ECLIC 9

EU AND COMPARATIVE LAW
ISSUES AND CHALLENGES SERIES

International Scientific
Conference

"Strong and Secure Europe: Legal and Economic Aspects"

EDITORS:
Tunjica Petrašević
Dunja Duić
EXECUTIVE EDITOR:
Ante Novokmet

BOOK OF PROCEEDINGS

PRAVOS
Europska komisija
Hanns Seidel Stiftung
ACADEMIA SCIENTIARUM ET ARTIUM CROATICA MDCCCLXI

EU AND COMPARATIVE LAW ISSUES AND CHALLENGES SERIES (ECLIC) – ISSUE 9
ISSN (Online): 2459-9425
Publishers:
Josip Juraj Strossmayer University of Osijek, Faculty of Law Osijek

Editors in Chief
Tunjica Petrašević, PhD, Full Professor, Faculty of Law Osijek, Croatia
Dunja Duić, PhD, Associate Professor, Faculty of Law Osijek, Croatia

Executive Editor
Ante Novokmet, PhD, Associate Professor, Faculty of Law Osijek, Croatia

Technical Editors
Veronika Sudar, LLM, Faculty of Law Osijek, Croatia
Ivan Vidaković, LLM, Faculty of Law Osijek, Croatia

Editorial Board
Dubravka Akšamović, PhD, Full Professor, Faculty of Law Osijek, Croatia
Ivana Barković Bojanić, PhD, Full Professor, Faculty of Economics in Osijek, Croatia
Boris Ljubanović, PhD, Full Professor with Tenure, Faculty of Law Osijek, Croatia
Renata Perić, PhD, Full Professor with Tenure, Faculty of Law Osijek, Croatia
Branka Rešetar, PhD, Full Professor with Tenure, Faculty of Law Osijek, Croatia
Mario Vinković, PhD, Full Professor with Tenure, Faculty of Law Osijek, Croatia
Igor Vuletić, PhD, Full Professor, Faculty of Law Osijek, Croatia
Mirela Župan, PhD, Full Professor with Tenure, Faculty of Law Osijek, Croatia
Jelena Dujmović Bocka, PhD, Associate Professor, Faculty of Law Osijek, Croatia
Ana Đanić Čeko, PhD, Associate Professor, Faculty of Law Osijek, Croatia
Barbara Herceg Pakšić, PhD, Associate Professor, Faculty of Law Osijek, Croatia
Jelena Kasap, PhD, Associate Professor, Faculty of Law Osijek, Croatia
Katarina Knol Radoja, PhD, Associate Professor, Faculty of Law Osijek, Croatia
Višnja Lachner, PhD, Associate Professor, Faculty of Law Osijek, Croatia
Nataša Lucić, PhD, Associate Professor, Faculty of Law Osijek, Croatia
Katarina Marošević, PhD, Associate Professor, Faculty of Law Osijek, Croatia
Paula Poretti, PhD, Associate Professor, Faculty of Law Osijek, Croatia
Zvonimir Tomičić, PhD, Associate Professor, Faculty of Law Osijek, Croatia
Nikol Žiha, PhD, Associate Professor, Faculty of Law Osijek, Croatia
Mato Palić, PhD, Assistant Professor, Faculty of Law Osijek, Croatia

International Editorial Board
Martin Trybus, PhD, Full Professor, University of Birmingham, United Kingdom
Richard Devlin, PhD, Full Professor, Dalhousie University, Halifax, Canada
Prof. dr. habil. Herke Csongor DSc., University of Pecs Hungary
Robert Kert, PhD, Full Professor, University of Vienna, Austria
Vid Jakulin, PhD, Full Professor, University of Ljubljana, Slovenia
Vladimir Čolović, PhD, Full Professor, Institute for Comparative Law, Belgrade, Serbia
Zlatan Meškić, PhD, Full Professor, University of Zenica, Bosnia and Herzegovina
Primož Gorkič, PhD, Associate Professor, University of Ljubljana, Slovenia
Hesi Siimets-Gross, PhD, Associate Professor, University of Tartu, Estonia
Regina Hučková, PhD, Associate Professor, University Pavol Jozef Šafárik in Košice, Slovakia
Boban Misoski, PhD, Associate Professor, Ss. Cyril and Methodius University in Skopje, Macedonia
Anneli Soo, PhD, Associate Professor, University of Tartu, Estonia
Alfonso Palacio-Vera, PhD, Associate Professor, Complutense University of Madrid, Spain
Pedro Caeiro, PhD, Assistant Professor, University of Coimbra, Portugal
Kristina Misheva, PhD, Associate Professor, Goce Delčev University of Štip, Macedonia
Valentina Colcelli, PhD, University of Perugia, Italy
Valter Moura do Carmo, PhD, University of Marilia, Sao Paulo, Brazil

