle that EU acts, even when implementing binding obligations under United Nations Security Council mandates, hold no immunity from judicial review if they violate the EU Charter of Fundamental Rights. The *Kadi* jurisprudence set a remarkably high bar for evidentiary justi-

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1 Sztulman, A., *EU Sanctions Litigation: Fundamental Rights and International Security*, Routledge, London, 2026, p. 1.

2 Lonardo, L., *Challenging EU sanctions against Russia: The role of the Court, judicial protection, and Common Foreign and Security Policy*, Cambridge Yearbook of European Legal Studies, Vol. 25, 2023, p. 42.

fication, requiring the Council to provide specific, concrete evidence justifying the freezing of assets and rejecting the notion that executive discretion in foreign policy is absolute or immune from judicial scrutiny.[3]

However, the post-2022 landscape suggests a subtle but significant recalibration of these standards. Faced with a flood of annulment actions from Russian entities and individuals, the Court is navigating a difficult path between upholding the *Kadi* standards of full judicial review and respecting the Council›s broad margin of appreciation in defining foreign policy objectives during a major conflict. There are indications of a potential trend where the necessity of maintaining a unified diplomatic front against aggression induces a form of judicial deference that may dilute the rigorous scrutiny standardized in earlier case law. There is a palpable risk that the «manifest error of assessment" test is being applied more leniently, allowing broad presumptions of connection to the Russian regime to substitute for concrete evidence of individual wrongdoing.[4]

This paper addresses the critical doctrinal question: To what extent has the CJEU maintained, modified, or eroded its standards regarding evidence, reasoning, and the intensity of judicial review in the wake of the 2022 invasion of Ukraine? Furthermore, does the current jurisprudential approach threaten to normalize a permanent "state of exception" within EU administrative law, where security imperatives permanently override procedural guarantees? To answer this, the research adopts a rigorous doctrinal legal methodology. It begins by reconstructing the pre-2022 doctrinal baseline, dissecting the applicable standard of proof. It then engages in a detailed analysis of the post-2022 sanctions architecture, specifically identifying the structural shifts in how sanctions are drafted, what the academic literature has termed the "de-targetization" of restrictive measures, and the role of the European Commission as primary drafter. Finally, through a detailed examination of recent judgments and the decentralized implementation landscape, the paper assesses whether the current regime remains compatible with the Charter of Fundamental Rights. Given the substantial volume of annulment actions brought by Russian individuals and entities since February 2022, the cases examined in this paper were selected on the basis of their direct and identifiable doctrinal contribution to the specific issues of evidence sufficiency, statement of reasons, and intensity of judicial review that form its analytical framework. Priority was given to judgments in which the CJEU or the General Court expressly addressed the

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3 Zelyova, N., *Restrictive measures – sanctions compliance, implementation and judicial review challenges in the common foreign and security policy of the European Union*, ERA Forum, Vol. 22, 2021, pp. 17–29.

4 Terlinden, M., *Sanctions without scrutiny? The role of proportionality in the case law of the European Union courts*, Leuven Centre for Global Governance Studies Working Paper, No. 248, 2025, p. 6.

evidentiary threshold for listing, the burden of proof, the proportionality of individual designations, or the permissible scope of the "leading businessperson" criterion—that is, to cases that illuminate the contours of due process in the post-2022 sanctions regime rather than merely resolving the individual dispute.

2. THE LEGAL AND INSTITUTIONAL FRAMEWORK OF EU RESTRICTIVE MEASURES

The European Union's competence to adopt restrictive measures operates within a unique legal architecture that bridges the intergovernmental nature of the Common Foreign and Security Policy (CFSP) and the supranational character of the internal market policies. This hybridity creates a specific legal system where political discretion upholds strict judicial oversight.

2.1. Treaty Provisions and the Dual Legal Basis

The legal foundation for EU sanctions involves a two-step procedure designed to reconcile the sovereignty of Member States in foreign policy with the uniformity of the internal market. This is not merely a procedural formality but a constitutional necessity to ensure the legality of acts that influence economic rights protected by the Charter.

The first step is the adoption of a Decision by the Council of the European Union under Article 29 of the Treaty on European Union (TEU). Article 29 TEU grants the Council the competence to define the Union's position on a particular geographical or thematic issue. This act is purely intergovernmental and legally binds the Member States to align their national policies with the Union's position.[5] It provides the political mandate and the strategic definition of the sanction regime, identifying the targets and the criteria for listing.[6] However, a CFSP Decision under Article 29 TEU lacks direct effect on private parties; it binds states but cannot, by itself, impose obligations on banks, corporations, or individuals to freeze assets.

A second step is required to give these measures economic effect within the EU legal order. To implement measures that interrupt or reduce economic relations with a third country or freeze the assets of individuals, the Council must adopt a Regulation under Article 215 of the Treaty on the Functioning of the European Union (TFEU). This article serves as the "bridge" between the CFSP and the TFEU. Once

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5 Szép, V., *New intergovernmentalism meets EU sanctions policy: The European Council orchestrates the restrictive measures imposed against Russia*, Journal of European Integration, Vol. 42, No. 6, 2020, p. 858.

6 Sztulman, A., *op. cit.*, note 1, p. 6.

adopted by a qualified majority on a joint proposal from the High Representative and the Commission, this Regulation is directly applicable across all Member States. It bypasses national implementation and creates binding obligations for all natural and legal persons within the EU jurisdiction. The choice of legal basis is not merely procedural; it dictates the scope of judicial review. While the CJEU has traditionally had limited jurisdiction over CFSP Decisions, it has full jurisdiction over Regulations based on Article 215 TFEU, thereby subjecting the economic implementation of sanctions to standard judicial scrutiny regarding their legality.

Crucially, while Article 29 TEU enables the act, the values guiding the entire process are enshrined in Article 21 of the TEU. Article 21(1) TEU explicitly states that the Union's action on the international scene shall be guided by the principles which have inspired its own creation: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.[7] This textual distinction is vital for judicial review; the Court evaluates the proportionality of sanctions not against the political will of the Council *per se*, but against the objectives of Article 21 TEU such as the preservation of peace and international security.

2.2. Fundamental Rights under the Charter of Fundamental Rights

The EU Charter of Fundamental Rights constitutes the primary normative check on the EU's sanctions power. Three provisions are central in the context of restrictive measures, forming the constitutional core of the defence for listed individuals.

Article 47 – Right to an Effective Remedy and a Fair Trial: This provision guarantees access to justice and the ability to obtain a review before an independent tribunal. In sanctions cases, Article 47 is central to assessing whether individuals can contest listings effectively. The CJEU considers Article 47 to be self-standing, requiring no additional specification by Union or national law to confer rights. It serves as the basis for the Court's jurisdiction to annul listings where the Council has failed to provide evidence or reasons, ensuring that no EU act affecting individual rights remains beyond judicial reach.[8]

Article 41 – Right to Good Administration: This article codifies the procedural obligations of the EU institutions. It includes the right of every person to be heard before any individual measure which would affect him or her adversely is taken,

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7 *Ibid.*

8 Matuška, P., *Constitutional implications of EU sanctions against the EU citizens*, European Studies – The Review of European Law, Economics and Politics, Vol. 10, No. 2, 2023, p. 46.

and the obligation of the administration to give reasons for its decisions. In the context of sanctions, this translates into the Council's duty to provide specific and concrete reasons for a listing, enabling the target to understand the case against them and to exercise their right of defense effectively.[9] The doctrinal roots of this duty in EU sanctions practice predate the Kadi jurisprudence. In *Organisation des Modjahedines du peuple d'Iran v Council* (*OMPI*, Case T-228/02), the General Court held for the first time that listed parties must be notified of the grounds for their listing and afforded a genuine opportunity to challenge the evidence against them—a procedural requirement that the subsequent Kadi jurisprudence elevated into a constitutional principle of EU law.[10]

Article 17 – Right to Property: Sanctions measures, particularly asset freezes, constitute a significant interference with the peaceful enjoyment of possessions. Article 17 requires that any such interference be lawful, proportionate, and justified by a general interest objective. The Court must balance the individual's property rights against the essential public interest of maintaining international peace and security. While the Court generally accepts that sanctions are necessary, the proportionality analysis under Article 17 requires that the measures do not impair the very substance of the right, for instance, by becoming a *de facto* permanent confiscation without trial.[11]

2.3. The Role of the Commission as Sanctions Drafter

While the Treaty framework places the Council as the primary vessel of the CFSP, the operational reality post-2022 has seen a significant shift towards the European Commission. The complexity of modern economic warfare involving complex financial restrictions, dual-use technology bans, and energy embargoes, requires technical expertise that the Council Secretariat and the European External Action Service (EEAS) often lack. Consequently, the Commission, particularly its Directorate-General for Financial Stability, Financial Services and Capital Markets Union (DG FISMA), has emerged as the *de facto* primary drafter of the sanctions packages.

This institutional evolution means that while the Council formally adopts the decisions, the *substance* is increasingly drafted by the Commission. This centralization has facilitated the speed and uniformity of the sanctions, but it also blurs the lines of the intergovernmental CFSP process. It raises questions about the trans-

[9] Matusiak-Frącczak, M., *The EU's sanctions against Russia in the context of the Russian aggression on Ukraine, and their judicial control*, Acta Universitatis Lodziensis. Folia Iuridica, Vol. 106, 2024, p. 172.

[10] Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council*, ECLI:EU:T:2006:384, para. 126.

[11] Lonardo, L., *op. cit.*, note 2, p. 55.

parency of the drafting phase and whether the «emotional resonance» of the Commission's political leadership influences the legal strictness of the listing criteria.[12]

3. THE PRE-2022 DOCTRINAL BASELINE: THE KADI LEGACY

To evaluate the evolution of judicial standards post-2022, of great importance is establishing the doctrinal baseline set by the Court in the preceding decade. This era was defined by the struggle to reconcile the supremacy of UN Security Council resolutions with the internal autonomy of the EU legal order.

3.1. The "Kadi" Standard and Full Judicial Review

The cornerstone of EU sanctions jurisprudence is the *Kadi* case law. In *Kadi I* and *Kadi II*, the Court strongly rejected the notion that CFSP acts implementing UN resolutions are immune from judicial review. The Court held that the review of the lawfulness of grounds for listing must be "full" and not merely marginal or limited to checking for manifest errors. The EU judiciary must ensure that the decision, which affects the person individually, is taken on a sufficiently solid factual basis.[13][14]

This meant that the Council could not rely solely on diplomatic secrecy; it had to produce evidence capable of substantiating the reasons for listing. The *Kadi* standard shifted the burden of proof squarely onto the EU institutions. It established that judicial review extends to the verification of the facts alleged in the statement of reasons. As stated in *Bank Mellat* (Case C-176/13 P), it is for the Council to prove that the allegations are well-founded, not for the applicant to provide negative proof that they are not involved in the proscribed conduct.[15] This allocation of the burden of proof was a critical safeguard for listed entities. The practical force of this principle was demonstrated in *Council v Fulmen and Mahmoudian* (Case C-280/12 P), where the Court of Justice annulled the listing of an Iranian entity solely because the Council was unable to produce any evidence capable of substantiating its claims before the Court. The judgment confirmed that bare as-

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12 Lepeu, J., *Ukraine, the de-targetization of EU sanctions, and the rise of the European commission as architect of EU foreign policy*, International Politics, Advance online publication, 2025, p. 977.

13 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, para. 326.

14 Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission and Others v Kadi*, ECLI:EU:C:2013:518, para. 97.

15 Case C-176/13 P, *Council v Bank Mellat*, EU:C:2016:96, para. 109.

sertion, even if based on classified information that could not be disclosed, cannot satisfy the burden of proof where no other verifiable material is adduced.[16]

This rigorous approach to judicial scrutiny did not develop in a vacuum but was the result of a prolonged constitutional struggle over the very nature of EU restrictive measures. The EU's initial pivot towards "targeted" sanctions in the early 2000s was explicitly designed to minimize collateral humanitarian damage, thereby distinguishing EU practice from blunt, conventional embargoes.[17] However, this individualization of sanctions inevitably triggered profound fundamental rights concerns. The CJEU's jurisprudence, beginning with the *Kadi* cases, effectively constitutionalized the CFSP by refusing to allow the intergovernmental nature of foreign policy to act as a legal lacuna for individual rights.[18] The constitutional implications of this turn were widely debated in the academic literature. De Búrca has argued that the *Kadi* judgments reflected a deliberate choice by the Court to treat the EU as an autonomous constitutional order whose fundamental rights commitments cannot be overridden by external obligations, a choice that established the template for the subsequent evolution of judicial review in CFSP matters.[19]

In the post-Lisbon era, the Court progressively dismantled the remaining barriers to judicial review within the CFSP, culminating in landmark decisions such as *Rosneft*[20]. The CJEU systematically engaged in a "gap-filling" exercise, interpreting the jurisdictional carve-outs of Article 24(1) TEU and Article 275 TFEU as narrowly as possible to preserve the coherence of the EU legal order.[21] The right to effective judicial protection, enshrined in Article 47 of the Charter, served as a "transformative force", compelling the Council to significantly improve its evidentiary standards and statement of reasons in the years preceding the 2022 invasion.[22] It is precisely against this backdrop of heightened judicial vigilance and established scholarly consensus that the Court's post-2022 pragmatic deference must be critically evaluated.

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16 Case C-280/12 P, *Council v Fulmen and Mahmoudian*, ECLI:EU:C:2013:775, paras. 58–72.

17 Portela, C., *Are European Union sanctions "targeted"?*, Cambridge Review of International Affairs, Vol. 29, No.3, 2016, p. 914.

18 Eckes, C., *EU restrictive measures against natural and legal persons: From counterterrorism to third country sanctions*, Common Market Law Review, Vol. 51, No. 3, 2014, p. 870.

19 De Búrca, G., *The European Court of Justice and the International Legal Order After Kadi, Harvard International Law Journal*, Vol. 51, No. 1, 2010, pp. 1–49.

20 Case C-72/15, *PJSC Rosneft Oil Company v Her Majesty's Treasury*, EU:C:2017:236, para. 88.

21 Van Elsuwege, P., *Judicial review and the Common Foreign and Security Policy: Limits to the gap-filling role of the Court of Justice*, Common Market Law Review, Vol. 58, No. 6, 2021, p. 1735.

22 Poli, S., *The right to effective judicial protection with respect to acts imposing restrictive measures and its transformative force for the Common Foreign and Security Policy*, Common Market Law Review, Vol. 59, No. 4, 2022, p. 1055.

3.2. Specificity of Evidence and the "Tay Za" Standard

In addition to the burden of proof, the Court established strict standards regarding the *quality* of the link required between the individual and the sanctioned regime. In *Pye Phyo Tay Za v Council* (Case C-376/10 P), dealing with sanctions on Myanmar, the Court struck down a listing that relied solely on a family connection. The Court held that restrictive measures must be directed only against the leaders of such countries and the persons associated with them. It rejected the presumption that a family connection alone was sufficient to establish that an individual benefited from the regime's policies.[23]

This judgment reinforced the requirement that listings be grounded in factual specificity rather than broad assumptions or "guilt by association." The Court required a tangible link, active support or specific benefit, rather than a mere status-based connection. This jurisprudence created a high bar for the Council, demanding individualized evidence files for each listing that demonstrated a direct connection to the wrongful conduct of the targeted state.[24]

3.3. The "Manifest Error" in Complex Assessments

While *Kadi* promised a full review of facts, the Court also acknowledged the Council›s broad discretion in defining foreign policy objectives. In cases like *Rosneft*, regarding the 2014 sectoral sanctions against Russia, the Court confirmed that the Council has a wide margin of appreciation in determining the "necessary measures" to achieve CFSP objectives.[25] The Court's role is not to substitute its policy judgment for that of the Council but to ensure the measure is not manifestly inappropriate to the objective. This doctrinal distinction creates a dual-track system: deference on the macro-policy level (e.g., whether to sanction the oil sector), but rigorous, fact-based scrutiny on the micro-level of individual designations to ensure innocent individuals are not collateral damage.[26]

This pre-2022 baseline established a system where the EU courts acted as a robust filter, striking down listings that lacked specific evidence or relied on broad, unsupported presumptions. The question that remains is whether this filter has held up against the volume of wartime sanctions.

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23 Case C-376/10 P, *Pye Phyo Tay Za v Council*, EU:C:2012:138, para. 66.

24 Lonardo, L., *op. cit.*, note 2, p. 54.

25 *Rosneft*, *op. cit.*, note 20, para. 88.

26 Zelyova, N., *op. cit.*, note 3, p. 20.

4. THE POST-2022 SANCTIONS REGIME: DE-TARGETIZATION AND NEW ARCHITECTURE

The Russian invasion of Ukraine in February 2022 did not merely increase the quantitative volume of restrictive measures; it fundamentally altered the teleological and structural nature of the EU's sanctions regime. The transition from the pre-2022 sanctions to the current strategy of comprehensive economic erosion has introduced new legal concepts and institutional dynamics that challenge the established *Kadi* safeguards.

4.1. The Rise of the Commission as Sanctions Drafter

A critical, yet often under-analyzed, structural shift in the post-2022 era is the re-engineering of the institutional balance within the sanctions adoption process. Traditionally, pursuant to Article 29 TEU, sanctions were the exclusive domain of the Council, driven by Member States and the EEAS, operating through the unclear machinery of the RELEX and COEST working groups. This intergovernmental dominance reflected the sovereign sensitivity of foreign policy. However, the post-2022 reality reveals a profound institutional migration of power.

The sheer technical complexity of the measures adopted against Russia, ranging from SWIFT disconnections and central bank asset immobilizations to complex prohibitions on dual-use technology exports, exceeded the technical capacity of foreign ministries. Consequently, as noted in Section 2.3, DG FISMA emerged as the primary drafter of the sanctions packages.[27]

This shift has significant legal implications for due process. While the formal legal adoption remains with the Council (preserving the intergovernmental structure of Article 29 TEU), the *substance* is increasingly technocratic and centralized within the Commission. This centralization facilitated the unprecedented speed of adoption, allowing the EU to act in «real-time» with the unfolding aggression. However, it also bypassed the traditional, although slower, deliberative checks inherent in the Council›s diplomatic process. The result was the proliferation of «template-based» reasoning in individual listings, where the administrative rationale for sanctioning individuals was often standardized rather than individualized, creating a tension with the *Bank Mellat* requirement for specific, concrete evidence.

4.2. De-targetization: From Surgical to Comprehensive

The defining doctrinal feature of the post-2022 regime is the phenomenon of "de-targetization." The philosophy of "smart sanctions," dominant since the late

[27] Lepeu, J., *op. cit.*, note 12, p. 977.

1990s, was predicated on the distinction between the regime leadership (the target) and the general population (to be spared). It is argued that the post-2022 Russia sanctions have effectively abandoned this distinction in favor of measures that approximate a comprehensive embargo, blurring the lines between individual culpability and collective economic punishment.[28] The theoretical foundations of the smart sanctions paradigm and the conditions under which targeted EU sanctions produce behavioural change were extensively analysed by Portela, whose foundational study demonstrated that effectiveness hinges precisely on the individualized precision that the post-2022 regime has substantially diluted.[29]

Legally, this "de-targetization" manifests in the exponential broadening of listing criteria. The Council amended Council Regulation (EU) No 269/2014 to allow for the listing not just of those directly responsible for the aggression, but of "leading businesspersons" operating in economic sectors providing a substantial source of revenue to the Russian Federation (Article 3(1)(g)). This amendment marks a transition from *conduct-based* liability (sanctioned for what you *did*) to *status-based* liability (sanctioned for who you *are*).[30]

By defining entire sectors, energy, finance, transport, defense, as critical to the regime, the EU legal order now operates under the presumption that any individual achieving economic prominence within these sectors is a contributor to the Russian state's war economy. This structural shift directly challenges the *Tay Za*[31] doctrine, which prohibited the presumption of support based solely on status or association. Under the current regime, the «individualized assessment» required by *Kadi*[32] judgements frequently satisfied by merely proving the individual's economic status, rather than any specific act of support for the war.

5. DOCTRINAL ANALYSIS OF POST-2022 CASE LAW

The Court of Justice has been flooded with annulment actions from Russian oligarchs, family members, and corporate entities challenging these new measures. Analysis of recent judgments reveals a judiciary attempting to navigate the tension between the strict evidentiary standards of the *Kadi* era and the geopolitical necessity of the current moment.

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28 *Ibid*.

29 Portela, C., *European Union Sanctions and Foreign Policy: When and Why Do They Work?*, Routledge, London, 2010.

30 Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

31 *Pye Phyo Tay Za v Council*, *op. cit.*, note 23, para. 66.

32 *Kadi and Al Barakaat International Foundation v Council and Commission*, *op. cit.*, note 13, para. 326.

5.1. The "Leading Businessperson" Criterion and the Rebuttable Presumption

The central legal battleground in the post-2022 litigation has been the interpretation of the "leading businessperson" criterion. In a series of judgments, including *Shulgin v Council* (Case T-364/22), *Pumpyansky v Council* (T-270/22), and *Gennady Nikolayevich Timchenko and Elena Petrovna Timchenko v Council of the European Union* (T-644/22), the General Court has largely upheld the Council's broad discretionary power.[33]

The Court has accepted a logic of "implied support." It reasoned that in a state-capitalist system such as that of the Russian Federation, maintaining a dominant market position or managing a major company is fundamentally linked to regime support. Therefore, the Council does not need to prove a direct link between the individual and the military aggression in Ukraine. It is sufficient for the Council to demonstrate that the individual is a "leading businessperson" in a relevant sector. Once this status is established, a presumption arises that the individual provides support to, or benefits from, the Russian government.[34]

This constitutes a significant reversal of the burden of proof. While formally the burden remains on the Council, in practice, the burden shifts to the applicant to demonstrate that they are *not* supporting the regime, a *probatio diabolica* in a non-transparent authoritarian system where public dissent carries the risk of imprisonment or asset seizure by the Russian state. The Court has generally dismissed arguments that the «leading businessperson» criterion is disproportionate or lacks a causal link to the war, deferring to the Council›s assessment that eroding the Russian economic base is a necessary component of the CFSP objective to restore peace. Lonardo has observed that this line of reasoning effectively places Russia-related sanctions litigation in a sui generis category, where the procedural safeguards of EU administrative law are recalibrated to accommodate the systemic logic of state-capitalist complicity, rather than requiring proof of individual wrongdoing in the conventional sense.

5.2. Evidence Standards and the "Prigozhina" Correction

Despite the general trend of deference regarding listing criteria, the Court has maintained a degree of vigilance regarding the quality and temporality of evidence. Unlike the carefully curated intelligence report in UN counter-terrorism

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[33] Case T-364/22, *Shulgin v Council*, ECLI:EU:T:2023:503.; Case T-270/22, *Pumpyansky v Council*, ECLI:EU:T:2023:757.; Case T-644/22, *Timchenko and Timchenko v Council*, ECLI:EU:T:2024:258.

[34] Matusiak-Frącczak, M., *op. cit.*, note 9, p. 170.

cases, EU listings often rely on "press packs", compilations of news articles, Wikipedia entries etc.

The limits of this approach were exposed in the case of *Violetta Prigozhina* (Case T-212/22). The General Court annulled the listing of the mother of Yevgeny Prigozhin, the late leader of the Wagner Group. The Council had justified her listing on the grounds that she was the owner of companies linked to her son. However, the Court found that the evidence relied upon by the Council was outdated; at the time of the contested acts, she had ceased to be the owner of the relevant entities. The Court held that a family link alone, without evidence of continued economic association at the time of the listing, was insufficient to justify the restrictive measure.[35][36]

The *Prigozhina* judgment serves as a critical doctrinal corrective. It reaffirms that even in the context of war, the Council cannot be insufficiently rigorous in its evidentiary approach. The facts must be accurate, reliable, and crucially, contemporaneous. The Court refused to allow the general notoriety of the son to cure the evidentiary defects regarding the mother, thereby upholding the principle that sanctions are not instruments of collective family punishment but measures based on individual conduct or specific economic links.

5.3. Proportionality and the "Security Exception": The RT France Case

The tension between fundamental rights and security imperatives reached its peak in the *RT France* judgment (Case T-125/22). The Council imposed a ban on the broadcasting activities of RT France, a Russian state-funded media outlet, arguing it was an instrument of information warfare and destabilization. RT France challenged the ban as a violation of the freedom of expression enshrined in Article 11 of the Charter.[37]

The Grand Chamber of the General Court upheld the ban, applying a proportionality test that heavily weighted the "threat to the Union's public order and security" posed by hybrid warfare. The Court reasoned that the essence of the right to freedom of expression was not impaired because the measure was temporary and reversible. Furthermore, the Court accepted that the Council could take such measures without providing a prior hearing, citing the "extreme urgency" of the situation immediately following the invasion.[38]

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35 Case T-212/22, *Violetta Prigozhina v. Council of the European Union*, ECLI:EU:T:2023:104.

36 Lonardo, L., *op. cit.*, note 2, p. 57.

37 Case T-125/22, *RT France v Council*, ECLI:EU:T:2022:483.

38 Matusiak-Frącczak, M., *op. cit.*, note 9, p. 179.

This judgment signals a doctrinal shift towards what might be termed a "security exception" within the proportionality analysis. While the restriction on property in *Rosneft*[39] was justified by strategic sectoral targeting, the restriction on expression in *RT France* was justified by the cognitive dimension of warfare. The Court displayed a willingness to defer to the Council's assessment of what constitutes a threat to public order, suggesting that in times of existential crisis, the balance of proportionality tilts decisively in favor of security. Critics argue that relying on the «temporary» nature of sanctions is theoretically flawed given the complex nature of the conflict, potentially leaving rights suspended indefinitely.[40]

5.4. The Standard of Review: Manifest Error vs. Full Review

While formally maintaining the "full review" standard established in *Kadi*, the post-2022 jurisprudence reveals a dichotomy in the Court's approach. When reviewing facts (e.g., did Person X own Company Y on Date Z?), the Court exercises full scrutiny. However, when reviewing the complex economic and political assessments (e.g., does sanctioning the fertilizer sector contribute to peace?), the Court applies the "manifest error of assessment" test.

As established in *Rosneft*, the Court acknowledges the Council's wide margin of appreciation in determining the measures necessary to maintain international peace and security.[41] In the post-2022 cases, this deference has allowed the Council to target the "inner circle" of the Russian economy based on broad presumptions of influence. The Court essentially checks whether the individual fits the criteria of the strategy, rather than questioning the efficacy of the strategy itself. This deference is pragmatic, recognizing the judiciary's lack of competence in foreign policy, but it risks isolating the substantive logic of "total sanctioning" from rigorous legal challenge. Terlinden's analysis of proportionality in the EU courts' sanctions case law reinforces this concern: while the Court formally conducts a three-stage proportionality review, the "manifestly inappropriate" threshold applied at the level of strategic policy assessment renders that review largely formal, effectively shielding the macro-design of the sanctions regime from substantive judicial scrutiny.

6. IMPLEMENTATION GAPS: THE "SCATTERED JUNGLE"

While the adoption of sanctions is centralized in Brussels and adjudicated in Luxembourg, their enforcement remains stubbornly national. This dichotomy creates

[39] Case C-72/15, *PJSC Rosneft Oil Company v Her Majesty's Treasury*, EU:C:2017:236, para. 88.

[40] Matusiak-Frącczak, M., *op. cit.*, note 9, p. 173.

[41] Case C-72/15, *PJSC Rosneft Oil Company v Her Majesty's Treasury*, EU:C:2017:236, para. 88.

a significant gap in the legal architecture of the sanctions regime. The implementation landscape has been aptly characterized in the academic literature as a "scattered jungle of national authorities."[42]

Across the 27 Member States, there are over 160 different competent authorities responsible for freezing assets, granting derogations for basic needs or legal fees, and enforcing penalties for evasion. This fragmentation leads to severe legal uncertainty. An individual might be granted a derogation to access frozen funds to pay defense counsel in France but denied the same derogation in Latvia, despite the governing EU Regulation being identical.

The right to effective judicial protection (Article 47) and the right to property (Article 17) are thus geographically contingent, depending on the administrative efficiency and political will of the national authority. This lack of uniformity undermines the primacy of EU law. If the nature of the EU sanction is unitary, its application must be uniform. The disparity in criminal penalties for sanctions violations, ranging from administrative fines in some states to prison sentences in others, led to the adoption of Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673. This move towards harmonization constitutes an acknowledgment that the current "scattered" enforcement mechanism fails to guarantee both the effectiveness of the CFSP and the uniform protection of fundamental rights.[43]

7. ASSESSMENT: COMPATIBILITY WITH CONSTITUTIONAL PRINCIPLES

The evolution of the CJEU's jurisprudence post-2022 reflects a judiciary attempting to balance the imperatives of the Union's security with the protection of the individual rights that define those values.

The right to effective judicial protection remains the strongest safeguard in the EU legal order. The annulments in cases like *Prigozhina* and the granting of interim measures in *Mazepin* (Case T-743/22 R) demonstrate that the Court does not

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42 Olsen, K. B.; Kjeldsen, S. F., *Strict and uniform: Improving EU sanctions enforcement*, DGAP Policy Brief No. 29, German Council on Foreign Relations, Berlin, 2022, p. 5.

43 Giumelli, F. *et al.*, *The when, what, where and why of European Union sanctions*, European Security, Vol. 30, No. 1, 2021, p. 20. See also Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673, OJ L, 2024/1226.

serve as a mere instrument of executive validation. However, the practical effectiveness of this right is hindered by the procedural tactic of "renewal." Sanctions are typically renewed every six months.[44] By the time the General Court delivers a judgment annulling a listing, the Council may have already adopted a new decision with slightly modified reasons or updated evidence, re-listing the individual. This forces the applicant to initiate a new legal battle, creating an adversarial cycle that undermines the finality of the judicial remedy. Van Elsuwege has noted that this dynamic exposes a structural tension inherent in the CJEU's gap-filling role: the more robustly the Court exercises jurisdiction over CFSP acts, the more the Council is incentivized to adapt its listings procedurally rather than substantively, undermining the transformative potential of judicial protection.[45]

The quality of reasoning in Council decisions remains a persistent issue. The use of standardized templates for hundreds of listings weakens the individual nature of the administrative act required by Article 41 of the Charter. While the Court has accepted this somewhat standardized reasoning due to the "context" of the war, there is a doctrinal risk that this lowers the administrative standards for future, less urgent crises. Furthermore, the fragmented implementation landscape described in Section 6 as a "scattered jungle" complicates the right to good administration, as individuals face unclear and divergent administrative practices when seeking derogations.

The right to property has undergone the most significant stress. The acceptance of broad sectoral bans and status-based listings implies that property rights of "leading businesspersons" are increasingly viewed as subordinate to foreign policy goals. While the Court insists that asset freezes are temporary preservation measures and not confiscations, the prolonged nature of the conflict means that these "temporary" measures may last for years or decades. This approximates a *de facto* expropriation without the procedural safeguards of criminal law (such as a conviction). The longer the sanctions remain in place without a clear exit strategy or de-listing mechanism, the more fragile the proportionality justification becomes.[46]

8. CONCLUSION AND RECOMMENDATIONS

The full-scale invasion of Ukraine by Russia in 2022 has served as a profound stress test for the European Union's constitutional order, forcing a direct confrontation

[44] Case T-212/22, *Prigozhina v Council*, ECLI:EU:T:2023:104; Case T-743/22 R, *Mazepin v Council*, Order of the President of the General Court, 1 March 2023.

[45] Sztulman, A., *op. cit.*, note 1, p. 14.

[46] Zelyova, N., *op. cit.*, note 3, p. 18.

between the immediate, existential demands of geopolitical security and principles of the rule of law. The jurisprudential evolution observed in the aftermath of February 2022 represents not merely an intensification of existing practices, but a fundamental transformation in the legal character of EU restrictive measures. The transition from the pre-2022 paradigm of "surgical," behavior-altering sanctions to a post-2022 strategy of "total" economic erosion has required a judicial recalibration that carries significant long-term risks for the Union's legal integrity.

The doctrinal reassessment reveals that while the Court of Justice has formally adhered to the rigorous procedural shell established in the *Kadi* era demanding evidence, individual statements of reasons, and respect for the rights of the defense the substantive application of these standards has undergone a pragmatic, if not deferential, adaptation. The concept of "de-targetization" explains the jurisprudential shift from conduct-based liability to status-based liability. By accepting the Council's logic that in a state-capitalist system, economic importance is equivalent to political support for the aggressor, the Court has effectively lowered the evidentiary threshold required for listing. The validation of the "leading businessperson" criterion creates a rebuttable presumption that borders on a *probatio diabolica*, requiring applicants to prove a negative that they do not support a totalitarian regime in order to regain their fundamental rights. While this judicial approach is understandable within the context of armed conflict, it sets a precarious precedent where the individualization of guilt—a cornerstone of EU administrative law—is sacrificed for the efficiency of collective economic measures.

Furthermore, a critical institutional migration of power has reshaped the sanctions landscape. The emergence of the European Commission as the *de facto* «architect» of the sanctions regime has centralized the drafting of restrictive measures, prioritizing speed and technical scope over the deliberative nuance of traditional CFSP decision-making. This centralization has streamlined the EU›s response to aggression but has also led to the proliferation of standardized, template-based reasoning in listings. The Court's acceptance of such standardized reasoning, provided it is supported by open-source intelligence, indicates a willingness to accommodate the operational urgency of the Commission and Council, potentially at the expense of the rigorous scrutiny of facts mandated by *Bank Mellat*.

The tension between security and rights reaches its peak in the domain of fundamental freedoms. The judgment in *RT France* and the maintenance of massive sectoral bans signal the emergence of a «security exception» within the proportionality analysis. The Court now weighs the abstract «security of the Union» and the fight against «hybrid warfare» so heavily that severe restrictions on property rights (Article 17) and freedom of expression (Article 11) are considered propor-

tionate, provided they remain theoretically «temporary.» However, as the conflict extends, the «temporary» nature of asset freezes increasingly resembles permanent confiscation without criminal conviction, challenging the very essence of the right to property.

Moreover, the effectiveness of this entire legal regime is threatened by the fragmented implementation landscape described in Section 6 as a "scattered jungle." The disconnect between the supranational adoption of sanctions and their fragmented national enforcement creates a landscape of legal uncertainty where the right to effective judicial protection is geographically conditioned. Without the harmonization of criminal penalties and centralized enforcement mechanisms, the EU risks a scenario where its foreign policy is unified in theory but divergent in practice, undermining both its geopolitical credibility and its duty to ensure equality before the law.

To ensure that the doctrinal evolution observed in the post-2022 landscape does not permanently erode the protective function of the Charter of Fundamental Rights, judicial review and standards of evidence, the following recommendations are proposed based on the identified legal gaps:

1. *Standardization of Evidence*: The current reliance on open-source intelligence and ad-hoc press clippings significantly weakens the "sufficiently solid factual basis" standard mandated by the CJEU in the *Bank Mellat* jurisprudence. To ensure legal certainty and mitigate the risk of mass annulments, the EU requires a formalized evidentiary mechanism within its existing constitutional architecture. Doctrinally, this oversight function should not be left in an institutional vacuum. Relying on Article 27(3) TEU, a specialized sanctions evidence and verification unit should be formally consolidated within the European External Action Service (EEAS), specifically building upon the existing capabilities of the EU Intelligence and Situation Centre (EU INTCEN). By centralizing the vetting of evidence under the High Representative before a proposal is submitted to the Council under Article 29 TEU, the Union would bridge the gap between national intelligence gathering and supranational legal accountability, ensuring that all listings strictly adhere to the procedural guarantees of Article 41 of the Charter.[47]
2. *Clarification of De-listing Criteria*: The judicial acceptance of the "leading businessperson" criterion has unintentionally created a *probatio diabolica* for targeted individuals, effectively transforming a rebuttable presumption (*praesumptio iuris tantum*) into an indisputable one. To reconcile this status-based

[47] Olsen, K. B.; Kjeldsen, S. F., *op. cit.*, note 42, p. 9.

liability with the right to an effective remedy (Article 47 of the Charter), the Council must codify a clear legal test for de-listing. The regulatory framework should introduce a structured burden-shifting mechanism: once the Council establishes an individual's status within a strategic economic sector, the targeted person must be provided with an explicit, exhaustive set of justified criteria. This legal test should require the applicant to demonstrate a verifiable disassociation of ties with the sanctioned regime, such as documented divestment of assets, formal resignation from state-affiliated corporate boards within a predefined timeframe (e.g., six months), or explicit public distancing. Such a teleological approach ensures that restrictive measures continue to function as temporary, behavior-altering tools under Article 21 TEU, rather than morphing into punitive, *de facto* permanent confiscations without a criminal conviction.

3. *Harmonized Enforcement*: The EU must urgently address the "scattered jungle" of implementation. The adoption of Directive (EU) 2024/1226 is a necessary step, but further integration is required. A dedicated EU sanctions agency or extended powers for the European Public Prosecutor's Office (EPPO) could ensure uniform application of the law and uniform protection of rights across Member States, preventing forum shopping and unequal treatment.[48]
4. *Judicial Efficiency*: The General Court should consider expedited procedures for sanctions cases to prevent the adversarial cycle where judgments are of no practical significance by the renewal of listings. An accelerated procedure would enhance the effectiveness of the remedy under Article 47 of the Charter.

Ultimately, the jurisprudence emerging from this crisis demonstrates that strategic autonomy and the rule of law are not mutually exclusive, but their coexistence requires constant vigilance. The CJEU has managed to prevent the total securitization of the legal order by annulling listings where evidence was demonstrably outdated or insufficient, as seen in *Prigozhina*. Yet, the danger remains that the "exceptional" standards accepted during the conflict—reliance on press compilations, broad presumptions of association, and massive sectoral restrictions—will become the default setting for future EU external action. The Court's task in the coming years will be to guard the boundaries of this new regime rigorously, ensuring that the "security of the Union" does not become a *carte blanche* for executive discretion. The EU must remain a community of law, even when forced to act as a geopolitical power; if it sacrifices the former to achieve the latter, it risks eroding the very values it seeks to defend.

[48] Giumelli, F. *et al.*, *op. cit.*, note 43, p. 20.

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Review article

HARMONISATION OF CROSS-BORDER CORPORATE TRANSFORMATIONS AS A TOOL OF THE EUROPEAN UNION'S STRATEGIC AUTONOMY AND EXTERNAL ECONOMIC POLICY*

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ABSTRACT

This article examines the harmonization of cross-border transformations of commercial companies, particularly cross-border mergers and transformations involving a change of registered office, as a significant legal instrument for the development of the European Union's internal market. Based on the case law of the Court of Justice of the European Union and EU secondary law, specifically Directive (EU) 2019/2121, the article analyzes the legal framework governing the mobility of commercial companies within the European Union and its role in implementing cross-border reorganizations without the need for liquidation or reincorporation. Particular attention is paid to the impact of increased corporate mobility on deepening the integration of the internal market and on strengthening the competitiveness of companies based in the European Union.

The article further addresses the identification and analysis of risks associated with cross-border transformations of commercial companies, particularly in terms of their potential misuse and circumvention of national legal requirements. In this context, particular emphasis is placed on ensuring adequate protection for minority shareholders, whose legal status may be adversely affected by the implementation of cross-border mergers and transformations. Attention is focused on the protective mechanisms arising from European Union law, including procedural safeguards and the right to withdraw, as well as their significance in balancing the principle of company mobility with the protection of legitimate private-law interests.

Beyond the traditional internal market rationale, the article examines the extent to which a harmonized legal framework for cross-border transformations of commercial companies acquires broader significance in the context of the concept of the European Union's open strategic autonomy. At this level, the article analyzes whether and how harmonization in this area can contribute to the consolidation of economic activity within the internal market and to the

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promotion of economically stronger and more resilient corporate structures. In conclusion, the article assesses the significance of cross-border transformations of commercial companies in the broader context of the European Union's external economic policy and highlights their potential to indirectly contribute to strengthening the global competitiveness of companies based in the European Union in a changing geopolitical environment.