EU AND COMPARATIVE LAW ISSUES AND CHALLENGES SERIES (ECLIC) – ISSUE 9

International Scientific Conference

"Strong and Secure Europe: Legal and Economic Aspects"

Editors:
Tunjica Petrašević, Dunja Duić
Executive Editor:
Ante Novokmet
BOOK OF PROCEEDINGS

In Dubrovnik, 12-13th June 2025

Publishers
University Josip Juraj Strossmayer of Osijek
Faculty of Law Osijek

For the publishers
Tunjica Petrašević, PhD, Full Professor
Dunja Duić, PhD, Associate Professor

Organizing committee
Krisztina Karsai, PhD, Full Professor
Boban Misoski, PhD, Full Professor
Tunjica Petrašević, PhD, Full Professor
Igor Vuletić, PhD, Full Professor
Mirela Župan, PhD, Full Professor with Tenure
Bojana Čučković, PhD, Associate Professor
Dunja Duić, PhD, Associate Professor
Jelena Kasap, PhD, Associate Professor
Višnja Lachner, Associate Professor
Nataša Lucić, PhD, Associate Professor
Katarina Marošević, PhD, Associate Professor
Ante Novokmet, PhD, Associate Professor
Paula Poretti, PhD, Associate Professor
Nikol Žiha, PhD, Associate Professor
Veronika Sudar, LLM, Teaching Assistant
Ivan Vidaković, LLM, Teaching Assistant

Scientific program committee
Zlatan Meškić, PhD, Full Professor (Bosnia and Hercegovina)
Vladimir Čolović, PhD, Full Professor (Serbia)
Richard Devlin, PhD, Full Professor (Canada)
Martin Trybus, PhD, Full Professor (United Kingdom)
Tunjica Petrašević, PhD, Full Professor (Croatia)
Pedro Caeiro, PhD, Associate Professor (Portugal)
Dunja Duić, PhD, Associate Professor (Croatia)
Martina Harc, PhD, The Institute for Scientific and
Artistic Work of the Croatian Academy in Osijek (Croatia)
Jelena Kasap, Associate Professor (Croatia)
Višnja Lachner, Associate Professor (Croatia)
Nataša Lucić, PhD, Associate Professor (Croatia)
Katarina Marošević, PhD, Associate Professor (Croatia)
Ante Novokmet, PhD, Associate Professor (Croatia)
Alfonso Palacio-Vera, PhD, Associate Professor (Spain)
Hesi Siimets-Gross, PhD, Associate Professor (Estonia)
Nikol Žiha, PhD, Associate Professor (Croatia)
Regina Hučkova, PhD, Assistant Professor University (Slovakia)
Kristina Misheva, PhD, Assistant Professor (Macedonia)
Valentina Colcelli, PhD (Italia)
Valter Moura do Carmo, PhD (Brazil)

Editors
Tunjica Petrašević, PhD, Full Professor
Dunja Duić, PhD, Associate Professor

Executive Editor
Ante Novokmet, PhD, Associate Professor

Print
Krešendo

ISBN 978-953-8109-65-2

International Scientific Conference

“Strong and Secure Europe: Legal and Economic Aspects“

TABLE OF CONTENT

Foreword XI

Topics

Chapter 1

Ilija Rumenov, Donche Tasev
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 3

Veronika Sudar, Sanja Mišević
FREEDOM OF SPEECH AND DEMOCRACY IN EUROPE: LEGAL CHALLENGES AND INSTITUTIONAL RESPONSES 21

Kosjenka Dumančić
HI BOSS, DON'T SEND ME AN E-MAIL WHEN I SLEEP: IMPLEMENTATION OF "THE RIGHT TO DISCONNECT" INTO THE EU LAW 42

Kosjenka Dumančić, Dominik Vuletić
LIABILITY FOR DAMAGES CAUSED BY AUTONOMOUS DRIVING VEHICLES FROM THE EU LAW PERSPECTIVE 64

Vladimir Mikić
DESIGNING EUROPEAN "POLICIES FIT FOR THE FUTURE": HOW ABOUT REVIVING THE IDEA OF A EUROPEAN FOREIGN MINISTER? 77

Eimys Ortiz-Hernández
HAPING GLOBAL TRADE NORMS: THE EU-MERCOSUR AGREEMENT AND THE EU'S ROLE IN THE INTERNATIONAL ORDER 99

Diana Treščáková
FREEDOM OF EXPRESSION ON THE INTERNET VS. DIGITAL SERVICES ACT: CHOSEN ASPECTS 127

Chapter 2

Zvonimir Jelinić
JUDICIAL LAW-MAKING AND THE UNIFORM APPLICATION OF LAW AFTER ECJ'S JUDGMENT IN THE *HANN INVEST* CASE – A MISSION FOR CROATIA AND THE LESSON FOR OTHER MEMBER STATES 147

Davorin Pichler, Marija Pavošević
CIVIL LAW ASPECTS OF THE CONFLICT OF PRIVATE AND PUBLIC INTERESTS AND REALIZATION OF GUARANTEE OF THE RIGHT OF OWNERSHIP IN THE BOUNDARY REGULATION PROCEDURE 166

Tadeusz Zembrzuski
STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION – MEASURES OF PROTECTION AGAINST MANIFESTLY UNGROUNDED CLAIMS OR ABUSIVE LITIGATION. A POLISH PERSPECTIVE 186

Maja Proso, Vedran Zlatić
THE APPLICATION OF THE LEGAL PRINCIPLES AND METHODS OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN CLIMATE CHANGE-RELATED CASES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS 201

Nikol Žiha, Marko Sukačić
THE IMPACT OF EU NATURE RESTORATION LAW ON PRIVATE PROPERTY RIGHTS – BETWEEN THE ENVIRONMENTAL PROTECTION AND THE (IN) COMPATIBILITY WITH THE ROMAN LEGAL TRADITION 224

Chapter 3

Magdalena Skibińska
SAFEGUARDING INTERESTS AND HUMAN RIGHTS OF UNACCOMPANIED MINORS SEEKING ASYLUM IN POLAND THROUGH CIVIL PROCEEDINGS..... 253

Ines Medić
BEST INTERESTS OF UNACCOMPANIED CHILDREN IN RETURN PROCEEDINGS..... 275

Ivan Šimović, Josipa Kokić
ROLE OF THE PARENTS IN THE EXERCISE OF THE CHILD'S RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION 300

Lilla Garayova
PARENTHOOD WITHOUT BORDERS - JUDICIAL COOPERATION FOR CROSS-BORDER FAMILY SECURITY IN THE EU 326

Nikol Bogdan, Daniela Šincek, Dinka Caha
SELF-EFFICACY AND EMOTIONAL REGULATION AS PREDICTORS OF DEPRESSIVE SYMPTOMS AMONG SOCIAL WORKERS: ALIGNING RESEARCH WITH EUROPEAN UNION WORKPLACE MENTAL HEALTH GUIDELINES..... 348

Aleksandra Rabrenović, Ljubomir Tintor
EXECUTION OF THE EUROPEAN COURT OF HUMAN RIGHTS JUDGMENTS RELATED TO RIGHTS OF PERSONS WITH DISABILITIES: TWO STEPS FORWARD, ONE STEP BACK?..... 373