Keywords: *Corporate mobility in EU law, Creditor protection, Freedom of establishment, Minority shareholder protection, EU strategic autonomy*

1. INTRODUCTION

Cross-border transformations of commercial companies represent an indispensable tool in European Union law for the realization of the freedom of establishment[1] and, at the same time, a practical means of reorganizing business structures within the functioning of the EU internal market. Their importance is growing, particularly in an environment of economic integration, where companies increasingly need to change their organizational structure, relocate their registered office, or consolidate operations across Member States without liquidation or the need to establish a completely new legal entity. It is precisely for this reason that the harmonization of rules governing cross-border transformations of commercial companies has gradually become one of the key issues in European company law. This article analyzes the key link between cross-border corporate transformations and the evolving strategic autonomy of the European Union, particularly in the context of its external economic policy. It is based on the thesis that the enhanced mobility of companies, facilitated by harmonized legislation, represents a significant tool for strengthening the EU's economic resilience and its capacity for autonomous action[2] at the global level amid increasingly unpredictable macroeconomic conditions.

In order to deepen the integration of the EU internal market, strengthen legal certainty in cross-border mobility, and protect the entities concerned, legislation governing the cross-border conversion of companies was adopted at the EU level. Directive (EU) 2019/2121 on cross-border conversions, mergers, and divisions, adopted on November 27, 2019 (hereinafter referred to as *the "Conversion Directive"*)[3], required Member States to transpose its provisions into their national law by January 31, 2023, at the latest. It is currently part of the applicable legal framework, which contributes to reducing legal uncertainty and harmonizing the

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1 Articles 49 and 54 of the Treaty on the Functioning of the European Union (hereinafter *"TFEU"*).

2 Steinbach, A., *The EU's Turn to 'Strategic Autonomy': Leeway for Policy Action and Points of Conflict*, The European Journal of International Law, 2023, 34(4), 973–1006. ISSN 0938-5428, Available at: [DOI 10.1093/ejil/chad048].

3 Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 on certain aspects of company law as regards cross-border conversions, mergers, and divisions, OJ L 321, 12 December 2019, pp. 1–44.

rules on cross-border conversions at the European Union level. While the Directive is sometimes referred to in the literature as the "Mobility Directive", the term "Conversion Directive" is preferred in this article as it better reflects the primary subject matter of the analysis, namely cross-border conversions. The term "cross-border transformations" is used as a broader umbrella concept encompassing conversions, mergers and divisions within the meaning of the Directive.

For the purposes of this article, it is necessary to distinguish between three forms of cross-border corporate transformations. A cross-border conversion refers to a situation in which a company converts its legal form as registered in the departure Member State into a legal form of the destination Member State, while preserving its legal personality. A cross-border merger involves the combination of two or more companies governed by the laws of different Member States. A cross-border division concerns the transfer of assets and liabilities of one company to one or more successor companies, of which at least one is established in a different Member State; the Directive distinguishes three subtypes: a full division, a partial division, and a division by separation. These categories are regulated separately in Directive 2017/1132, as amended by Directive (EU) 2019/2121, although they share a common objective: to facilitate corporate mobility within the internal market while protecting affected stakeholders.

However, the development of the relevant legislation in this area has been shaped not only by EU secondary law, but also, to a significant extent, by the case law of the Court of Justice of the European Union (hereinafter *the "CJEU"*), which has long affirmed that cross-border conversions of commercial companies fall within the scope of the freedom of establishment under Articles 49 and 54 TFEU. The judgment in the *SEVIC Systems* case explicitly identified cross-border mergers as a specific means of exercising the freedom of establishment, essential for the proper functioning of the EU internal market. Subsequent case law in the *Cartesio*[4] and *VALE*[5] cases further intensified the pressure to eliminate inconsistencies between national legal regimes and the requirements of EU primary law in corporate mobility. It was precisely these tensions between differing national regimes and the requirement for effective corporate mobility that served as one of the main drivers for the adoption of harmonization measures at the EU level. Although the case law of the Court of Justice of the European Union concerning the freedom of establishment has clarified certain contentious issues, it is clear that case law alone cannot ensure a sufficient degree of legal certainty.[6]

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4 Case C-210/06 *Cartesio Oktató és Szolgáltató bt*, Judgment of the Court (Grand Chamber) of December 16, 2008, ECLI: EU:C:2008:723.

5 Case C-378/10 *VALE Építési kft,* Judgment of the Court (Grand Chamber) of July 12, 2012, ECLI: EU:C:2012:440.

6 Gerner-Beuerle, C.; Mucciarelli, Federico M.; Schuster, E.; Siems, M., *Making the Case for a Rome V Regulation on the Law Applicable to Companies,* ECGI Law Working Paper No. 549/2020, 2020.

The harmonized regulatory framework not only creates space for companies to adapt operationally to fluctuations in the global market, but also encourages the desired concentration of economic activities within the European economic area.[7] Although the primary purpose of the Conversion Directive is to remove barriers to the cross-border mobility of commercial companies, its ancillary impacts on economic stability and global competitiveness, both of commercial companies operating within the EU and, secondarily, of the EU itself, cannot be overlooked. This text therefore does not limit the discussion of corporate transformations to a description of technical and legal procedures. Rather, it takes an analytical approach to cross-border corporate transformations as a tool of the EU's broader economic and geopolitical strategy. The main objective of this article is therefore to assess whether the current legal framework can effectively balance the requirement for the free mobility of business entities with the protection of affected individuals, while also aligning with the EU's strategic goals.

Methodologically, the article is based on an analysis of relevant case law of the Court of Justice of the EU, which preceded legislative activity and defined the limits of freedom of establishment. At the same time, the author employs a comparative approach in evaluating various approaches to the protection of minority shareholders. The central research question of this article is whether, and through which legal and economic mechanisms, the harmonisation of cross-border corporate transformations may contribute to the European Union's Open Strategic Autonomy. The article tests this thesis against the current legal framework established by Directive (EU) 2019/2121 and the preceding case law of the CJEU.

2. HARMONISATION OF CROSS-BORDER CONVERSIONS IN EU LAW

2.1. Shaping the Legal Regime for Cross-Border Conversions: From Case Law to Legislative Stability

The development of transnational economic relations in the context of globalization and Europeanization creates the conditions for increased mobility of business entities. Companies established under the law of one state may, during their existence, seek to transfer their registered office or relocate their entire business operations to another jurisdiction, typically due to more favorable business condi-

Available at:
[https://ssrn.com/abstract=3720574], pp. 3–4.

7 Jevremović - Petrović, T., *"Harmonization of EU law on cross-border movement of companies."*, Vol. 58, 2020, pp. 88-89., Available at:
[https://doi.org/10.5937/pip2003081j]

tions. However, such a decision need not be motivated solely by economic reasons but may also result from practical circumstances, such as a change in the personal circumstances of the partners or the execution of property transactions with a cross-border element.[8]

The development of the legal framework for cross-border mobility in the European Union can be characterized as a gradual evolution in the form of a dialogue between the legislator and the case law of the Court of Justice of the European Union. The fundamental legal framework is primarily provided by Articles 49 and 54 TFEU[9], which guarantee the freedom of establishment not only for natural persons but also for commercial companies established under the law of an EU Member State. The starting point for understanding the limited mobility in the early case law of the Court of Justice of the EU was the perception of commercial companies as entities closely tied to the national legal order. Unlike natural persons, whose existence is not contingent on legal regulation, commercial companies are established and exist solely under the law of the state of their incorporation. It follows that they are obligated to comply with the conditions that this legal system sets forth for their existence, operation, and dissolution. It was precisely this link to the home legal system that, at the time of the decision in the *Daily Mail* case, was one of the main reasons why it was not possible to freely transfer a company's registered office to another Member State without the consent of the state of origin.[10]

In the judgment in question, the Court of Justice of the European Union concluded that Articles 52 and 58 of the EEC Treaty[11] do not grant commercial companies the right to transfer their central management to another Member State while retaining their legal personality. It justified this conclusion by stating that differences between national legal systems regarding a company's connection to the legal order had not been harmonized at the level of Community law. As stated in paragraph 23 of the judgment, these are matters to be addressed through legislative action, not through judicial interpretation of the provisions on freedom of establishment. This decision confirmed the competence of the Member State of origin to autonomously regulate the conditions under which an entity or commercial company established by it may leave its jurisdiction.[12]

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8 Patakyová, M.; Czókolyová, B. *Theory of the company in the triad of decisions Daily Mail, Cartesio, and VALE – the company as fiction, a nexus of contracts, or a real person?,* Právny obzor, 2015, Vol. 98, No. 1, pp. 3–21.

9 Articles 49 and 54 of the Treaty on the Functioning of the European Union (hereinafter *"TFEU"*).

10 Patakyová; Czókolyová, *op. cit.,* note 8, pp. 3–21.

11 European Communities, *Treaty establishing the European Economic Community (Treaty of Rome) of March 25, 1957.* Official Journal of the European Communities, 1957.

12 Case C-81/87, *The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc,* Judgment of the Court of Justice of 27 September 1988 in ECLI: EU:C:1988:456. paras. 20–25.

In assessing EU secondary law, the Court of Justice of the EU has taken a rather restrictive approach to the issue of the mobility of legal entities. In response to the second question referred for a preliminary ruling, it stated that *Council Directive 73/148 on the abolition of restrictions on movement and residence*[13] applies exclusively to natural persons and therefore cannot be applied by analogy to commercial companies without further ado. It also follows from the judgment in question that, although the freedom of establishment precludes discrimination against companies by the host state, the legal situation at the time did not yet prevent the state of origin from determining the conditions under which a company may transfer its management abroad. Consequently, the issue of cross-border mobility of companies remained largely in the hands of national legislators, as it had not yet been sufficiently harmonized at the Community level.[14]

This restrictive approach was subsequently followed by the case law of the Court of Justice of the European Union, which took a different direction in the *Centros* case*[15]*, in which the aspect of secondary establishment came to the fore. In this judgment, the Court of Justice of the European Union expressly held that Articles 52 and 58 of the EC Treaty[16] preclude a Member State from refusing to register a branch of a company duly incorporated under the law of another Member State solely on the ground that the company does not carry out any economic activity in the State of its incorporation and intends, through the branch, to carry out its activities exclusively in the host State. The mere fact that the founders of a commercial company chose the legal system of another Member State due to more favorable conditions for company formation does not, therefore, constitute an abuse of the freedom of establishment, according to the Court of Justice of the European Union. The *Centros* decision thus represented a significant weakening of the previous approach, which placed particular emphasis on the company's connection to the legal system of the state of its incorporation. The Court of Justice of the EU emphasized that the right to establish a company in one Member State and to conduct business activities in another Member State through a branch of

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13 Council of the European Communities, *Council Directive 73/148/EEC of May 21, 1973, on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services,* Official Journal of the European Communities, 1973, L 172, pp. 14–16.

14 Case C-81/87 *The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc,* Judgment of the Court of Justice of 27 September *1988* ECLI: EU:C:1988:456, para. 18, paras. 28–29.

15 Case C-212/97 *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, Judgment of the Court of Justice of 9 March 1999, ECLI: EU:C:1999:126.

16 European Communities, *Treaty establishing the European Community (Consolidated Version)m* Official Journal of the European Communities, 2002, C 325, pp. 33–184.

that company is an inherent part of the freedom of establishment within the EU internal market. At the same time, it rejected arguments based on the need to protect creditors and prevent fraud as grounds for a general refusal to register a branch, since such objectives can also be achieved by less restrictive means. This judgment has further reinforced in the CJEU's case law the idea that the cross-border mobility of commercial companies must not be restricted without a valid reason merely because the company exploits regulatory differences between the legal systems of Member States to its advantage.[17]

While the *Centros* judgment affirmed a company's right to establish an organizational unit in another Member State regardless of its founders' motives, the *VALE* decision[18] advanced the issue further toward the recognition of cross-border conversions—that is, changes in a company's legal form while maintaining the continuity of its legal personality. In paragraph 33 of this judgment, the Court of Justice of the EU emphasized that if national law permits conversion for domestic commercial companies, it must also permit conversion for companies from other Member States under comparable conditions. Otherwise, there would be a violation of the freedom of establishment. In its decision, the Court of Justice of the EU also addressed the practical aspects of registering such a conversion in the commercial register. In paragraph 62, it held that the host state cannot refuse to recognize a foreign company as a legal predecessor, as this would effectively prevent the implementation of a cross-border conversion. At the same time, in paragraph 61, it emphasized that the authorities of the host state are required to give due consideration to documents issued in the state of origin to avoid unnecessary duplication of verification of facts that have already been established. Taken as a whole, this approach was aimed at ensuring the practical feasibility of cross-border conversions within the EU internal market.[19]

Subsequent activity by the Court of Justice of the EU on the issue at hand in the *Polbud* case[20] significantly clarified the scope of the freedom of establishment in the context of cross-border transfers of commercial companies. In that case, the Court of Justice of the EU confirmed that this freedom also applies to a situation where a company relocates only its registered office to another Member State in order to be converted there into a company under the law of that *(so-called "host")*

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17 Case C-212/97 *Centros Ltd v. Erhvervs- og Selskabsstyrelsen* Judgment of the Court of Justice of 9 March 1999, ECLI: EU:C:1999:126, paras. 27–30.

18 Case C-378/10 *VALE Építési kft*, Judgment of the Court (Grand Chamber) of July 12, 2012, ECLI: EU:C:2012:440.

19 *Ibid.*

20 Case C-106/16 *Polbud – Wykonawstwo sp,* Judgment of the Court (Grand Chamber) of October 25, 2017, in. *z o.o.* ECLI: EU:C:2017:804.

State, even without simultaneously relocating its actual place of business. This judicial ruling confirms that a cross-border conversion is not contingent on the necessary transfer of the actual center of business, provided that the legal system of the host state does not require such a condition. The Court of Justice of the EU also emphasized that a company's mere attempt to take advantage of the more favorable legal framework of another Member State does not in itself constitute an abuse of rights. In this regard, it expressly stated that establishing a registered or actual place of business in a Member State with the aim of benefiting from more favorable legislation cannot be considered an abuse of the freedom of establishment. It also rejected the notion that the mere relocation of a registered office gives rise to a general presumption of fraud. This significantly limits the scope for national authorities to "block" cross-border conversions solely based on general considerations regarding possible circumvention of the law.[21]

Of particular importance is also the conclusion that the home Member State cannot make a cross-border conversion conditional on the mandatory liquidation of the company. The Court of Justice of the EU acknowledged that the protection of creditors, minority shareholders, and employees constitutes a legitimate objective, but emphasized that a general obligation to liquidate goes beyond what is necessary to achieve that objective. It pointed to the existence of less restrictive means, such as appropriate safeguards to protect creditors, and so on. The decision thus confirmed that cross-border conversion is a legitimate exercise of the freedom of establishment and that national procedural requirements must not render it practically unenforceable.[22]

From a broader systemic perspective, this shift in case law appears to have fostered an environment in which commercial companies can choose, within the EU internal market, the legal system that best suits their needs *(law shopping)*. As noted in the scholarly literature, this has strengthened the element of so-called *regulatory competition* among Member States, as individual legal frameworks find themselves in a position where they must respond to the mobility of commercial companies and create an environment that is fiscally and economically attractive yet legally and regulatory balanced.[23]

The case law of the Court of Justice of the EU, which culminated in the *Polbud* judgment, provided a significant impetus for legislative activity at the EU level.

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21 *Ibid.*

22 *Ibid.*

23 Grambličková, B.; Macko, R., *The Rise of Cross-Border Company Conversions (From the Polbud Judgment to the Cross-Border Conversions Directive) (Part 1)*, Justičná revue, 2022, Vol. 74, No. 4. Available at: [https://www.legalis.sk/clanky/2768/vzostup-cezhranicnych-premien-spolocnosti-od-rozsudku-polbud-po-smernicu-o-cezhranicnych-premenach-1-cast], Accessed 29 April 2026.

This development ultimately led to the adoption of Directive (EU) 2019/2121, referred to in this article as the Conversion Directive. As Papadopoulos notes, this is a comprehensive reform, often referred to as *CBMD 2.0*, which, following long-standing tensions between national legal systems and the requirements of freedom of establishment, introduces a uniform framework not only for cross-border mergers but, for the first time, also for other forms of cross-border transformations of commercial companies, including their divisions. The aim of this legislation was not only to facilitate the mobility of companies but also to create a predictable and stable legal environment that reduces transaction costs and administrative burdens. In this sense, the Conversion Directive translates previous case law conclusions into specific procedural rules and contributes to the elimination of legal uncertainty that resulted from their gradual development.[24]

The development of the case law of the Court of Justice of the European Union provides the foundational framework for the issue under examination, without which it is impossible to fully understand the current state of cross-border mobility of commercial companies. Case law has gradually shaped the scope for the mobility of commercial companies and confirmed that cross-border conversions constitute a legitimate exercise of the freedom of establishment. However, as these processes have intensified, it has become clear that the mere removal of barriers to mobility is insufficient. The need to protect entities whose legal status may be affected by cross-border reorganization has come to the fore. It is precisely at this point that the limits of purely case-law-based development have become apparent. While the case law of the Court of Justice of the European Union has effectively eliminated several national restrictions, it was secondary legislation - specifically the Conversion Directive - that established a systematic regulatory framework for the protection of creditors, minority shareholders, and other affected parties. The following analysis therefore focuses on how this legal framework balances the requirement for the mobility of commercial companies with the need to ensure legal certainty and the protection of selected affected parties.

2.2. Selected Protective Mechanisms for Creditors in Cross-Border Mergers and Conversions

An important element of the relatively new EU legislation is also the effort to balance a high degree of corporate mobility with the protection of affected parties,

[24] Papadopoulos, T., *Legislation Commentary: Amendments to the EU Harmonization of Cross-Border Mergers following the Adoption of Directive 2019/2121*, European Business Law Review, 2023, Vol. 34, No. 5, pp. 894–895. ISSN 0959-6941, Available at: [DOI: 10.54648/eulr2023042].

particularly minority partners or shareholders, and creditors. Prior to the adoption of the Conversion Directive, their status was largely left to national law, which led to fragmentation of the legal framework and the resulting legal uncertainty. The Conversion Directive introduced separate protective regimes for cross-border conversions, mergers and divisions. Creditor protection in cross-border conversions is regulated by Article 86j of Directive 2017/1132, while creditor protection in cross-border mergers is regulated by Article 126b. Although these provisions are based on a similar protective logic, they should not be treated as identical, since each of them reflects the specific legal nature of the relevant cross-border operation. Creditor protection as such existed in national legal systems, the Conversion Directive made it an integral part of a more coherent European framework for cross-border mergers and conversions, thereby reducing the previously fragmented mosaic of national legal regulations. One of the key tools is *the solvency statement*, which is prepared by the statutory body and is intended to accurately reflect the financial situation of the company. This mechanism, supplemented by the possibility for creditors to seek *appropriate safeguards*, serves as a preventive tool for their protection, designed to prevent the abuse of cross-border transactions to the detriment of their rights.[25]

To properly understand the scope of this regulation, it is first necessary to briefly outline the risks creditors face in cross-border operations, particularly mergers. Creditors who entered a contractual relationship with the company prior to the publication of the intention to carry out a cross-border merger deserve special protection, as they could not have foreseen the change in the applicable law and jurisdiction. Conversely, creditors who entered into a contractual relationship only after the publication of the joint cross-border merger project had the opportunity to consider the potential consequences of this change and therefore should not enjoy the same level of special protection.[26] In addition to the risk of a change in the governing law, there is also a risk for creditors related to corporate governance, as a cross-border merger may be disadvantageous from a business perspective and may lead to a reduction in the value of the merging companies, which will naturally have a negative impact on the position of creditors as well.[27]

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[25] Papadopoulos, T., *The New Harmonized Protection of Creditors in Cross-Border Mergers,* European Company and Financial Law Review, 2022, Vol. 19, No. 3, . pp. 423–424, 426. ISSN 1613-2548, Available at: [DOI: 10.1515/ecfr-2022-001].

[26] Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 on certain aspects of company law as regards cross-border conversions, mergers, and divisions, Official Journal of the European Union, 2019, L 321, pp. 1–44, Recital 24.

[27] Winner, M., *Creditor Protection in Mergers in Europe,* in: Kovacs, E.; Winner, M. (eds.), Stakeholder Protection in Restructuring: Selected Company and Labor Law Issues, Budapest: ELTE Eötvös Kiadó, 2019, pp. 49–50.

Prior to the adoption of the Conversion Directive, the protection of creditors in cross-border mergers was governed by national law. The original Article 121(2) of Directive 2017/1132 required only compliance with national rules and formalities, including those relating to the protection of creditors of the participating companies. The diversity of national rules thus led to significant legal diversity, which complicated cross-border mergers and created uncertainty for both the participating companies and their creditors.[28]

National creditor protection systems could be divided into *ex ante* and *ex post* models. *Ex ante* protection allowed creditors to exercise their rights even before the cross-border merger took effect, thereby enhancing legal certainty, but at the same time it could prolong or complicate the merger process. *Ex post* protection, on the other hand, allowed creditors to assert their rights against the successor company only after the merger took effect, which, while facilitating the smooth progress of the process, increased legal uncertainty and practical difficulties in enforcing claims against a foreign entity, although these were partially mitigated by the Brussels Ibis Regulation.[29] The coexistence of both systems within the EU caused significant practical complications.[30]

Following the adoption of the Conversion Directive, creditor protection in cross-border mergers is harmonized primarily by Article 126b, while the corresponding provision for cross-border conversions is Article 86j. Article 126b requires Member States to provide for an adequate system of protection for the interests of creditors in cross-border mergers. This protection is supplemented by more specific instruments, in particular the *solvency declaration* under Article 126b(2) and the possibility for creditors to request *adequate safeguards* under the second subparagraph of Article 126b(1).[31] Article 86j establishes a comparable framework for cross-border conversions, while also reflecting the specific risks resulting from the transfer of the company into the legal regime of another Member State. Creditor protection is thus two-tiered: on the one hand, there is a general requirement for an adequate protection system; on the other hand, there are specific harmonized mechanisms that Member States may supplement with their own rules.[32]

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28 Papadopoulos, *op. cit.,* note 25, p. 426.

29 Schmidt, J., *Cross-Border Mergers and Divisions, Transfers of Seat: Is There a Need to Legislate?,* Brussels, European Parliament, 2016, pp. 18–19.

30 Papadopoulos, T., *The New Harmonized Protection of Creditors in Cross-Border Mergers,* European Company and Financial Law Review, 2022, Vol. 19, No. 3, p. 427.

31 *Ibid*., p. 429.

32 *Ibid.*, p. 429.

One of the important mechanisms of creditor protection is the solvency declaration. In the context of cross-border mergers, this mechanism is addressed in Article 126b (2), while in the context of cross-border conversions a comparable rule is contained in Article 86j (2). In both cases, however, the Directive does not impose an unconditional obligation on all Member States to require such a declaration but provides that Member States may require the administrative or management body of the company to issue a statement accurately reflecting its current financial position. This instrument serves a preventive and informational function, as it encourages the company's bodies to assess its financial situation responsibly and provides creditors with a basis for determining whether their claims are sufficiently protected.[33]

The second key mechanism is the right of creditors to request adequate safeguards. In cross-border mergers, this right is regulated by the second subparagraph of Article 126b(1), while in cross-border conversions it is regulated by Article 86j(1). Creditors who are not satisfied with the protection provided by the common draft terms of the cross-border merger may, within three months of its publication, request appropriate safeguards from the competent administrative or judicial authority. The Conversion Directive also indirectly assumes that creditors should first attempt to reach a contractual solution with the company. The Conversion Directive itself deliberately does not specify the types of safeguards that may be imposed, which can be viewed positively, as the adequacy of a safeguard must be assessed according to the specific factual and legal situation. We believe that the timing of the protection system represents a certain weakness. Although the draft terms of a cross-border merger must be published at least one month before the date of the general meeting, a request for appropriate safeguards may be filed within three months of the publication of the draft. As a result, a cross-border merger may take effect even before such a request is filed, so that a generally designed *ex ante* system may, in specific situations, function de facto as *ex post* protection.[34]

A comparison between Article 86j and Article 126b shows that both provisions follow a similar protective structure. Both require Member States to provide an adequate system of protection for creditors whose claims predate the publication of the draft terms, and both allow creditors to request adequate safeguards within three months of such publication. However, Article 86j contains an additional rule that is specific to cross-border conversions. Under Article 86j (4), creditors whose claims arose before the publication of the draft terms may institute pro-

[33] *Ibid.,* p. 443.

[34] *Ibid.*, p. 433; Winner, M., *Creditor Protection in Mergers in Europe,* in: Kovács, E.; Winner, M. (eds.) *Stakeholder Protection in Restructuring,* Selected Company and Labour Law Issues, Budapest: ELTE Eötvös Kiadó, 2019, p. 56.

ceedings against the company in the Member State of departure within two years from the date on which the conversion has taken effect. This additional safeguard reflects the fact that, in a cross-border conversion, the company changes its applicable legal regime and jurisdiction, which may make the enforcement of creditors' claims more difficult.

The adoption of Article 126b and Article 86j of Directive 2017/1132, as amended by the Conversion Directive, did not entail the replacement of all national creditor protection mechanisms. Existing national provisions may be retained or adapted to the new harmonized rules, provided they are compatible with them. In addition to specific creditor protection mechanisms, other instruments of national commercial or civil law, such as liens or claims for damages, may continue to operate in parallel.[35] In this context, Papadopoulos correctly notes that when implementing the harmonised creditor protection framework, Member States should also draw on their experience with these general national creditor protection instruments.[36]

2.3. Selected Protective Mechanisms for Minority Partners and Shareholders

The legal framework for the protection of minority shareholders (or partners) in cross-border transformation processes has undergone a fundamental transformation, reflecting the need to balance the freedom of establishment with the protection of investments and property rights of partners or shareholders. Prior to the adoption of the Conversion Directive, the protection of minority partners in cross-border operations of commercial companies was regulated only in a piecemeal manner, with the focus of EU legislation lying in the codified Directive (EU) 2017/1132[37], which primarily focused on cross-border mergers. The old legal framework left Member States with considerable discretion in setting protective measures for affected entities, which led to legal uncertainty and varying levels of protection across the EU internal market.[38] The new legal regime has introduced deeper harmonization, which applies not only to mergers but also to other forms of cross-border transformations of commercial companies.

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35 Papadopoulos, T., *op. cit.*, note 25 p. 438.

36 *Ibid.,* p. 443.

37 Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 on certain aspects of company law (codified version). *Official Journal of the European Union*, L 169, June 30, 2017, pp. 46–127.

38 Alavi, H.; Khamichonak, T., *Protection of Dissenting Shareholders in the EU Cross-Border Mergers Framework: A Call for Further Harmonization?,* Trames Journal of the Humanities and Social Sciences, 2017, Vol. 21, No. 3, p. 251, 223. ISSN 1406-0922, Available at: [DOI: 10.3176/tr.2017.3.02].

It is also necessary to highlight the risks faced by minority shareholders (partners) in the context of cross-border mergers. In the process of cross-border mergers, the protection of minority shareholders represents one of the most complex elements of corporate law, as there is a direct clash between the principle of corporate mobility on the one hand and the legitimate expectations of investors on the other.[39] The structural imbalance of power, determined by the principle of proportionality of voting rights, naturally places minority shareholders in a vulnerable position, in which they are often subject to the dominance of majority owners.[40] This asymmetry takes on a critical dimension particularly for entities that acquired their stake in the company prior to the announcement of the intention to carry out a cross-border operation.

For these shareholders, one can speak of a situation in which they had no realistic possibility of anticipating a fundamental change in the company's legal regime. A cross-border operation does not merely entail a change in the governing law but, as a rule, also an intervention in the company's internal affairs and the scope of procedural safeguards. A change in jurisdiction can significantly affect the exercise of rights associated with participation in the company, particularly the right to information, which is a fundamental prerequisite for a qualified assessment of the consequences of such a transaction.[41] Shareholders who find themselves in this situation *ex post* should therefore enjoy a higher level of protection, as they made their investment decision in a different legal and economic environment. In this context, the right to adequate monetary compensation takes on particular significance, as it constitutes a key instrument for compensating financial loss, both as a result of a change in the value of the shareholding and as consideration upon a shareholder's withdrawal from the company.[42]

Conversely, it appears justified, similarly to the protection of creditors, to distinguish among shareholders based on the timing of their entry into the company. Shareholders who acquired their interest only after the publication of the draft terms of the cross-border conversion (or the cross-border conversion plan) had

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39 Papadopoulos, T., *"Protection of shareholders in cross-border mergers: the new harmonized rules", European Company and Financial Law Review*, Vol. 18, No. 6, 2021, p. 1006, Available at: [https://doi.org/10.1515/ecfr-2021-0038].

40 Puspita, L.; Gunadi, A., *Legal Protection of Minority Shareholders' Interests in Merger Actions*, Awang Long Law Review, 2025, Vol. 7, No. 2, p. 420,Available at: [DOI: https://doi.org/10.56301/awl.v7i2.1572].

41 Kubíková, Ľ. *Minority Shareholders' Right to Information and to Adequate Monetary Compensation in Cross-Border Relocation of the Registered Office*, A Comparative Analysis of Czech and Slovak Law. in: *Private Law*, 2025, No. 3.

42 Mašurová, A.; Patakyová, M., *Special Property Claims of Minority Shareholders in Cross-Border Mergers and Consolidations under Slovak Law,* Právny obzor, 2015, Vol. 98, No. 4, pp. 365–366.

an objective opportunity to familiarize themselves with the planned transaction and to take its consequences into account in their investment decision. In their case, therefore, there can be no question of an unexpected change in the legal regime that would require the same level of protection as for the original shareholders. This does not, however, mean that they are completely deprived of legal protection, given that the law continues to grant them fundamental guarantees, particularly the right to have their shares repurchased at *a fair price.*[43] However, their position has been influenced from the outset by the fact that they joined the company with knowledge of the planned change and thus with acceptance of the risks associated with it.[44] The legal framework must therefore ensure not only the formal recognition of rights but also their actual enforceability, in order to prevent the abuse of cross-border transformations to circumvent national investor protection standards.

A central element of modernized protection for minority shareholders (partners) in the sense outlined above is the right to withdraw from the company in exchange for appropriate monetary compensation, known as *the exit right*. Under Article 86i of Directive 2017/1132, as amended by the Conversion Directive, members who voted against the approval of the conversion plan have the right to dispose of their shares for adequate cash compensation. This provision should be distinguished from Article 126a, which regulates the protection of members in cross-border mergers. While Article 86i focuses primarily on the exit right of members who voted against the conversion plan, Article 126a also contains a specific mechanism concerning the share exchange ratio. Under Article 126a (6), members who did not exercise their exit right may challenge the share exchange ratio and claim a cash payment. This mechanism is specific to cross-border mergers, where the exchange ratio determines the position of members in the successor company. By contrast, such a mechanism is not relevant in the same way in cross-border conversions, since the member generally retains a participation in the converted company.

Reference to the Slovak legal framework is illustrative at this point, as Act No. 309/2023 Coll. represents a relatively recent transposition of the Conversion Directive and may serve as an example of a Central European implementation approach to the harmonised EU framework. In the Slovak Republic, this guarantee is reflected in Sections 90 and 91 of Act No. 309/2023 Coll. on the Conversion of Commercial Companies and Cooperatives (hereinafter *the "Conversion Act"*).

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43 Papadopoulos, T., *Protection of Shareholders in Cross-Border Mergers: The New Harmonized Rules*, European Company and Financial Law Review. 2021, Vol. 18, No. 6, p. 989, ISSN 1613-2246.

44 Kubíková, Ľ. *Minority Shareholders' Right to Information and to Adequate Monetary Compensation in Cross-Border Relocation of the Registered Office: A Comparative Analysis of Czech and Slovak Law*, Private Law, 2025, No. 3.

While in the case of a joint-stock company, the process is technically implemented in the form of an offer to repurchase shares[45], in the case of a limited liability company, the institution of payment of a settlement share applies.[46] The relevant provisions shall apply mutatis mutandis also in cases of cross-border changes in the legal form of a commercial company. Unlike the original legislation, the new legislation does not require informing shareholders about the right to appropriate monetary compensation and the conditions for its exercise in the invitation to the general meeting or in the notice of the general meeting, which is to decide on the approval of the cross-border conversion proposal.[47] Of course, the provision of the aforementioned guarantees to minority shareholders (or partners) may occur in both cases only if cumulatively defined conditions are met.

When exercising the right to a settlement share and the right to withdraw from the company, the risk of their potential financial impact on the company itself is often overlooked.[48] The payment of monetary compensation to withdrawing partners (shareholders) must undoubtedly comply with creditor protection rules and must not jeopardize the company's solvency or liquidity. A fundamental difference from the previous legal situation is the company's obligation to provide an email address for receiving shareholders' declarations regarding the exercise of their right to withdraw from the company for consideration, which represents a significant shift toward digitization and more efficient exercise of rights, particularly by foreign investors.[49]

However, effective and harmonized capital mobility is not merely a technical tool for the development of the EU's internal market, but is becoming an integral part of the Union's broader efforts to strengthen its strategic autonomy and the EU's external economic policy on a global scale, as it enables the retention and consolidation of economic and innovation capacities within the EU while preventing their relocation outside the European legal and regulatory space.

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45 Section 90 of Act No. 309/2023 Coll. on the Transformation of Commercial Companies and Cooperatives, as amended.

46 Section 91 of Act No. 309/2023 Coll. on the Transformation of Commercial Companies and Cooperatives, as amended.

47 Žitňanská, L.; Frindrich, J.; Kormaník, I., *Act on the Transformation of Commercial Companies and Cooperatives*, Bratislava, Wolters Kluwer, 2025, pp. 296–297.

48 Roodhooft, O., *The Impact of Appraisal Remedies on the Financial Position of the Private Company.* European Company Law, 2023, Vol. 20, No. 3, pp. 63–69, [DOI: 10.54648/EUCL2023011].

49 Article 86i(2) of the Conversion Directive.

3. CROSS-BORDER CONVERSIONS AS A TOOL OF EU STRATEGIC AUTONOMY

The harmonized legal framework for cross-border conversions established by the Conversion Directive goes beyond the boundaries of technical regulation of corporate law and thus becomes an integral part of the EU's broader economic strategy. It may be noted that, in the context of deepening the EU internal market, legal certainty in company mobility acts as a catalyst for economic efficiency. By eliminating the fragmentation of legal regulations that previously forced companies into costly liquidations and reincorporation under a different legal system, capital is potentially freed up, which can be more effectively invested - for example, in innovation and development - rather than being spent on transaction fees and legal advice related to liquidation and new company formation.

It is precisely the existence of a functional mechanism for cross-border conversions that enables business entities to effectively reorganize their legal and economic structure within the EU internal market without interrupting the legal continuity of the company in question. This form of business reorganization subsequently creates the conditions for companies to grow into larger, capital-stronger entities capable of succeeding even in a global competitive environment.

In this context, the concept of *Open Strategic Autonomy* - formally articulated in the European Commission's 2021 Trade Policy Review[50] and further developed in the EU Industrial Strategy Update of the same year - expresses the European Union's ability to make independent decisions, advance its own economic interests, and simultaneously protect the values upon which it was founded, in an environment of growing global competition. As Steinbach notes, the concept does not prescribe a fixed outcome but rather defines a space for policy action aimed at reducing critical dependencies while preserving openness to international trade and investment.[51] Although this concept originated in the field of security and defense, its gradual extension to the internal market sphere highlights the Union's effort to address economic risks arising from the EU economy's strong interdependence with the external environment.

This primarily involves limiting situations in which unilateral dependence on external actors could negatively impact the functioning of the European economy.

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[50] European Commission. Trade Policy Review. COM(2021) 66 final, 18 February 2021; European Commission. Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery. COM(2021) 350 final, 5 May 2021.

[51] Steinbach, A., *The EU's Turn to 'Strategic Autonomy': Leeway for Policy Action and Points of Conflict*, The European Journal of International Law, 2023, Vol. 34., No. 4, pp. 974–975, ISSN 0938-5428, [DOI 10.1093/ejil/chad048].

The concept of strategic autonomy therefore does not imply a quest for complete independence from foreign entities, but rather the active management of mutual economic dependencies or ties.[52]

This aspiration for autonomy is not without foundation in international law. As Gajić demonstrates, the European Union possesses a right of self-determination in the sense of international law - the right to freely determine its political status and pursue its own economic and social development - a concept that finds practical expression in the Union's Open Strategic Autonomy strategy.[53] That this concept has moved from political rhetoric into operational instruments is illustrated by the Council's recent agreement on the Global Europe external financing instrument for 2028 - 2034, which explicitly frames the Union's external action around the advancement of EU strategic interests and the need to act with unity and ambition on the world stage.[54]

The contribution of harmonised corporate mobility to *Open Strategic Autonomy* operates through three specific and interconnected mechanisms. First, the elimination of non-tariff barriers reduces transaction costs, freeing capital that can be redirected toward innovation and growth rather than spent on legal restructuring. Second, a predictable legal framework encourages companies to retain and consolidate their economic activity within the EU's regulatory space, rather than relocating outside it in search of legal certainty. Third, the existence of clear and enforceable rules produces a signalling effect: it enhances the credibility of European companies vis-à-vis external investors and creditors, thereby reducing the EU's dependence on capital flows driven by external - including geopolitical - interests. In this sense, the harmonization of legal regulations governing cross-border transformations of commercial companies can be viewed as a concrete tool through which the European Union strengthens the cohesion of its economic area, reduces the dependence of companies on differing national legal regulations, and at the same time enables them to better assert themselves in an international competitive environment.

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52 Gutiérrez Roa, T., *From vulnerability to strategic autonomy: Discursive transformations in EU energy security (2003–2024),* Energy Strategy Reviews, 2026, 64, pp. 2–3, 8, 102113. ISSN 2211-467X, [DOI 10.1016/j.esr.2026.102113].

53 Gajić, A. V., *Self-Determination of the European Union,* in: Petrašević, T.; Duić, D.; Novokmet, A. (eds.), EU and Comparative Law Issues and Challenges Series (ECLIC), 2024, issue 8, pp. 559–579..

54 Council of the European Union, Press Release, 16 June 2026, MFF 2028-2034: Council agrees partial mandate on Global Europe, Available at: [https://www.consilium.europa.eu/en/press/press-releases/2026/06/16/mff-2028-2034-council-agrees-partial-mandate-on-global-europe/], Accessed 29 April 2026.

Enhancing mobility through cross-border transformations is closely linked to the removal of non-tariff barriers[55], which have long hindered the efficient use of capital within the internal market. In practice, these barriers manifest not only as formal regulatory restrictions but also in the form of differing administrative procedures, licensing requirements, or inconsistent enforcement practices, which *in themselves* increase costs for businesses.[56] While not all of the following potential gain relates directly to corporate mobility, it is estimated that removing barriers to the movement of goods and services between Member States could bring an additional 644 billion EUR to the European economy — illustrating the broader economic rationale for reducing regulatory fragmentation, of which corporate mobility rules form a significant part.[57] The harmonization of legislative rules in the area of corporate mobility therefore not only serves to simplify administrative procedures but also contributes to reducing costs arising from differing legal frameworks in individual Member States. If companies have the option to change their registered office or carry out cross-border conversions without unnecessary regulatory burdens, they can better organize their activities, expand their operations, and make more efficient use of available resources, which naturally enables them to reduce costs and strengthen their market position, including their ability to keep pace with technological developments in strategic sectors.

The legal certainty arising from a unified framework for cross-border transformations also has broader practical significance, which can be described as *a* certain *signaling effect*[58] . This refers to a situation where the very existence of clear and predictable rules enhances the credibility of companies vis-à-vis third parties, particularly investors and creditors. This dynamic is further reinforced by what Bradford describes as the Brussels Effect - the EU's unique capacity to export its regulatory standards globally, not through coercion but through the sheer gravitational pull of its market size and the non-divisibility of regulatory compliance. A harmonised framework for cross-border transformations contributes to this effect: by setting clear and enforceable rules, the EU shapes the conditions under which companies operating within its internal market structure their legal and economic

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55 Non-harmonized legislation, complex administrative procedures, unclear or inconsistent rules, slow approval or authorization processes, etc. – author's note.

56 Papadopoulos, T., *Legislation Commentary: Amendments on the EU Harmonization of Cross-Border Mergers after the Adoption of Directive 2019/2121*, European Business Law Review, 2023, Vol. 34, No. 5, p. 929.

57 Bárta, M.; Ďurana, R., *Market Power – How to Strengthen the EU Single Market for the Next 30 Years.* Bratislava: INESS – Institute of Economic and Social Studies, 2024. p. 37.

58 The term *"certification effect*" refers to a situation in which a particular transaction, an investor's entry, or the quality of the legal and institutional environment serves as a signal of a company's credibility to third parties, thereby helping to reduce information asymmetry and strengthen investor confidence.

activities, reducing the attractiveness of regulatory arbitrage outside the European regulatory space.[59]

Research by Macoris et al. further points out that acquiring minority equity stakes in commercial companies represents an important mechanism for mitigating their financial *constraints*, as it allows for access to additional capital sources without the need to acquire a controlling interest in the target company.[60] It should be noted that a harmonized legal framework for cross-border transformations not only provides procedural certainty in the actual execution of cross-border transactions in the broader sense, but also creates an environment in which the rights of creditors and minority shareholders are better protected.

Achieving strategic autonomy requires a certain balance between ambition and responsibility. This does not mean isolation from the rest of the world, but rather the ability to keep things under control and to influence one's own destiny (economic development or growth).[61] In the field of corporate law, this means creating conditions in which European companies will not merely passively adopt rules from outside, but will be able to actively adapt and respond to a changing economic environment, for example through simpler reorganization across member states. The harmonization of cross-border transformations plays an important role in this regard, as it establishes the basic rules and provides a framework that allows companies to operate more flexibly across the entire Union. Without such mobility, the internal market would remain fragmented, which would weaken the Union's position in the world and reduce its ability to keep pace with global competition, including technological, digital, and scientific and innovation developments. The broader shift in EU industrial policy, from a market-creating to a more market-directing role, reflects precisely the recognition that regulatory frameworks must actively support the competitive position of European companies, not merely remove formal barriers to their operation.[62]

Current real-world examples also illustrate the importance of the legal framework for the cross-border mobility of commercial companies. The case of GymBeam,

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59 Bradford, A., *The Brussels Effect: How the European Union Rules the World*, Oxford: Oxford University Press, 2020, Chapter 2.

60 Macoris, L. S.; Kabbach de Castro, L.R.; Kalatzis, A. E. G.; Boehe, D.M., *Cross-border and domestic minority acquisitions and financial constraints: Reaping big benefits from small shareholders*, Corporate Governance: An International Review, 2023, Vol. 31, No. 3, pp. 491–514.

61 Brustlein, C., *European Strategic Autonomy: Balancing Ambition and Responsibility*, Éditoriaux de l'Ifri. Paris: Ifri, 2018, pp. 1–2.

62 Tröster, B.; Papatheophilou, S.; Küblböck, K., *Strategic Autonomy meets Global Dependency: Instruments and Implications of the EU's Raw Materials Policy with Third Countries*, ÖFSE Briefing Paper No. 36, Vienna, May 2025, pp. 4–5.

a company founded in Slovakia that gradually expanded into European markets, highlights the real limitations of a business environment based on differing national legal regulations. According to available information, part of the company's business activities is being relocated to Austria, primarily due to a more favorable and, above all, more predictable regulatory and tax environment.[63] Although this is not a complete relocation of the company but rather a partial reorganization of its structures, this step reflects a broader trend toward optimizing corporate structures within the EU so that they can operate more efficiently. While this relocation poses a challenge for Slovakia's domestic business environment, it is important to note that from the perspective of EU strategic autonomy, what ultimately matters is that the reorganization remains within the European economic and legal space - rather than moving outside the EU entirely. It is precisely here that harmonized cross-border transformation rules play a decisive role: they make it possible to retain capital, talent, and economic activity within the Union, even when companies choose to reorganize across Member State borders.

Such decisions by entrepreneurs highlight the practical justification for harmonized legal institutions, such as cross-border conversions. In an environment without a clear and uniform legal framework, similar steps would be associated with significantly higher transaction costs, legal uncertainty, and the risk of disrupting business continuity. In this respect, the Conversion Directive provides a legal framework that may facilitate the reorganization of companies such as GymBeam to flexibly reorganize their legal and economic structure without the need for liquidation and reincorporation, particularly in situations where business conditions in their home state deteriorate to such an extent that continued operation in that legal and economic environment becomes less efficient or even economically unviable, thereby simultaneously minimizing transaction costs and preserving the continuity of the company's legal personality.

4. CONCLUSIONS

This article demonstrates that the legal regulation of cross-border transformations of commercial companies can no longer be understood merely as a technical segment of European company law. It is an area where the core of the freedom of establishment intersects with the practical requirements of the functioning of the EU internal market, as well as with the Union's broader economic and political

[63] Runnová, K.. *A well-known brand has run out of patience: It grew from scratch in Slovakia, now it is leaving for a better business environment. Aktuality.sk*, 2025, December 16, Available at: [https://www.aktuality.sk/clanok/468MCfE/znamej-znacke-dosla-trpezlivost-na-slovensku-vyrastla-z-nuly-teraz-odchadza-za-lepsim-podnikatelskym-prostredim/], Accessed 12 April 2026.

ambitions. The evolution from a case-law-based framework to explicit harmonization through the Cross-Border Conversion Directive confirms that while primary law and the case law of the Court of Justice of the EU established the fundamental parameters of corporate mobility, it was only the legislative approach to this issue that brought about a higher degree of predictability, legislative coherence, and legal certainty. This is precisely where the fundamental contribution of the current legal framework lies, as it enables the conduct of cross-border operations without interrupting the legal personality of a business entity while simultaneously providing clearer rules for the protection of affected individuals.

It is particularly significant that the harmonized regime does not currently prioritize the mobility of commercial companies absolutely and unconditionally but seeks to balance it with the protection of creditors, minority partners or shareholders, and other affected parties. This aspect represents one of the most significant qualitative shifts from the previous situation, in which the level of protective mechanisms was largely left to national legislation. While the current legal framework does not eliminate all issues of interpretation and application, it creates a firmer foundation to ensure that cross-border transformations are not used as a means of weakening the legal protection of weaker participants in corporate relationships.

It can be confirmed that the issue under examination is not merely a set of technical rules governing the operation of commercial companies but also has broader significance in terms of the economy, competitiveness, and the European Union's position in the global environment. Cross-border transformations of commercial companies represent one of the tools through which the European Union can promote a more efficient organization of business structures, the concentration of capital, and a more flexible response to changing economic conditions. Returning to the central research question posed in this article: the analysis confirms that harmonised corporate mobility does function as a concrete instrument of the EU's Open Strategic Autonomy - specifically through three mechanisms identified in the preceding analysis: the elimination of non-tariff barriers that free capital for reinvestment, the consolidation of economic activity within the EU's regulatory space, and the signalling effect that reduces the Union's dependence on externally driven capital flows.

In this regard, the harmonization of corporate mobility rules translates into a measurable contribution to the EU's *Open Strategic Autonomy* - not as a primary instrument of geopolitical strategy, but as a structural enabler that strengthens the Union's economic cohesion and reduces its vulnerability to external pressures. If companies can reorganize their operations within the common market without

unnecessary legal and administrative barriers, this strengthens not only their individual competitiveness but also the overall economic resilience of the Union as a whole. On the other hand, however, it cannot be overlooked that the mere existence of harmonized rules does not automatically guarantee their equally effective functioning in all Member States. The real benefit of this regulation will also depend on the quality of its national implementation, on the consistency of the decision-making practices of national judicial authorities, as well as on the ability of individual legal systems to prevent a formalistic or opportunistic interpretation of problematic provisions. Without these prerequisites, there is a risk that harmonization will remain a formal rather than a truly functional and beneficial tool.

In conclusion, it is encouraging to note that the EU, including through the harmonization of the legislative framework for cross-border transformations, is sending a clear signal to international markets that the European corporate landscape is open and flexible, yet regulated in a manner that prevents potential unfair practices. It can therefore be concluded that while in the past cross-border mergers and transformations were viewed primarily through the lens of shareholders' private interests, today their regulation is becoming a tool for geo-economic stability. The Union's ability to provide a modern, transparent, and secure legal framework for the mobility of capital and companies is thus one of the structural pillars of its *Open Strategic Autonomy* - and, as this article has sought to demonstrate, cross-border corporate transformation law is no longer merely a chapter of company law, but an instrument of geo-economic governance.[64]

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[64] This observation finds support in the recent literature on geopolitics and corporate law. As Ilmonen demonstrates, the EU has pursued a whole-of-government approach in which corporate regulation forms part of a broader policy toolbox for the pursuit of strategic state interests. Ilmonen, K., *Geopolitics and Corporate Law in the EU,* Law & Geoeconomics, 2025.

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Original scientific paper

FORCE MAJEURE, HARDSHIP AND CONTRACT ADAPTATION IN THE CONTEXT OF EU SANCTIONS AND GLOBAL CRISES

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ABSTRACT

Recent geopolitical developments, including the expansion of European Union sanctions, armed conflicts, and global economic disruptions, have significantly affected the performance of contractual obligations within and beyond the EU. These events challenge traditional doctrines of force majeure and hardship, raising questions about contractual stability, risk allocation, and judicial intervention. EU restrictive measures, in particular, create complex legal and factual scenarios: in some cases they may lead to contract nullity, in others they render performance legally or factually impossible, or cause serious economic or regulatory imbalance addressed through hardship. The primary objective of this study is to identify the principles and criteria courts should apply when assessing whether EU restrictive measures constitute grounds for contract nullity, force majeure, or hardship. The research also examines contract adaptation as a preffered remedial mechanism, highlighting circumstances in which courts may modify contractual terms based on good faith rather than terminate the contract. Methodologically, the study combines doctrinal legal analysis with a comparative approach, examining national legislation, supranational soft law instruments, and relevant case law, including proceedings related to the COVID-19 pandemic, where contracts were substantially hindered or rendered impossible. This allows identification of convergent principles as well as divergences in judicial interpretation. The paper is structured in six sections, covering the historical and normative framework of EU restrictive measures, contract nullity, force majeure, and hardship. The findings provide answers to the research question and highlight the principles and criteria that courts can follow in assessing the legal effects of EU restrictive measures. Overall, the study contributes to debates on the adaptability of obligations law and emphasizes contract adaptation as a mechanism for preserving legal certainty and economic resilience under extraordinary circumstances.

Keywords: *Contract adaptation EU, Sanctions, Force majeure, Hardship, Contract adaptation*

1. INTRODUCTION

Recent geopolitical developments, including the expansion of European Union[1] sanctions, armed conflicts, and global economic disruptions, have profoundly affected the performance of contractual obligations within and beyond the EU. The increasing frequency and scale of regulatory and geopolitical shocks challenge traditional doctrines of force majeure and hardship in obligations law, raising critical questions regarding contractual stability and the adaptability of contract law in times of crisis. EU restrictive measures, in particular, present complex legal and factual scenarios. While in some instances such measures may lead to contract nullity, in others they create legal or factual impossibility of performance or result in serious economic or regulatory imbalance addressed through hardship. These distinctions are not merely theoretical: they carry significant implications for contracting parties, affecting the potential remedies available under domestic and supranational legal instruments. Consequently, they highlight the complexity of determining whether EU restrictive measures constitute grounds for contract nullity, force majeure, or hardship. The primary objective of this study is to identify the principles and criteria that courts should apply when assessing the legal consequences of EU restrictive measures on contractual obligations. The research further examines the role of contract adaptation as a preferred remedial mechanism, emphasizing circumstances in which courts may modify contractual terms in accordance with the principle of good faith, rather than terminate the contract. The paper is structured into seven sections. Following the introduction, the second section provides an analysis of the historical and normative framework of EU restrictive measures, alongside contemporary developments. The third section examines contract nullity as a potential legal consequence of the impact of EU restrictive measures. The fourth section focuses on the doctrine of force majeure, with particular attention to the assumptions of foreseeability, inevitability, and insurmountability. The fifth section addresses hardship as a flexible mechanism for managing structural imbalances resulting from sudden regulatory or geopolitical changes. The sixth section analyses certain aspects of relevant case law concerning EU restrictive measures and COVID-19 pandemic. Finally, concluding considerations, based on the overall results of the conducted research and the comparison of the solutions presented in national regulations and soft law legal instruments, provide an answer to the research question and highlight the principles and criteria that can be identified as those which courts should follow when assessing whether EU restrictive measures constitute grounds for contract nullity, force majeure, or hardship. The arguments presented in this paper are further supported by relevant case law in proceedings related to the sanctions and COVID-19 pandemic, in which contracts were likewise affected by measures that substantially hindered or rendered the performance

[1] Hereinafter referred to as: EU.

of contractual obligations impossible. Methodologically, the study adopts a doctrinal legal approach complemented by a comparative perspective. It systematically examines national legislation, supranational soft law instruments of private law and relevant judicial decisions, thereby identifying convergent principles as well as divergences in interpretation. This approach enables a rigorous evaluation of the conditions under which EU restrictive measures may impact contract validity and the applicability of the institutes of contract nullity, force majeure and hardship. The research contributes to scholarly debates on the adaptability of obligations law within the EU, highlighting contract adaptation as a mechanism for maintaining both legal certainty and economic resilience under extraordinary circumstances.

2. LEGAL NATURE OF EU SANCTIONS – A RESPONSE TO GLOBAL CRISES

Sanctions in international law[2] constitute one of the most widely used instruments of foreign policy, through which governments and international organizations respond to national or international violations.[3] During the last decade, there has been a significant stagnation in the application of UN sanctions, as the permanent members of the Security Council were unable to reach decisions on a number of major global security challenges.[4] Generally speaking, there has been an increase in the adoption of autonomous, or unilateral, sanctions by the EU and the United States[5], which have assumed a leading role in shaping the global agenda through various sanctions regimes.[6]

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2 For an overview of the literature on sanctions in international law, see: Brück, O., *Les sanctions en droit international public*, A. Pedone, Paris, 1933.; Reisman, W.M., *Sanctions and Enforcement*, in: Black, C.E.; Falk, R.A. (eds.), The Future of International Legal Order, Vol. 3: Conflict Management, Princeton University Press, Princeton, 2019, pp. 273. – 335.; Doxey, M.P., *International Sanctions in Contemporary Perspective*, Macmillan Press, Basingstoke, 1987; Lapaš, D., *Sankcija u međunarodnom pravu*, Pravni fakultet u Zagrebu, Zagreb, 2003.; Abi – Saab, G., *The concept of Sanction in International Law*, in: Gowlland – Debbas, V. (eds.), United Nations Sanctions and International Law, Kluwer Law International, The Hague, 2001, pp. 29. – 41.; Lloyd Brown – John, C., *Multilateral Sanctions in International Law*, Praeger Publishers Inc, New York, 1975; Shaw, M.N., International Law, Seventh Edition, Cambridge University Press, Cambridge, 2014, p. 3. and 901. sq.

3 Meissner, K., *How to sanction international wrongdoing? The design of EU restrictive measures*, in: The Review of International Organizations, Vol. 18, No. 1, 2023, p. 61.

4 For example, following Russia's annexation of Crimea in 2014, the UN Security Council was unable to adopt a decision on imposing sanctions against the Russian Federation, as it exercised its veto power. See: *Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields* Veto, United Nations Meetings Coverage, Available at: [https://press.un.org/en/2022/sc14808.doc.htm], Accessed 11 March 2026.

5 Hereinafter referred to as: USA.

6 See in: Cardwell, P. J.; Moret, E., *The EU, Sanctions and Regional Leadership*, European Security, Vol. 32, No. 1, 2023, pp. 1. – 2.

2.1. EU Sanctions: A Historical Review, Normative Framework, and Contemporary Developments

The number of sanctions, or restrictive measures, as the term is used in EU acts, imposed by the EU has increased significantly since the early 1990s. [7] Likewise, these measures have developed in terms of their severity and significance, through which the EU has established itself as one of the most important international actors in responding to violations of international law norms.[8] However, the first sanctions imposed by the European Economic Community date back to the early 1980s, namely against the Soviet Union in 1981 and Argentina in 1982. In the literature, the 'London Report' of 1981 is often cited as the basis for their adoption, serving as a foundation for cooperation in the field of foreign policy.[9] In the early development of the EU sanctions system, restrictive measures were a part of the Common Commercial Policy and were largely characterized by the implementation of UN sanctions.[10] The adoption of the Treaty of Maastricht on European Union[11] in 1992 marked a new phase in the development of EU sanctions policy, as Title II of the new treaty[12] granted the EU the authority to impose autonomous restrictive measures within the framework of the Common Foreign and Security Policy[13] and introduced a two-tier procedure for the adoption of EU restrictive measures.[14] The Treaty of Lisbon[15] of 2007 further contributed to the development of EU sanctions by defining the fundamental principles and mechanisms of the CFSP and by further clarifying the procedure for adopting restrictive measures.[16] It also provided for the establishment of the European External Action Service[17] and the strengthening of the powers of the High Representative of the

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7 For a graphical overview of the growth dynamics in the number of restrictive measures imposed by the EU, see: Giumelli, F.; Hoffmann, F.; Książczaková, A., *The When, What, Where and Why of European Union Sanctions*, European Security, Vol. 30, No. 1, 2021, p. 9.

8 Khort, I., *The Sanctions Principles – Based Regulation: A Blueprint for a New Approach for the EU Sanctions Policy (Part I)*, European Company and Financial Law Review, Vol. 21, No. 2, 2024, p. 193.

9 Giumelli, F.; Hoffmann, F.; Książczaková, A., *op. cit.*, note 7, p. 5.

10 Kern, A., *Economic Sanctions: Law and Public Policy*, Palgrave Macmillan, Basingstoke, 2009., p. 129.

11 Treaty on European Union, 7 Feb. 1992, 1992 O.J. (C 191) 1, hereinafter referred to as: TEU (Maastricht).

12 V. *Ibid.*, Chapter II.

13 Hereinafter referred to as: CFSP.

14 See in: Giumelli, F.; Hoffmann, F.; Książczaková, A., *op. cit.*, note 7, p. 6., Khort, I., *op. cit.*, note 8, p. 201., Anthony, I., *Sanctions Applied by the European Union and United Nations*, in: SIPRI Yearbook 2002: Armaments, Disarmament and International Security, 2002., p. 211.

15 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C 306/01 (hereinafter referred to as: TEU (Lisbon)).

16 Khort, I., *op. cit.*, note 8, p. 202.

17 Hereinafter referred to as: EEAS.

EU for Foreign Affairs and Security Policy[18]. Finally, the TEU (Lisbon) explicitly emphasized the financial and economic nature of EU restrictive measures.[19] The measures are adopted on the basis of decisions brought by the European Council and the Council of the EU[20] within the framework of the CFSP, which, pursuant to Article 24 of the Treaty on European Union[21], are adopted unanimously, except where the Treaties provide otherwise. In accordance with Article 29 of the TEU and Article 215 of the Treaty on the Functioning of the European Union[22], The Council adopts decisions on the imposition of sanctions, which are subsequently implemented through The Council regulations.[23]

2.2. The Legal Basis, Adoption Procedures, and Soft Law Instruments regarding Restrictive Measures

As noted above, the basis for adopting restrictive measures are the decisions of the European Council and the Council of the EU within the framework of the CFSP, adopted pursuant to Article 24 of the TEU. Subsequently, the High Representative of the EU for Foreign Affairs and Security Policy and the European Commission prepare a draft joint proposal of the restrictive measures for The Council[24], which decides on their adoption by a qualified majority.[25] The Council regulations, applied individually with respect to each state targeted by the sanctions, establish the fundamental aspects of the implementation and enforcement of EU restrictive measures.[26] These regulations define the scope of application of restrictive measures, the

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18 The position of the High Representative was originally established in 1997 on the basis of the Treaty of Amsterdam, although responsibilities in the field of foreign policy were shared with the European Commissioner for External Relations. See: *EU High Representative for Foreign Affairs and Security Policy*, Available at: [https://www.consilium.europa.eu/en/council-eu/high-representative-foreign-affairs-security-policy/], Accessed 12 March 2026.

19 See: Article 188 K (1)TEU (Lisbon)

20 Hereinafter referred to as: The Council.

21 Consolidated version of the Treaty on European Union [2012] OJ C 326/13 (hereinafter referred to as: TEU)

22 Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (hereinafter referred to as: TFEU).

23 Giumelli, F.; Hoffmann, F.; Książczaková, A., *op. cit.*, note 7, p. 6.

24 Article 29. of the TEU constitutes legal basis for the decisions of the Concil of Ministers regarding sanctions regimes. See: *Ibid.*

25 See: Article 215 (1) TFEU.

26 See: Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2014] OJ L 78, Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2014] OJ L 229, Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010 [2012] OJ L 88, Council Regulation (EU) No 36/2012 of 18

exchange of information between competent authorities regarding the measures, key definitions for their implementation, the prohibition of circumvention, the authorization of exemptions from sanctions, and the establishment of liability for violations.[27] The EEAS and the European Commission assist The Council in the preparation of legal texts and also provide support to Member States in the implementation of the restrictive measures.[28] Certain soft law instruments on sanctions have also played an important role in the development of the EU policy on restrictive measures. In this regard, there are three key legal instruments governing the adoption of EU restrictive measures. Such measures are adopted on the basis of the general objectives and guiding principles set out in the Basic Principles on the Use of Restrictive Measures (Sanctions)[29] of 2004, and are defined and implemented in accordance with the Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) within the Framework of the EU Common Foreign and Security Policy[30] of 2003. The Sanctions Guidelines contain definitions of terms used in the legal instruments regulating restrictive measures, as well as recommendations for determining and implementing sanctions in terms of their methods, objectives, enforcement, monitoring, limitations, and other aspects. The aim of the Sanctions Guidelines is to promote the uniform application of restrictive measures, and they were most recently updated in 2018.[31] Finally, in 2005, the Best Practices for the Effective Implementation of Restrictive Measures[32] were adopted, and they were most recently updated in 2024. [33] The Best Practices provide recommendations for

January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011 [2012] OJ L 16, Council Regulation (EU) 2017/2063 of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela [2017] OJ L 295, among others.

27 Khort, I., *op. cit*., note 8, p. 203.

28 Giumelli, F.; Hoffmann, F.; Książczaková, A., *op. cit*., note 7, p. 6.

29 Council of the European Union, Basic Principles on the Use of Restrictive Measures (Sanctions) [2004] 10198/1/04, Available at: [https://data.consilium.europa.eu/doc/document/ST-10198-2004-REV-1/en/pdf], Accessed 13 March 2026 (hereinafter referred to as: Basic Principles).

30 Council of the European Union, Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy [2003] 15598/17, Available at: [https://data.consilium.europa.eu/doc/document/ST-11623-2024-INIT/en/pdf], Accessed 12 March 2026 (hereinafter referred to as: Sanctions Guidelines).

31 See: *Ibidem.* It should be noted, as several authors have pointed out, that the Sanctions Guidelines were adopted prior to the Basic Principles, even though the latter regulate the very basis for adopting restrictive measures, which arguably suggests that the order of their adoption should have been reversed. See in: Portela, C., *Where and Why does the EU Impose Sanctions?*, Politique européenne, No. 17, 2005., p. 90.

32 Council of the European Union, Best Practices for the Effective Implementation of Restrictive Measures [2005] 15114/05.

33 Council of the European Union, Update of the EU Best Practices for the Effective Implementation of Restrictive Measures [2024] 11623/24, Available at:

the effective implementation of restrictive measures in accordance with applicable EU law and national laws, particularly regarding the designation and identification of persons and entities subject to targeted restrictive measures, financial restrictive measures, the prohibition on the provision of goods, as well as coordination and cooperation.[34] The adoption of these soft law instruments has significantly contributed to the increased use of restrictive measures, despite the fact that they are non-binding instruments that do not impose any limitations on the EU restrictive measures policy. [35] As a result, there are more than forty different sanctions regimes currently in force.[36] EU restrictive measures can be examined from multiple perspectives, taking into account their adoption procedure[37], addressees of the sanctions[38] and their content. In terms of content, the types of EU restrictive measures include arms embargoes (prohibiting the sale, supply, transport, or export of weapons), travel bans (prohibiting entry to or transit through the territory of Member States for certain individuals), asset freezes (targeting the property of individuals or entities subject to restrictive measures), trade restrictions (limiting or prohibiting imports or exports), financial restrictions (affecting the financial institutions of the targeted country, such as prohibitions on payments), and diplomatic restrictions.[39]

3. THE NULLITY OF A CONTRACT AS A POSSIBLE LEGAL CONSEQUENCE OF THE IMPACT OF EU RESTRICTIVE MEASURES ON CONTRACT

The nullity of a contract constitutes the most severe legal consequence that may arise from the application of EU restrictive measures, as it entails the complete annulment of the contract and all its legal effects from the moment of its conclu-

[https://data.consilium.europa.eu/doc/document/ST-11623-2024-INIT/en/pdf], Accessed 13 March 2026 (hereinafter referred to as: Best Practices).

34 See: *Ibidem.*

35 V. Khort, I., *op. cit*., note 8, p. 205. and Druláková R.; Rolenc J.M.; Trávníčková Z., Zemanová, Š., *Assessing the Effectiveness of the EU Sanction Policy*, Central European Journal of International and Security Studies, Vol. 4, No. 1, 2010, p. 117.

36 For an overview of EU restrictive measures currently in force, see: *EU Sanctions Map*, Available at: [https://www.sanctionsmap.eu/#/main], Accessed 13 March 2026.

37 The EU can impose restrictive measures in three ways: as multilateral sanctions adopted by the UN Security Council and transposed into EU law; as autonomous (unilateral) sanctions that supplement UN sanctions; and as fully autonomous sanctions imposed by the EU entirely outside the UN framework. See in: Cardwell, P. J.; Moret, E., *op. cit.*, note 6, p. 5.

38 In this regard, we distinguish between internal and external sanctions. For more on this, see: Pospieszna, P.; Onderco M.; Van der Veer, R., *Comparing Public Attitudes Towards Internal and External EU Sanctions: the Role of Populism, Trust and Euroscepticizm*, East European Politics, Vol. 40, No. 2, 2024, p. 347.

39 Giumelli, F.; Hoffmann, F.; Książczaková, A., *op. cit.*, note 7, p. 8.

sion (*ab initio*).[40] Within civil law doctrine, a legal act is deemed null where it fails to produce the legal effects that would have arisen had it been valid. Given that nullity operates *ex tunc*, such contracts are treated as though they had never been concluded and are therefore regarded as legally non-existent. As a rule, a contract affected by nullity cannot subsequently be validated, even if the underlying cause ceases to exist, except in exceptional cases explicitly provided by the law. The doctrine of nullity serves to safeguard public order and the fundamental principles of the legal system. Its defining characteristics include its operation by force of law (*ex lege*), the obligation of courts to consider it of their own motion (*ex officio*), the standing of any interested party to invoke it, and the absence of limitation periods for its assertion.[41] Illegality, understood as inconsistency with statutory provisions or mandatory rules, represents a principal ground for nullity. For instance, Croatian Civil Obligations Act provides that a contract contrary to the Constitution, mandatory provisions, or public morals is null, unless the purpose of the infringed rule indicates a different legal consequence.[42] Comparable solutions are found in other legal systems: German *Bürgerliches Gesetzbuch* renders null legal transactions that infringe statutory prohibitions[43], Austrian *Allgemeines Bürgerliches Gesetzbuch* invalidates contracts contrary to legal prohibitions or public policy[44]; and French *Code civil* requires lawful content as a condition for contractual validity[45]. As EU law forms an integral part of the legal orders of the Member States and enjoys primacy over conflicting national norms[46], EU decisions and regulations imposing restrictive measures constitute part of the national laws and acquire binding force

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40 For a detailed discussion on the nullity of contracts and its assumptions, see: Klarić, P.; Vedriš, M., *Građansko pravo*, *XV. izmijenjeno i dopunjeno izdanje*, Narodne novine, Zagreb, 2025., pp. 137. sq.; Slakoper, Z.; Gorenc, V., *Obvezno pravo, Opći dio: Sklapanje, promjene i prestanak ugovora*, Novi informator, Zagreb, 2009., pp 314. sq.; Kačer, H.; Radolović, A.; Slakoper, Z., *Zakon o obveznim odnosima s komentarom*, Poslovni zbornik, Zagreb, 2006., pp. 323. sq.; Gorenc, V. *et al.*, *Komentar Zakona o obveznim odnosima*, Narodne novine, Zagreb, 2014., pp. 513. sq.

41 Slakoper, Z.; Gorenc, V., *op. cit.*, note 40, p. 315.

42 Civil Obligations Act, Official Gazette No. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018, 126/2021, 114/2022, 156/2022, 145/2023, 155/2023 (hereinafter referred to as: COA), Art. 322. para 1.

43 *Bürgerliches Gesetzbuch*, RGB1. S. 195, 18 August 1896, in the version promulgated on 2 January 2002 (BGBI p. 42, corrected p. 2909; 2003 p. 738), last amended by the Act of 4 February 2026 (BGB I p. 33), in force since 10 February 2026. (hereinafter reffered to as: BGB), § 34. and § 134.

44 *Allgemeines Bürgerliches Gesetzbuch*, JGS No. 946/1811, last amended by BGBl. I No. 111/2025 (hereinafter referred to as: ABGB), § 879.

45 *Code civil*, in force since 21 March 1804, version as of 01 January 2026 (hereinafter referred to as: *Code civil*), Art. 1128.

46 See: Constitution of the Republic of Croatia, Official Gazette No. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010, 5/2014 (hereinafter referred to as: Constitution of the Republic of Croatia), Art. 134. and 141.a., *Grundgesetz für die Bundesrepublik Deutschland*, the consolidated version published in the Federal Law Gazette, Part III, classification number 100-1, last amended by Article 1 of the Act of 22 March 2025 (Federal Law Gazette 2025 I No. 94), Art. 23., French Constitution of 4 October

within domestic legal systems. Accordingly, where such measures prohibit the performance of a contractual obligation, that obligation - and potentially the contract as a whole - may be regarded as contrary to mandatory law and thus null under national civil law. In this context, particular attention should be given to the temporal dimension of nullity, namely the question whether, for the doctrine of nullity to apply, the ground of nullity - in the present context, an EU restrictive measure - must exist at the time of the conclusion of the contract, or whether a sanction adopted subsequently may also render a previously valid contract null. The answer to this question should be guided by the principle that the validity of a contract is assessed by reference to the moment of its conclusion. Neither the major European civil codes nor the Croatian COA contain an express statutory provision establishing this rule; rather, it derives from general principles of law and has been consistently affirmed in judicial practice. In the Republic of Croatia, for example, the principle follows from the constitutional prohibition of the retroactive application of laws and other legal acts[47], whereas in the French legal system such a prohibition is expressly enshrined in the *Code civil*.[48] Accordingly, the principle that the requirements for contractual validity must be assessed at the time of contract formation has been recognised in the jurisprudence of the French Court of Cassation[49], the German *Bundesgerichtshof*[50], and the Austrian *Oberster Gerichtshof*.[51] It follows that a contract may be declared null on the ground of incompatibility with a prohibition imposed by an EU restrictive measure only where the relevant restrictive measure was already in force at the time the contract was concluded. Conversely, where a restrictive measure capable of affecting the performance of the contract is adopted only after the contract has been validly concluded, it cannot subsequently render that contract null. Rather, the prohibition contained in such a measure may be characterised as an event giving rise to force majeure, resulting in subsequent objective impossibility of performance and thereby constituting a legal basis for the discharge of contractual obligations. Illustrative examples of measures that may trigger contract nullity include arms embargoes[52], import and export bans[53], and financial

1958, Art. 55., Constitution of Austria (as amended in 2024): Federal Constitutional Act (*Bundes-Verfassungsgesetz*) (B-VG) (reinst. 1945), Art. 50a and 50b.

47 See: Constitution of the Republic of Croatia, Art. 90. para 4.

48 See: *Code civil*, Art 2.

49 See the decision of the Court of Cassation, Civil Division, 1 No 06-15.090 of 12 July 2007.

50 See the decision of *Bundesgerichtshof* No VIII ZR 344/13 of 25 June 2014.

51 See the decision of *Oberster Gerichtshof* No 5 Ob 67/95 of 11 March 1997.

52 See: Council Regulation (EC) No 314/2004 of 19 February 2004 concerning certain restrictive measures in respect of Zimbabwe [2004] OJ L 55/1 (hereinafter referred to as: Council Regulation (EC) No 314/2004), Art. 2.

53 See: Council Regulation (EU) 2017/1509 of 30 August 2017 concerning restrictive measures against the Democratic People's Republic of Korea and repealing Regulation (EC) No 329/2007 [2017] OJ L 224/1, Chapter II, Art. 3.

sanctions targeting specific persons or entities, particularly prohibitions on making funds or economic resources available to them.[54] These prohibitions are explicitly established in EU regulations and as such form part of the binding legal framework of the Member States, with their effectiveness reinforced, *inter alia*, through the application of the nullity doctrine. It should, however, be emphasized that EU restrictive measures do not expressly prescribe contract nullity as a consequence of their breach. Rather, the adoption of sanctions and enforcement mechanisms is left to the discretion of the Member States.[55] Although national implementing legislation frequently does not explicitly regulate the nullity of contracts the fulfillment of which is prohibited by EU restrictive measures, general principles of civil law provide a sufficient legal basis for courts to declare such contracts null in individual cases. Finally, civil law recognises the concept of partial nullity, whereby only the unlawful provision is set aside, provided that the remainder of the contract can subsist independently.[56] Consequently, contracts affected by EU restrictive measures may, where appropriate, remain in force in a modified form, with only the offending provisions removed.

4. APPLICABILITY AND LIMITS OF FORCE MAJEURE IN THE CONTEXT OF EU RESTRICTIVE MEASURES

Objective impossibility of performance is one of the modalities for the extinction of an obligation and arises when the impossibility is caused by an event that is extraordinary, external, unforeseeable, unavoidable or irremediable, which could not have been prevented and which occurs after the conclusion of the contract but before the obligation becomes due. In legal doctrine, events possessing these characteristics are encompassed by the concept of force majeure. [57] Various circum-

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54 See: European Commission, *European Union, Consolidated Financial Sanctions List*, Available at: [https://data.europa.eu/data/datasets/consolidated-list-of-persons-groups-and-entities-subject-to-eu-financial-sanctions?locale=en], Accessed 16 March 2026.

55 See: Council Regulation (EC) No 314/2004, Art. 12. In the Republic of Croatia application of EU restrictive measures is regulated by the Law on Restrictive Measures, Official Gazzete No. 133/2023, 151/2025 and General Guidelines on the Application of the Law on Restrictive Measuresl, Available at: [https://mvep.gov.hr/UserDocsImages/2024/datoteke/General%20Guidelines%20on%20the%20applicationof%20the%20Law%20on%20restrictive%20measures.pdf], Accessed 17 March 2026.

56 See: Klarić, P.; Vedriš, M., *op. cit.*, note 40, pp. 150 – 151; BGB, § 139, COA, Art. 324., *Code civil*, Art. 1184.

57 For a review of the literature on force majeure, see: Musgrave, T. D., *Force Majeure and the Law: Acts of God in Comparative and Historical Perspective*, Routledge, 2025, Abingdon, Garb, L.; Copeman, J.; Mendoza, R. (eds.), *Force Majeure: An International Comparative Analysis*, Koninklijke Brill, Leiden, 2026.; Slakoper, Z.; Gorenc, V., *op. cit.*, note 40, p. 441 sq. and 564 sq.; Klarić, P.; Vedriš, M., *op. cit.*, note 40, p. 478. sq.; Gorenc V. *et al.*, *op. cit.*, note 40, p. 616. sq.

stances may give rise to impossibility of performance, which can be categorized as factual (such as the destruction of the object of the obligation) or legal (such as import or export prohibitions), and, in terms of their duration, as either permanent or temporary.[58] EU restrictive measures may be regarded as force majeure and, consequently, may lead to the extinction of an obligation or release from liability for performance, provided that all the conditions for the existence of force majeure are met in the specific case. In legal doctrine, as previously noted, it is required that the event is beyond the debtor's control, unforeseeable, and that its consequences could not have been avoided. Nevertheless, European civil codes often do not provide an explicit definition of force majeure. For instance, the German BGB stipulates that the right to performance is excluded to the extent that it is impossible for the debtor or for anyone else.[59] Similarly, the Austrian ABGB addresses only the impossibility of performance, providing that the accidental and total destruction of a particular thing extinguishes all obligations, including the obligation to compensate for its value. This principle also applies to cases in which the fulfillment of an obligation or the payment of a debt becomes impossible due to another event.[60] The Croatian COA does not explicitly mention force majeure, yet it nevertheless incorporates its elements within the framework of release from liability for performance.[61] Among the aforementioned legal systems, only the French *Code civil* provides an explicit definition of force majeure, stipulating that force majeure in contractual matters arises when an event beyond the control of the debtor, which could not reasonably have been foreseen at the time the contract was concluded and whose effects cannot be avoided by appropriate measures, prevents the debtor from performing their obligation.[62] Provisions on force majeure are also included in supranational soft law instruments aimed at harmonizing private (contractual) law, such as the UNIDROIT Principles[63], the Principles of European Contract Law[64], and the Draft Common Frame of Reference[65]. The UNIDROIT Principles, the PECL, and the DCFR contain virtually identical pro-

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58 Slakoper, Z.; Gorenc, V., *op. cit.*, note 40, p. 564.

59 See: BGB, § 275 para. 1. and 2.

60 See: ABGB, § 1447.

61 See: COA, Art. 343. and Art. 373.

62 *Code civil*, Art. 1218. para 1.

63 UNIDROIT Principles of International Commercial Contracts, 2016, Available at: [https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-bl.pdf], Accessed 17 March 2026. (hereinafter referred to as: UNIDROIT Principles).

64 Principles of European Contract Law, Available at: [https://www.trans-lex.org/400200/_/pecl/], Accessed 17 March 2026 (hereinafter referred to as: PECL)

65 Draft Common Frame of Reference for European Private Law, Comment, Available at: [https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/EUROPEAN_PRIVATE_LAW/

visions on force majeure, according to which a party's non-performance is excused if it demonstrates that it is due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.[66] In light of the aforementioned rules on force majeure, an EU restrictive measure may be considered force majeure if it is adopted after the conclusion of the contract[67], prevents the debtor from performing their obligation[68], was unforeseeable for the debtor[69], and is unavoidable, irremediable, and insurmountable.[70] Examples of EU restrictive measures that may qualify as force majeure in terms of their impact on affected contracts often coincide with those that could potentially result in contract nullity, such as arms embargoes, import or export bans, and financial measures, including asset freezes and payment prohibitions.[71] Specifically, the prohibitions contained in EU restrictive measures, in terms of their impact on a contract, may be interpreted both as a conflict with mandatory legal provisions, resulting in contract nullity, and as an event causing impossibility of performance under the concept of force majeure. It should be emphasized that, in such cases, the impossibility of performance will primarily be regarded as legal in nature[72], and only in a smaller number of in-

EN_EPL_20100107_Principles__definitions_and_model_rules_of_European_private_law_-_Draft_Common_Frame_of_Reference__DCFR_.pdf], Accessed 17 March 2026.

66 See: PECL, Art. 8:108 (Excuse due to an impediment) para 1. in comparison to UNIDROIT Principles, Art. 7.1.7. (Force Majeure) para 1. and DCFR, Art. III. – 3:104 para 1. (Excuse due to an impediment).

67 If EU restrictive measures were already imposed at the time of contract conclusion, the requirement of unpredictability is not satisfied, since the debtor was aware of, or should have been aware of, such measures and should have taken them into account; consequently, they cannot rely on them to avoid contractual obligations. However, if such measures existed at the time of conclusion but were unknown to the parties, the application of rules on mistake (*error*) may be considered. See: DCFR, Art. III – 3:104, *Comments.*

68 It appears that there is no need to specifically refer to a claim that an event is beyond the debtor's control, as EU restrictive measures are imposed by EU bodies and, as such, are always external, i.e., beyond the debtor's control.