Mira Lulić, Davor Muhvić, Ivana Rešetar Čulo
CLIMATE CHANGE AND HUMAN RIGHTS:
AN OVERWIEW OF INTERNATIONAL CASE LAW..... 391

Chapter 4

Katarina Knol Radoja, Dinka Šago
TRANSPARENCY OF CIVIL PROCEEDINGS IN THE DIGITAL AGE 429

Željka Primorac, Marija Pijaca, Božena Bulum
OPENING/FALLING OF THE BOW VISOR/RAMP AS THE CAUSE OF MARITIME CASUALTIES – LIABILITY AND INSURANCE ASPECTS..... 453

Regina Hučková
AUTOMATED DECISION-MAKING AND THE ROLE OF ARTIFICIAL INTELLIGENCE IN RESOLVING DISPUTES OVER ILLEGAL CONTENT ON DIGITAL PLATFORMS 479

Šime Jozipović, Trpimir Perkušić
LIABILITY IN A DIGITALIZED WORKPLACE: THE ROLE OF THE EU'S NEW AI FRAMEWORK BETWEEN INNOVATION AND SECURITY 491

Simona Rudohradská
PRACTICAL APPLICATION OF THE DIGITAL SERVICES ACT - THE CASE OF THE SLOVAK REPUBLIC* 521

Curzio Fossati
AI SYSTEMS AND PRODUCT LIABILITY IN THE EU: A PRIVATE INTERNATIONAL LAW ANALYSIS 545

Chapter 5

Boris Ljubanović, Josip Plišo
THE IMPACT OF LAND CONSOLIDATION ON AGRICULTURE AND RURAL DEVELOPMENT 567

Jelena Dujmović Bocka, Danijela Romić, Željka Vajda Halak
CITIZENS' ATTITUDE TOWARDS LOCAL OFFICIALS - FREQUENCY, PREVENTIVE MEASURES AND CONSEQUENCES OF AGGRESSIVE BEHAVIOUR 589

Miroslav Šeparović, Helena Majić
RESTRICTIVE MEASURES OF THE EUROPEAN UNION AND THE PROPORTIONALITY OF RESTRICTIONS ON THE FREEDOM TO CONDUCT A BUSINESS AND THE RIGHT TO PROPERTY: THE BOSPHORUS DOCTRINE AND EUROPEAN CONSTITUTIONAL PLURALISM 618

Ivana Tucak, Ivica Pavić, Žaklina Harašić
ON THE PUBLIC HEALTH CRISIS: WITH SPECIAL REFERENCE TO THE CASE LAW OF THE CROATIAN CONSTITUTIONAL COURT 648

Rebecca Lilla Hassanová, Dominika Moravcová
THE PRINCIPLE OF NON-REFOULMENT A CORNERSTONE OF REFUGEE PROTECTION OR A LEGAL FICTION? 684

Jeronim Dorotić
THE ROLE OF EUROPEAN CULTURAL CSOs IN FOSTERING THE EU'S EXTERNAL CULTURAL RELATIONS 711

Chapter 6

Aljanka Klajnšek
LINKING EU STRATEGIC GOALS WITH NATIONAL BUDGETS: INSIGHTS FROM SLOVENIA 743

Jelena Tadić Cegnar
DIGITAL LABOUR PLATFORM (DLP) REGULATION IN CROATIA..... 765

Jasminka Đojinčević
LOBBYING IN THE EUROPEAN UNION 789

Marko Tomljanović, Pavle Jakovac, Dejan Bodul
CITY OF ZAGREB'S MODEL FOR MUNICIPAL WASTE COLLECTION:
AN EXAMPLE OF BEST PRACTICE? (AN INTERDISCIPLINARY APPROACH) 819