69 The wording of national provisions on force majeure suggests that the relevant event must be objectively unforeseeable. See: COA, Art. 343 and 373., *Code civil*, Art. 1218. para 1. However, a more appropriate standard is whether a diligent contracting party could have foreseen or reasonably been expected to take the event into account, as reflected in the UNIDROIT Principles, PECL, and DCFR. See: *supra*, note 66. This is also the view of the authors in Gorenc, V. *et al.*, *op. cit.*, note 40, p. 618.

70 In relation to this assumption of force majeure, both Croatian COA and the UNIDROIT Principles, PECL, and DCFR refer to the possibilities of the specific debtor, thus adopting a subjective criterion, whereas the French *Code civil* retains the objective criterion of inevitability in this context.See: *supra*, note 66. in comparison to COA, Art. 343 and 373., *Code civil*, Art. 1218. para 1.

71 See *supra*, p. 7.

72 As in the case of an arms embargo, where trade may be physically possible, but is illegal and, as such, constitutes a legal, rather than factual, impossibility of performance.

stances as factual impossibility[73]. Whether an EU restrictive measure will be regarded as force majeure, or whether the entire contract or part thereof will be declared null, depends on the court's interpretation in the specific case. Other examples of EU restrictive measures that may constitute force majeure include travel bans[74], where the performance of a contract - relying on the entry into or transit through the territory of EU Member States by a sanctioned person - becomes factually impossible, as well as trade restrictions, such as prohibitions on road transport of goods within the EU by carriers with business operations in Russia, or bans on port access for vessels registered under the flag of the Russian Federation[75], where the performance of contracts dependent on the transport of goods through the EU or access to EU maritime ports also becomes factually impossible. Considering force majeure more broadly, beyond the EU sanctions framework and in the context of global crises, an illustrative example of an event that, in terms of its impact on affected contractual relationships, could be regarded as force majeure was the pandemic caused by the SARS-CoV-2 virus[76]. Measures to contain the pandemic included, among others, border closures and movement restrictions, work prohibitions, bans on gatherings, and similar interventions[77], which resulted in the impossibility of performing obligations under a large number of contracts. However, courts have not automatically recognized the COVID-19 pandemic as force majeure; rather, the fulfillment of the conditions for force majeure has been assessed on a case-by-case basis. An example of a decision in which the COVID-19 pandemic was deemed force majeure, and thus constituted a basis for exemption from contractual obligations, is the judgment of the French Court of Cassation of July 6, 2022[78], which explicitly stated that the pandemic and its developments constituted a force majeure event preventing the performance of obligations.[79] The legal consequence of the impact of EU restrictive measures on a contract, when considered as force majeure, consists in the release

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73 In the case of financial measures such as asset freezes or payment bans, the performance of a contractual obligation involving a bank payment will not be factually possible, as the payment cannot be processed.

74 See: Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2014] OJ L 78, Art. 1.

75 See: Council Regulation (EU) 2022/576 of 8 April 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L 111, Art. 1. para 11.

76 Hereinafter referred to as: COVID – 19.

77 See: Roksandić, S.; Grđan, K., *COVID-19 i razumijevanje pravnih propisa vezanih uz suzbijanje zaraznih bolesti u Republici Hrvatskoj – osvrt na bitna pravna pitanja od početka pandemije do listopada 2020.*, Pravni vjesnik, Vol. 36. No. 3-4, 2020., pp. 327.- 343.

78 Court of Cassation, Civil Division, First Civil Chamber, 21-11.310, of 6 July, 2022.

79 See: *Ibid.*

of the debtor from the obligation whose performance has become impossible due to the sanctions. In this regard, the Croatian COA provides for the debtor's exemption from liability for damages, the German BGB stipulates that the right to performance is excluded, the Austrian ABGB provides that all obligations are extinguished, and the French *Code civil* states that the debtor is released from the obligation to the extent that its performance is rendered impossible due to force majeure.[80] Furthermore, the latter provides that, if the impediment to performance is temporary, the performance of the contract is suspended, except where the resulting delay justifies the termination of the contract.[81] The same principle is reflected in relevant soft law instruments, as the UNIDROIT Principles, the PECL, and the DCFR prescribe that, as a legal consequence of force majeure, a party is excused from non-performance[82], with the proviso that, where the excusing impediment is only temporary, the excuse applies for the period during which the impediment exists.[83] Finally, it is important to mention the International Chamber of Commerce (ICC) clauses[84], which are standardized contractual provisions developed by the ICC to assist parties in addressing specific situations in international contracts. The most well-known of these is the ICC Force Majeure Clause, which allows parties in international contracts to overcome issues arising from differences in national legislations.[85] Of particular interest for the subject of this research is the fact that, in paragraph 3, the ICC Force Majeure Clause lists among the events which are presumed to qualify as force majeure: currency and trade restrictions, embargoes, and sanctions.[86] Similar to the arrangements found in national laws and soft law instruments of private law, the ICC Force Majeure Clause establishes, as a legal consequence of the impact of force majeure on a contract, the excusal of the obligation to perform, with the proviso that, in the case of a temporary impediment, performance is suspended for the duration of the impediment. [87]

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80 See: COA, Art. 343. and 373., BGB, § 275., ABGB, § 1447, *Code civil*, Art. 1351.

81 See: *Code civil*, Art. 1218.

82 See: UNIDROIT Principles, Art. 7.1.7. para 1., PECL, Art. 8:108 para 1. and DCFR Art. III-3:104 para 1.

83 See: UNIDROIT Principles, Art. 7.1.7. para 2., PECL, Art. 8:108 para 2. and DCFR Art. III-3:104 para 3.

84 Hereinafter referred to as: ICC Clauses.

85 *ICC Force Majeure and Hardship Clauses*, March 2020, Available at: [https://iccwbo.org/wp-content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march 2020.pdf], Accessed 19 March 2026.

86 *ICC Force Majeure Clause*, para 3.

87 *ICC Force Majeure Clause*, para 5.

5. HARDSHIP IN CONTRACTUAL OBLIGATIONS AS A RESULT OF EU RESTRICTIVE MEASURES

In certain cases, the application of EU restrictive measures to contracts affected by them does not result in the impossibility of performing contractual obligations, but instead causes excessive and disproportionate difficulties in their performance. This situation in contractual relationships is addressed under the legal concept in common law systems known as hardship, and in continental legal doctrine as change of circumstances or the *rebus sic stantibus* clause, which has been implemented under various designations in different national legal systems.[88] German legal theory, within the framework of the doctrine of *Störung der Geschäftsgrundlage*[89], holds that if the circumstances forming the basis of a contract have significantly changed after its conclusion - such that the contracting parties would not have concluded the contract at all had they foreseen such a change, or would have done so under substantially different terms - an adjustment of the contract may be requested. [90] Only if such adjustment, or modification of the contract, is not possible, may the contract be terminated. [91] French *Code civil* regulates changes in circumstances that result in excessively onerous performance under the theory of *imprévision*, stipulating that if a change in circumstances unforeseen at the time the contract was concluded renders performance excessively burdensome for a party who did not agree to assume the risk, that party may request renegotiation of the contract from its counterparty. If renegotiation is refused or fails, the parties may agree to terminate the contract on a date and under conditions they deter-

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88 In German and Austrian legal doctrine, this concept is referred to as *Wegfall/Störung der Geschäftsgrundlage*, in France it is known as *imprévision*, in Italy as *eccessiva onerosità sopravvenuta*, and in Croatian legal system as *Izmjena ili raskid ugovora zbog promijenjenih okolnosti (Modification or termination of the contract due to changed circumstances)*. It is worth noting that the term "hardship" has been used in this paper because it is widely recognized in international commercial practice. For these reasons, the term "hardship" is also employed in the UNIDROIT Principles. See:UNIDROIT Principles, Art. 6.2.1., *Comment*.

89 In translation: Disappearance or disruption of the basis of the contract.

90 See: BGB, § 313.

91 For a discussion on the doctrine of *Störung der Geschäftsgrundlage* see in detail in: Rösler, H., *Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law*, European Review of Private Law, Vol. 15, No. 4, 2007., pp. 483. – 514.; Hondius, E.; Grigoleit, E.H., *Unexpected Circumstances in European Contract Law*, Cambridge University Press, Cambridge, 2011., pp. 55. – 69.; Rösler, H., *Changed and Unforeseen Circumstances in German and International Contract Law*, Slovenian Law Review, Vol. 47, No. 1, 2008., pp. 47 – 58. It is worth noting that Austrian doctrine *Wegfall der Geschäftsgrundlage* is substantively aligned with the German theory of *Störung der Geschäftsgrundlage,* and, in addition, it is not explicitly regulated in the ABGB, which is why it is not particularly emphasized among continental European doctrines on changed circumstances.

mine, or jointly request the court to adapt it.[92] In this respect, the Croatian COA regulates the institution of contract modification or termination due to changed circumstances, providing that if, due to extraordinary circumstances arising after the conclusion of the contract - which could not have been foreseen at the time of its conclusion - the performance of an obligation by one party becomes excessively onerous or would cause it an unreasonably large loss, that party may request that the contract be modified or even terminated. [93] From the abovementioned national provisions on the doctrine of changed circumstances, it follows that, for its application, the change in circumstances must occur after the conclusion of the contract, must be external, extraordinary, and unforeseeable, and must result in an excessive burden on the performance of the obligation by one party. Corresponding conditions for the existence of hardship, or change of circumstances, are also contained in the UNIDROIT Principles, PECL, and DCFR, which as a general rule provide that an obligation must be performed even if performance has become more onerous, whether due to increased costs of performance or a diminution in the value of the performance received by a party.[94] However, in the event of hardship[95] or a change of circumstances[96], provided that the events occurred after the conclusion of the contract, were unforeseeable, beyond the control of the disadvantaged party, and that the disadvantaged party did not assume the risk of such events, the disadvantaged party may request renegotiation. In the case of unsuccessful negotiations, the court may modify the contract in order to restore con-

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92 See: *Code civil*, Art. 1195. For a more detailed discussion on the French theory of *imprévision*, see: Momberg Uribe, R.A., *The Effect of a Change of Circumstances on the Binding Force of Contracts: Comparative Perspectives*, Intersentia, Utrecht, 2011., pp. 43. – 68.; Kovac, M.; Poncibo, C., *Towards a Theory of Imprevision in the EU?*, European Review of Contract Law, Vol. 14, No. 4, 2018, pp. 350. – 356.; Ben Hamida, W., *L'imprévision et l'arbitrage aprés la réforme du droit des contracts en France*, ASA Bulletin, Vol. 39, No. 2, 2021, pp. 378. – 396.

93 See: COA, Art. 369. – 372. For a more detailed discussion on the institute of modification or termination of contracts in Croatian law, see: Nikšić, S., *Temeljna obilježja instituta izmjene ili raskida ugovora zbog promijenjenih okolnosti*, in: Liber amicorum Nikola Gavella, Građansko pravo u razvoju, Pravni fakultet Sveučilišta u Zagrebu, 2007., pp. 563- 605; Petrić, S., *Izmjena ili raskid ugovora zbog promijenjenih okolnosti prema novom Zakonu o obveznim odnosima*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 28, No. 1, 2007, pp. 1- 49; Klasiček D.; Ivatin M., *Modification or dissolution of contracts due to changed circumstances (clausula rebus sic stantibus)*, Pravni vjesnik, Vol. 34, No. 2, 2018, pp. 27. – 55.

94 See: UNIDROIT Principles, Art. 6.2.1., PECL, Art. 6:111. para 1.DCFR, Art. III. – 1:110 para 1.

95 According to the UNIDROIT Principles, which use the term "hardship" and define it in Article 6.2.2, hardship occurs when the occurrence of events fundamentally alters the equilibrium of the contract.

96 In accordance with the PECL, which stipulates that a legally relevant change of circumstances occurs when the performance of the contract became excessively onerous, and the DCFR, which requires that the performance of a contractual obligation became so onerous that it would be manifestly unjust to hold the debtor to the obligation. See: PECL, Art. 6:111, para 1, and DCFR, Art. III.-1:110, para 1.

tractual equilibrium or may terminate it. [97] It follows that the conditions for the existence of hardship, in terms of the characteristics of the events that give rise to it, correspond to those required for an event to qualify as force majeure, with the difference that in the case of force majeure, performance of the contract becomes impossible, whereas in the case of hardship, performance is significantly more difficult – still possible, but accompanied by difficulties and costs that the obligor did not anticipate at the time of assuming the contractual obligation.[98] Accordingly, the impact of EU restrictive measures on a contract may constitute hardship (or change of circumstances) if their adoption renders performance excessively onerous for the obligor; this applies when the measure is adopted after the conclusion of the contract[99], is beyond the control of the affected party[100], was unforeseeable, and provided that the affected party has not assumed the risk of such an event. EU restrictive measures, particularly financial restrictions and SWIFT- related measures[101], may directly affect the execution of international contracts by making payments between contracting parties significantly more difficult. In such cases, although performance remains possible, serious disruptions arise in the method of payment, there are increased transaction costs and the need for alternative financial arrangements, resulting in a disturbance of the economic equilibrium of the contract and constituting a typical example of hardship. Beyond the scope of EU restrictive measures, the COVID-19 pandemic should be mentioned as a global crisis that caused hardship in numerous contracts, where performance did not become impossible but was rendered exceptionally onerous; in such instances, particularly in the practice of German courts, it has often been recognized as a

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97 In the part related to the legal consequences of hardship, i.e., the change of circumstances, there are certain differences among the mentioned soft law instruments: The UNIDROIT Principles, in the case of hardship, authorize the affected party to request renegotiation, and if an agreement cannot be reached (which includes a situation where the other party refuses to negotiate), the court may modify or terminate the contract. According to the PECL, in the event of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it. If no agreement is reached, the court may decide on the modification or termination of the contract. Finally, the DCFR requires that the debtor's attempt to negotiate a modification of the contract be fulfilled as a condition for the court to modify or terminate the contract. Compare UNIDROIT Principles, Art. 6.2.3, PECL, Art. 6:111, paras 2 and 3, and DCFR, Art. III.-1:110, paras 2 and 3.

98 See: Kačer, H.; Radolović, A.; Slakoper, Z., *op. cit.*, note 40, pp. 371 – 372.

99 It should be noted that the UNIDROIT Principles, in contrast to other soft law instruments and national regulations, recognize as a legally valid assumption of hardship the circumstance that events became known to the party after the conclusion of the contract. See: UNIDROIT Principles, Art. 6.2.2.

100 See: *supra*, note 67.

101 As imposed by Council Regulation (EU) 2022/345 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L 63/1, Art. 1.

basis for hardship.[102] The legal consequences of hardship caused by the imposition of EU restrictive measures vary depending on the applicable national law or supranational rules governing the contract.[103] However, it can generally be concluded that contemporary regulation of this doctrine favors contract adaptation over termination.[104] Certain national legal systems[105], as well as all previously mentioned supranational soft law instruments, primarily prescribe the obligation and right to renegotiate the contract in light of changed circumstances, reserving the court's power to modify or terminate the contract only in the event of unsuccessful negotiations. As a preventive measure against inconsistencies between national legal systems, ICC Clauses should also be noted; specifically, the ICC Hardship Clause which allows the parties to stipulate in advance the procedure to be followed in cases of disproportionate difficulty in performance due to external circumstances, such as, among others, EU restrictive measures.[106]

6. EU RESTRICTIVE MEASURES AND GLOBAL CRISES AS EXTRAORDINARY CIRCUMSTANCES IN CASE LAW

Among the judicial decisions addressing the legal nature of sanctions, i.e. restrictive measures, and their impact on contractual relationships, particular attention should be given to the case law of the French Court of Cassation. In the well-known *Bank Sepah* case, the Court held that "the freezing of the assets of a person or entity targeted by such measures on account of its activities does not constitute force majeure for the affected party, due to the absence of the requirement of externality." Accordingly, the Court established that a counterparty domiciled in Russia and targeted by restrictive measures cannot invoke force majeure, as the

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102 See the decision of Bundesgerichtshof XII ZR 8/21 of 12 January 2022. For a review of the case law of German courts regarding the COVID-19 pandemic, see: *Rechtsprechung zur COVID-19-Pandemie,* Available at: [https://dejure.org/corona-pandemie?s=nach_Rechtsgebieten&rechtsgebiet=Prozessrecht], Accessed 23 March 2026.

103 Indeed, according to the COA, it is permitted to request both the modification and termination of the contract, with such a request being made through a lawsuit in judicial proceedings. In French law, as well as when the UNIDROIT Principles, PECL, and DCFR apply to the contract, access to the court in this sense is not possible without prior negotiations, or an attempt to negotiate, regarding the content of the contract. In German law, the preferred consequence of the disruption of the basis of the contract is the mutual adjustment of the contract to the new circumstances, with judicial termination of the contract being possible only if modification is not possible or cannot be reasonably imposed on the other contracting party.

104 As is the case in Croatian and German law. See *supra*, pp. 11-12.

105 See: *Code civil*, Art. 1195.

106 See *supra*, note 85.

requisite element of externality is lacking.[107] Significant judicial guidance may also be found in the case law of the courts of the United Kingdom.[108] In *Lamesa Investments Ltd v Cynergy Bank Ltd*, the Court of Appeal confirmed that the borrower was entitled to suspend the payment of interest instalments where making such payments could expose it to the risk of secondary sanctions under United States law. Thus, sanctions were recognised as a valid ground for the suspension of contractual performance.[109] A considerable body of case law concerning the legal nature of global crises as extraordinary and unforeseeable circumstances can be found in the decisions of national courts of EU Member States relating to the COVID-19 pandemic. In this regard, the jurisprudence of the German courts is particularly extensive. Reference should once again be made to the previously discussed judgment of the *Bundesgerichtshof* in case XII ZR 8/21, in which the Court held that measures adopted to combat the COVID-19 pandemic do not automatically constitute force majeure, but may amount to a *Störung der Geschäftsgrundlage* and thereby justify an adjustment of rent to reflect the changed circumstances.[110] Similarly, in case No 5 U 1782/20 before the *Oberlandesgericht Dresden*, the Court, by judgment of 24 February 2021, reduced the amount of rent payable on the grounds that the textile retail store operating within the leased premises had been required to remain closed for a certain period of the lease as a result of measures imposed by the competent ministry to contain the COVID-19 pandemic.[111] In case No 2 U 138/21 before the *Oberlandesgericht Frankfurt am Main*, the Court adopted the position that even the indirect consequences of lockdown measures may constitute hardship and, as such, justify the adaptation of a contract.[112] A similar issue arose before the *Tribunal judiciaire d'Annecy* in proceedings concerning the suspension of rent payments due to the lessee's inability to use the leased premises as a result of lockdown measures. The lessee invoked force majeure in support of its claim for suspension of the obligation to pay rent. The Court, however, declined to classify pandemic-related lockdown measures as force majeure.[113] Likewise, the Paris Judicial Court in judgment No. 20/04516 concluded

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107 See: Judgement of the Court of Cassation, Nos 18-18.542 and 18-21.8114 of 10 July 2020.

108 Although the United Kingdom (hereinafter referred to as: the UK) formally withdrew from the European Union as part of the so-called Brexit process on 31 January 2020 at midnight Central European Time, the case law of UK courts is nevertheless considered in this analysis due to its relevance to the subject matter. Moreover, particular account is taken of the fact that the case referred to was brought before court during the period in which the UK was still a Member State of the European Union.

109 See: Lamesa Investments Ltd v Cynergy Bank Ltd [2020] EWCA Civ 821 of 30 June 2020.

110 See: *supra*, note 102.

111 See the judgement of *Oberlandesgericht Dresden* No. 5 U 1782/20 of 24 February 2021.

112 See the judgment of the *Oberlandesgericht Frankfurt am Main* No. 2 U 138/21 of 18 February 2022.

113 See the decision of the *Tribunal judiciaire d'Annecy*, No. 20/00275 of 7 September 2020. Similar conclusions were reached by the Montpellier Judicial Court in judgement No. 20/30974 of 10 September

that measures adopted in response to the pandemic could not serve as a basis for complete release from contractual obligations. Nevertheless, the Court emphasised that contracts must be performed in good faith, which requires parties, in exceptional circumstances, to assess whether such circumstances necessitate an adaptation of the terms governing the performance of their respective obligations. This reasoning clearly reflects the doctrine of hardship.[114] Croatian case law has similarly treated the COVID-19 pandemic and the measures adopted to contain it primarily as changed circumstances rendering contractual performance excessively onerous[115], and only exceptionally as force majeure giving rise to complete impossibility of performance and thereby releasing the parties from their contractual obligations.[116] Given the tendency of european courts to exclude the application of force majeure in cases involving contracts affected by restrictive measures, and particularly in disputes concerning the impact of extraordinary measures adopted in response to the COVID-19 pandemic, together with the fact that Croatian courts have generally characterised the pandemic as a case of changed circumstances, it appears likely that Croatian courts would adopt a similarly restrictive approach when assessing the legal nature of EU restrictive measures. Croatian courts, like the national courts of other European states, are guided primarily by the principle of *pacta sunt servanda* and by a preference for preserving contractual relationships wherever possible. Consequently, where contracts are affected by circumstances such as EU restrictive measures or the COVID-19 pandemic, courts will generally seek solutions through contractual adaptation, temporary suspension of performance, or modification of contractual obligations, resorting to the doctrine of force majeure and complete discharge from contractual obligations only in exceptional cases.

7. CONCLUSION

Although EU restrictive measures are primarily instruments of the Common Foreign and Security Policy, in practice they exert a significant impact on private law contracts, particularly in international trade, the energy sector, and financial transactions. This paper demonstrates how EU restrictive measures, in terms of their

2020 and Paris Judicial Court, Nos. 20/55901 and 20/53713 of 26 October 2020.

114 See the judgement of Paris Judicial Court No. 20/04516 of 10 July 2020.

115 See the judgment and decision of the High Commercial Court of the Republic of Croatia, No. Pž-123/2024-3, of 27 November 2024; the judgment of the same court, No. Pž-91/2024-3, of 7 May 2025; and the headnote of the High Commercial Court of the Republic of Croatia in case No. Pž-2973/2025-3, of 24 September 2025.

116 See also the decision of the Supreme Court of the Republic of Croatia, No. Rev-861/2024-2, of 3 September 2024.

impact on contractual relationships affected by them, may constitute grounds for the nullity of a contract, force majeure, or hardship. Moreover, the same restrictive measure may, in substance, be legally qualified as either one of the aforementioned legal institutes. Force majeure is generally associated with the objective impossibility of performing an obligation, whether factual or legal, whereas hardship refers to situations in which performance remains possible but becomes exceptionally difficult or economically disproportionate. Given that the foregoing demonstrates that the legal qualification of EU restrictive measures, in terms of their impact on private law contracts, largely depends on the court's interpretation, the aim of this paper has been to determine the principles and criteria that courts should apply when deciding whether, in a particular case, a contract should be declared null, whether performance has become impossible due to force majeure, or whether the rules on hardship, i.e. change of circumstances, should be applied. An analysis of national legal systems and soft law instruments governing the aforementioned doctrines indicates that contemporary contract law favors the preservation of contracts and their adaptation to new circumstances over the termination of contractual relationships. This approach is most clearly reflected in the regulation of hardship, where European civil law systems explicitly give priority to the modification of the contract, while termination is permitted only where a fair adaptation of the contract to the new circumstances is not possible.[117] Even in the context of force majeure, which as a rule leads to the termination of contractual obligations, where the impossibility of performance, or the event constituting force majeure, is of a temporary nature, the obligation does not cease; rather, its performance is postponed for the duration of the event, i.e. the period of impossibility.[118] The tendency to preserve contracts is most pronounced in European soft law instruments for the harmonization of private law, which, in the regulation of hardship, i.e. change of circumstances, establish as a fundamental rule that an obligation must be performed even if performance has become more onerous, while the subsequent rules on the possibility of modifying or terminating a contract due to hardship are framed as exceptions to this principal rule.[119] Additionally, the provisions on hardship in the aforementioned legal instruments primarily grant the affected party, or impose an obligation on both parties, to initiate renegotiations, with any modification or termination of the contractual relationship occurring only in the event of unsuccessful negotiations. These legal instruments also provide for the

[117] See *supra*, pp. 11 sq.

[118] This is explicitly provided for in the French *Code civil* (supra, note 76.), while in practice comparable interpretations are applied to § 275 BGB and § 1447 ABGB. See Palandt, *Bürgerliches Gesetzbuch*, 71st ed., C.H. Beck, Munich, 2012, p. 354, and the judgment of the Austrian *Oberster Gerichtshof* No. 3 Ob 589/51 of 21 November 1951.

[119] See: *supra*, p. 12.

aforementioned rule within the provisions on force majeure, according to which, in cases where the excusing impediment is only temporary, the excuse applies only for the duration of the impediment.[120] The principle of good faith and the principle of the duty to uphold contractual obligations (*pacta sunt servanda*) constitute fundamental principles of European civil law, ensuring that a contract remains binding on the parties and that contractual obligations are performed in good faith, in accordance with their content and accepted practice.[121] The principle of good faith (*Treu und Glauben*) is particularly significant in German doctrine on changed circumstances, where it has served as the basis for recognizing the impact of altered circumstances on a contract and for adapting its content to new conditions. [122] Given that the aforementioned principles require respect for the binding force of contracts and the performance of contractual obligations in good faith, in cases of changed circumstances and when determining the applicable law and the fate of the contract, they also oblige courts, wherever possible, to maintain contracts in force through a fair adaptation to the new circumstances. The foregoing argumentation can also be substantiated by relevant case law, particularly in analogy with case law developed in the context of the COVID-19 pandemic, as these cases have established relevant criteria for assessing the effects of extraordinary circumstances - particularly national and supranational measures and prohibitions - on contractual obligations. Jurisprudence in this regard has demonstrated a tendency to treat measures adopted in response to the COVID-19 pandemic as constituting hardship, favoring the preservation of contracts in force and their adaptation to new circumstances. This is clearly illustrated by German case law, in which the courts confirmed that state measures drastically altering economic circumstances typically do not render performance impossible but may constitute a disturbance of the contractual basis justifying contract adaptation. [123] This confirms that, in contemporary contract law, the principle *in favorem contractus* predominates, whereby contracts are generally preserved rather than terminated. While force majeure is applied more restrictively and only in cases of complete impossibility of performance, hardship serves as a more flexible instrument enabling

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120 See: *supra*, note 66.

121 See: *Code civil*, Art. 1103. and 1104., BGB, § 242, ABGB § 914, UNIDROIT Principles, Art. 1.3. and 1.7., PECL, Art. 1:102 and 1:201.

122 Rösler, H., *Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law*, *op. cit.*, note 91, p. 488.

123 See: *supra*, p. 14.., but also for example the ruling of the Austrian *Oberster Gerichtshof* on October 21, 2021, which established that the restrictions on business operations imposed due to the COVID-19 pandemic, which made it impossible to use the leased premises, do not constitute force majeure justifying the termination of the contract. Instead, they lead to a temporary impossibility of performance, which justifies a reduction in rent based on § 1104 and § 1105 of the ABGB. See: *Oberster Gerichtshof* OGH 3 Ob 78/21y of 21 October 2021.

the adaptation of contracts to new circumstances, particularly in the context of regulatory interventions such as EU restrictive measures. In conclusion, it can be stated that, when deciding whether an EU restrictive measure constitutes, in terms of its impact on a contract, grounds for nullity, force majeure, or hardship, courts are required, based on the principles of good faith and *pacta sunt servanda*, favoring the *in favorem contractus* principle, to assess whether the contract can, in the given case, be maintained in force and, where possible, adapted to new circumstances through the postponement of performance or the equitable modification of contractual obligations. Only in cases where performance, or a fair adaptation, is absolutely impossible should the contractual relationship be terminated. In line with this, EU restrictive measures generally should not lead to the termination of contractual relationships; rather, they should primarily activate mechanisms of hardship and contract adaptation. Such an approach is fully consistent with the contemporary approach in contract law and judicial practice, which prioritizes the continuity and adjustment of contracts over their termination, while preserving the balance between legal certainty, fairness, and economic efficiency.

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Original scientific paper

FILLING THE GAP: EU PRIVATE INTERNATIONAL LAW AND RIGHTS IN *REM* OVER CRYPTO-ASSETS

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ABSTRACT

This research explores whether the growing legal complexity surrounding crypto-assets should serve as a turning point for the EU to adopt unified conflict-of law rules specifically for rights in rem over crypto-assets. Although the EU has shown dynamic regulatory activity in PIL under Article 81(2) TFEU, its competence is limited in matters concerning property regimes due to the neutrality principle set forth in Article 345 TFEU. Each Member State retains autonomy over substantive property law, and this fragmentation is reflected at the PIL level as well. The paper argues that, in light of the inherently cross-border nature and rising economic significance of crypto-assets, the EU should seriously consider developing unified conflict-of-law rules applicable to rights in rem over crypto-assets in order to enhance legal certainty, coherence, and the integrity of the EU internal market.

Keywords: *Applicable law, Crypto-assets, EU private international law, Lex rei sitae, Qualification, Rights in rem*

1. INTRODUCTION

The rise of distributed ledger technology (DLT) has brought about new forms of intangible digital assets, most notably crypto-assets, whose legal nature and geographical localisation remain uncertain. This uncertainty is especially visible in the context of rights in *rem* over crypto-assets, giving rise to difficult questions not only in substantive private law, but also in private international law (hereinafter: PIL). Although crypto-assets are generally recognised as intangible digital assets, most EU Member States still do not have conflict-of-law rules specifically designed for proprietary relationships concerning such assets. Instead, domestic legal systems continue to rely on traditional rules, particularly the *lex rei sitae*

rule, despite the fact that these rule was originally developed for assets capable of physical localisation. Application of the *lex rei sitae* rule to decentralised digital assets, which lack a fixed territorial connection, therefore remains far from straightforward. As a result, courts may encounter considerable difficulties both in the qualification of proprietary rights relating to crypto-assets and in determining the applicable law in cross-border disputes.

At the EU level, the adoption of the Markets in Crypto-Assets Regulation[1] (hereinafter: MiCA Regulation), which became fully applicable in late 2024, represents an important step towards the harmonisation of crypto-asset regulation within the internal market. While the MiCA Regulation acknowledges proprietary interests in crypto-assets in a broad sense, it deliberately avoids providing a specific private law qualification of such rights and does not introduce conflict-of-law rules governing rights in *rem*. Its primary objective is instead to reduce regulatory fragmentation among Member States and to safeguard the effective functioning of the internal market. Consequently, private law questions are addressed only to the extent necessary to support those regulatory aims, while more fundamental issues of legal qualification remain within the competence of national legal systems.

Against this background, this paper examines whether it would have been appropriate, within the broader framework of the MiCA Regulation, to unify conflict-of-law rules applicable to rights in *rem* over crypto-assets at the EU level. More specifically, the paper considers whether the absence of such a rule constitutes a significant legal gap in the current regulatory framework. The paper advances the argument that leaving these questions entirely to the Member States contributes to a considerable degree of legal uncertainty within the European crypto-asset market. This becomes particularly evident when viewed through the concept of qualification, one of the central methodological tools of private international law. The difficulties arise because proprietary relationships concerning crypto-assets may be placed into different legal categories depending on the approach adopted by a particular legal system. Some legal systems may refuse to recognise rights in *rem* over crypto-assets altogether and instead resolve disputes exclusively through the application of the *lex fori*. Others may accept the existence of proprietary rights over crypto-assets by interpreting the legal category underlying the *lex rei sitae* rule more broadly. In this sense, the problem is not limited merely to the absence of unified conflict-of-law rule. Rather, it reflects a deeper methodological issue concerning the qualification of legal categories in private international law and the

[1] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 [2023] OJ L 150.

extent to which traditional proprietary concepts can accommodate crypto-assets. At the same time, the scope of this paper remains deliberately limited. The analysis focuses exclusively on the qualification of the legal category underlying the *lex rei sitae* rule. It does not address the separate issue of determining the connecting factor itself, namely the localisation of crypto-assets and the qualification of the *locus rei sitae*. That issue raises distinct methodological difficulties due to the inherently digital, decentralised, and intangible nature of crypto-assets and therefore deserves separate analysis.

In addition to this introduction, the paper is divided into four further chapters. The following chapter analyses the existing EU legal framework governing crypto-assets. The third chapter examines the broader legislative activity of the EU in the field of private (international) law and its implications for legal relationships involving crypto-assets. The fourth chapter forms the central part of the paper and explores, through the application of methods of qualification within the national PIL systems of Member States, the difficulties associated with subsuming proprietary relationships concerning crypto-assets under the traditional *lex rei sitae* rule. Finally, the concluding chapter presents the principal findings of the research and offers concluding observations concerning the future development of private international law in this field.

2. CRYPTO-ASSETS IN EUROPEAN UNION LAW

2.1. The Digital Finance Package

At the EU level, the normative regulation of crypto-assets began in 2020, when the European Commission introduced the Digital Finance Package[2], aimed at strengthening the competitiveness and innovative capacity of the EU financial sector, while at the same time safeguarding the interests of investors in crypto-markets, particularly consumers.[3] The Package consisted of several initiatives. Within its framework, the Commission published the Retail Payments Strategy[4], which seeks to further promote the digitalisation of retail payments and the development of instant payments, while also reducing Europe's dependence on global

[2] European Commission, *Digital Finance Package: Commission sets out new, ambitious approach to encourage responsible innovation to benefit consumers and businesses*, Available at: [https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1684], Accessed 14 March 2026.

[3] Vandezande, N., *Crypto-assets: the European Legal Framework*, Intersentia, Cambridge, Antwerp and Chicago, 2023, p. 331.

[4] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Retail Payments Strategy for the EU, COM(2020) 592 final.

corporations in the field of cross-border payments through the development of innovative European solutions.[5] Furthermore, in 2022, the Digital Operational Resilience Act was adopted with the aim of establishing uniform rules concerning the security of network and information systems used by financial entities in the course of their business operations, in order to ensure a high level of digital operational resilience.[6] The third legislative measure emerging from the Digital Finance Package was the DLT Pilot Regime Regulation[7], which lays down rules governing market infrastructures based on distributed ledger technology (DLT) for the trading of financial instruments in the form of crypto-assets.[8] Finally, the fourth and central pillar of the Package is the MiCA Regulation, adopted in 2023, which will be discussed in greater detail below.

2.2. MiCA Regulation

The substantive scope of the MiCA Regulation encompasses uniform rules governing the public offering and admission to trading of crypto-assets, as well as rules relating to the provision of crypto-asset services.[9] In that respect, the Regulation applies to all natural and legal persons, as well as other undertakings, engaged in the issuance, public offering or admission to trading of crypto-assets, together with entities providing crypto-asset services within the European Union. As a regulation, it is binding in its entirety and directly applicable in all EU Member States.[10] The MiCA Regulation entered into force in 2023, although certain provisions became applicable progressively. The Regulation has been fully applicable in its entirety since 30 December 2024.[11]

Pursuant to the MiCA Regulation, a crypto-asset is defined as *"a digital representation of a value or of a right which is able to be transferred and stored electronically using distributed ledger technology or similar technology"*.[12] In this regard, it

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5 Vandezande, *op. cit.,* note 3, p. 331.

6 Art 1(1) of the Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011 [2022] OJ L 333.

7 Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology, and amending Regulations (EU) No 600/2014 and (EU) No 909/2014 and Directive 2014/65/EU [2022] OJ L 151.

8 Vandezande, *op. cit.*, note 3, p. 332.

9 Art 1(1) MiCA Regulation.

10 Arts 2(1) and 149(4) MiCA Regulation.

11 Art 149 MiCA Regulation.

12 Art 3(1)(5) MiCA Regulation.

should be emphasised that certain provisions of the MiCA Regulation are not, in principle, applicable to all possible manifestations of crypto-assets or tokens. Indeed, the MiCA Regulation distinguishes between four categories of tokens: asset-referenced tokens, e-money tokens, utility tokens and, finally, crypto-assets in the broader sense.[13] An asset-referenced token is defined as a type of crypto-asset that seeks to maintain a stable value by referencing another value or right, or a combination thereof, including one or more official currencies.[14] Such tokens essentially constitute a form of stablecoin.[15] By contrast, e-money tokens are a type of crypto-asset whose value is linked exclusively to the value of a single official currency.[16] The principal distinction between these two categories therefore lies in the fact that e-money tokens seek to maintain stability solely by reference to one fiat currency, without the possibility of combinations characteristic of asset-referenced tokens.[17] As regards utility tokens, these are defined as a type of crypto-asset intended to provide access to a good or service supplied by the issuer of that token itself.[18] Although the general definition of crypto-assets has already been outlined above, certain limitations of the MiCA Regulation in relation to this broader category of crypto-assets should nevertheless be highlighted. In particular, the substantive scope of the MiCA Regulation expressly excludes crypto-assets that qualify as financial instruments[19], deposits, funds other than e-money tokens, and similar financial products. Likewise, the Regulation does not apply to crypto-assets that are unique and non-fungible, namely NFTs.[20]

The regulatory requirements laid down by the MiCA Regulation primarily concern the conditions governing the authorisation of issuers, as well as the public offering, issuance and admission to trading of crypto-assets, together with the authorisation of providers of crypto-asset services. These regulatory requirements are not uniform across all categories of crypto-assets; rather, they differ depending on whether the crypto-asset in question constitutes a crypto-asset other than an

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13 Vandezande, *op. cit.*, note 3, p. 332.; Asscheman, A., *„Crypto-assets under MiCAR: a deep dive into risks, solutions, and regulatory convergence*", ERA Forum, Vol. 24, 2023, p. 491.

14 Art 3(1)(6) MiCA Regulation.

15 Poulle, J.-B. *et al*, *EU Banking and Financial Regulation*, Edward Elgar Publishing, Cheltenham and Northampton, 2024, p. 664.

16 Art 3(1)(7) MiCA Regulation.

17 Poulle, *op. cit.*, note 15, p. 664.

18 Art 3(1)(9) MiCA Regulation.

19 It refers to transferable securities, money market instruments, options and futures, among others, that are issued using distributed ledger technology and are classified as financial instruments in accordance with Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) [2014] OJ L 173.

20 Art 2(3) and (4) MiCA Regulation; Vandezande, *op. cit.*, note 3, pp. 335-336.

asset-referenced token or e-money token, or whether it falls within one of those specific categories. In any event, one of the central requirements is that issuers intending to offer crypto-assets to the public or seek their admission to trading on a trading platform are required to publish a white paper in advance. That white paper must contain all essential information necessary to enable potential investors to make an informed investment decision, including information concerning the characteristics of the crypto-asset, the rights and obligations attached to it, the technology employed, and related matters.[21] It should be emphasised, however, that the provisions governing the issuance of crypto-assets do not apply to crypto-assets for which no identifiable issuer can be determined, namely crypto-assets and services operating on fully decentralised DLT systems, such as the cryptocurrency Bitcoin.[22]

Furthermore, in addition to the rules governing the public offering of crypto-assets, another important component of the MiCA Regulation concerns the provision of crypto-asset services. Such services may, on a professional basis, be provided by legal persons and other undertakings, provided that they have obtained authorisation from the competent authority.[23] The purpose of the regulatory requirements applicable to providers of crypto-asset services is to ensure a high standard of service for clients, a standard which derives from obtaining authorisation to provide such services, satisfying organisational and prudential requirements, and establishing effective internal risk-management mechanisms.[24] The requirements imposed on providers of crypto-asset services are of particular importance because the majority of participants in the crypto-market rely on one or more of these services, notwithstanding the fact that the crypto-market was originally conceived as a fully decentralised system operating without intermediaries. Equally important, particularly in the context of legal relationships involving a cross-border element, is the fact that providers authorised to offer one or more crypto-asset services in their home Member State, namely the Member State in which they

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21 Poulle, *op. cit.*, note 15, p. 664.

22 Art 2 (3)(4) MiCA Regulation; Zetzsche, D.; Woxholth, J., *The EU Law on Cryptoassets: A Guide to European FinTech Regulation*, Cambridge University Press, Cambridge, 2025, p. 45; Vandezande, *op. cit.*, note 3, p. 335.; MiCA Regulation, recitals 22 and 26.

23 Art 59(1) of the MiCA Regulaton. According to the art 3(1)(16), the MiCA Regulation distinguishes a comprehensive range of services related to crypto-assets, namely: the provision of custody and administration of crypto-assets on behalf of clients; the operation of a crypto-asset trading platform; the exchange of crypto-assets for funds; the exchange of crypto-assets for other crypto-assets; the execution of orders for crypto-assets on behalf of clients; the placing of crypto-assets; the reception and transmission of orders for crypto-assets on behalf of clients; the provision of advice on crypto-assets; the provision of crypto-asset portfolio management; and the provision of crypto-asset transfer services on behalf of clients.

24 Asscheman, *op. cit.*, note 13, p. 493.

have their registered office, are entitled to provide those services throughout the European Union without the need for any physical presence in other Member States.[25] A further important distinction between providers of crypto-asset services and persons subject to the rules governing the public offering or issuance of crypto-assets under the MiCA Regulation lies in the fact that all providers of crypto-asset services, such as custodians, remain subject to the relevant MiCA provisions governing crypto-asset services even in relation to crypto-assets that are excluded from the MiCA rules on public offerings and issuance. This includes, for example, cryptocurrencies based on fully decentralised systems whose issuer cannot be identified, such as Bitcoin.[26] Indeed, the very purpose of the general definition of crypto-assets under the MiCA Regulation is to encompass all other forms of tokens in addition to those categories specifically regulated, unless such tokens are either entirely excluded from the scope of the Regulation or only certain provisions of the MiCA Regulation are excluded in relation to them.[27]

Although the MiCA Regulation is, in essence, an instrument of regulatory law and therefore predominantly public-law in character, it nevertheless contains a number of provisions which, by their nature, traditionally belong to the sphere of private law and are intended to protect the interests of investors and clients, particularly consumers. For example, the Regulation provides for a consumer's right of withdrawal from the purchase of crypto-assets; rules governing the civil liability of offerors and issuers towards holders of crypto-assets in cases where the information contained in the white paper is inaccurate or misleading; rules concerning the civil liability of providers of crypto-asset custody services in the event of loss of clients' crypto-assets or private keys; as well as provisions requiring the legal segregation of clients' crypto-assets from the assets of the service provider, particularly in situations of insolvency.[28] Nevertheless, all of the foregoing examples amount only to fragmentary private-law regulation of legal relationships concerning crypto-assets within the meaning of the MiCA Regulation.[29] It should be observed that the Regulation does not provide an answer to two fundamental questions, particularly having regard to the specific mobility of crypto-assets as digital objects. First, the MiCA Regulation contains no provision addressing the substantive legal qualification of crypto-assets as such, nor does it qualify the

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25 Vandezande, *op. cit.*, note 3, p. 371.; MiCA Regulation, recital 76.

26 Zetzsche, *op. cit.*, note 22, p. 102.; MiCA Regulation, recital 22.

27 Tomczak, T., *Crypto-assets and crypto-assets' subcategories under MiCA Regulation*, Capital Markets Law Journal, Vol. 17, No. 3, 2022, pp. 380-381.

28 Asscheman, A, *op. cit.*, note 13, p. 492; art 15(1), art 26(1), art 52(1), art 75(1)(7)(8), and art 82(1) MiCA Regulation.

29 Omlor, S., *Germany and the EU*, in: Eggen, M.; Jeng, L.; Omlor, S. (eds.), Control and Ownership of Digital Assets: A Comparative Law Survey, Mohr Siebeck, Tübingen, 2026, p. 77.

subjective proprietary rights that may exist in relation to crypto-assets. Secondly, the Regulation likewise does not contain a unified conflict-of-laws rule governing the direct rights of holders in relation to crypto-assets, that is, a rule corresponding to the traditional private international law rule governing proprietary rights, namely the *lex rei sitae* rule. This omission is somewhat surprising given that the very purpose of the MiCA Regulation is to prevent regulatory fragmentation of the crypto-asset market, fragmentation which could distort competition within the Union's internal market and simultaneously hinder the cross-border provision of crypto-asset services.[30]

3. EU LEGISLATIVE ACTIVITIES IN THE FIELD OF PRIVATE (INTERNATIONAL) LAW

In light of the foregoing, it should be noted that the EU is not empowered to regulate, whether through unification or harmonisation, the entire body of private law or the entirety of a particular field of private law. Rather, its competence extends only to specific segments of private law, insofar as this is necessary to ensure the proper functioning of the Union's internal market.[31] Consequently, EU legislative activity in the field of private law ranges from fragmented unification or harmonisation in certain areas of substantive private law to a very high degree of unification in the field of private international law. To date, substantive harmonisation within EU law has been most pronounced in the areas of consumer contract law, employment law, copyright law, industrial property law and insurance law.[32] By contrast, legislative activity in the field of private international law has been considerably more dynamic, based on the competence conferred by Article 81(2) of the Treaty on the Functioning of the European Union[33] (hereinafter: TFEU) concerning judicial cooperation in civil matters, which inter alia includes the unification of conflict-of-laws rules, all with a view to ensuring the smooth functioning of the internal market.[34]

However, the most contentious issue for the purposes of this research, namely the qualification of crypto-tokens as such, as well as the qualification of the legal relationship between a token and its holder, which consequently raises the question

30 MiCA Regulation, recital 5.

31 Perišin, T., *Ima li Europska unija ovlast regulirati privatno (posebice ugovorno) pravo?*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 62, Nos. 5-6, 2012, p. 1800.; Josipović, T., *Privatno pravo Europske unije - Opći dio*, Narodne novine, Zagreb, 2020, pp. 669-672.

32 Josipović, *op. cit.*, note 31, pp. 669-670.

33 Treaty on the Functioning of the European Union (consolidated version) [2016] OJ C202.

34 Martiny, D., *Lex rei sitae as a connecting factor in EU Private International Law*, IPRax, No. 2, 2012, p. 120.

whether a proprietary relationship in respect of the token may exist, in principle falls outside the scope of EU competence. This is because, pursuant to Article 345 TFEU, the Treaties do not prejudice the rules in Member States governing the system of property ownership. That provision therefore reflects the principle of neutrality of the founding Treaties with regard to national systems of property law.[35] Indeed, each Member State maintains its own rules of property law and, consequently, its own autonomously developed legal concepts.[36] This approach has likewise been adopted in the MiCA Regulation, as is evident from Article 75(7) thereof, which expressly provides for the segregation of clients' crypto-assets from the custodian's own assets *"in accordance with the applicable law"*. Evidently, beyond requiring the legal separation of clients' crypto-assets from those of the custodian, the intention was not to provide a more precise substantive legal qualification of crypto-assets or of legal relationships concerning crypto-assets. Instead, these matters were left to the substantive laws of the Member States.

Moreover, the neutrality of the founding Treaties with regard to the regulation of substantive proprietary relationships is also reflected at the conflict-of-laws level. The EU has not adopted unified conflict-of-laws rules governing proprietary relationships; rather, each Member State continues to apply its own autonomous rules of private international law. Nevertheless, the legal systems of the Member States largely adhere to the traditional private international law rule for determining the applicable law governing rights in *rem*, namely that such rights are governed by the law of the state in which the asset is situated, that is, by the *lex rei sitae* rule.[37] [38] As an exception to the foregoing, however, it should be noted that, in relation to certain legal relationships, only specific proprietary aspects have been regulated, and only insofar as necessary, in particular cross-border contexts. Examples

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35 CJEU, Judgment of 22 October 2013, *Staat der Nederlanden v Essent NV*, C-105/12, ECLI:EU:C:2013:677, para. 29.

36 Lehmann, M., *Exclusive Jurisdiction*, in: Dickinson, A.; Lein, E. (eds.), The Brussels I Regulation Recast, Oxford University Press, Oxford, 2015, p. 261.

37 Briggs, A., *The Conflict of Laws*, 3rd edition, Oxford University Press, Oxford, 2013, p. 298.; Josipović, T.; Ernst, H., *Stvarno pravo*, in: Josipović, T. (ed.), Privatno pravo Europske unije – Posebni dio, Narodne novine, Zagreb, 2022, p. 400.

38 Art 20 of the Private International Law Act, Official Gazette, Nos 101/17, 67/23 (hereinafter: ZMPP) (Croatia); §31(1) of the Federal Act of 15 June 1978 on Private International Law, Original version: Federal Law Gazette No. 304/1978 (National Council: legislative period XIV, government bill 784, committee report 945, p. 96. Federal Council: committee report 1841, p. 377.) (hereinafter: IPRG) (Austria); Art 43(1) of the Introductory Act to the Civil Code in the version promulgated on 21 September 1994, Federal Law Gazette [Bundesgesetzblatt] I p. 2494, last amended by Article 2 of the Act of 25 June 2021 (Federal Law Gazette I p. 2133); Article 240 last amended by Article 10 of the Act of 22 December 2020 (Federal Law Gazette I, p. 3328) (hereinafter: EGBGB) (Germany); Dika, M.; Knežević, G.; Stojanović, S., *Komentar Zakona o međunarodnom privatnom i procesnom pravu*, Nomos, Belgrade, 1991, p. 67; Martiny, *op. cit.*, note 34, p. 124.

include the protection of third parties' rights in *rem* in cross-border insolvency proceedings, as well as the adaptation of rights in *rem* in matters relating to succession, matrimonial property regimes, and the property consequences of registered partnerships.[39]

4. CONFLICT-OF-LAWS QUALIFICATION OF PROPRIETARY RIGHTS IN CRYPTO-ASSETS

4.1. The General Conflict-of-Laws Rule Governing Proprietary Relationships from the Comparative Perspective of Selected Member States

Given that it has already been indicated that the autonomous private international law systems of the Member States traditionally apply the *lex rei sitae* conflict-of-laws rule, it is first necessary to clarify the general scope of that rule. The legal category underlying the *lex rei sitae* rule, in principle, encompasses all forms of property, both movable and immovable.[40] The scope of application of this conflict-of-laws rule in relation to proprietary relationships primarily includes the creation, existence and extinction of proprietary rights, as well as the content, exercise and transfer of proprietary rights in property.[41] The connecting factor of the rule in question (*locus rei sitae*) is generally regarded as a simple, stable and efficient connecting factor, since the localisation of property is ordinarily straightforward, objectively ascertainable and visible to all, particularly to third parties in light of the *erga omnes* effect of proprietary rights.[42] Against this background, and in the context of crypto-assets, the literature contains a growing number of scholarly contributions addressing the localisation of tokens in the digital environment, that is, the determination of the connecting factor *locus rei sitae*. Although

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[39] Art 8 of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L 141; art 31 of the Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201; art 29 of the Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L 183; art 29 of the Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] OJ L 183; Josipović, *op. cit.*, note 37, p. 400.

[40] Dika, Knežević, Stojanović, *op. cit.*, note 38, pp. 65-67.; arts 22 and 23 ZMPP.

[41] Sajko, K., *Međunarodno privatno pravo*, 5th edition, Narodne novine, Zagreb, 2009, pp. 140-141.

[42] Erlank, W., *The disconcerting exercise of finding and applying the lex rei sitae in Cyberspace*, European Property Law Journal, Vol. 7, No. 3, 2018, p. 215.

this issue undoubtedly deserves careful consideration, given that the connecting factor of a conflict-of-laws rule ultimately determines the legal system whose law will apply, one should not lose sight of the more fundamental question concerning the legitimacy of applying the *lex rei sitae* rule to crypto-assets in the first place. More specifically, the question arises as to how the application of that rule may be justified in light of the inherently intangible nature of crypto-assets, which inevitably leads to the issue of the qualification of the legal category underlying the relevant conflict-of-laws rule. Accordingly, this paper will focus exclusively on the qualification of the legal category underpinning the conflict-of-laws rule governing proprietary rights, whereas the question of the qualification of the connecting factor *locus rei sitae* falls beyond the scope of this contribution and, owing to the intangible nature of crypto-assets, warrants separate examination in the context of their concrete localisation.

4.2. Approaches to Qualification from the Perspective of the Autonomous Private International Law of EU Member States

Qualification is present in every positive branch of law, while within private international law it is generally understood as the method by which factual or legal issues are subsumed under the appropriate conflict-of-laws rule.[43] In other words, it is the method used to determine which conflict-of-laws rule is applicable to a particular situation.[44] Despite its importance and the specific features that will become apparent in the course of this paper, the concept of qualification is only rarely regulated explicitly in national codifications of private international law. At EU level, for example, fewer than half of the Member States expressly regulate qualification, that is, contain an explicit rule governing the method of qualification within their national private international law systems.[45] In the context of the selected legal systems examined in this research, it should be noted that neither the Austrian, Croatian nor German PIL Acts contain a provision specifically regulating qualification.[46] Nevertheless, the fact that these legal systems, like the majority of Member States, do not contain explicit rules on qualification does not mean that conflict-of-laws qualification is not carried out, particularly given that

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43 Tekin, E., *A New Form of Working Relationship in The Digital Age: Crowdworking from a Private International Law Perspective,* in: Villata, F. C.; Župan, M.; Trimmings, K.; Gabrielli, G. (eds.), Law in the Age of Digital Technologies, Milano University Press, Milano, 2025, p. 221; Tekin, E., *Position of French in Private International Law Theory,* in: Kordić, Lj. (ed.), Language(s) and Law, Faculty of Law Osijek, Osijek, 2023, pp. 61-62.

44 Wilke, F. M., *A Conceptual Analysis of European Private International Law*, Intersentia, Cambridge, 2019, p. 114.

45 *Ibid.*, pp. 116-117.

46 *See* IPRG; ZMPP; and EGBGB.

qualification constitutes a prerequisite for the application of any conflict-of-laws rule. It may therefore be concluded that the choice and application of methods of qualification have largely been left to judicial practice and legal doctrine.

The absence of explicit provisions regulating qualification in the national private international law systems of the Member States is likely a consequence of conflict-of-laws unification within EU private international law. Under the influence of EU law, an autonomous interpretation of conflict-of-laws rules and of the concepts contained in EU private international law instruments has gradually developed, reinforced further by the uniform meaning ensured through the interpretative authority of the Court of Justice of the European Union. From today's perspective, traditional national qualification has therefore been substantially displaced by European autonomous qualification.[47] Nevertheless, national methods of qualification continue to play an important role in those areas of private international law that have not been unified at EU level. One such area is the determination of the applicable law governing proprietary relationships, including the application of the general *lex rei sitae* rule.

4.3. Qualification of the Legal Category Underlying the *Lex Rei Sitae* Rule in the Context of Crypto-Assets

When discussing the qualification of a legal category, the primary issue concerns whether a particular legal relationship may be subsumed under a given conflict-of-laws rule, that is, whether the relationship in question falls within the scope of the legal category underlying that rule.[48] Applied to the context of crypto-assets, the issue may be framed as follows: can rights relating to crypto-assets be subsumed under the legal category underlying the *lex rei sitae* rule?[49] Accordingly, for the purposes of this part of the paper, the central issue concerns the qualification of direct subjective proprietary rights in crypto-assets, namely the qualification of the rights held by the token holder in relation to the token itself, together with all legal questions connected thereto, such as the transfer of crypto-assets and the nature and content of the rights that the holder may exercise over them. The need

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47 *Arg. ex* Župan, M., *The New Croatian Private International Law Act, Something Old, Something New and Much Borrowed*, in: Bonomi, A.; Romano, G. (eds.), Volume XXII Yearbook of Private International Law – 2020/2021, Verlag Dr. Otto Schmidt, Köln, 2021, p. 387.

48 Varadi, T. *et al.*, *Međunarodno privatno pravo*, Univerzitet u Beogradu – Pravni fakultet, Belgrade, 2022., p. 121.

49 For instance, the German conflict-of-laws rule provides that rights in *rem* in a thing shall be governed by the law of the state in which the thing is situated (Art 43(1) EGBGB), whereas Croatian law stipulates that rights in *rem* in things are subject to the law of the state in which the things are situated (Art 20 ZMPP). Translation by the author.

to determine an appropriate legal category for such legal relationships involving crypto-assets may be illustrated by imagining a situation in which a person from one state unlawfully transfers a certain quantity of tokens on a DLT system to a third party on the basis of a transaction for value, while that third party is unaware that the transferor is acting without the consent of the lawful holder. In such circumstances, the question arises whether the acquirer, acting in good faith, has in fact become the lawful holder of the token. A further illustration may be found in the converse situation, namely where a third party asserts rights over a particular token controlled by another person, despite the absence of any contractual or other legal relationship between them.[50] Additional examples may arise in the context of custodial arrangements relating to tokens, particularly where insolvency proceedings are opened against the custodian and the custodian's clients seek to separate the tokens from the insolvency estate in order to preserve their rights and prevent the liquidation of the tokens for the benefit of the insolvency creditors. Indeed, there is a broader view that situations involving third-party rights in relation to crypto-assets, such as those outlined above, are particularly suitable for qualification as proprietary relationships from the perspective of private international law.[51] Simplified somewhat, it may therefore be said that the need to apply a conflict-of-laws rule governing proprietary relationships does not fundamentally differ from the corresponding need at the level of substantive law, since, even at the conflict-of-laws level, it is sufficient that one of the parties bases its claim or defence on the assertion: *"This is mine"*.[52]

In light of the foregoing, while the determination of proprietary rights in conventional tangible assets, such as movable and immovable property, is generally carried out through the almost routine application of the *lex rei sitae* rule, courts addressing proprietary relationships concerning crypto-assets will very likely encounter difficulties in selecting the relevant conflict-of-laws rule, that is, difficulties of qualification.[53] Given that a crypto-token constitutes a specific form of intangible object, legal systems whose autonomous private international law has not been technologically adapted may face uncertainty regarding the qualification of direct subjective rights in crypto-assets as such. More specifically, such uncertainty may manifest itself in several ways: under which legal category of a conflict-of-laws rule should rights in crypto-assets be subsumed; how should the boundaries

50 Tan, S. W., *Transnational Transactions on Cryptoasset Exchanges: A Conflict Of Laws Perspective*, Singapore Journal of Legal Studies, 2022, p. 400.

51 *Ibid.*

52 Burrows, A., *The Conflict of Laws and Unjust Enrichment*, in: Dickinson, A.; Peel, E. (eds.), A Conflict Of Laws Companion, Oxford Academic, Oxford, 2021, p. 195.

53 Critchley, A. D. J., *The Application of Foreign Law in the British and German Courts*, Hart Publishing, Oxford, 2022, p. 14.

between existing legal categories be drawn; and what is the scope of application of the existing conflict-of-laws rules. Put simply, the question is whether direct subjective rights in crypto-assets fit within the existing corpus of conflict-of-laws rules of a given legal system at all.[54]

4.3.1. Qualification of the Legal Category According to *Lex Fori*

The leading method of qualification is qualification according to *lex fori*. This method precedes every conflict-of-laws qualification and, in essence, concerns the selection of the relevant conflict-of-laws rule for a legal relationship containing an international element.[55] The method operates by attributing to the concepts forming the legal category of the relevant conflict-of-laws rule the same meaning and interpretation that those concepts possess within the substantive law of the legal system from which the rule itself originates. This follows from the fact that the conflict-of-laws rule is itself part of that legal order.[56] For example, the Spanish Civil Code expressly provides that qualification for the purpose of determining the applicable conflict-of-laws rule must always be carried out in accordance with Spanish law.[57] Accordingly, the qualification of a legal category is undertaken in line with the systematic structure and conceptual understanding of the *lex fori*.[58] This method is, in principle, particularly suitable in relation to the qualification of proprietary rights in immovable property, especially having regard to the rules on international jurisdiction in civil and commercial matters, pursuant to which exclusive jurisdiction over rights in *rem* in immovable property lies with the courts of the Member State in which the property is situated, that is, by virtue of the *forum rei sitae* jurisdictional criterion.[59] Consequently, in matters concerning proprietary rights in immovable property, the court possessing exclusive international jurisdiction determines the applicable law through the application of *lex rei sitae*, which in practice ultimately results in the application of *lex fori*[60], since the immovable property is located within the territory of the forum state itself. As a

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54 Goetzke, C.; Michaels, R., *Characterisation*, in: Beaumont, P;, Holliday, J. (eds.), A Guide to Global Private International Law, Hart Publishing, Oxford, 2022, pp. 31-32.

55 Đorđević, S., *Teleološka redukcija kolizionih normi i popunjavanje pravnih praznina u Zakonu o rešavanju sukoba zakona sa propisima drugih zemalja*, Zbornik radova Pravnog fakulteta u Novom Sadu, Vol. 53, No. 2, 2019, p. 468.

56 Katičić, N., *Međunarodno privatno pravo*, Pravni fakultet u Zagrebu, Zagreb, 1979, p. 37.

57 Wilke, *op. cit.*, note 44, pp. 114-115.

58 Đorđević, *op. cit.*, note 55, p. 468.

59 Art 24(1) of the 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 (recast) [2012] OJ L 351.

60 The *lex causae* coincides with the *lex fori*.

result, there are generally no substantial obstacles to the consistent application of the *lex fori* method, given that the court operates entirely within the boundaries of its own legal system when carrying out qualification.

The situation is, however, considerably more challenging in the context of movable property due to the inherent mobility of such assets, and particularly in relation to crypto-tokens as specific intangible (digital) objects. In that respect, *stricto sensu*, this method of qualification would not be applicable in relation to crypto-assets within those Member State legal systems that strictly adhere to the criterion of tangibility as a prerequisite for the existence of proprietary rights.[61] More generally, qualification according to *lex fori* is unsuitable where a legal relationship or institution is unknown to the law of the forum state, that is, where the relationship cannot be subsumed under any existing legal category.[62] Although ownership and other proprietary rights are undoubtedly recognised within the substantive laws of the Member States, the difficulty lies in the fact that, in certain national legal systems, tokens as intangible objects are not recognised as potential objects of proprietary rights due to the operation of the *numerus clausus* principle and the doctrine of tangibility. In the context of crypto-assets, a strict application of qualification according to *lex fori* would therefore mean that the legal category underlying the *lex rei sitae* rule must be interpreted in accordance with the standards of the substantive law of the Member State from which the relevant conflict-of-laws rule originates. Thus, if one proceeds from Croatian or German substantive law - both of which are grounded in a strict application of the doctrine of tangibility - it follows that legal relationships concerning crypto-assets could not be subsumed under the traditional *lex rei sitae* rule within those legal systems.[63]

An additional challenge to the application of the *lex fori* method may also be found in Austrian law. Under Austrian substantive law, crypto-tokens may potentially constitute suitable objects of ownership and other proprietary rights.[64] However, the relevant conflict-of-laws provision of the Austrian IPRG, namely § 31(1), expressly provides that the rule applies exclusively to tangible property (*körperlichen Sachen*). Consequently, even from the Austrian perspective, the consis-

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61 *Arg. ex* Omlor, *op. cit.*, note 29, pp. 67-68.

62 Goetzke, Michaels, *op. cit.*, note 54, p. 34.

63 Binder, J.-H., *Germany*, in: Lehmann, M.; Morishita, T. (eds.), Cryptocurrencies in National Laws: A Global Survey, Brill Nijhof, Leiden and Boston, 2025, pp. 332-333; Omlor, S., *Digital ownership of blockchain tokens: a comparative law guideline*, in: Nordtveit, E. (ed.), The Changing Role of Property Law, Edward Elgar Publishing, Cheltenham, 2023, pp. 137-138; Jakšić, T.; Petrović, S., *Croatia,* in: Lehmann, M.; Morishita, T. (eds.), Cryptocurrencies in National Laws: A Global Survey, Brill Nijhof, Leiden and Boston, 2025, p. 191.

64 Miernicki, M., *Austria,* in: Lehmann, M.; Morishita, T. (eds.), Cryptocurrencies in National Laws: A Global Survey, Brill Nijhof, Leiden and Boston, 2025, pp. 114-119.

tent application of qualification according to *lex fori* would not be possible. Given the explicit requirement of tangibility as a precondition for the application of the *lex rei sitae* rule under § 31(1) IPRG, a strict application of the *lex fori* method in the context of crypto-assets would amount to an interpretation *contra legem*.

4.3.2. Qualification of the Legal Category According to Lex Causae

Another method of qualification, alongside qualification according to *lex fori*, is qualification according to *lex causae*. This method is generally criticised in legal scholarship due to the impracticality of its application. The method consists in selecting and interpreting the relevant conflict-of-laws rule on the basis of the law governing the legal relationship in question (*lex causae*), which inevitably gives rise to a form of logical circularity.[65] The very purpose of qualifying a legal category is to identify, through the connecting factor of the most appropriate conflict-of-laws rule, the substantive law applicable to the legal relationship. Under the *lex causae* method, however, qualification is to be carried out precisely according to the law that would govern the relationship (the putative *lex causae*), even though that law is not yet known, since the process is still situated at the stage of qualifying the legal category rather than the connecting factor of the conflict-of-laws rule.[66] Accordingly, in the context of crypto-assets, and specifically with regard to the qualification of the legal category underlying the relevant conflict-of-laws rule, this method should be rejected at the initial stage of qualification. At this stage, the analysis remains concerned with identifying the relevant conflict-of-laws rule governing direct subjective rights in crypto-assets. Until the applicable conflict-of-laws rule has been identified, qualification according to *lex causae* is simply not possible.

Nevertheless, qualification according to *lex causae* assumes particular importance at the second stage of qualification, that is, following the initial qualification according to *lex fori* of the relevant conflict-of-laws rule.[67] Once the applicable conflict-of-laws rule has identified the applicable law, any further qualification within the framework of the applicable substantive law is then carried out according to *lex causae*. Applied to legal relationships concerning crypto-assets, this means that *lex causae* will ultimately resolve issues such as whether a token is capable of constituting an object of proprietary rights at all, what types of rights may exist in

[65] Varadi, *op. cit.*, note 48, pp. 126-127.

[66] *Ibid.*

[67] Katičić, *op. cit.*, note 56, p. 37.

relation to the token and with what content, as well as the conditions governing the acquisition, exercise and extinction of such rights.[68]

4.3.3. Extended Qualification of the Legal Category According to Lex Fori in Accordance with the Functional Approach

In light of the two methods of qualification discussed above, together with the difficulties involved in selecting the relevant conflict-of-laws rule governing direct subjective rights in crypto-assets, it would appear more appropriate *de lege lata* to apply the *lex rei sitae* rule, while interpreting the legal category underlying that rule in a broader sense through the adoption of a functional approach. In other words, qualification should be carried out irrespective of whether, under the *lex fori*, ownership or other proprietary rights may formally exist in relation to tokens at all.[69] The emphasis in this context lies on the relationship of direct control exercised by the holder over the token in question, a relationship which all third parties are required to respect. Whether a particular token is in fact capable of constituting an object of proprietary rights, and if so, which specific proprietary rights may arise in relation to it, is ultimately a matter to be determined by the applicable substantive law (*lex causae*) designated through the connecting factor of the relevant conflict-of-laws rule.[70]

Several arguments may be advanced in support of this position. More generally, such an approach to qualification is not unknown within the doctrine of private international law. Among the principal proponents of an expanded *lex fori* qualification are *Batiffol* and *Niederer*. *Batiffol* argues that one should certainly begin with the legal categories of the *lex fori*, but that those categories must be conceptually broadened so as to identify the underlying substance of the category in question, with the aim of linking the foreign legal institution to that legal category, even

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68 Goetzke, Michaels, *op. cit.*, note 54, p. 34; In the national legal systems of those Member States whose autonomous private international law has dispensed with the doctrine of *renvoi*, this implies that qualification under the *lex causae* is undertaken solely at the level of substantive law, without recourse to the conflict-of-laws rules of the *lex causae*. This approach, in turn, leaves room for the substantive requalification of the legal relationship in light of the relevant connecting factor. In other words, even where a conflict rule relating to rights in *rem* is used as the initial point of reference, it does not necessarily follow that the substantive rules of property law will ultimately govern the relationship; depending on the connecting factor, the matter may instead fall to be governed by rules drawn from another branch of private law.

69 Bonomi, A., *Blockchain and Private International Law – Some General Remarks*, in: Bonomi, A. *et al* (eds.), Yearbook of Private International Law Volume XXIV – 2022 / 2023, Verlag Dr. Otto Schmidt, Köln, 2024, p. 158.; Goetzke, Michaels, *op. cit.*, note 54, p. 34.

70 Dika, Knežević, Stojanović, *op. cit.*, note 38, p. 67.

where the institution itself is otherwise unknown to the law of the forum state.[71] Likewise, *Niederer* maintains that the concepts forming part of the legal categories of the *lex fori* should remain the starting point, but that their scope ought to be expanded where necessary.[72] Accordingly, in the context of crypto-assets, a form of extension of the scope of the legal category underlying the *lex rei sitae* rule should be adopted through an expansive interpretation. Such an approach is also generally recognised in private international law as a legitimate interpretative method for addressing legal lacunae at the conflict-of-laws level.[73] In essence, this amounts to a flexible approach to qualification, characterised by a certain degree of adaptation, whereby the application of the applicable law is extended to situations which the legal category underlying the *lex rei sitae* rule, as the starting conflict-of-laws rule, did not originally encompass, but which are nevertheless sufficiently comparable in legal terms.[74] Such an approach - in which qualification according to *lex fori* remains the starting method, albeit with an expanded understanding of the legal category - also reflects the broader internationalist perspective upon which methods of qualification in private international law should generally rest. This is particularly important given that the legal order of the forum need not necessarily recognise certain legal relationships or institutions at the substantive level in order for its courts to adjudicate upon them, including proprietary relationships concerning crypto-assets.[75] It is precisely here that the qualitative dimension of qualification becomes particularly significant. As *Wilke* explains, conflict-of-laws rules generally rely on broad legal categories, while the terminology employed merely serves as a linguistic tool. This is because, when constructing a conflict-of-laws rule, concepts derived from national substantive law are used to indicate a particular legal category, while at the same time it is intended that the same legal category should also be capable of encompassing foreign substantive law.[76]

4.3.4. Justification for the Extended Qualification of the Legal Category According to *Lex Fori* in Accordance with the Functional Approach

According to the prevailing view in the doctrine of private international law, a conflict-of-laws rule need not necessarily be expressly prescribed. Rather, it is gen-

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71 Varadi, *op. cit.*, note 48, p. 125., citing: Batiffol, H., Lagarde, P., *Droit international privé I*, Paris, 1974, pp. 367-380.; and Batiffol, H., *Aspects philosophiques de droit international privé*, Paris, 1956, pp. 19-36.

72 Varadi, *op. cit.*, note 48, p. 125., citing: Niederer, W., *Einführung in die allgemeinen Lehren des Internationalen Privatrechts*, Zürich, 1956, pp. 221. *et seq*.

73 Varadi, *op. cit.*, note 48, p. 90.

74 Sajko, *op. cit.*, note 41, pp. 184. and 226.

75 Tan, *op. cit.*, note 50, p. 400.

76 Wilke, *op. cit.*, note 44, pp. 115-116.

erally accepted that, as in any other branch of law, legal lacunae may arise within private international law and that such gaps should be filled through ordinary interpretative techniques, including analogy, the application of general principles, and the law-making role of the judge.[77] This concerns situations in which a particular issue cannot be subsumed under any existing conflict-of-laws rule.[78] Such a doctrinal understanding reflects the recognition that it is impossible to legislate conflict-of-laws rules for every legal relationship that may emerge in the future, particularly in light of the evolving nature of social and private legal relationships. This is especially evident in the context of proprietary relationships concerning crypto-assets as a contemporary technological phenomenon. Indeed, the reality of legal lacunae in private international law is expressly acknowledged in the Croatian ZMPP, which specifically regulates the approach to be taken where no conflict-of-laws rule exists for a particular private legal relationship. Thus, Article 7 ZMPP provides that, in the absence of rules determining the applicable law for private-law relationships containing an international element, the court shall apply, mutatis mutandis, the provisions and principles of the ZMPP itself, the principles of the legal order of the Republic of Croatia, and the general principles of private international law as a branch of law. By contrast, neither the Austrian IPRG nor the German EGBGB contains an explicit rule governing the filling of legal lacunae in the conflict-of-laws context. In such legal systems, the law-making role of the judge becomes correspondingly more pronounced.

Before proceeding further with the consideration of techniques for filling legal lacunae in the context of crypto-assets, it is necessary to emphasise the reason demonstrating the need to fill such lacunae in relation to the *lex rei sitae* conflict-of-laws rule and crypto-assets. This necessity is justified by the principle of the closest connection as a fundamental principle of private international law, since that principle reflects Savigny's understanding of identifying the seat (*Sitz*) of a particular legal relationship.[79] In this regard, it should be noted that the principle of the closest connection has been expressly elevated to the status of a general statutory principle within the Austrian IPRG, while in Croatian autonomous private international law it may be discerned as a fundamental principle through an analysis of the overall corpus of conflict-of-laws rules contained in the ZMPP.[80] Although the principle of the closest connection will find its fullest expression at

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77 Katičić, N., *Ogledi o međunarodnom privatnom pravu*, Narodne novine, Zagreb, 1971, p. 22.

78 Kostić-Mandić, M., *Međunarodno privatno pravo*, Pravni fakultet Univerziteta Crne Gore, Podgorica, 2017, p. 65.

79 *Ibid.*

80 § 1 IPRG; Sikirić, H., *Zakon o međunarodnom privatnom pravu*, Pravo u gospodarstvu, Vol. 58, No. 5, 2019, pp. 823-826.

the stage of qualification of the connecting factor *locus rei sitae*, it should nevertheless be emphasised that extending the application of the *lex rei sitae* conflict-of-laws rule to intangible objects such as crypto-assets itself contributes to the realisation of that principle. Were the application of the *lex rei sitae* rule not extended to crypto-tokens, courts would either be compelled to construct an entirely new conflict-of-laws rule with a wholly new legal category and connecting factor, or alternatively apply *lex fori*, which would amount to a denial of the principle of the closest connection and would effectively undermine the very purpose of determining the applicable law in legal relationships containing an international element.[81] Indeed, in legal systems where conflict-of-laws rules are applied *ex officio*, the application of the substantive *lex fori* may constitute only an exception, and not a general solution in situations where no explicit conflict-of-laws rule exists for a particular legal relationship.

In light of the foregoing, analogy should be regarded as the primary and most fundamental method for filling the legal lacunae in question. Through the use of analogy, a certain modification of existing conflict-of-laws rules is achieved, namely the extension of the relevant conflict-of-laws rule to situations that do not originally fall within the scope of the legal category underlying the *lex rei sitae rule*. In this respect, when discussing the application of analogy, it is important to emphasise the legally relevant similarity between control over a token and control over a tangible object in the substantive law sense more generally, a similarity which also finds reflection at the conflict-of-laws level. Generally speaking, for an object to qualify as a suitable object of proprietary rights within a civil-law legal system, it must be individualised (or at least identifiable), capable of being subjected to human control through possession, and, relatedly, it must be possible to exclude all third parties from the use of that object, that is, the object must possess the characteristic of rivalrousness.[82] Applied analogously to tokens, it may be argued that tokens likewise possess a certain degree of individualisation, given that they are associated with a specific public address functioning as a distinct location, albeit one existing in the digital environment.[83] Moreover, only the holder of the relevant private key is capable of disposing of the tokens associated with that address. Furthermore, in the context of crypto-assets, subjection to human control

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81 Wurmnest, W.; Kübler-Wachendorff, M., *The Constitutionalization of Public Policy in Private International Law*, in: Hugo, C.; Möllers, T. M. J. (eds.), Legality and Limitation of Powers: Values, Principles and Regulations in Civil Law, Criminal Law, and Public Law, Nomos, Baden-Baden 2019, p. 299.

82 Gullifer, L., *Proprietary Rights in Digital Assets*, in: Koller, C., Lehmann, M. (eds.), Digital Assets in Enforcement and Insolvency: Securing Creditor Access and Protecting Customer Interests in the Crypto World, Hart Publishing, Oxford and Dublin, 2025, pp. 16-19.

83 Carr, D., *Cryptocurrencies as Property in Civilian and Mixed Legal Systems*, in: Fox, D., Green, S. (eds.), Cryptocurrencies in Public and Private Law, Oxford University Press, Oxford, 2019, pp. 186-187.

is not manifested through possession in the traditional sense, which presupposes the tangible existence of the object possessed, but rather through factual control exercised by means of the private key used to authorise transactions on the DLT system.[84] In this regard, the concept of "control", as developed *inter alia* by the UNIDROIT Principles on Digital Assets and Private Law, emerges as a functional equivalent of possession in relation to crypto-assets. Such control is based both on the positive ability to use the crypto-asset and on the negative ability to exclude all third parties from access to that asset.[85] It is precisely this latter, negative power to exclude third parties that constitutes a defining characteristic of proprietary rights, namely their *erga omnes* effect. Accordingly, the similarity between possession of tangible objects and control over crypto-assets lies in the fact that the holder of the crypto-asset is entitled to exclude any third party from using or accessing the crypto-asset. Likewise, the similarity in terms of rivalrousness is reflected in the fact that the transfer of control over a crypto-asset to a new holder simultaneously prevents the previous holder from disposing of that same crypto-asset.[86] It may therefore be concluded that a holder of a crypto-asset who exercises control over it possesses a form of authority over the crypto-asset which, in substantive terms, closely resembles, first and foremost, ownership of movable property.[87]

Furthermore, in addition to the previously discussed legally relevant similarities between tangible objects and crypto-assets, fundamental legal principles must also be taken into account as a justification for the extended application of the *lex rei sitae* conflict-of-laws rule to crypto-assets. This is because fundamental legal principles, including principles relating to the protection of fundamental human rights and freedoms, constitute the primary foundation for the construction, interpretation and application of any legal rule, including conflict-of-laws rules.[88] Within the context of private international law, the influence of human rights protection standards is realised primarily through the selection of the connecting factors of conflict-of-laws rules, but also at the level of the fundamental institutions of private international law itself.[89] Given that qualification constitutes one of the foundational institutions of private international law, since it precedes the

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84 Gullifer, *op. cit.*, note 82, pp. 16-19.

85 UNIDROIT, *Principles on Digital Assets and Private Law*, UNIDROIT, Rome, 2023, principle 2(2), comment 6.3; Omlor, *op. cit.*, note 29, p. 82.

86 Gullifer, *op. cit.*, note 82, pp. 16-19.

87 Villata, F. C., *Cryptocurrencies and Conflict of Laws*, in: Bonomi, A. *et al.* (eds.), Blockchain and Private International Law, Brill | Nijhof, Leiden and Boston, 2023, p. 335.

88 Đorđević, *op. cit.*, note 55, p. 480.

89 Župan, M., *Utjecaj zaštite ljudskih prava na suvremeno međunarodno privatno pravo*, in: Barbić, J.; Sikirić, H. (eds.), Međunarodno privatno pravo - interakcija međunarodnih, europskih i domaćih propisa, Hrvatska akademija znanosti i umjetnosti, Zagreb, 2020, p. 132.

application of any conflict-of-laws rule, it follows that, in the context of crypto-assets, and for the purpose of ensuring the applicability of the existing *lex rei sitae* rule, the relevant human rights protection standards should also be extended to the legal category underlying the *lex rei sitae* rule. This is particularly justified in light of the fact that proprietary relationships traditionally represent an area where private law intersects with constitutional and Convention-based guarantees of property rights.[90] For example, German legal scholarship has taken the position that crypto-assets fall within the scope of the constitutional guarantee of property.[91] Against this background, and bearing in mind that both the European Convention for the Protection of Human Rights and Fundamental Freedoms[92] (hereinafter: ECHR) and the Charter of Fundamental Rights of the European Union[93] (hereinafter: Charter) are instruments common to all Member States, the following sections will outline additional arguments which, viewed from that perspective, support the extended application of the *lex rei sitae* conflict-of-laws rule in relation to crypto-assets.

At the outset, it should be emphasised that the scope of the protection of property rights under Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms[94] does not extend solely to ownership of tangible objects in the sense of substantive property law. Rather, the concept of property is understood far more broadly from a constitutional perspective, encompassing other rights and interests capable of being classified as possessions.[95] Accordingly, the ECtHR has consistently held in its case-law that the fact that a particular interest is not recognised by national substantive law as a right in the private-law sense does not prevent that interest, having regard to the circumstances of the case, from being classified as property deserving protection under the ECHR.[96] Furthermore, and particularly relevant in the context of crypto-assets

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90 *Ibid.*

91 Omlor, *op. cit.*, note 29, p. 81.

92 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

93 Charter of Fundamental Rights of the European Union [2012] OJ C 326.

94 Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS No. 9.