FOREWORD

The 9th edition of the International Scientific Conference on EU and Comparative Law Issues and Challenges (ECLIC), titled "*Strong and Secure Europe: Legal and Economic Aspects*", offered another valuable opportunity for scholarly reflection and exchange on current challenges in European legal systems. With contributions from participants representing 11 countries, 35 papers, and over 100 authors including co-authors, this edition continues the tradition of bringing together legal scholars and practitioners in intellectually engaging dialogue on European legal challenges. This year, the Faculty of Law in Osijek took a step beyond established practice and organisational routines by choosing to host the conference in one of the world's and Croatia's most treasured cities — Dubrovnik, a memorable and inspiring venue, sincerely appreciated by all participants. The conference was supported by the Croatian Representation of the European Commission, the Croatian Academy of Sciences and Arts, and the Hanns Seidel Stiftung, whose sponsorship underscores the institutional recognition of ECLIC's contribution to legal science and policy discourse. Over the years, ECLIC has grown into a distinguished forum for addressing current challenges in EU law, comparative legal systems, and their intersection with economic and political frameworks.

As a keynote speaker, I was truly honoured to have been invited to open the academic programme of the conference with a lecture on the topic: "*EU Rule of Law on Trial: Institutional and Security Barriers to the EPPO's Prosecutions – Focus on Croatia*." The lecture brought critical attention to the institutional and procedural challenges of the evolving role of the European Public Prosecutor's Office (EPPO) and exposed how its work has become a source of tension between national sovereignty and supranational criminal jurisdiction, especially in politically sensitive cases involving high-ranking officials.

The EPPO has, in recent years, shaken the political and legal foundations of several Member States, including Croatia. While it was initially welcomed, the EPPO's actual investigations, especially those involving politically exposed persons, have revealed signs of systemic resistance. This was most recently demonstrated by a jurisdictional conflict between the EPPO and the Croatian State Attorney's Office in a high-profile criminal investigation involving the current Minister of Health and other officials. In that case, the Croatian Chief State Attorney unilaterally deprived the EPPO of competence, invoking national legislation without judicial oversight or procedural guarantees, raising serious concerns about compliance with both EU law and the Croatian Constitution.

At the heart of this controversy lies a fundamental question: which body qualifies as the competent judicial authority under Article 25(6) of the EPPO Regulation to resolve conflicts of jurisdiction? Many EU Member States, including Croatia, have designated their Chief Prosecutors for this role, thereby disregarding a foundational legal principle dating back to Roman law: *nemo iudex in causa sua*. Such arrangements violate both procedural fairness and the principle of judicial impartiality, given that the decision on competence entails critical factual and legal assessments, functions traditionally reserved for courts.

The constitutional gravity of these issues was recently confirmed by the Croatian Constitutional Court's decision of 8 July 2025 (USRH, U-I-5437/2024). Acting upon the request of 33 Members of Parliament, the Court chose not to address the questions substantively, but instead submitted four preliminary questions to the Court of Justice of the EU, notably asking: whether the Chief State Attorney qualifies as a "court" within the meaning of Article 25(6) of the EPPO Regulation; whether such unilateral national decision-making violates the principle of EPPO's independence; and whether the EPPO has the right to effective judicial protection against national obstruction.

Despite broad judicial support (eleven out of thirteen judges), the decision illustrates the Court's reluctance to engage with politically sensitive constitutional questions, opting instead to shift responsibility to the CJEU for matters that appear legally straightforward to most constitutional and criminal law experts.

This situation reveals the fragility of European integration in the area of criminal justice but also reaffirms the need for sustained legal reflection to safeguard the integrity of the European legal order. The ECLIC serves as a meeting point for legal experts, fostering interdisciplinary exchange and addressing complex challenges. The diversity of papers in this volume reflects the intellectual strength and growing influence of the ECLIC community.

Sincere appreciation is owed to its organisers, editors, and authors for cultivating a space that brings together expertise from across Europe. The conference's continued relevance and success testifies to its clear vision, thoughtful organisation, and engagement with pressing legal issues. In doing so, ECLIC advances European legal thought and reinforces the cornerstone of the European project: the rule of law.