95 van Erp, S.; Akkermans, B., *European Union property law*, in: Twigg-Flesner, C. (ed.), The Cambridge Companion to European Union Private Law, Cambridge University Press, Cambridge, 2010, p. 175; ECtHR, Judgment of 23 February 1995, *Gasus Dosier- und Fördertechnik Gmbh v The Netherlands*, App. no. 15375/89, para. 53.; ECtHR, Judgment of 25 March 1999, *Iatridis v Greece*, App. no. 31107/96, para. 54.; ECtHR, Judgment of 5 January 2000, *Beyeler v Italy*, App. no. 33202/96, para. 100.

96 ECtHR, Judgment of 29 March 2010, *Brosset-Triboulet and Others v France*, App. no. 34078/02, para. 71.

and private international law as a branch of private law, the ECtHR has adopted the general position that, in situations involving private legal relationships where one private party interferes with the peaceful enjoyment of property of another private party, the state assumes a positive obligation to ensure, through its national law, adequate legal protection of property rights, together with effective legal remedies enabling the injured party to seek protection of those rights.[97] It follows from the foregoing that states bear a positive obligation to secure measures ensuring the effective realisation of the guaranteed right to property.[98] Consequently, in order to give effect to the guarantee of property rights at the conflict-of-laws level, courts of the Member States should extend the scope of application of the autonomous national *lex rei sitae* rule so as to encompass crypto-assets, irrespective of the manner in which crypto-assets as intangible objects are treated under the substantive property law of the *lex fori*. The fact that the *lex fori* may not formally recognise the legal position of the token holder as deriving from a particular subjective proprietary right does not diminish the reality that the holder nevertheless exercises exclusive control over the crypto-asset through the private key and is thereby able autonomously and for their own benefit to exercise all rights deriving from that exclusive control over the token.[99] In this regard, it should also be noted that the CJEU, when interpreting the scope of Article 17(1) of the Charter, has taken the view that the guarantee of property extends to rights having economic value which create a legal position within the legal order and enable the holder to exercise those rights autonomously and for their own benefit.[100] In that respect, it should further be emphasised that crypto-tokens generally possess value, whether economic or monetary, depending on whether they are exchanged for economic goods or for money.[101] In light of all the foregoing considerations, even courts of Member States whose substantive law does not recognise ownership or other proprietary rights in crypto-assets would nevertheless be required, through a functional approach, to extend the substantive scope of application of the *lex rei sitae* rule.

Although the doctrine of qualification is sometimes criticised in legal scholarship as a potential instrument of manipulation, such criticism can hardly be levelled against the proposed extended *lex fori* qualification with a functional approach

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97 ECtHR, Judgment of 14 October 2008, *Blumberga v Latvia*, App. no. 70930/01, para. 67.; Schabas, W., *The European Convention on Human Rights: A Commentary*, Oxford University Press, Oxford, 2015.

98 Schabas, *op. cit.*, note 97.

99 Rueckert, C., *Cryptocurrencies and fundamental rights*, Journal of Cybersecurity, Vol. 5, No. 1, 2019, p. 7.

100 CJEU, Judgment of 22 January 2013, *Sky Österreich GmbH v Österreichischer Rundfunk*, C-283/11, ECLI:EU:C:2013:28, para. 34.

101 Omlor, *op. cit.*, note 63, p. 132.

in the context of crypto-tokens, particularly given the inherently intangible nature of such objects.[102] On the contrary, this approach enables the filling of a legal lacunae by focusing on the function of legal institutions and legal categories themselves. In this respect, the legally relevant similarity between ownership of a tangible object and control over a token lies precisely in the ability to exclude third parties and in the existence of direct subjective proprietary rights in relation to the object itself.[103] In this connection, the application of the *lex rei sitae* rule to crypto-assets may additionally be justified by reference to the residual nature of that rule within the autonomous private international law systems of the Member States in relation to the conflict-of-laws instruments of EU private international law. The latter naturally enjoy priority by virtue of the supremacy of EU law, provided that the legal issue in question falls within the scope of a particular EU private international law instrument. Comparing, on the one hand, the potential applicability of the conflict-of-laws rules governing contractual obligations (Rome I Regulation[104]) and non-contractual obligations (Rome II Regulation[105]), with, on the other hand, the conflict-of-laws rules governing proprietary relationships in relation to direct rights over crypto-assets, it should be emphasised that the conflict-of-laws rules relating to obligations possess an autonomous and uniform European meaning derived from the case law of the CJEU. The CJEU has, in its jurisprudence, distinguished proprietary rights from obligations under EU law. In essence, the distinction lies in the fact that a proprietary right, being linked to a particular object, produces effects *erga omnes*, whereas an obligation may be asserted only against a specific debtor.[106] It therefore follows that obligations possess merely relative effect (*inter partes*), presupposing the existence of a debtor-creditor relationship. By contrast, and crucially in the context of the qualification of direct rights in crypto-tokens, proprietary rights operate in relation to an object, traditionally a thing, and produce absolute effects. This interpretation adopted by the CJEU closely corresponds to the traditional understanding of the operation of obligations and proprietary rights rooted in the Roman law tradition. Consequently, the CJEU's understanding strongly suggests that, for the purposes of EU private international law, neither the Rome I Regulation nor the Rome II Regulation is

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102 Banu, R.; Green, M. S.; Michaels, R., *Introduction*, in: Banu, R.; Green, M. S.; Michaels, R. (eds.), Philosophical Foundations of Private International Law, Oxford University Press, Oxford, 2024, p. 6.

103 *Ibid.*

104 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L 177.

105 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 [2007] OJ L 199.

106 CJEU, Judgment of 9 June 1994, C-292/93, *Norbert Lieber v. Willi S. Göbel and Siegrid Göbel*,, ECLI:EU:C:1994:241, para. 14.

suitable for governing direct rights existing in relation to crypto-assets where such rights bind all third parties with *erga omnes* effect. This is particularly so where the holder of ownership or another proprietary right stands in no relative legal relationship with those third parties and where, put simply, the claim or defence is based on the assertion: *"This is mine"*.[107] Accordingly, whenever a legal relationship cannot be qualified as an obligation within the meaning of EU private international law, and where the matter does not fall within another specific field of EU private international law, such as succession, matrimonial property or insolvency matters, but instead concerns a relationship producing absolute effects, the *lex rei sitae* rule should, by virtue of its residual function, be applied in such situations on the basis of an extended *lex fori* qualification adopting a functional approach.

5. CONCLUDING REMARKS

From the foregoing, it is evident that considerations regarding the applicability of the legal category underlying the *lex rei sitae* rule in the context of crypto-assets remain largely confined to academic debate. In the legal systems examined in this paper, there is still no meaningful body of case-law addressing the issue, that is, no clear judicial position as to whether the scope of the *lex rei sitae* rule may be extended to crypto-assets as intangible objects. This is particularly significant in legal systems whose substantive law consistently adheres to the doctrine that only tangible objects may constitute "things", since such an approach may equally influence conflict-of-laws qualification through the consistent application of the *lex fori* method.

Indeed, if a court in a given Member State were unable to subsume legal relationships concerning crypto-assets under any existing autonomous conflict-of-laws rule, the only remaining option would be the application of *lex fori*. Such an outcome would, however, amount to a denial of the closest connection principle as one of the fundamental principles of private international law. Conversely, if a court were hypothetically to rely solely on the principle of the closest connection in order to determine the applicable law governing an undefined legal relationship concerning crypto-assets, the question would still arise as to what precisely the court would be seeking an applicable law for, namely, which legal institution or which legal issue. In such circumstances, the court would effectively be required to construct an entirely new legal category for crypto-tokens alongside the existing categories within the corpus of private international law. It therefore appears more appropriate to recognise an extended application of the existing legal category underpinning the *lex rei sitae* rule, particularly given that there are legally relevant

[107] Burrows, *op. cit.*, note 52, p. 195.

similarities between tangible objects and tokens. Such an approach would also contribute to the effective protection of property rights at the conflict-of-laws level from the perspective of both the ECHR and the Charter. Moreover, by proceeding in this manner, the court would not undermine the coherence of domestic substantive law; rather, it would merely adopt a more flexible and expansive understanding of existing legal categories at the conflict-of-laws level. Ultimately, it is the *lex situs* itself that will determine whether a token is sufficiently individualised to constitute a potential object of proprietary rights, as well as resolve all related issues, including the acquisition of proprietary rights, the protection of good-faith acquirers, and the legal remedies available for the protection of such rights.

Nevertheless, as already indicated in this paper, the prevailing understanding remains that the founding Treaties do not affect national systems of property law, a position that also manifests itself at the conflict-of-laws level through the absence of unification efforts within EU private international law. Bearing in mind that the principal objective of the MiCA Regulation was to prevent regulatory fragmentation of the crypto-asset market, fragmentation capable of distorting competition within the Union's internal market and hindering the cross-border provision of crypto-asset services, it must be concluded that a significant legislative omission arose from the failure to introduce a unified European conflict-of-laws rule governing proprietary relationships in respect of crypto-assets. Indeed, any analogous application of the *lex rei sitae* rule to crypto-assets largely depends on national legal concepts, doctrinal approaches, and judicial activism within the Member States. Consequently, the determination of the applicable law governing proprietary rights in crypto-assets remains within the domain of the autonomous private international law rules of the Member States, making it impossible to speak of a genuinely uniform approach across the EU internal market as a whole. This, in turn, perpetuates a considerable degree of legal uncertainty for participants in the European crypto-market, since it remains unclear how courts in individual Member States might approach the determination of the applicable law governing proprietary relationships connected with crypto-assets.

Finally, it should be emphasised that the issue extends beyond the question of the legal category itself and also encompasses the subsequent level of qualification, namely the determination of the connecting factor *locus rei sitae* in the context of localising crypto-assets. The qualification of that connecting factor constitutes a further layer of complexity in conflict-of-laws analysis, since it ultimately determines the applicable substantive law. Accordingly, the adoption of a unified conflict-of-laws rule at EU level would not only facilitate the harmonisation of legal categories and relevant connecting factors for determining the applicable law, but would also enhance legal certainty and contribute to the uniform application

of law across the European internal market, particularly in light of the potential future contribution of the CJEU through its case law.

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Review article

DEFENCE BY TRANSPORT LAW? CONSTITUTIONAL CONSTRAINTS OF MILITARY TRANSPORTS PERMISSIONS AND EMERS IN THE PROPOSED MILITARY MOBILITY REGULATION (COM(2025) 847)

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ABSTRACT

In November 2025, the European Commission tabled a proposal for a Regulation establishing a Union-wide framework to facilitate the cross-border transport of military equipment, goods and personnel (COM(2025) 847). Building on earlier military-mobility initiatives that relied predominantly on action plans and voluntary coordination, the draft would introduce directly applicable procedural harmonisation, including a uniform framework for authorisation procedures and an EU-level emergency mechanism (EMERS) designed for temporary, extraordinary and urgent situations.

The proposal relies on EU transport competences (Articles 91 and 100(2) TFEU), thereby triggering the ordinary legislative procedure; it is presented exceptionally without an impact assessment and is instead accompanied by a Staff Working Document.

The paper aspires to answer the following main question: under what constitutional conditions can EU transport competences sustain binding authorisation procedures and an emergency regime for military transport without encroaching upon Member States' national security prerogatives and sovereign discretion over transit decisions? It advances a "proceduralisation" account of the draft: rather than transferring substantive control over military movements to the Union, the proposal seeks to standardise how Member States operationalise transit decisions by imposing common procedural parameters and crisis-specific acceleration tools. At the same time, this design generates Treaty-sensitive pressure points, especially where accelerated procedures and emergency activation risk compressing national discretion in security-relevant contexts.

Methodologically, the paper uses doctrinal legal research, operationalised through textual, systematic and contextual interpretation. First, it assesses the choice of legal basis by analysing the

proposal's objectives and operative content, in line with the Court of Justice's established approach to legal-basis selection. Second, it evaluates two legally decisive clusters, the authorisation regime and EMERS, against the principles of conferral, subsidiarity and proportionality, with particular attention to the safeguards that preserve national security prerogatives. Third, it maps (without exhaustively analysing) the draft's infrastructure-readiness and solidarity components to clarify how they shape the proposal's overall constitutional profile and where legislative contestation is most likely to arise.

By focusing on competence boundaries, institutional design and emergency governance, the paper aims to offer a legally grounded account of the emerging "Military Schengen" agenda and clarifies how far defence-readiness can be pursued through non-CFSP hard law while remaining constitutionally disciplined.

***Keywords**: Autonomy, CSDP, Competence, EMERS, Mobility*

1. INTRODUCTION

In November 2025, the European Commission proposed a Regulation establishing a Union-wide framework for the cross-border transport of military equipment, goods, and personnel (COM(2025)847)[1]. The proposal represents a qualitative leap from voluntary coordination under the 2018 Action Plan on Military Mobility[2] and the Permanent Structured Cooperation (hereinafter: PESCO) framework to binding hard law[3], adopted under the ordinary legislative procedure on the basis of Articles 91 and 100(2) Treaty on the Functioning of the European Union (hereinafter: TFEU). The choice of the transport title rather than a Common Foreign and Security Policy (hereinafter: CFSP) legal basis is not merely procedural. It determines the decision-making rule (qualified majority rather than unanimity), the role of the European Parliament (co-legislator rather than consulted), and the scope of judicial review (full rather than limited under Article 275 TFEU). All of this raises a wide spectrum of legal questions, which this paper addresses as follows.

The proposal sits at the intersection of two structural developments in EU law. The first is the steady "mainstreaming" of defence objectives into policy fields governed by the ordinary Treaty competences, a process that allows the Union to pursue security goals without engaging the unanimity and constraints of the CFSP. The second is the long-standing tension between the principle of conferral,

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1 Proposal for a Regulation of the European Parliament and of the Council establishing a Union-wide framework for cross-border transport of military equipment, goods and personnel, COM(2025) 847 final.

2 JOIN(2018) 5 final (Action Plan on Military Mobility), JOIN(2025) 846 final (Action Plan on Military Mobility 2.0).

3 On the broader trajectory of defence mainstreaming through non-CFSP instruments, see Steinbach, A., "*The Supranational Turn of EU Defence Policy*", Common Market Law Review, Vol. 62, 2025, pp. 1635-1674.

which confines the Union to the competences attributed to it, and the functional pressure to read sectoral legal bases broadly enough to meet new strategic needs. COM(2025) 847 brings these two developments into direct contact as it uses a transport competence to pursue a defence-readiness objective, and in doing so raises the question of how far a sectoral legal basis can be stretched before it encroaches on competences the Treaties reserve to other procedures or to the Member States. This paper situates its doctrinal analysis within that broader frame.

Under what constitutional conditions can EU transport competences sustain binding authorisation procedures and an emergency regime for military transport without encroaching upon Member States' national security prerogatives? The question is not whether EU defence mainstreaming is desirable, given the geopolitical case for military mobility has been made quite clear since Russia's full-scale invasion of Ukraine exposed the operational consequences of fragmented transport rules[4]. The question is whether the specific legal architecture chosen by the Commission in this specific case can bear the constitutional weight placed upon it.

The paper advances a "proceduralisation" account of the proposal. The central claim is that COM(2025) 847 standardises how Member States operationalise transit decisions - such as timelines, notification formats, scope categories, revocation grounds - rather than transferring substantive control over which military movements to permit. Whether this proceduralisation logic can sustain the entire proposal, including its emergency chapter, is the constitutional challenge the paper investigates. It proposes a distinction between "procedural regulation" and "substantive predetermination" as a doctrinal criterion for assessing dual-use, defence-adjacent measures adopted on sectoral TFEU legal bases.

The analysis proceeds in six steps. Section 2 examines the choice of legal basis through the Court of Justice of the European Union's (hereinafter: CJEU) centre-of-gravity methodology, engaging directly with recently published Snell's opinion to the Grand Committee of the Finnish Parliament on COM(2025) 847 in which he objects that the permit system regulates entry rather than transport.[5] Section 3 develops the proceduralisation account for the ordinary authorisation regime, identifying both its strengths and its constitutional limits. Section 4 tests whether EMERS[6] can be sustained within the same framework. Section 5 maps the proposal's infrastructure-

[4] Commission Staff Working Document accompanying the Proposal for a Regulation establishing a Union-wide framework for cross-border transport of military equipment, goods and personnel, SWD(2025) 847 final, Section 1.

[5] Snell, J., *Legal Opinion to the Grand Committee of the Finnish Parliament*, U 1/2026 vp, 24 March 2026, Available at: [https://www2.eduskunta.fi/FI/vaski/JulkaisuMetatieto/Documents/EDK-2026-AK-15265.pdf], Accessed 2 April 2026.

[6] European Military Mobility Enhanced Response System, Articles 18-31 of the Proposal.

readiness, capability-pooling, and temporary-control provisions as further constitutional pressure points. Section 6 synthesises the findings by distinguishing four types of constitutional challenge, followed by the conclusion of the paper.

This paper is methodologically based on doctrinal legal research, operationalised through textual, systematic, and contextual interpretation. The paper evaluates the authorisation regime and EMERS primarily against the principles of conferral and proportionality; subsidiarity receives lighter treatment because the Staff Working Document (hereinafter: SWD)[7] evidence on failed voluntary coordination supports Union-level intervention as such, while the principal constitutional contestation centres on the specific design choices within that intervention. Two further limitations should be acknowledged. First, the paper analyses a legislative proposal, not an adopted act, and so the text may change during the legislative process. Second, the proceduralisation/predetermination distinction proposed here is consistent with the direction of the CJEU's jurisprudence but is not compelled by it; it is the paper's own doctrinal contribution, offered for debate.

2. THE CHOICE OF LEGAL BASIS: ARTICLES 91 AND 100(2) TFEU

The proposal is based on Articles 91 and 100(2) TFEU[8]. The Commission's justification is notably thin, with less than a page in the SWD, engaging neither with the centre-of-gravity methodology nor with Article 40 TEU or Article 4(2) TEU[9]. As Snell has demonstrated, the choice of legal basis is open to contestation. He concludes that Articles 91 and 100(2) TFEU are "not the correct legal basis" because the permit system regulates entry into the country, not transport as such.[10]

2.1. Aim and Content: a Split Result

The Court's legal-basis doctrine requires assessment of aim and content on the basis of objective factors amenable to judicial review.[11] Where one purpose is iden-

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7 SWD(2025) 847 *op. cit.*, note 4.

8 COM(2025) 847, preamble. The SWD justifies the dual basis: "the Regulation includes measures applicable for road, rail and inland waterway transport, but also for air and sea transport" (SWD(2025) 847, Section 3.1).

9 SWD(2025) 847, Section 3.1. On the constitutional significance of legal-basis choice, see Case C-263/14, Parliament v Council, EU:C:2016:435, par. 43; Engel, A., "*The CJEU's Centre of Gravity Theory in Legal Basis Litigation: A Flawed Concept*", in: Loxa, A.; Lonardo, L. (eds), The Reasoning of the Court of Justice of the EU, Oxford University Press, 2026, p. 234.

10 Snell, J., *op. cit.*, note 5.

11 Case C-300/89, *Commission v Council (Titanium dioxide),* EU:C:1991:244, par. 10; Case C-130/10, *Parliament v Council,* EU:C:2012:472, par. 42. On the Court's inconsistent application, See Engel, A., *op. cit.*, note 8, pp. 238-239.

tifiable as predominant and the other merely incidental, the measure must be founded on a single legal basis.[12] Applied to COM(2025) 847, this test yields a split result.

On the content side, the case is strong since the operative provisions regulate cross-border transport permissions (Articles 4-6), traffic arrangements and rail-path allocation (Articles 7-8), dangerous goods and abnormal cargo (Articles 10-11), customs formalities (Articles 15-16), infrastructure readiness (Article 32), and capability pooling (Article 35) which belong to the instruments from the established toolbox of the common transport policy[13] and at the same time the proposal does not regulate deployment, command, or operational use of armed forces.

On the aim side, Article 1 frames the objective in transport-policy terms, but Recital (1) identifies military mobility as "an essential enabler for European security and deterrence," and the proposal forms part of a Military Mobility Package linked to the Joint White Paper for European Defence Readiness 2030.[14] The telos is defence readiness, but the question is whether a defence telos is fatal to a transport legal basis.

Case C-43/12 *Commission v Parliament and Council* provides a structural, though not dispositive, analogy. The Court held that cross-border exchange of road-safety information belonged to Article 91(1)(c) TFEU despite its law-enforcement dimension.[15] The factual distance is considerable, but the case establishes that a measure does not lose its transport character merely because it serves adjacent non-transport objectives. Conversely, in C-377/12 *Philippines PCA* the Court treated transport clauses as ancillary to a predominant development-cooperation basis because they were limited to broad declarations of aims and did not determine in concrete terms the manner in which the cooperation would be implemented.[16] Whether transport is the centre of gravity or merely ancillary, therefore, depends on the substantive weight of the transport provisions within the act.

This paper argues that the critical variable is the nature of the regulatory operation performed. Where the proposal standardises the procedures through which

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12 Case C-36/98, *Spain v Council*, EU:C:2001:64, par. 59; Craig, P., The Lisbon Treaty, Oxford University Press, 2010, p. 156 ff.

13 Cf. Regulation (EC) No 1072/2009; Directive 2012/34/EU, Art. 48; Directive 2008/68/EC. On the CTP's breadth, see Rusche, T. M., "*Article 91 TFEU*", in Kellerbauer, M.; Klamert, M.; Tomkin, J. (eds), *The EU Treaties and the Charter of Fundamental Rights,* Oxford University Press, 2019, p. 944, par. 4, noting the "very far-reaching competence" not yet judicially constrained (p. 946, par. 14).

14 COM(2025) 847, Explanatory Memorandum, Section 1; JOIN(2018) 5; JOIN(2025) 846.

15 Case C-43/12, *Commission v Parliament and Council*, EU:C:2014:298, par. 42-44.

16 Case C-377/12, *Commission v Council (Philippines PCA*), EU:C:2014:1903, par. 52-60.

Member States process military transport requests, it operates as a transport measure. Where it predetermines the substantive outcome, such as replacing national decisions with automatic acceptance, it crosses into a domain that the transport title alone cannot sustain, especially given the nature of CFSP. This distinction between procedural regulation and substantive predetermination is proposed as a doctrinal conclusion of the aim-and-content test for dual-use, defence-adjacent measures, which is consistent with the jurisprudence's direction, though not compelled by it.[17]

2.2. The "Entry" Objection and the CFSP Boundary

Snell's counter-argument goes directly to that limit, claiming the authorisation system does not, by its nature, directly concern transport but rather regulates the entry into the country.[18] Article 4(2) TEU, he argues, precludes an expansive reading of the transport title, and by contrasting Article 11 TFEU (an integrating principle) with Article 4(2) TEU (a separating one), he concludes the authorisation provisions require either a CFSP basis or bilateral agreements.[19] The paper finds this argument as correct in one important respect and too broad in another.

Snell is correct that Article 20(1) removes the national decision on territorial access. Under that provision, once EMERS is activated, a request for military transport is automatically treated as granted unless the receiving Member State acts, so that silence or inaction produces acceptance rather than refusal. What has been displaced is therefore a sovereign prerogative, not a transport procedure. Section 4 of this paper reaches a similar conclusion.

However, his characterisation of the ordinary regime (Articles 4-6) as "regulating entry" rather than transport is too broad, though not without force. The ordinary regime constrains national discretion significantly through the fact that standing

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17 The doctrine has documented the broader pattern of defence mainstreaming through non-CFSP competences, see Steinbach, A., *op. cit. 3*, pp. 1635-1674; Meershoek, N., "*Why the EU Internal Market is Not the Correct Legal Basis for Regulating Military-strategic Procurement*", European Law Review, Vol. 47, No. 3, 2022, pp. 353-375; Horn, A., *European Defence Under the Treaties*, Swedish Institute for European Policy Studies (SIEPS), European Policy Analysis, No. 2025:12epa, 2025,This article contributes a doctrinal criterion through the distinction between procedural regulation and substantive predetermination for assessing where such measures remain within the constitutional reach of sectoral legal bases.

18 Snell, J., *op. cit.*, note 5.

19 Snell, J., *op. cit.*, note 5, citing Case C-440/05, *Commission v Council*, EU:C:2007:625, par. 70-71. On the conferral principle, see Klamert, M., commentary on *Article 5 TEU*, in: Kellerbauer, M.; Klamert, M.; Tomkin, J. (eds.), *The EU Treaties and the Charter of Fundamental Rights*, Oxford University Press, 2019, par. 5-7.

permissions under Article 5 are pre-authorisations valid until revoked, and both Articles 5(5) and 6(4) limit revocation to force majeure or a "serious threat to public policy, public order or national security." Nevertheless, the critical distinction remains because under Articles 5 and 6, each Member State retains an individual decision to grant or deny permission, but under Article 20(1), that decision is eliminated. It is this difference in the text that grounds the paper's conclusion that the ordinary regime and EMERS must be assessed separately. More broadly, Article 91 TFEU has long covered transport rules that incidentally condition cross-border territorial access, such as cabotage rules and dangerous-goods regulations, which are also, in a sense, regulations of "entry," yet uncontroversially accepted transport measures.[20]

Article 40 TEU reinforces this differentiated analysis as it is "balanced" post-Lisbon and protects CFSP from TFEU encroachment and vice versa, without hierarchy.[21] In C-244/17 *Kazakhstan PCA*, the Court confirmed that the centre-of-gravity test applies to CFSP/TFEU boundary disputes - in this case, stating that CFSP links not "sufficient" to require a CFSP basis may be treated as incidental.[22] In our case, the proposal does not implement any pre-existing CFSP act, and the regulatory framework originates within the transport policy space. Whether it functionally reallocates authority away from CFSP requires separate assessment for the ordinary regime and for EMERS due to the different nature of each regime regarding the preservation of Member State discretion under CFSP.

2.3. Defence mainstreaming: the transport title as a new vector

The proposal extends Steinbach's documented pattern of non-CFSP defence-mainstreaming to a previously unexplored vector using the transport title, which, unlike industrial or internal-market bases, structures physical access to territory rather than economic conditions.[23] Where earlier defence-mainstreaming mea-

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20 Rusche, *op. cit.*, note 13, pp. 944-945, par. 8-10.

21 On Article 40 TEU post-Lisbon, see Wessel, R. A., "*Legality in EU Common Foreign and Security Policy*", in Kilpatrick, C.; Scott, J. (eds), *Contemporary Challenges to EU Legality*, Oxford University Press, 2021, pp. 82-85; Lonardo, L., "*Common Foreign and Security Policy and the EU's External Action Objectives: An Analysis of Article 21 of the Treaty on the European Union*", European Constitutional Law Review, Vol. 14, No. 3, 2018, pp. 584-608.

22 Case C-244/17, *Commission v Council* (Kazakhstan PCA), EU:C:2018:662, par. 42-44. See also Case C-658/11, *Parliament v Council,* EU:C:2014:2025 par. 44; Case C-263/14, *Parliament v Council*, EU:C:2016:435 par. 43.

23 Steinbach *op. cit. 3*, pp. 1635-1638; Szép, V.; Wessel, R. A., et al., *The Current Legal Basis and Governance Structures of the EU's Defence Activities*, ENGAGE Working Paper No. 4, December 2021; Horn *op. cit.*, note 17; On the parallel deployment of industrial-policy and internal-market competences for defence purposes, and the resulting "product federalism," see Říha, M., *Do you have EU Indus-*

sures effected a "marketisation" of EU defence through economic competences, COM(2025) 847 represents what this paper terms the "territorialisation" of defence mainstreaming through transport law - a distinction not, to the author's knowledge, drawn in the literature.[24][25] This touches the sovereign prerogative at the core of Article 4(2) TEU. The adequacy of the proposal's safeguards related to that is examined in Section 6.

2.4. Provisional conclusion

Applying the Court's established methodology for the choice of legal basis to COM(2025) 847 does not yield a single answer since the non-EMERS architecture and EMERS stand on different constitutional footing.

For the non-EMERS architecture (Articles 4-16, 32-36, and supporting provisions), the transport legal basis is defensible, though not without tension. The operative content is recognisably transport-regulatory, the proposal does not implement a pre-existing CFSP act, and critically, the individual national decision to grant or deny each permission is preserved. Section 3 develops this through a proceduralisation account, while acknowledging that standing permissions create a ratchet on future sovereign discretion and compressed ad hoc timelines generate their own pressure.

For EMERS (Articles 19-21), the position is materially different. The deemed-acceptance clause (Article 20(1)) eliminates the individual national decision on territorial access. The mandatory priority-access regime (Article 21) compels service interruption. These provisions predetermine the substantive outcome by removing the decision itself. As Section 4 will argue, this pushes beyond what the transport title can plausibly sustain.

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trial policy legal basis? And can I see it?, Prague Law Working Papers Series, No. 2026/I/4, 2026, who documents the use of Article 173 TFEU and Article 114 TFEU as indirect instruments for financing defence procurement and industrial development outside the CFSP framework.

[24] The concept of "territorialisation" is employed here in a competence-analytical sense, denoting the extension of defence mainstreaming from economic competences (internal market, industrial policy) to a legal basis that structures physical access to national territory. It should be distinguished from the spatial-geopolitical concept of "vertical territorialisation" advanced by Lingevicius, J.; Martins, B. O.; Bruni, G., From the Ground to the Stars: *The Vertical Politics of the EU Drone Wall and Airspace Defence*, Journal of Common Market Studies, [2026, doi:10.1111/jcms.70092], who use the term to describe the EU's emergent multi-layered defence continuum extending from drone and counter-drone systems through air and missile defence to outer space.

[25] On competence creep through broad sectoral bases, see Garben, S., "*Competence Creep Revisited*", Journal of Common Market Studies, Vol. 57, No. 2, 2019, pp. 205-222, at p. 206.

This does not mean the entire regulation lacks the correct legal basis. The centre-of-gravity determination rests on what each cluster substantively does, not on political motivation or article-counting. The *effet utile* of the constitutional settlement requires that both the CFSP framework and the transport title be given real effect and neither should be hollowed out by the other. Assessed substantively, the non-EMERS architecture determines *how* military transport is processed within civilian infrastructure. Even within this architecture, certain provisions generate additional constitutional pressure, notably the incorporation of Council Military Requirements (Article 32) and the temporary-control framework (Article 38), which requires Member States to establish binding orders for temporary control or use of infrastructure and assets. These provisions do not, however, alter the dominant transport-regulatory character of the non-EMERS architecture, and their specific pressure points are mapped in Section 5. Therefore, the paper reaches the conclusion that the non-EMERS architecture constitutes the act's centre of gravity.

EMERS is substantively different because of what it *does,* which is the elimination of the sovereign transit decision. EMERS as drafted, is constitutionally defective as it cannot be reconciled with the transport legal basis unless narrowed to preserve some form of individual national decision.

3. THE AUTHORISATION REGIME: PROCEDURALISATION AND ITS LIMITS

If the transport legal basis is defensible for the ordinary authorisation regime, this is because the proposal employs a specific regulatory technique rather than directly harmonising substantive outcomes. Eliantonio and Muir have termed this technique "incidental proceduralisation" as the insertion of procedural rules in secondary EU law adopted based on provisions enabling the EU to develop a substantive policy.[26] In such cases, the EU shapes how Member States exercise their powers without directly prescribing what outcome they must reach. Dubos traces its origins to "a grey area of European federalism" in which the Union, lacking explicit procedural competence, uses substantive legal bases to harmonise the procedural conditions of national decision-making.[27]

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[26] Eliantonio, M.; Muir, E., "*Concluding Thoughts: Legitimacy, Rationale and Extent of the Incidental Proceduralisation of EU Law*", Review of European Administrative Law, Vol. 8, No. 1, 2015, pp. 177-204, at p. 178.

[27] Dubos, O., "*The Origins of the Proceduralisation of EU Law: A Grey Area of European Federalism*", Review of European Administrative Law, Vol. 8, No. 1, 2015, pp. 7-26.

3.1. Standing Permissions (Article 5): Proceduralisation With a Ratchet

Article 5 establishes a regime of standing military transport permissions based on open-ended, pre-authorised permissions granted by the receiving Member State for defined categories of military transport operations. In this context, three features are constitutionally significant.

First, the initial decision to grant or deny the standing permission remains formally with the receiving Member State, though it is exercised within a Union-defined baseline. The receiving Member State "shall take a decision to grant or deny" the permission within two months (Article 5(2)), and the regulation does not prescribe what that decision must be, however, standing permissions must cover at least the categories listed in Annex I (Article 5(1)), and the Commission may amend Annex I by delegated act (Article 5(10)), meaning the Union partly shapes the substantive scope of what a granted permission must encompass. This forms the textual anchor of the proceduralisation thesis as the Union harmonises the procedure and defines the minimum baseline, while the Member State retains the substantive decision on whether to open its territory at all.

Second, once granted, a standing permission is "valid until explicitly suspended or revoked" (Article 5(5)). Revocation is limited to force majeure or a "serious threat to public policy, public order or national security," and must be justified. This creates a ratchet. The initial sovereign choice is free, but its reversal is constrained. The permission, once given, generates a presumption of continued access that can be defeated only on narrow grounds. This is more than pure procedural harmonisation as it shapes the substantive landscape of future decisions by creating a default of openness.

Third, the receiving Member State may impose conditions and modify a standing permission (Article 5(3), (6)), which preserves a degree of ongoing control. But modification requires three working days' notice, and the categories of transport covered must include at least those listed in Annex I as Union-defined minimum scope.

Assessed against the principles the abstract identifies: preservation of the initial grant/deny decision is the principal reason the ordinary regime remains defensible under the transport basis, notwithstanding the substantive effects of minimum mandatory scope (Annex I), open-ended validity, narrow revocation grounds, and delegated updating of the scope categories. However, the grant/deny decision alone does not settle the conferral question. What keeps the regime on the procedural side of the line is the combination of preserved initial discretion, the national security exit valve for revocation, and the absence of deemed acceptance which

constitutes a structural combination analogous to C-43/12 *Commission v Parliament and Council*, where the Court accepted the transport characterisation in part because binding procedural obligations (information exchange) coexisted with preserved national substantive discretion (the decision whether to prosecute).[28]

The subsidiarity question is addressed by the SWD's evidence that voluntary coordination failed: 76.92% of Member States still rely on ad hoc arrangements, and only approximately 50% have integrated the EDA Technical Arrangements into national procedures.[29] This evidence supports the case for Union-level intervention but does not, by itself, justify the specific design choice of open-ended validity with narrow revocation grounds, which is the most contestable aspect of the ordinary regime's proportionality. The proportionality question, therefore, turns on whether that particular configuration falls within the legislature's margin of appreciation in choosing among proportionate means. Alternative designs could reduce this pressure. Fixed-term validity with periodic renewal, broader security-based revocation grounds, or a requirement of periodic parliamentary review at the national level would all constitute less intrusive means of achieving the same regulatory objective. The paper's assessment is that the current design nevertheless falls within the legislature's margin of appreciation, because national security remains an explicit ground for withdrawal, preventing the most acute encroachment on sovereignty. It does so, however, at the outer edge of that margin, and the ratchet effect of a regime that is easy to enter and hard to exit must be acknowledged as a constitutional cost even where the overall proportionality assessment is favourable. The legislative process may well opt for a less constitutionally exposed configuration.

3.2. Ad Hoc Permissions (Article 6): Compressed Timelines

Article 6 regulates ad hoc permissions for individual or short-notice transport operations not covered by standing permissions. The receiving Member State must decide within three working days (Article 6(3)). The revocation grounds are identical to Article 5, and the Member State may impose conditions, including specific routes, and may require police escort or other safety arrangements.

The constitutional pressure here consists in the timeline. Three working days to evaluate a potentially complex multinational military transit compresses the evaluative space within which the sovereign decision is exercised. If the timeline makes a meaningful "no" practically difficult, particularly for operations involving dangerous goods, abnormal cargo, or large-scale movements, the procedure begins to constrain the substance.

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[28] Case C-43/12 *op. cit.*, note 15, paras. 38-44.

[29] SWD(2025) 847, *op. cit.*, note 4, Section 3.1.1.

The paper's assessment is that the three-day deadline is constitutionally defensible, though at the margin. The absence of deemed acceptance does not eliminate the constitutional concern. If reality shows that the decision window is so short that refusal becomes operationally unrealistic in complex cases, the procedure constrains the substance regardless of the formal default rule. This is the strongest argument against the ordinary regime's proportionality, and the paper does not dismiss it, acknowledging that the assessment could theoretically be contested. Three considerations nevertheless mitigate, though they do not eliminate, the concern.

First, the Member State can still deny within three days and critically, silence does not trigger deemed acceptance under the ordinary regime, unlike under EMERS (Article 20(1)). The consequence of failing to decide in time is administrative delay and not automatic authorisation, which creates a qualitatively different constitutional situation.[30] Second, the Member State may attach conditions, including route restrictions, which allow risk mitigation even where outright refusal would be difficult to justify. Third, the proposal aligns with the 2024 Military Mobility Pledge, in which Member States themselves committed to a three-day standard (Recital 10), suggesting that the timeline reflects operational practice rather than Union imposition.[31]

3.3. The Constitutional Boundary

The ordinary authorisation regime thus represents proceduralisation in a constitutionally permissible degree as the Union standardises procedures without prescribing outcomes, in a structural pattern analogous to the transport measures the Court accepted in C-43/12 *Commission v Parliament and Council*.[32] Even Snell, whose objection to the transport legal basis is the most developed in the current debate, acknowledges that under the ordinary regime "the granting or refusal of authorisations is, under normal circumstances, at the discretion of the Member States."[33]

The ordinary regime is not constitutionally costless, since standing permissions create a ratchet and compressed timelines narrow the evaluative space, but the es-

[30] This is the critical difference since under Article 6, non-response within the deadline does not equal acceptance but under Article 20(1), all requests are "deemed accepted.

[31] Recital (10) of the Proposal refers to the 2024 Military Mobility Pledge, in which participating Member States committed to processing ad hoc military transport permissions within three working days. On the Pledge and its policy context, see JOIN(2025) 846 final (Action Plan on Military Mobility 2.0).

[32] Case C-43/12 *op. cit.*, note 15.

[33] Snell, J., *op. cit.*, note 5.

sential feature that separates it from EMERS remains intact because each Member State retains an individual decision that can result in denial and that can be exercised on national security grounds. Where that decision is eliminated, as Section 4 will demonstrate, the proceduralisation account breaks down and the transport legal basis is pushed beyond what it can plausibly sustain.

4. EMERS: WHERE PROCEDURALISATION BREAKS DOWN

The proceduralisation account holds for the ordinary regime because, however constrained, the individual national decision survives. EMERS (Articles 18-27) disrupts this logic. The deemed-acceptance clause (Article 20(1)) and the priority-access regime (Article 21) cross the constitutional threshold identified by this paper's procedural/substantive distinction and the existing safeguards are insufficient to reconcile EMERS with the transport legal basis.

4.1. The Deemed-Acceptance Clause: Elimination of the National Decision

Article 19 provides that EMERS may be activated by Council implementing act upon Commission proposal where there is "an existing or an expected need for significantly higher volumes, frequency or speed of military transport" that existing rules cannot meet. Activation must occur within 48 hours, for a maximum of 12 months (Article 19(3)). The conditions are broadly defined and non-exhaustive.

The constitutionally decisive provision is Article 20(1): "By way of derogation from Article 5 and 6, during the period of activation of EMERS, requests for military transport permissions shall be deemed accepted by the receiving Member States." This replaces the individual national grant/deny decision, identified in Section 3 as the constitutional anchor of the ordinary regime, with automatic acceptance. In such a situation, the requesting Member State needs only to notify the receiving Member State six hours before arrival at the border crossing point (Article 20(2)). This can be dissected into three main constitutional objections.

Firstly, on the conferral, the proceduralisation thesis holds for the ordinary regime because the Union regulates how, while the Member State decides whether. Under Article 20(1), there is no "whether", and the decision is predetermined by the regulation itself. The receiving Member State may determine traffic arrangements (Article 20(3)), but it cannot refuse transit. What has been displaced is not a procedural parameter but the sovereign decision on territorial access. This is precisely the line Snell draws: "Member States would thus lose their ability to control the armed forces entering their territory. This directly affects the core functions of the

state and national security as referred to in Article 4(2) TEU,[34] and on this point, the paper agrees with Snell.

Secondly, on the Article 4(2) TEU reservation, that provision requires the Union to respect "their essential state functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State." The deemed-acceptance clause removes the individual Member State's ability to exercise that responsibility in respect of each specific military transit during the activation period. The safeguard clause in Article 20(1) using the formula "without prejudice to the specific character of the security and defence policies of certain Member States" is too vague to constitute an effective exit valve and its operational meaning is unclear. Does it permit a neutrality-based opt-out? A case-by-case refusal on specific security grounds? Or is it merely a declaratory recital-style saving? The proposal does not specify that, and the absence of specificity represents in itself a constitutional deficiency. If Article 4(2) TEU requires the Union to respect essential State functions including national security, then an instrument that eliminates the individual sovereign decision on military transit must contain a safeguard whose scope and operation are sufficiently clear to permit the Member State to know whether it may refuse, and the Court to review whether the balance required by Article 4(2) TEU has been maintained. A clause whose operative content cannot be determined fails to perform that function.[35]

A narrower counter-reading is conceivable. The "without prejudice" clause may have been intended solely to accommodate the specific position of neutral or non-aligned Member States, such as Austria, Ireland, or Malta, rather than to preserve a general right of refusal for all Member States. Even on this narrower reading, however, the clause remains constitutionally insufficient. A neutrality-specific saving would leave non-neutral Member States without any mechanism to refuse individual transits during EMERS on national security grounds unrelated to neutrality, which is a result that Article 4(2) TEU, applying to all Member States without distinction, cannot easily accommodate.

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[34] Snell, J., *op. cit.*, note 5.

[35] Klamert, M., *Commentary on Article 4 TEU*, in Kellerbauer, M.; Klamert, M.; Tomkin, J. (eds), The EU Treaties and the Charter of Fundamental Rights, Oxford University Press, 2019, par. 22-23, observing that the requirement to respect essential State functions does not amount to an inherent general exception excluding security-related measures from the scope of EU law, and that Article 4(2) TEU does not create an obligation to give priority to national interests over Union interests. On the related but distinct derogation under Article 346 TFEU, see *Kellerbauer, M., Commentary on Article 346 TFEU*, *ibid.*, p. 2051, par. 5-6.

Thirdly, on democratic legitimacy, EMERS is activated by a Council implementing act, adopted by a qualified majority (Article 19(2)-(3)). A Member State can therefore be outvoted on activation and subsequently be required, under Article 20(1), to accept military transits it did not consent to permit. If EMERS is correctly characterised as displacing sovereign security and defence decisions rather than regulating transport procedure, routing it through the transport title and qualified majority voting (hereinafter: QMV) deprives the CFSP/CSDP institutional safeguards, in particular the unanimity requirement of Article 42(4) TEU, of practical effect. As Wessel observes, Article 40 TEU is designed to protect precisely these procedural distinctions.[3637]

4.2. Priority Access: Obligations on Member States and Private Actors

Article 21 requires Member States and infrastructure owners, operators, and managers to "grant military transports priority access" across all modes. Ongoing or planned civilian services "shall be interrupted, postponed or cancelled" to allow priority access (Article 21(6)). No compensation is due to affected transport users (Article 21(7)).

This provision raises concerns under the Charter of Fundamental Rights (hereinafter: the Charter), specifically Article 17 (right to property) and Article 16 (freedom to conduct a business), which this paper flags without exhaustive analysis, as the abstract limits its scope to competence and institutional questions. Infrastructure owners, operators, and managers are compelled to interrupt, postpone, or cancel civilian services (Article 21(6)), while the no-compensation rule of Article 21(7) applies to "other affected transport users." Both features are constitutionally intrusive. The first imposes direct obligations on private actors, the second denies remedy to those whose services are displaced.[38] Any such limitation must, under Article 52(1) of the Charter, be provided for by law, respect the essence of the right, and comply with proportionality which are requirements that merit further analysis beyond this paper's scope.[39]

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36 Wessel *op. cit.*, note 21 pp. 82-85.

37 Besides that the European Economic and Social Committee has called for "structured democratic oversight at EU and Member State level over the activation and use of military mobility derogations and priority mechanisms, including regular reporting to parliaments": EESC Opinion on COM(2025) 847, 2025, par. 1.14.

38 The EESC has similarly called for compensation on a tort law basis for logistics and transport operators, including employees, who suffer direct damage from military transport prioritisation: EESC Opinion on COM(2025) 847, 2025, par. 1.7.

39 See also Rumenov, I.; Tasev, D., *Cultural Heritage, Property Rights, and Cross-Border Disputes: The Influence of J. Paul Getty Trust and Others v. Italy on National Legislation and Private International Law*,

4.3. Comparison With Other Emergency Instruments

EMERS is not without precedent in EU emergency governance. The Internal Market Emergency and Resilience Act (IMERA - Regulation 2024/2747) similarly provides for graduated emergency modes with Council activation, temporary derogations, and enhanced coordination obligations.[40] Article 122 TFEU has been deployed as the basis for emergency measures in economic crises and the COVID-19 pandemic.[41] Cinnirella identifies an emerging "supranational model" of EU emergency powers, in which sectoral legislation incorporates dormant emergency frameworks that can be activated by institutional decision.[42]

EMERS fits within this trajectory but exceeds it in one critical respect. As far as the author of this paper is aware, there is no EU emergency instrument that compels acceptance of the physical transit of foreign sovereign actors across Member-State territory. IMERA's emergency mode imposes information obligations, priority-rated orders, and coordination requirements, but it does not displace the sovereign decision on territorial access, which constitutes a qualitative, not merely quantitative, difference.

4.4. Conclusion on EMERS

EMERS represents a pre-emptive codification of emergency military-transport powers. In principle, such codification offers a constitutional advantage over ad hoc improvisation by subjecting emergency authority to predefined conditions, temporal limits, and institutional safeguards. But the specific design of Article 20(1) is constitutionally incapable of achieving this purpose. Additionally, White has argued in the broader context of EU emergency governance that pre-emptive regularisation of the exception raises problems of its own, including the risk of normalising executive discretion and fostering the appetite to invoke emergency powers beyond what is strictly necessary.[43]

EU and Comparative Law Issues and Challenges Series (ECLIC), Issue 9, 2025, pp. 3-20. comparing the reconciliation of individual property rights with an overriding public or sovereign interest as a recurring theme in European fundamental-rights adjudication under Article 1 of Protocol No. 1 ECHR, the Convention analogue to Article 17 of the Charter.

40 Somssich, R., "*How Resilient Will the Internal Market Emergency and Resilience Act Be*?", Common Market Law Review, Vol. 62, 2025, pp. 797-832.

41 Chamon, M., "*The Non-Emergency Economic Policy Competence in Article 122(1) TFEU*", Common Market Law Review, Vol. 61, 2024, pp. 1501-1526; Calleja, R.; Rusche, T. M.; Shipley, T., "*EU Emergency - Call 122?*, Columbia Journal of European Law, Vol. 29, 2024, pp. 520 ff.

42 Cinnirella, C., "*Emergency Powers' of the European Union: An Inquiry on the Supranational Model",* European Papers, Vol. 10, No. 3, 2025, pp. 525-553.

43 White, J., "*Constitutionalizing the EU in an Age of Emergencies*", Journal of Common Market Studies, Vol. 61, 2023, pp. 781-796.

The strongest defence of Article 20(1) would read the "without prejudice" clause as preserving an individual right of refusal on security grounds, via interpretative integration with Article 4(2) TEU. But that reading produces an internal contradiction. The provision cannot simultaneously mean that all requests are deemed accepted and that each Member State may refuse on specific security grounds. If the clause permits refusal, deemed acceptance is emptied of content but if it does not, the safeguard is purely declaratory. This incoherence is itself evidence that the provision, as drafted, has not resolved the constitutional tension it generates.

By eliminating the individual national decision on territorial access and providing only a vague safeguard, EMERS compresses national security discretion to a degree that the transport title cannot plausibly sustain. This is no longer a mere constitutional strain but a mismatch between the regulatory technique (transport-law derogation) and the substantive operation performed (displacement of sovereign territorial-access decisions).

The paper accordingly concludes that EMERS in its current form requires at least the modification of the deemed-acceptance mechanism to preserve some form of individual national decision. This could be done, for example, by replacing deemed acceptance at least with an accelerated permission procedure subject to a 24- or 48-hour deadline, with refusal permitted on national security grounds. Alternatively, Snell has suggested that the emergency provisions might require a separate constitutional architecture, either within CFSP or through bilateral agreements, following the logic of C-440/05 *Commission v Council*, where different components of a policy area required different legal bases.[44]

5. INFRASTRUCTURE, SOLIDARITY, AND THE BROADER CONSTITUTIONAL PROFILE

Beyond the authorisation regime and EMERS, the proposal contains infrastructure-readiness, capability-pooling, and asset-control provisions that shape its overall constitutional profile. Three features are constitutionally significant and merit identification as likely axes of possible contestation.

[44] Snell, J., *op. cit.*, note 5; in: C-440/05 *Commission v Council,* the Court there held that certain provisions could not validly be adopted on the transport basis; it did not, however, positively endorse a specific split-instrument architecture. The question of whether Article 122 TFEU or a dedicated CFSP instrument could provide a more appropriate basis for the emergency chapter merits further research beyond this paper's scope.

5.1. The Incorporation of Council Military Requirements Into Transport Law

Article 32 requires Member States to upgrade dual-use infrastructure along military mobility corridors to "the transport infrastructure requirements defined in Annex II to the Council Military Requirements." The Council Military Requirements were approved by the Council within an intergovernmental defence-planning context, rather than enacted as part of the transport regulation itself. Article 32 gives them legal effect through a transport regulation adopted under the ordinary legislative procedure, creating a normative bridge between intergovernmental military planning and supranational transport law.

The constitutional significance is that, while Article 32 itself sets substantive priorities (network continuity, gauge migration, bridge reinforcement, throughput capacity), it does so by importing and operationalising an external benchmark of Annex II to the Council Military Requirements. The SWD estimates that implementing the resulting infrastructure upgrades along military mobility corridors requires investment exceeding EUR 100 billion.[45] Whether this constitutes an exercise of transport competence or an operationalisation of defence-readiness policy is a question the proposal does not address, and the centre-of-gravity analysis in Section 2 treats as part of the non-EMERS architecture that remains transport-regulatory in character. That assessment holds because the infrastructure obligations concern transport capacity, for example, bridge reinforcement, gauge migration, throughput enhancement, rather than military command. But the dependence on externally defined Council Military Requirements introduces a defence-policy input into the transport-law framework that deserves continued scrutiny.

5.2. The temporary control framework and the Solidarity Pool

Two further provisions share a common constitutional logic. Both extend the proposal's reach beyond procedural harmonisation into the material availability of transport assets for military use - one through coercive domestic powers, the other through funding-linked coordination.

Article 38 requires each Member State to establish a framework for issuing "binding orders to obtain the temporary control or right of use over an infrastructure, asset or equipment located on its territory which is necessary for the execution of military transport operations." This is framed as a last resort, applicable only where "no alternative solution can be achieved through mutual agreement or under an

[45] SWD(2025) 847, Section 1.2. Approximately 500 "hotspot" projects have been identified for priority implementation along the four military mobility corridors.

existing contract within the required timeframe" (Article 38(1)). Compensation must be provided (Article 38(2)(b)), and measures must be "strictly necessary and proportionate" (Article 38(3)).

Article 38 is among the most constitutionally intrusive non-EMERS provisions. It mandates a quasi-requisitioning power[46] exercised by the Member State, not by the Union, but required to exist by the regulation. The fundamental-rights implications (Article 17 Charter - right to property; Article 16 - freedom to conduct a business) are apparent and merit analysis that exceeds this paper's scope. The last-resort and proportionality requirements mitigate, but do not eliminate, the concern.

The Solidarity Pool (Article 35) creates a separate constitutional dynamic. Registration of capabilities is voluntary for Member States, but mandatory for capabilities "acquired or contracted with the financing support of any Union funding" (Article 35(4)). During EMERS, Article 25 adds a stronger consequence: if capabilities acquired, contracted, or purchased with Union funding could support priority requests, Member States may not invoke the exceptional-situation carve-out in Articles 35(10)-(11) to withhold those capabilities. Together, these create a graduated conditionality because Union funding triggers mandatory registration, and during EMERS, it precludes withdrawal of registered capabilities that could support priority requests as a form of financial conditionality applied to defence logistics, consistent with the broader pattern documented by Steinbach.[47]

5.3 Likely Axes of Contestation

Three axes of contestation are identifiable. Firstly, the incorporation of Council Military Requirements into binding transport law could face objections from Member States that resist importing intergovernmentally approved military planning standards into a regulation adopted under the ordinary legislative procedure, a concern grounded in the conferral principle and the CFSP/TFEU demarcation. Secondly, the temporary control framework (Article 38) could be contested under Articles 16 and 17 of the Charter, from both infrastructure operators and Member States concerned about the precedent of Union-mandated requisition-type powers exercised at the national level. Thirdly, the Solidarity Pool's financial conditionality, consisting in a mandatory registration of Union-funded capabilities in combination with the EMERS-triggered constraint on withdrawal (Article 25) may be contested by Mem-

[46] Power to compel temporary control over privately held assets against the owner's will, subject to compensation.

[47] On financial conditionality in EU defence policy, see Steinbach *op. cit.*, note 3, pp. 1655-1660.

ber States that wish to retain full discretion over assets acquired with Union support. These axes are flagged for further research rather than resolved here.

6. SYNTHESIS OF CONSTITUTIONAL PRESSURE POINTS

COM(2025) 847 generates constitutional pressure at several identifiable points. Not all of these engage the same legal standard or produce the same legal consequence. This section distinguishes four types of constitutional challenge that the proposal may face in the legislative process or, if adopted, before the Court.

6.1. Legal Basis

The analysis in Sections 2 to 4 concludes that the transport legal basis is defensible for the non-EMERS architecture but not for EMERS as currently drafted. The centre-of-gravity assessment locates the act's predominant content in the transport-regulatory provisions while identifying the deemed-acceptance mechanism (Article 20(1)) as a structural mismatch between the chosen legal basis and the substantive operation performed. This differentiated conclusion presupposes that EMERS is severable from the remainder of the act without altering its remaining substance.[48]

However, the severability question is not self-evident, given that EMERS-linked provisions permeate other chapters of the proposal, notably the Solidarity Pool conditionality (Article 25) and the priority-access regime (Article 21). Snell, for his part, argues that the authorisation provisions constitute "one of the core elements" and cannot be severed.[49] The paper does not share that assessment insofar as the permanent architecture, comprising the authorisation regime, infrastructure-readiness provisions and solidarity mechanisms, retains independent regulatory meaning without EMERS. A full resolution of the severability question nevertheless exceeds the scope of this paper and would need to be tested against the Court's established severability case law.

6.2. Conferral and Proportionality

The second type of challenge accepts the transport legal basis but argues that specific provisions exceed the limits of that competence. Two distinct objections

[48] On partial annulment and severability, see e.g. Case C-244/03, France v Parliament and Council, EU:C:2005:299, par. 12-13; Case C-263/14, Parliament v Council, EU:C:2016:435, par. 47. The Court permits partial annulment only where the provisions to be annulled are severable from the remainder of the act without altering its substance.

[49] Snell, J., *op. cit.*, note 5.

arise. The first is a conferral objection under Article 5(2) TEU, as the Union may act only within the limits of the competences conferred. If a provision performs an operation that the transport title cannot sustain, which this paper argues is deemed acceptance, the problem is not that the measure goes further than necessary, but that the Union lacks competence for what the provision actually does.

The second is a proportionality objection under Article 5(4) TEU. Even where competence exists, the specific design must not exceed what is necessary.[50] For the ordinary regime, the most contestable proportionality point is the design of standing permissions with open-ended validity with narrow revocation grounds, assessed against the legislature's margin of appreciation. For the non-EMERS infrastructure provisions, Article 32's incorporation of Council Military Requirements and Article 38's temporary-control framework are vulnerable to proportionality challenge, the former because it operationalises externally defined defence-planning standards, the latter because it mandates a quasi-requisitioning power.

6.3 National Security Prerogatives

The third type of challenge invokes the Treaty-level protection of national security under Article 4(2) TEU, which requires the Union to respect essential State functions, including safeguarding territorial integrity and national security. As Klamert observes, this requirement does not amount to an inherent general exception excluding security-related measures from the scope of EU law, nor does it create an obligation to give priority to national interests over Union interests.[51] It does, however, require that the Union demonstrate respect for these functions, which entails a balancing exercise in which the intensity of the Union measure is weighed against the degree of interference with the national security prerogative.

The deemed-acceptance clause is the provision most directly engaged by Article 4(2) TEU. By eliminating the individual national decision on military transit, Article 20(1) compresses Member States' ability to exercise their national security prerogative in respect of each specific operation, which becomes acute when combined with QMV activation, as Section 4 demonstrated. The distinction between Section 6.1 and this section should be noted. Section 6.1 concerns whether the Union has used the correct legislative procedure, and this section concerns wheth-

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50 Klamert, M., *Commentary on Article 5 TEU*, in: Kellerbauer, M.; Klamert, M.; Tomkin, J. (eds), *op. cit.*, note 19, paras. 33–35.

51 Klamert, M., *Commentary on Article 4 TEU*, in: Kellerbauer, M.; Klamert, M.; Tomkin, J. (eds), *op. cit.*, note 36, paras. 22-23.

er Article 4(2) TEU operates as a substantive limit on what even a correctly based act can require of Member States.

A related but distinct question is whether Member States could invoke Article 346(1)(b) TFEU to resist specific obligations under the proposal. This paper does not pursue that question in depth, because Article 346(1)(b) is framed around measures connected with "the production of or trade in arms, munitions and war material" which is a scope that does not naturally encompass compelled acceptance of military transit across territory, which concerns the physical movement of armed forces rather than defence products.[52]

6.4 Charter Rights

The fourth type of challenge concerns fundamental rights under the Charter, specifically the right to property (Article 17) and the freedom to conduct a business (Article 16). The priority-access regime (Article 21) compels private infrastructure operators to interrupt civilian services, while the no-compensation rule (Article 21(7)) denies redress to other affected transport users, which is a combination that raises the sharper rights concern. The temporary-control framework (Article 38) raises related but partly mitigated concerns, because it includes express compensation and proportionality safeguards. Any such limitation must satisfy Article 52(1) of the Charter. This paper flags but does not exhaustively analyse these rights questions, which merit dedicated treatment in further research.

7. CONCLUSION

COM(2025) 847 is constitutionally defensible in some respects and constitutionally defective in others. The transport legal basis is capable of sustaining the proposal's permanent architecture, such as the authorisation regime, infrastructure-readiness provisions, and solidarity mechanisms, because these provisions standardise the procedures through which Member States process military transport rather than predetermining the outcome. The individual national decision to grant or deny permission survives, even if it is exercised within a Union-defined baseline of minimum scope, open-ended validity, and narrow revocation grounds. This assessment extends to the authorisation regime and infrastructure-readiness provisions, though not without qualification. As Section 5 demonstrated, certain non-EMERS provisions, notably the temporary-control framework (Article 38)

[52] On the strict interpretation of Article 346 TFEU, see Kellerbauer, M., *Commentary on Article 346 TFEU*, in Kellerbauer, M.; Klamert, M.; Tomkin, J. (eds), *op. cit. 36*, p. 2051, pars. 5-6; Randazzo, V., *Article 346 and the qualified application of EU law to defence*, EUISS Brief, 2014.

and the EMERS-linked conditionality of the Solidarity Pool (Articles 35 and 25), reach beyond procedural harmonisation into the material availability of transport assets. These provisions generate their own constitutional pressure, but they do not cross the threshold of substantive predetermination identified by this paper, because the underlying sovereign decisions, whether to establish a requisitioning framework and whether to register capabilities, remain with the Member State.

However, EMERS, as currently drafted, cannot be sustained on the same basis. The deemed-acceptance clause (Article 20(1)) eliminates the individual national decision, which is the very feature that makes the ordinary regime constitutionally viable. The priority-access regime (Article 21) adds direct obligations on private infrastructure operators and denies compensation to affected transport users. The safeguard clause in Article 20(1) is operationally ambiguous, so it cannot simultaneously mean that all requests are deemed accepted and that each Member State may refuse on specific security grounds. This internal contradiction reveals that the provision has not resolved the constitutional tension it generates.

The paper's central analytical contribution, which lies in the distinction between procedural regulation and substantive predetermination, is offered as a doctrinal criterion for assessing where sectoral TFEU competences can sustain defence-adjacent measures. Articles 91 and 100(2) TFEU can sustain measures that proceduralise military transport decisions, but they cannot sustain measures that displace the sovereign decision on whether foreign armed forces may cross national territory. That is the line EMERS clearly crosses.

Beyond COM(2025) 847, the proposal marks a new frontier in EU defence mainstreaming. Where earlier instruments effected a "marketisation" of EU defence through industrial and internal-market competences, this proposal represents the "territorialisation" of defence mainstreaming through transport law and structuring physical access to territory, not merely economic conditions. How far this vector extends will depend on whether the constitutional discipline of conferral, proportionality, and national security prerogatives proves adequate to the task. That is a question not for this paper alone, but for the legislative process, the Member States, and ultimately the Court.

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Review article

DIGITAL MARKETING AND CYBERSECURITY IN HEALTH TOURISM: A COMPARATIVE ANALYSIS OF SPA AND HEALTH RESORTS IN CROATIA AND SLOVENIA

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ABSTRACT

Health tourism is one of the most dynamic segments of the contemporary tourism industry, particularly within the European Union, where the free movement of patients and the availability of cross-border healthcare services drive growing demand for specialised health tourism offerings. In this environment, digital marketing has become a key instrument for the international positioning of healthcare institutions, while the ongoing digitalisation of business processes simultaneously generates increasing requirements for cybersecurity and the protection of personal and health-related data.

* The authors disclose the use of ChatGPT and Google translate exclusively as auxiliary linguistic tools for translating limited excerpts and ensuring terminological consistency. These tools were not used for generating substantive content, legal analysis or conclusions, all of which remain the sole responsibility of the authors.

Spa and health resorts constitute a core segment of health tourism in Croatia and Slovenia, drawing on natural healing resources, medical expertise, and a long-standing tradition of rehabilitation and disease prevention. To remain competitive in the European market, these institutions are increasingly utilising digital communication and sales channels, including official websites, social media platforms, and online booking systems, in which data security is an integral component of their digital presence. This paper aims to analyse and compare how spa and health resorts in Croatia and Slovenia integrate digital marketing and cybersecurity into their business and communication practices. Particular emphasis is placed on the role of cybersecurity in digital advertising, online booking processes, and data management, as well as on its visibility in public communication directed at service users. Methodologically, the paper is based on an analysis of relevant European Union legal and regulatory frameworks, including NIS 2, the Cybersecurity Act, the Cyber Solidarity Act, and the Cyber Resilience Act, as well as a comparative case study of selected spas and health resorts in Croatia and Slovenia. The empirical component of the research includes a qualitative analysis of official websites and digital communication channels, as well as a survey focusing on managerial and marketing practices within these institutions. The results of the comparative analysis indicate that Croatian and Slovenian health resorts have a well-developed, functional digital presence, including official websites, online booking and payment, and active use of social networks. The main similarities concern the recognition of digital channels as a means of information dissemination, promotion, and building user trust. The main differences concern the intensity of content publishing, the dynamics of paid advertising, and the extent of multilingual website adaptation.

An empirical preliminary study conducted on a sample of health resorts in Croatia and Slovenia found that digital marketing is perceived as an important factor for international visibility, while cybersecurity is mainly viewed as an integral part of responsible digital business, rather than as an obstacle to digital advertising. The results indicate a high number of official websites, extensive use of digital advertising and social networks, but also limited adoption of advanced digital solutions and insufficient employee education. The main challenges are the protection of sensitive data, regulatory compliance, developing a security culture, and the high costs of investing in cybersecurity.

The paper offers both theoretical and practical contributions to the discussion of the importance of cybersecurity as a fundamental element of the sustainable and competitive development of health tourism within the European context.

***Keywords**: Cybersecurity, Digital transformation, Digital marketing, EU regulatory framework, Health tourism*

1. INTRODUCTION

Health tourism is increasingly emerging as one of the most important specialised forms of tourism. Its significance stems from the integration of health, rehabilitation, preventive, and tourism services into a comprehensive offer aimed at maintaining and improving users' health. The development of health tourism in Europe is further driven by increasing patient mobility, greater accessibility of health services, and growing demand for high-quality and affordable healthcare-related tourism. Within health tourism, health resorts stand out as an important segment

in both the Republic of Croatia and the Republic of Slovenia. Health resorts are based on natural healing factors, which constituted the origins of health tourism, medical and rehabilitation services, and a long tradition of preventive and therapeutic treatment. Although both countries, Croatia and Slovenia, possess natural and institutional prerequisites for the development of this form of tourism, there are still differences between them, primarily with regard to the level of market profiling. Digital transformation has significantly influenced the way health tourism providers operate and communicate. In particular, online reservation systems, online payment systems, and digital communication tools such as official websites, social media, and digital marketing have led to increased market visibility, more effective communication with users, and greater service availability. At the same time, the increased use of digital processes has further highlighted the importance of information system security and data protection, particularly in sectors that process highly sensitive personal and health-related data. Cybersecurity has therefore emerged as a critical issue in modern data management within health tourism sector. Therefore, the importance of cybersecurity is not limited solely to the technical protection of information systems; it also encompasses protecting the confidentiality, integrity, and availability of data, preserving business continuity, and the mitigation of legal and other risks. This paper analyses the integration of digital marketing and cybersecurity within the health tourism sector, with a special focus on health resorts in Croatia and Slovenia. The paper aims to analyse and compare how health resorts in these countries incorporate digital marketing and cybersecurity into their business and communication practices. The paper is based on an analysis of relevant European and national cybersecurity legal frameworks, and a qualitative assessment of the digital presence of selected health resorts. Furthermore, a preliminary study was conducted with a convenience sample of employees from Croatian and Slovenian health resorts who held management, marketing, IT, or related positions. The paper is structured into six sections. Following the introduction, the second section outlines the concept of health tourism and the characteristics of its development in Croatia and Slovenia, with a special focus on health resorts as an important segment thereof. The third section provides an overview of cybersecurity through general concepts and definitions, describes the European network of legal acts through the most important documents of the European Union, and analyses and compares the Croatian and Slovenian national cybersecurity systems. The fourth section addresses digital marketing in health tourism and provides a qualitative analysis of the digital presence of selected health resorts. The fifth section presents the results of the survey on the integration of digital marketing and cybersecurity in health resorts, outlines the research limitations, and offers recommendations for future research. The sixth section presents the concluding remarks.

2. THEORETICAL DEFINITION OF HEALTH TOURISM

Health tourism is one of the oldest forms of tourism, yet it remains one of the most dynamic segments of the tourism industry. Its development is particularly emphasised in the context of the European Union, where the free movement of patients and the availability of cross-border healthcare services stimulate demand for specialised health tourism offerings. Health tourism can be divided into three main segments: medical tourism, spa tourism, and wellness tourism. Medical tourism focuses on invasive and non-invasive medical procedures; spa tourism is based on the use of natural healing factors such as thermal waters, medicinal mud, and favourable climatic conditions, while wellness tourism encompasses activities aimed at maintaining and improving health through recreation, balanced nutrition, and relaxation.[1] For destinations, health tourism extends the tourism season year-round and attracts guests with higher purchasing power, thereby serving as an important factor in economic development and in strengthening international competitiveness. Geić points out that health tourism involves staying outside one's place of permanent residence for the purpose of treatment and health improvement through the use of natural healing factors and medical procedures.[2] After the theoretical definition of health tourism, the following analysis examines the position and development of health resorts in the Republic of Croatia and the Republic of Slovenia as important components of the overall health tourism offer.

2.1. Comparative Characteristics of the Development of Health Resorts in Croatia and Slovenia

Among the various forms of health tourism, health resorts stand out as a particularly traditional and recognisable segment of this sector. Health resorts represent an important component of health tourism in the Republic of Croatia and the Republic of Slovenia. Their development is based on the use of natural healing resources, together with the gradual expansion of services towards medical and rehabilitative care. In these countries, health resorts constitute an important segment of the overall health tourism offer. Although both countries use natural resources for healthcare purposes, there are certain differences in the organisation of services, market orientation, level of investment, and strategic approach to developing this segment. The Republic of Croatia has significant comparative advantages in developing health tourism: high-quality healthcare services, qualified medical staff, destination safety,

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1 Smith, M., *et al.*, *Balkan Wellbeing and Health tourism study*, 2016, Available at: [BalkanWellbeingFINALREPORT.pdf], Accessed 19 March 2026.

2 Geić, S., *Menadžment selektivnih oblika turizma*, Sveučilišni studijski centar za stručne studije u Splitu, Split, 2011, pp. 81-83.

competitive prices, and an abundance of natural healing resources. Health resorts are particularly prominent as specialised institutions that use thermal and mineral waters, medicinal mud, and climatic conditions for prevention, treatment, and rehabilitation under professional medical supervision. Telišman-Košuta and Marušić emphasise that the key success factors of Croatia include its favourable geographical position, good transport accessibility, membership in the European Union, high levels of safety, service quality combined with a good price-to-quality ratio, and well-preserved natural resources.[3] Despite its considerable potential, Croatia has yet to fully capitalise the opportunities for developing health tourism. One of the main reasons is the strong focus on seasonal coastal tourism, which means that health tourism and health resorts are still not sufficiently integrated into the year-round development model of the tourism offer.

Unlike Croatia, the Republic of Slovenia has developed a more systematic and internationally recognised model of health tourism, particularly in the health and wellness segments. Slovenia relies on a long tradition, developed infrastructure, and stronger integration of health and tourism services. A key competitive advantage for Slovenia lies in its rich natural healing resources, particularly thermal and mineral waters, which underpin the development of numerous health resorts. Recently, Slovenia has been further profiled as a sustainable and green destination, emphasising a healthy lifestyle, prevention, and a holistic approach to health. The Republic of Slovenia has been implementing a green environment policy since 2022, with an implementation plan extending to 2028, aiming to achieve added value with a smaller ecological footprint.[4] The focus is on energy efficiency, the renovation of medical capacities, and the expansion of accommodation capacity.[5] Furthermore, the development of health resorts and wellness tourism in Slovenia has been accompanied by stable investment cycles aimed at modernising infrastructure, digitalising business operations, and using renewable energy sources. Such an approach contributes to strengthening the competitiveness of Slovenian health resorts and their market positioning. From a comparative perspective, Croatia and Slovenia share a similar resource base for developing health tourism but differ in the degree of integration of healthcare and tourism services, the level of market positioning, investment dynamics, and the strategic approach to

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3 Telišman-Košuta, N.; Marušić, Z.. *Percepcija Hrvatske kao destinacije zdravstvenog turizma na tržištu posrednika – kvalitativno istraživanje, Konačni izvještaj*, 2018, Available at: [https://www.htz.hr/sites/default/files/2019-07/Zdravstveni%20turizam_Percepcija%20Hrvatske_Konacni%20izvjestaj_23042018_FIN.pdf2018], Accessed 19 March 2026.

4 Slovenian Tourism Strategy 2022–2028*,* May 2022, Available at: [https://www.gov.si/assets/ministrstva/MGTS/Dokumenti/DTUR/Strategija-slovenskega-turizma-20222028-/SLOVENIAN-TOURISM-STRATEGY-2022-2028-v2.pdf], Accessed 18 March 2026.

5 *Ibid.*

development. While Croatia possesses significant natural and professional potential, it still needs stronger integration between the healthcare and tourism sectors, whereas the Slovenian model appears to be more systematic and internationally recognised. It is precisely these similarities and differences that provide an important framework for the further analysis of digital presence and the integration of digital marketing and cybersecurity into the business operations of health resorts.

3. ASPECTS OF CYBERSECURITY

Cybersecurity has become an indispensable part of the economy, development, defence, and other important segments of society. Cyberattacks, due to their unpredictability, their potential to cause significant damage, and their ability to spread rapidly across national borders, represent a major priority for the European Union (EU) and its Member States. Today, cybersecurity encompasses everything from cybercrime to state-sponsored attacks. The rapid advancement of technologies and the sophistication of attack methods continue to pose significant challenges.[6] The concept of cybersecurity should be understood as extending far beyond a merely technical issue. This area plays a crucial role in promoting economic stability, enhancing investment attractiveness, and fostering innovation potential.[7]

3.1. Concept and Meaning of Cybersecurity

Cybersecurity is one of the most significant challenges of the 21st century. Conceptually and theoretically, it can be observed as part of information security and national security, and it is certainly closely related to the protection of critical infrastructure. The interweaving of different domains, such as political, social, economic, and security domains, such as defence, demonstrates the complexity and demanding nature of this field. The costs of cybersecurity[8], as well as the costs of security breaches, are increasing globally.[9] Companies need to allocate significant resources in order to cope with cybersecurity risks; additionally, to remain competitive, they must keep pace with rapid technological change through

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6 Svete, U., *Cybersecurity between technological determinism, political governance and national security challenges*, Journal of Comparative Politics, Vol. 2, No. 2, 2025, p. 108.

7 Ravlić, S.; Unukić, I., *Uloga kibernetičke sigurnosti u jačanju regionalne gospodarske otpornosti: Institucionalne i geopolitičke perspektive*, Festung: časopis za interdisciplinarna istraživanja u poslovanju, No. 2, 2025, p. 143.

8 ConCERT conference held in February 2026 showed that the costs of damage caused by cyberattacks are increasing. In addition to official data, it is clear that the real figures are more significant, since a part of cyberattacks are never reported and therefore not included in official statistics.

9 Saeed, S. *et al.*, *Digital Transformation and Cybersecurity Challenges for Business Resilience: Issues and Recommendations*, Sensors, Vol. 23, No. 15, article no. 6666, 2023, p. 2.

continuous investment.[10] To understand any field, particularly one as complex as cybersecurity, clear definitions of key concepts are essential to ensure a shared and consistent understanding. There are no universally accepted definitions of cybersecurity or related concepts[11], and differences in definitions can be found both in legal acts and in scientific and professional literature.[12] The NIS 2 Directive[13] provides definitions of several terms, some of which are defined by referring to other legal acts.[14] For example, cybersecurity and cyber threats are defined by reference to Regulation (EU) 2019/881.[15] According to that legal act, cybersecurity encompasses all activities necessary for protection against cyber threats affecting network and information systems, their users, and other persons affected by them. In contrast, a cyber threat denotes any possible circumstance, event, or action that could damage, disrupt, or otherwise adversely affect network and information systems, their users, and other persons. The NIS 2 Directive defines an incident as an event that threatens the availability, authenticity, integrity, or confidentiality of stored, transmitted, or processed data or services offered by or accessible through network and information systems.[16]

3.2. EU Cybersecurity Legal Framework

The fundamental EU document in the field of cybersecurity is Directive EU 2022/2555 (NIS 2 Directive) of 14 December 2022.[17] Significant organisational and functional differences in the implementation of cybersecurity solutions have been identified among Member States. The Directive aims to establish minimum

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10 *Ibid.,* pp. 10-11.

11 O debade, A. T.; Benkhelifa, E., *A comparative study of national cyber security strategies of ten nations*, 2023, [https://doi.org/10.48550/arXiv.2303.13938], Accessed 12 March 2026.

12 Florido-Benitez, L., *The role of cybersecurity as a preventive measure in digital tourism and travel: a systematic literature review*, Discover Computing, Vol. 28, No. 1, 2025, p. 4.
Using the example of the definition of the notion cybersecurity, the author showed how attitudes can be different through as many as 27 more or less different definitions of one and the same term.

13 Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 [2022] OJ L333/80.

14 The same way of defining is used in Law on Cybersecurity (Zakon o kibernetičkoj sigurnosti), Official Gazette, No. 14/2024.

15 Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 [2019] OJ L151/15.

16 Directive (EU) 2022/2555, note 14.

17 *Ibid.*

standards for cybersecurity capabilities and coordination across the entire EU. [18] The Directive expands its scope and coverage, thus increasing the number of entities or sectors, which are divided into key and important sectors, namely sectors of high criticality and other critical sectors. The health sector is explicitly designated as a key sector, i.e. a sector of high criticality. Member States can no longer independently determine entities, as harmonised criteria have been introduced to ensure consistency across national systems. Particular emphasis has been placed on the need for cooperation and data exchange. In order to achieve this, obligations regarding the designation of competent authorities and rules governing their work and cooperation have been established; at the same time, the EU has established additional bodies and organisations.[19] Deadlines and obligations for notifying competent authorities and reporting cyber threats or incidents are clearly defined. Furthermore, risk assessment and risk management constitute central elements of the cybersecurity framework, aimed at ensuring business continuity and minimising the adverse effects of incidents on service users and other services. Substantial penalties in cases of non-compliance and supervisory obligations within clearly defined deadlines have been established, without leaving such decisions to the discretion of Member States. In addition, the obligation to develop a comprehensive national strategy and the need to raise awareness of the importance of cybersecurity are prescribed. Based on the NIS 2 Directive, the EU Member States have further harmonised their cybersecurity frameworks by establishing minimum requirements for the functioning of a coordinated regulatory system across Member States. [20] The deadline for transposition of the NIS 2 Directive into national legislation was 17 October 2024.

In addition to the NIS 2 Directive, there are several other acts regulating this area, such as the Cyber Resilience Act of 23 October 2024 as Regulation (EU) 2024/2847[21], which emphasises that cybersecurity is one of the key challenges facing the EU, with far-reaching implications for the economy, democracy, security, and public health. The EU addresses these challenges by increasing resilience. The Act defines conditions for the development of secure products with digital elements, ensuring that hardware and software products with fewer vulnerabilities are brought to the market and that manufacturers assume responsibility for

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18 Svete, *op. cit.,* note 7, p. 117.

19 For example, Network EU-CyCLONe, Network of national CSIRTs, Cooperation group etc.

20 Council Recommendation (EU) 2025/C 3445 of 6 June 2025 on an EU blueprint for cyber crisis management, OJ C 2025/3445.

21 Regulation (EU) 2024/2847 of the European Parliament and of the Council of 23 October 2024 on horizontal cybersecurity requirements for products with digital elements and amending Regulations (EU) No 168/2013 and (EU) 2019/1020 and Directive (EU) 2020/1828 (Cyber Resilience Act) 2024 OJ L327/15.

cybersecurity throughout the entire product lifecycle, including the design, development and production. Prior to this act, there was no horizontal regulatory framework in the EU establishing comprehensive cybersecurity requirements for products with digital elements. With the aim of building cybersecurity capabilities for skills development, and enabling a faster detection of cyber threats and incidents and a more rapid response, Regulation (EU) 2025/38 of 19 December 2024, known as the Solidarity Act, was adopted.[22] It defines the need to establish a European cybersecurity alert system. The CSIRT system, as envisaged by the NIS 2 Directive, is an information exchange system, whereas the European alert system envisaged here is intended to represent a new capability that complements the CSIRT system. Member States retain primary responsibility for prevention, preparedness, response, and assistance, which is provided through the promotion of solidarity among Member States and the availability of technical assistance in situations of significant cyber incidents.

In addition, the EU legal framework also includes Regulation (EU) 2019/881 of 17 April 2019 on ENISA – the Cybersecurity Act. This act establishes ENISA – the European Union Agency for Cybersecurity – as a centre of expertise. The Agency has several objectives, including promoting cooperation, contributing to the strengthening of capabilities and capacity building, promoting awareness, education, research, and innovation, contributing to the development and implementation of EU policies and law, fostering international cooperation, and others.