Prof. dr. sc. Zlata Đurđević
Faculty of Law, University of Zagreb

Chapter 1

Original scientific paper

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

Ilija Rumenov, PhD, Associate Professor
University Ss Cyril and Methodius - Skopje, Faculty of Law "Iustinianus Primus"- Skopje
Bul. Goce Delcev 9, 1000 Skopje, Macedonia
i.rumenov@pf.ukim.edu.mk

Donche Tasev, PhD, **Researcher**
donce_tasev@yahoo.com

ABSTRACT

The European Court of Human Rights (ECtHR) case J. Paul Getty Trust and Others v. Italy can be viewed as a landmark decision in cultural heritage law influencing vast number of legal disciplines such as property law, international commercial law and private international law among others. In essence, this article examines the implication of the ECtHR decision that will have for national legislation, focusing on the balance of the right to peaceful enjoyment of possession under Article 1 of Protocol No.1 of the European Convention on Human Rights (ECHR) and the owner's rights against a state's sovereign interest in preserving cultural identity by weighing factors like the artifact's archaeological significance, the circumstances of its removal, and the acquirer's conduct. The article, is not just regarding the restitution of the famous sculpture "Victorious Youth" but it's about the legal battles that lasted for almost 50 years and the position of the ECtHR to safeguard the interest of the real owners despite the amount of time when the illicit export occurred.

In depicting the legal story behind this case, private international law becomes very important, since the lack of PIL provisions in this legal field, provide for serious problems of forum shopping and title laundering. This article also addresses the problems and challenges that the most important international agreements as the 1970 UNESCO Convention and the 1995 UNIDROIT Convention face.

Finally, the article discusses the consequences of the case J. Paul Getty Trust and Others v. Italy on all of these legal fields and how the countries can improve the legal surroundings and deter the illicit trade of cultural heritage.

Keywords: *Article 1 of Protocol No.1 of ECHR, Cultural Heritage Law, ECHR, Private International Law, 1970 UNESCO Convention, 1995 UNIDROIT Convention*

1. CULTURAL HERITAGE PROTECTION VS. PROPERTY RIGHTS

Few cases before the European Court of Human Rights (ECtHR) have captured the intersection of art, law, and history as dramatically as *J. Paul Getty Trust and Others v. Italy*[1]—a dispute centering on the Victorious Youth, a 2,300-year-old Greek bronze statue attributed to Lysippus. Beyond its artistic significance, the legal saga of this masterpiece, discovered by Italian fishermen in 1964 off the Adriatic coast, has reshaped cultural heritage law by clarifying states' rights to reclaim looted artifacts and defining due diligence obligations for collectors.

The Getty Case highlights the tension between private property rights (protected under Article 1 of Protocol no.1 to the ECHR) and the public interest in preserving cultural heritage. The ECtHR ruling in favor of Italy, underscores the principle that states have a legitimate interest in reclaiming cultural artefacts that are part of their national heritage, even if those are held by private entities abroad. However, to properly understand the consequences of this case in context of cultural heritage law, property law and cross border disputes the factual situation has to be given because the statue's history, from discovery to international litigation, highlights key legal issues regarding cultural heritage and property rights.

The legal history of the statue begins with its discovery in 1964 in the Adriatic Sea by Italian Fisherman in waters of the coast of Pedaso.[2] After its discovery, the statue was brought ashore to the port of Fano.[3] It was subsequently transported to Carrara, a suburb of Fano, and passed through several private hands before disappearing from Italy in 1965.[4] These actions have been the reason for initiation of the first set of criminal proceedings in the period 1966-1970 for theft of a protected archaeological object belonging to the State, pursuant to section 67 of Law no. 1089 of 1 June 1939 and under Article 624 of the Criminal Code.[5] Nevertheless, these persons were acquitted by the Perugia District Court based on the lack of proof where the statue was found: Italian waters, Yugoslavian waters or International waters.[6] The higher court proceedings lasted until 1970 when these person were finally acquitted based on the fact that there was no direct and convincing evidence of the origin and location of the discovery of the Statue in

1 *J Paul Getty Trust and Others v Italy*, Application No. 35271/19 [ECtHR, 18 January 2024.

2 *Ibid.,* para. 6.