EU activities in the field of cybersecurity should also be briefly considered in connection with recent developments on the geopolitical scene. The EU's efforts to create conditions for digital independence are increasingly coming to the forefront. The normative framework of the EU is particularly strong; however, to create conditions suitable for strengthening technological sovereignty, investments in domestic technologies and infrastructure are also required.[23] The plan for the digital decade also includes reducing dependence on other regions when it comes to key digital capacities.[24]

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22 Regulation (EU) 2025/38 of the European Parliament and of the Council of 19 December 2024 on measures to strengthen solidarity and capacities in the Union to detect, prepare for and respond to cyber threats and incidents and amending Regulation (EU) 2021/694 (Cyber Solidarity Act) [2025] OJ L38/1.

23 Lider, Europe searching for digital freedom, Available at: [https://lidermedia.hr/zeleno-i-digitalno/digitalna-sloboda-europa-trazi-izlaz-iz-zamke-tehnoloskih-divova/]. Published 18 May 2025. Accessed 04 March 2026.

24 Digital future for Europe, European Council, Available at: [https://www.consilium.europa.eu/hr/policies/digital-transition/], Last change 11 November 2025. Accessed 04 March 2026.

3.3. Cybersecurity in the Health Sector

The health sector is defined in the EU legal framework as a sector of high criticality, while tourism is not explicitly mentioned. Health resorts combine these two areas. Cybersecurity in the health tourism sector includes protecting sensitive and confidential patient or user data, business processes, business continuity, and digital and other infrastructure. The impact of cyberattacks, that is, their consequences, may be significant and include, among other things, extortion, blackmail, and the sale of data on the dark web and other platforms.[25] The European Action Plan on the cybersecurity of hospitals and healthcare providers of 15 January 2025[26] is a response to the urgency of the situation and the unique threats facing the health sector. The issue of ensuring cybersecurity is extremely complex, and the solution is seen in prevention, detection of cyber threats, response to attacks, and recovery therefrom. Digital transformation in the health sector and its interconnection with other sectors further increase the importance of cybersecurity. The health sector is regularly targeted by cyberattacks by individuals and groups, as well as by state-sponsored campaigns.[27] Improving the digital skills of healthcare professionals, as well as enhancing healthcare information structure in response to the growing application of new and complex technologies in medicine and healthcare, represents an important component of addressing cybersecurity challenges.[28] The importance of employee education also arises from the fact that, within the cybersecurity triad of people, processes, and technology, the human factor has proven to be the weakest link. Research shows that employee actions are responsible for the majority of cybersecurity incidents.[29] In general, and especially in the health sector, it is necessary to ensure at least a basic level of cyber hygiene and to foster a strong culture of cybersecurity.[30] ENISA has issued the document Cyber Hygiene

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25 Alarfaj, K. A.; Rahman, M. H., *The Risk Assessment of the Security of Electronic Health Records Using Risk Matrix*, Applied Sciences, Vol. 14, No. 13, 2024, p. 4.

26 European action plan on the cybersecurity of hospitals and healthcare providers, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Directorate-General for Health and Food Safety, Available at:
[https://health.ec.europa.eu/publications/european-action-plan-cybersecurity-hospitals-and-healthcare-providers_en/], COM(2025) 10 final, Brussels, 15 January 2025.

27 Belani, H. *et al.*, *SWOT analiza informacijske i kibernetičke sigurnosti u zdravstvenim ustanovama Hrvatske*, Bilten Hrvatskog društva za medicinsku informatiku, Vol. 28, No. 1, 2022, p. 2.

28 *Ibid*., p. 5.

29 Šolić, K. *et al.*, *Comparative Study on Online Security Awareness and Behavior Among Healthcare Professionals in Croatia,* 2024 47th MIPRO ICT and Electronics Convention, IEEE, 2024, p. 1803, [https://ieeexplore.ieee.org/abstract/document/10569325], Accessed 11 March 2026.

30 European action plan on the cybersecurity of hospitals and healthcare providers, note 28.

in the Health Sector,[31] which contains guidelines with simple and implementable measures for protection. The aim is to help all types of healthcare entities reduce cyber risks and strengthen their resilience.

According to ENISA data from 2023, the health sector reported the highest number of security incidents in the software or hardware vulnerabilities segment. The same source states that ransomware accounted for 54% of all analysed cyber incidents in the health sector during 2021-2023. Of these incidents, 83% were financially motivated, while 10% were ideologically motivated. According to the Commission's 2024 report, 71% of attacks affecting patient care were ransomware-type attacks. Ransomware is often combined with the leakage of patient data.[32]

Additionally, according to Eurobarometer data, in 2024, only 25% of surveyed companies in the field of healthcare, education and social protection provided training or implemented awareness-raising activities related to cybersecurity. Human error remains the largest contributor to cyber incidents in the health sector, further strengthening the argument for the importance of education and cybersecurity awareness.[33] The same source states that the largest share of companies using external providers for cybersecurity tasks comes from the healthcare, education, and social protection domains, accounting for 57% of surveyed companies. In 2024, an estimated shortage of about 299,000 qualified cybersecurity experts in the EU was reported.[34]

The health sector is among the most frequently targeted and most vulnerable sectors, according to recent data. Sensitive patient data is one reason this sector is particularly attractive to ransomware attacks. Data protection is crucial for safeguarding confidential and sensitive data and ensuring data integrity, given the ethical, legal, and health-related consequences. [35] Cybersecurity in the health sector should primarily ensure protection against data loss or theft, disruption of business processes, financial losses, and physical damage to infrastructure.[36]

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31 ENISA document with recommendations for cyber hygiene in health sector, Available at: [https://www.enisa.europa.eu/sites/default/files/2025-09/ENISA%20Cyber%20Hygiene%20in%20the%20Health%20Sector.pdf], Accessed 04 March 2026.

32 European action plan on the cybersecurity of hospitals and healthcare providers, p. 3, note 28.

33 *Ibid.*

34 *Ibid.*

35 Anson, A. *et al.*, *Ransomware attacks on healthcare systems: Case studies and mitigation strategies,* 2023, [https://www.researchgate.net/publication/376514138_Ransomware_Attacks_on_Healthcare_Systems_Case_Studies_and_Mitigation_Strategies], Accessed 11 March 2026.

36 *Ibid.*

3.4. Croatian and Slovenian Cybersecurity Systems

As Member States of the European Union, the Republic of Croatia and the Republic of Slovenia have transposed the NIS 2 Directive into their respective national legal frameworks and share a common foundation for establishing cybersecurity at the national level. Croatia adopted the Cybersecurity Act[37], which entered into force on 15 February 2024[38], while Slovenia transposed the NIS 2 Directive through its act on information security[39], which entered into force on 19 June 2025. In Croatia, the National Cybersecurity Strategy from 2015[40] remains in force, while in Slovenia, the Cybersecurity Strategy of the Republic of Slovenia from 2016 is in force. [41] The comparison of the Croatian and Slovenian systems is based on two fundamental documents, the law and the strategy. Croatia transposed the NIS 2 Directive among the first EU member states, while the Slovenian law entered into force eight months after the deadline set by the Directive. Although both states share the same goals deriving from the Directive, they have adopted different solutions in establishing their systems. Croatia regulated only the field of cybersecurity through its law, whereas Slovenia adopted a law regulating information security, with cybersecurity as part of that field. Consequently, Slovenian provisions include, for example, provisions on security checks for employees or job candidates, as well as provisions on specific characteristics of working hours in this field. Such provisions do not exist in Croatian legislation, since this area is regulated by other laws and bylaws. Although Slovenian regulations more frequently link cybersecurity to national security[42], the law does not place the central national authority within the security and intelligence system, as in the Croatian model. Croatia has placed its National Cybersecurity Centre within the

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37 Cybersecurity Act (Zakon o kibernetičkoj sigurnosti), Official Gazette, No. 14/2024.

38 In addition to the Cybersecurity Act (Zakon o kibernetičkoj sigurnosti), Croatia also adopted Regulation on Cybersecurity (Uredba o kibernetičkoj sigurnosti), Official Gazette, No. 135/2024, which entered into force 30 November 2024 and also Decision on the adoption of the National Cybercrisis Management Program (Odluka o donošenju Nacionalnog programa upravljanja kibernetičkim krizama), dated 09 January 2025 [https://ncsc.hr/hr/nacionalni-program-upravljanja-kibernetickim-krizama], Accessed 11 March 2026.

39 Information Security Act (Zakon o informacijski varnosti), Official Gazette of the Republic of Slovenia, No. 40/25.

40 National Cybersecurity Strategy (Nacionalna strategija kibernetičke sigurnosti), Official Gazette, No. 108/2015 entered into force 7 October 2015.

41 Cybersecurity Strategy of the Republic of Slovenia (Strategija kibernetske varnosti), Available at: [https://www.gov.si/assets/ministrstva/MDP/DID/Cyber_Security_Strategy_Slovenia.pdf], Accessed 11 March 2026, entered into force February 2016.

42 In the Slovenian strategy, the concept of national security is mentioned through the document in a total of eight places. For the first time already in the very introduction on the first page of the strategy, when it states how cybersecurity has become an important and integral part of national security.

Security and Intelligence Agency, which is certainly one of the key institutions of the national security system.[43] By contrast, the competent national authority in Slovenia is the Government Office for Information Security. The Slovenian intelligence and security agency retains competence in specific segments; it does not serve as the central authority within the cybersecurity system.

Both laws divide the entities to which they apply into key and important entities, that is, sectors of high criticality and other critical sectors. The Croatian law, in addition to those specified in the NIS 2 Directive, includes the education system in the second group, while the Slovenian law additionally includes local self-government within public administration in the same category. These two states are among the few EU Member States that have adopted only one national cybersecurity strategy to date. [44] Following the adoption of the NIS 2 Directive and the corresponding national laws, neither state has changed its strategy or adopted a new one. Both strategies, as strategic documents, were adopted at approximately the same time and set out their respective goals and corresponding measures. The Slovenian strategy provides an overview of the situation at the time of its adoption, a review of risks, a system scheme, and a SWOT analysis. The Croatian strategy does not contain these elements but instead, it sets out, for example, guiding principles, and is complemented by an Action Plan for implementation, adopted to facilitate the systematic monitoring of the Strategy's implementation.

In addition to comparisons of systems based on legal regulations, the literature also contains analyses grounded in the assessment of the state of cybersecurity itself. One approach to analysing the state of cybersecurity includes three indicators: level of penetration (LP), level of digitalisation (DL), and the Global Cybersecurity Index (GCI). The GCI represents the sum of five elements: legal, technical, organisational, capacity development, and cooperation.[45] According to research conducted in 2024, eight EU Member States are considered to have below-average GCI results, and nineteen have above-average scores. Slovenia is in the former group, and Croatia is in the latter. [46] Although the Croatian strategy is characterised by fewer goals, it has nevertheless achieved above-average GCI results.[47] In addition, there is another significant difference between the two systems, namely

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43 Security and Intelligence System Act (Zakon o sigurno-obavještajnom sustavu) Official Gazette No. 79/2006, 105/2006 entered into force 16 August 2006.

44 Fujs, D.; Bernik, I., *Analyzing cybersecurity of the European Union: Challenges and Opportunities for Public Administration*, Elektrotehniški vestnik, Vol. 91, No. 1–2, 2024, p. 12.

45 *Ibid.*, p. 10.

46 *Ibid.*, pp. 11-12.

47 *Ibid.*, p. 12.

the SK@UT system. [48] Some states, as part of their infrastructure, use sensors designed for the fast and efficient detection of cyberattacks; Croatia is one of these states. The SK@UT system, implemented in 2019, is a national system for detecting cyber threats and safeguarding cybersecurity. It comprises a network of sensors that monitor traffic and detect anomalies and potential threats in real time. This system is recognised as one of the three leading solutions in the EU.[49]

There are numerous examples of attacks on the health sector. [50] Probably the best-known attack on the health sector in Croatia occurred in June 2024 at KBC Rebro. Open sources made it possible to follow the entire incident, which served as an additional incentive to raise awareness of the importance of this segment and to implement the legal framework of the NIS 2 Directive more timely and effectively.[51] One example of an attack on the health sector in Slovenia is a ransomware attack that in 2019 affected the information system of Lekarna Ljubljana. As a result of the attack, the electronic systems of around 60 pharmacies in the Ljubljana area ceased functioning, and for a period, medicines were dispensed solely on paper prescriptions. [52]

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48 Official website of the National Centre for Cybersecurity about SK@ut system, Available at: [https://ncsc.hr/hr/skaut]. Accessed 04 March 2026.

49 Svete, *op. cit.,* note 7, pp. 112-113.

50 Although they do not apply nor to Slovenia or Croatia, let us mention some other examples of cyberattacks.
EU documents mention an example of an attack on Vastaamo. It is a Finnish company that provided a psychotherapy service and was attacked by a ransomeware attack. The result of the attack was the theft of patient dana, but also extortion. The attack took place in 2018, but was not discovered until 2020. Source European action plan on the cybersecurity of hospitals and healthcare providers, note 28.
Let us also mention the cyberattack which is believed to be the first cyberattack on a healthcare system that resulted in the death of a patient. Synnovis is a healthcare instituion that was the victim of a ransomware cyberattack in June 2024. The cyberattack resulted in the delay or cancellation of its services and affected over 11,000 different scheduled medical procedures. Some of the stolen confidential and sensitive dana was made public during the same month. In adition to the above, the cyberattack is believed to have resulted in the death of one of the patients. Source, Available at: [https://www.england.nhs.uk/synnovis-cyber-incident/], Accessed 11 March 2026 and [https://www.hipaajournal.com/patient-death-linked-to-ransomware-attack/], Accessed 04 March 2026.

51 Information about the cyberattack on KBC Zagreb, Available at: [https://www.dnevno.hr/vijesti/soa-se-oglasila-o-kibernetickom-napadu-na-kbc-zagreb-isticemo-i-jos-jednu-vaznu-stvar-2466699/], Accessed 17 February 2026.

52 Information about the cyberattack on Slovenian pharmacies, Available at: [https://net.hr/danas/svijet/hakeri-napali-slovenske-ljekarne-pao-centralni-informaticki-sustav-pacijenti-otezano-do-lijekova-a8c672a6-b9f2-11ec-a54f-0242ac130011?amp=1], Accessed 11 March 2026.

4. DIGITAL MARKETING IN HEALTH TOURISM

Digital marketing most commonly includes tools such as official websites, social media, email, and digital advertising. Biloš et al. state that digital marketing encompasses the use of digital technologies, Internet platforms, and online communication channels to plan, implement, and optimise marketing activities, with particular emphasis on user interaction, content personalisation, and the measurement of communication effectiveness in the digital environment.[53] Saputra argues that integrating digital marketing creates opportunities for more precise market targeting, improved customer engagement, and the optimisation of the user experience. At the same time, its implementation may be hindered by technical limitations, changes in organisational culture, and a lack of understanding of digital technologies. Therefore, the successful integration of digital marketing requires investment in organisational resources, support from top management, and the development of data-driven decision-making.[54] In the field of healthcare, digital marketing assumes additional importance because it is not limited to an institution's market positioning but it also involves providing information that may influence health literacy and patients' decisions. Bavrka and Bošnjak emphasise that digital marketing in healthcare entails the integration of online strategies for the promotion of medical services and the provision of information to patients. Despite its advantages, digital marketing in healthcare requires careful handling of personal data in order to ensure patient security and trust.[55] In the context of health tourism, digital marketing has an even broader function, as it relates not only to the promotion of healthcare services but also to the presentation of the destination, accommodation, additional amenities, and the overall stay experience. Cristóbal-Fransi et al. stress that an online presence is essential for tourism stakeholders and that health resorts represent an important resource for building the image of wellness and health tourism destinations. This suggests that the digital presence of health tourism destinations is not merely a technical issue of online visibility but also a matter of competitiveness, reputation, and market positioning.[56] Furthermore, official websites represent an important tool of digital marketing in health tourism. They provide users with access to basic information

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53 Biloš, A.; Turkalj, D.; Kelić, I., *Micro-moments of user experience: An approach to understanding online user intentions and behavior,* CroDiM: International Journal of Marketing Science, Vol. 1, No. 1, 2018, pp. 57-67.

54 Saputra, A., *The Importance of Digital Marketing Integration in Strategic Management Planning*, Action Research Literate, Vol. 8, No. 5, May 2024.

55 Bavrka, T.; Bošnjak, D., *Uloga digitalnog marketinga u promociji zdravstvenih usluga*, SKEI – Međunarodni interdisciplinarni časopis / International Interdisciplinary Journal, Vol. 5, No. 1, May 2024, pp. 101–111.

56 Cristóbal-Fransi, E. *et al.*, *The challenge of digital marketing in health tourism: the case of Spanish health resorts*, Qualitative and Quantity, 2023.

about the institution, service types, therapies, wellness and medical facilities, accommodation capacity, location, pricing, and online booking options. Websites are also key instruments in the design of digital communication campaigns.[57] In addition to websites, social media also play an important role, enabling health tourism providers to communicate directly with users. John et al. note that social media in health tourism are most commonly used for disseminating information and interacting with online audiences.[58] Smith and Wallace emphasise that social media have become a key communication tool in the promotion of health resort services. They are regarded as one of the most important marketing strategies for increasing user loyalty.[59] Their value is particularly evident in their capacity for regular content publishing, presenting benefits and services, sharing visual materials, and creating an impression of accessibility. Kaur and Kumar further emphasise that, despite certain limitations associated with the use of social media in health resort marketing, their advantages outweigh the identified disadvantages.[60] An additional dimension of digital communication is represented by digital advertising. Elrod and Fortenberry state that digital advertising involves the paid use of mass media to deliver messages to a target audience and represents one of the most common and effective ways of engaging both existing and potential patients. Although due to a traditionally conservative approach, digital advertising in the health sector has developed more slowly than in other industries, it is now firmly established and widely used in healthcare organisations worldwide. Its importance lies in the ability to target messages precisely, segment audiences, and measure campaign effectiveness, which makes it a particularly relevant tool for health tourism as well, where competition is strong, and user decisions often depend on the quality and persuasiveness of digital presentation.[61]

4.1. Comparative Analysis of the Digital Presence of Terme Tuhelj and Terme Olimia

Digital channels such as official websites, social media, and digital advertising in health tourism are gaining importance; therefore, an analysis of the online pres-

[57] Marine-Roig, E. *et al.*, *Measuring gastronomic image online*, International Journal of Environmental Research and Public Health, Vol. 16, No. 23, 2019.

[58] John, S.; Larke, R.; Kilgour, M., *Applications of social media for medical tourism marketing: an empirical analysis*, Anatolia, Vol. 29, No. 4, 2018, pp. 553–565.

[59] Smith, M.; Wallace, M., *An Analysis of Key Issues in Spa Management: Viewpoints from International Industry Professionals*, International Journal of Spa and Wellness, Vol. 2, No. 3, 2019, pp. 119–134.

[60] Kaur, K.; Kumar, P., *Social Media: A Blessing or a Curse? Voice of Owners in the Beauty and Wellness Industry*, The TQM Journal, Vol. 34, No. 5, 2022, pp. 1039–1056.

[61] Elrod, J. K.; Fortenberry, J. L. Jr., *Advertising in Health and Medicine: Using Mass Media to Communicate with Patients*, BMC Health Services Research, Vol. 20, 2020, article no. 818, pp. 1-8.

ence of service providers is crucial for understanding communication with users. For the purposes of this paper, a comparative analysis of the digital presence of Terme Tuhelj and Terme Olimia was conducted, as they represent Croatian and Slovenian health resorts. Table 1 contains the basic elements of online presence, such as the functionality of official websites, presence and frequency on social media and paid advertising.

Table 1: Comparative analysis of the digital presence of Terme Tuhelj (Croatia) and Terme Olimia (Slovenia)

Element of analysis	**Terme Tuhelj (Croatia)**	**Terme Olimia (Slovenia)**
Official website	Yes	Yes
Multilingual website	HR, ENG, SLO, DEU, ITA, PYC	HR, ENG, SLO, DEU, SRP, ITA, PYC
Online reservation system	Yes	Yes
Online payment for services	Yes	Yes
Facebook presence	Yes	Yes
Instagram presence	Yes	Yes
Use of paid advertising	Yes (continuous)	Yes (seasonal)
Social media posting frequency	High	Moderate to high

Source: Compiled by the author, based on an analysis of the official websites of Terme Tuhelj and Terme Olimia, their official profiles on social media, and the Meta Ads Library platform

The comparative analysis shows that both institutions have a well-developed digital presence. Terme Tuhelj and Terme Olimia have their own official websites, online booking is enabled, as well as online payment. Both institutions actively use social media, specifically Facebook and Instagram. Despite the similarities, there are also certain differences. Terme Tuhelj continuously uses paid digital advertising, while Terme Olimia is characterised by a seasonal approach to advertising. The above indicates a different marketing dynamic, as well as adjustments to promotional activities during periods of increased demand. The differences are also visible in the multilingualism of the official websites. Terme Olimia offers a greater number of languages, which indicates a stronger focus on the international market. Also, differences are visible in the frequency of posting on social media. Terme Tuhelj is more active than Terme Olimia. These results indicate that both spas recognise the importance of social media for communicating with users, but approach them with different intensity. In conclusion, digital presence does not only represent an additional promotional advantage but also becomes an important factor in competitiveness and availability of services, and can influence the building of trust among users.

5. INTEGRATION OF DIGITAL MARKETING AND CYBERSECURITY IN HEALTH RESORTS

5.1. Research Methodology

The research was conducted from February 1 to March 15, 2026, using a structured online questionnaire created in Google Forms. The questionnaire was designed specifically for the purposes of this study and was based on the established research objectives as well as the theoretical and regulatory frameworks governing digital marketing, data protection, and cybersecurity in health tourism. The questionnaire consists of 20 questions organised into four thematic sections. The first section covers digital marketing in the spa business, the second cybersecurity and data protection, the third the integration of digital marketing and cybersecurity, and the fourth covers the challenges and perspectives of their integration in the spa business. Closed-ended questions, multiple-choice questions, five-point Likert-scale items, and one open-ended question were used.

When presenting the research results, more precisely, when displaying certain graphs, the number of responses may vary because three questionnaire items were optional. These questions concerned the assessment of the connection between cybersecurity and digital advertising, and priorities for future development. The above questions are not necessarily equally applicable to all respondents, given the diversity of respondents' professional roles within the institutions. Therefore, the results of the above questions were analysed and interpreted based on the number of valid responses, more precisely, on 11 respondents, whereas all other results were based on the total convenience sample of 13 respondents.

Content validity of the questionnaire was ensured by aligning the questionnaire items with the research objectives and the key concepts discussed in the theoretical part of the paper, while a check for clarity and terminological consistency was carried out before distribution. Since this is an exploratory study conducted on a smaller convenience sample and the questionnaire is not based on standardised multi-item measurement scales, formal reliability testing, such as the calculation of Cronbach's alpha coefficient, was not performed. This limitation was taken into account when interpreting the results, which should be regarded as preliminary and exploratory. The average time required to complete the questionnaire was approximately 10 minutes. The collected data were analysed using descriptive statistical methods.

The population framework of the study was formed based on publicly available sources and official websites of health tourism institutions in Croatia[62] and Slove-

[62] Katalog projekata zdravstvenog turizma Ministarstva zdravstva Republike Hrvatske, Uprave za zdravstvenu zaštitu, Available at:

nia[63]. According to the National Programme - Action Plan for the Development of Health Tourism, 24 relevant health institutions were identified in Croatia, including special hospitals for medical rehabilitation, health resorts and spas, while the official list of Slovenian thermal spas and health institutions included 14 entities. A convenience sampling approach was employed in the study. Respondents were purposively selected through a review of the official websites of the selected health resorts and spas and by identifying publicly available contact details of individuals in management, marketing, IT and related positions, who were assumed to possess relevant knowledge of digital marketing, data protection and cybersecurity. A total of 23 institutions were contacted, including 11 in Croatia and 12 in Slovenia. Institutions were contacted primarily by email, and to a lesser extent by telephone, whereby due to the limited telephone response rate, further communication was conducted predominantly by email.

The sample included a total of 13 respondents from health spas in Croatia and Slovenia, with 61.5% of respondents coming from Croatian and 38.5% from Slovenian institutions. Given the use of the convenience sampling method and the limited number of responses, the results of the study should be interpreted as preliminary and exploratory, without the possibility of generalisation to the entire population of health tourism institutions in Croatia and Slovenia.

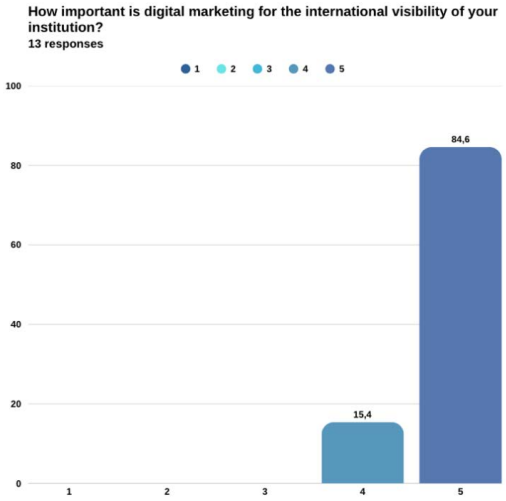
5.2. Results of the Preliminary Research

By type of institution, the most represented are medical and rehabilitation health resorts, followed by wellness and spa health resorts, thermal health resorts, and combined institutions. The results show that all observed health resorts use official websites (100%) as the primary channel of digital communication. Digital advertising (84.6%) and social networks (76.9%) are also highly represented. This confirms the dominant role of digital communication tools in the promotion of services. E-mail marketing is used by 61.5% of institutions, which indicates a relatively significant presence of direct digital communication with users. Specialised health tourism platforms are used to a lesser extent (30.8%), while virtual reality (VR), augmented reality (AR), and other forms of promotion are only marginally represented (7.7%). Health resorts continue to rely on conventional digital channels, while the application of more technologically advanced tools, such as artificial intelligence, is still limited.

[https://zdravlje.gov.hr/UserDocsImages/2025_Objave/Katalog%20projekata%20zdravstvenog%20turizma%202024.pdf], Accessed 03 June 2026.

63 All thermal spas and health resorts, Available at: [https://slovania-spa.si/all-thermal-spas-and-health-resorts-list], Accessed 03 June 2026.

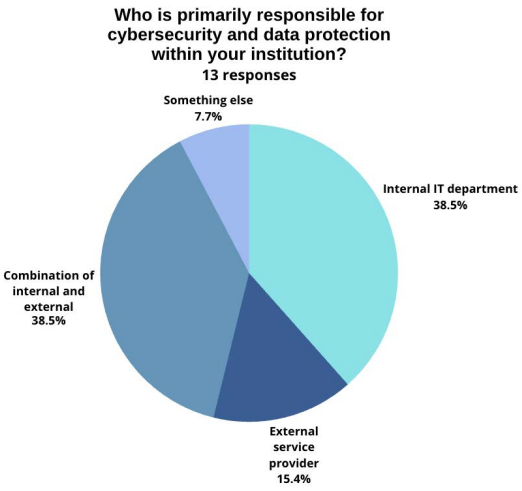
Chart 1: Assessment of the importance of digital marketing for the international visibility of the institution



Source: Compiled by the author

The results presented in Chart 1 show that the majority of respondents (84.6%) rate digital marketing as extremely important, while the remaining (15.4%) rate it as important. Given that no respondent chose lower ratings, it can be concluded that there is a clear consensus among the observed institutions on the strategic role of digital marketing in strengthening international recognition.

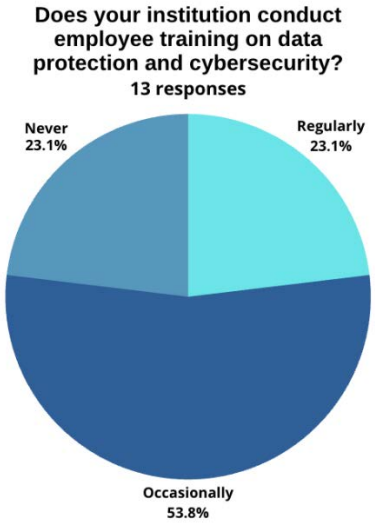
Chart 2: Primary responsibility for cybersecurity and data protection issues in the institution



Source: Compiled by the author.

The results shown in Chart 2 indicate a split model of managing security functions. In 38.5% of institutions, the internal IT department is primarily responsible, while an equal share of respondents indicates a combined model. In 15.4% of cases, security functions are entrusted to external providers, while 7.7% of respondents indicate a different organisational model. Given the results of the analysis, a hybrid approach to cybersecurity management is evident, as institutions combine internal capacities and external professional support, with the assumption of more efficient management of security risks.

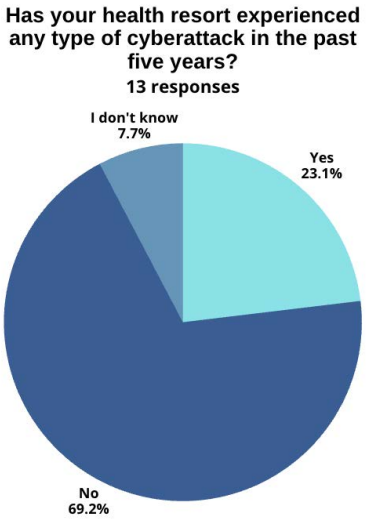
Chart 3: Implementation of employee training on data protection and cybersecurity



Source: Compiled by the author.

Chart 3 shows that employee training on data protection and cybersecurity at the observed health resorts is relatively low. Training is provided regularly in only 23.1% of facilities, while 53.8% of respondents report that it is provided occasionally. An additional 23.1% of respondents state that training is not provided at all in their facility. The results show that, despite the existence of formal data protection procedures, continuous training remains insufficiently systematically integrated.

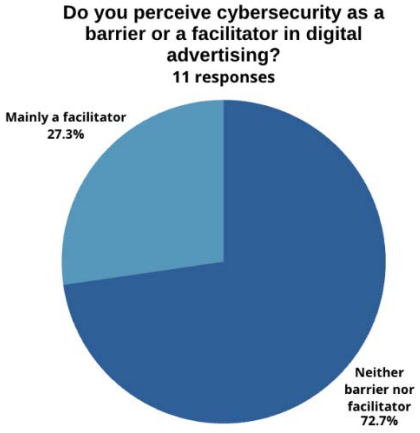
Chart 4: Experience of health resorts with cyberattacks in the past five years



Source: Compiled by the author.

Regarding cyberattacks, 69.2% of respondents report that their institution has not experienced any during the last five years. In contrast, 23.1% of respondents indicated that their institution has been exposed to a cyberattack, while 7.7% are unsure whether an attack has even been recorded at their institution, as shown in Chart 4. The results show that although most institutions have not reported cyberattacks, cybersecurity risks should not be underestimated within the health tourism sector. Therefore, it is necessary to educate employees and develop appropriate organisational mechanisms.

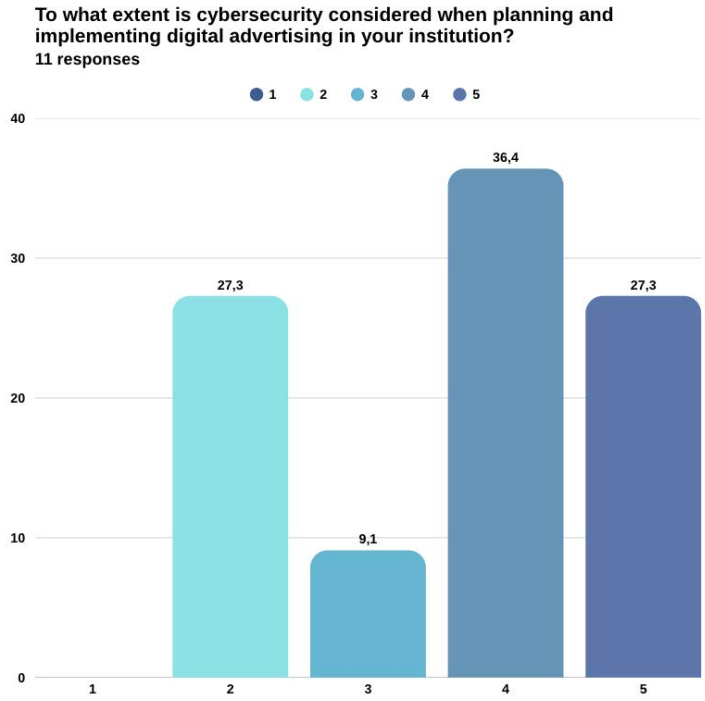
Chart 5: Perception of cybersecurity as a barrier or a facilitator in digital advertising



Source: Compiled by the author.

Chart 5 shows that respondents do not perceive cybersecurity as a limiting factor in digital advertising. A majority of respondents (72.7%) indicate that cybersecurity functions neither as a barrier nor as a facilitator. In contrast, 27.3% of respondents perceived cybersecurity as a facilitating factor, while none identified it as a barrier.

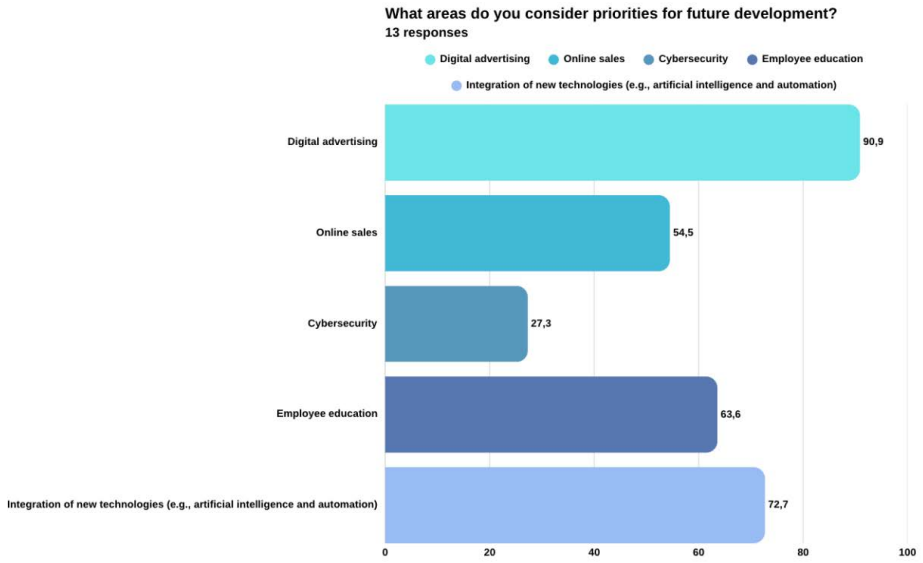
Chart 6: Level of cybersecurity involvement in the planning and implementation of digital advertising



Source: Compiled by the author.

Chart 6 shows that cybersecurity is mostly considered when planning and implementing digital advertising. The highest score of 4 was chosen by the majority of respondents (36.4%), while equal shares (27.3%) were recorded for the highest scores of 5 and 2. Score 3 was chosen by only 9.1% of respondents, while score 1 was not recorded. The above distribution indicates that cybersecurity plays a relevant role in digital advertising in most institutions, but differences in the level of integration are still visible.

Chart 7: Perception of priority areas for the future development of the institution



Source: Compiled by the author.

Respondents identify key priorities for future development in areas related to strengthening digital market presence. 90.9% of respondents singled out digital advertising, which indicates a high level of perceived strategic importance for the further development of institutions. New technologies such as artificial intelligence and automation (72.7%) and employee education (63.6%) are also considered extremely important areas. Online sales were identified as a priority in 54.5% of responses, which confirms their relevance in the context of the digitalisation of services. In contrast, cybersecurity was singled out in a smaller share, only 27.3%, which indicates that it is more often perceived as an integral part of the broader digital infrastructure.

The responses to the open-ended question: *"What do you consider to be the main challenges in integrating digital marketing and cybersecurity in the spa business?"* indicate several fundamental groups of challenges in integrating digital marketing and cybersecurity in the spa business. The most prominent theme relates to the protection of personal and particularly sensitive health data, which respondents recognise as a central issue when using digital marketing tools, online booking systems, and digital communication channels. This is directly linked to the need for compliance with the GDPR[64] (General Data Protection Regulation) and the secure

[64] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on

integration of various digital systems. The second group of challenges relates to organisational factors and human resources. Several responses emphasise the need for continuous employee education, the development of a security culture, and a clear definition of what to do in the event of a cyberattack. Therefore, it can be said that respondents do not view cybersecurity solely as a technical issue but as an area that depends on employees' competencies and the institution's organisational readiness. The third challenge relates to financial factors. Respondents state that the costs of implementing security systems are high. This indicates that the financial aspect represents an obstacle for those institutions with limited resources. In conclusion, the main challenges of integrating digital marketing and cybersecurity come down to three interrelated areas: data protection, employee education and the development of a security culture, and the financial challenge of implementing security systems in the institution.

5.3. Research Limitations and Recommendations for Future Research

The conducted research has several methodological limitations that need to be taken into account when interpreting the results. One of the key limitations of this research relates to the sample size, which includes a total of 13 respondents from health spas in Croatia and Slovenia, which limits the possibility of generalising the obtained results to the entire health tourism sector. This is partly due to the fact that the research is focused on a specific and relatively narrow population of experts employed in health spas, especially those who perform management, marketing, and related tasks, who are generally less available to participate in survey research. An additional limitation concerns potential response bias, as the research relies on respondents' statements about the practices and procedures within their institutions. Therefore, some responses may be shaped by subjective perception or by their level of information. The limitation of the research also stems from the research instrument itself. The questionnaire was developed specifically for this research and is not based on standardised multi-item measurement scales. This further indicates that the research is exploratory.

An additional limitation also applies to the comparative part of the paper, since two examples of health spas were selected for analysis, Terme Tuhelj (Croatia) and Terme Olimia (Slovenia). Therefore, the results of the comparative analysis should be interpreted as an insight into the selected cases, and not as a representative comparison of the Croatian and Slovenian health tourism sectors. The observed

the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119/1.

similarities and differences relate exclusively to the analyzed institutions and can serve as a starting point for future research on a wider sample of institutions.

Accordingly, this research can therefore be considered preliminary and represents the basis for future research on a larger and more methodologically robust sample. Also, future research should include conducting in-depth interviews with management, marketing, or IT experts within the institutions, in order to gain a deeper insight into the organisational, financial, and regulatory challenges of integrating digital marketing and cybersecurity in health tourism.

Despite the aforementioned limitations, the results obtained provide valuable insight into the practice of digital marketing and cybersecurity in health spas and contribute to a better understanding of the researched issues.

6. CONCLUSION

The development of health tourism is increasingly linked to digital transformation processes, with digital marketing and cybersecurity forming two interconnected components of the modern spa business. Digital marketing plays an important role in visibility, communication, and market positioning, while cybersecurity represents a necessary framework for data protection, regulatory compliance, and maintaining user trust.

The results of the research, based on a small convenience sample, indicate that the health spas in Croatia and Slovenia recognise the importance of digital marketing and, at the same time, appreciate the need for secure management of digital processes. The findings suggest that digital channels are widely used for promotional and communication purposes, especially through official websites, social networks, and digital advertising. At the same time, the results indicate that the integration of digital marketing and cybersecurity in practice remains uneven, particularly in employee education, the implementation of security procedures, and investments in appropriate digital infrastructure. A comparative analysis of Terme Tuhelj and Terme Olimia showed certain similarities in the development of functional digital presence, but also differences in the intensity of content publishing, the dynamics of paid advertising, and the scope of multilingual adaptation. However, the aforementioned differences should be interpreted solely in the context of the analysed cases, and not as representative indicators of general differences between the Croatian and Slovenian health tourism sectors.

Given the limitations of the research, the non-representative sample, and the exploratory nature of the empirical part, the findings cannot be generalised to the entire health and wellness tourism sector. Therefore, they should be viewed as a

preliminary insight into the selected practices and perceptions of the respondents and as a starting point for further research. Future research should include a larger, more representative sample of institutions, the use of standardised measurement instruments, and more advanced statistical methods to enable a deeper analysis of the relationship among digital marketing, cybersecurity, and the competitiveness of health and wellness tourism institutions. Despite its limitations, the research points to the importance of an integrated approach in which digital communication, protection of sensitive data, employee education, and security procedures are integral to the responsible and sustainable digital business of health spas.

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