3 *Ibid.*, para. 7.

4 *Ibid.*, paras. 7-9.

5 *Ibid.*, para. 10.

6 *Ibid.*, para. 11.

Italian territorial waters and, accordingly, of the crimes with which the defendants had been charged.[7]

The bronze statue resurfaced in Munich, Germany, in the possession of a German art dealer.[8] What is important from perspective of cultural heritage law in regards to this decision is that the Italian authorities are persistent in the intention to recover the statue. In the period of 1973-74, on several occasions they sought legal assistance from the German authorities but the cooperation was limited and the investigation was closed in 1974 by the German authorities and in 1976 by the Italian authorities.[9]

Following this, J. Paul Getty shows interest to purchase the Statue.[10] During the negotiations, on couple of occasions the lawyers of the vendor which was a company based in Liechtenstein, assured Mr. Getty that:

"…under Italian law, Italy could not claim any rights to the Statue. He argued, in particular, that it could not be proved that the statue under negotiation was the same as that which had been the subject of the above-mentioned criminal proceedings. In any event, he further observed that the criminal proceedings had concluded that it could not be proved that the statue had been found in Italian territorial waters, that the Italian government had failed to claim ownership of the statue in those criminal proceedings and that it was therefore an ordinary object belonging to his clients in a private capacity."[11]

Also, the purchaser was subsequently in several occasions reassured by representatives of the vendor that the Italian government doesn't have rights of ownership of the Statue and that the purchase can continue.[12] In meantime J. Paul Getty Sr. has died[13], but the Trust continued with the purchase and in 1977 they have reached an agreement for 3.95m $.[14] From that period, the Statue is in possession of the Getty Trust and exhibited since at the Getty Museum in Malibu, California.[15]

For decades, the Italian authorities made attempts to recovery of the Statue. There several were diplomatic and legal efforts made by the Italian government in the

7 *Ibid.*, para. 14.
8 *Ibid.*, para. 15.
9 *Ibid.*, paras. 16-22.
10 *Ibid.,* paras. 23-25.
11 *Ibid.,* para. 26.
12 *Ibid.,* paras. 30. and 31.
13 *Ibid.,* para. 33.
14 *Ibid.,* para. 37.
15 *Ibid.,* para. 38.

1980s and 1990s that culminated with the renewed action in 2007.[16] On 12 April 2007 the Pesaro public prosecutor's office brought charges against the captains of the two fishing boats and other persons involved. They were charged with exporting the Bronze without the required license, failing to report the Statue to the competent authorities after its discovery and violating border controls in importing it to Italy.[17] The criminal proceedings and other procedural aspects have been lasting for more than a decade,[18] until the Pesaro District Court issued a confiscation order on the grounds that the statue had been unlawfully exported without requisite customs duties or an export license. The Italian Court of Cassation upheld this order in 2019.[19] What is interesting from point of view of cultural heritage law is the observation and the reasoning of the preliminary investigations judge that concluded:

"…irrespective of that issue, the Italian State had acquired ownership of the Bronze as it had been discovered by an Italian-flagged vessel and therefore within Italian territory, in accordance with Article 4 of the Italian Navigation Code (see paragraph 116 below). Moreover, although antiquities experts had put forward several hypotheses (that the Bronze was an original, a Roman copy, a travelling exhibit or part of an imperial collection), the Bronze was most probably the work of the Greek artist Lysippus and its connection with Italy had to be considered "certainly not marginal", as at the time the Statue had been created the artist had most probably visited Rome and Taranto. At the relevant time, Greece and Rome had enjoyed good relations and, thereafter, Roman civilisation developed as a continuation of Hellenic civilisation. This was sufficient, according to the GIP, to establish a significant connection between the cultural object and Italy."[20]

This position was upheld by the Court of Cassation and event went to claim that:

"…a continuum between Greek civilisation, which had expanded onto Italian territory, and the subsequent Roman cultural experience; a continuum confirmed by the presence off the coast of Pedaso, in what is now the Marche Region, of the Statue of the 'Victorious Youth'".[21]

---

16 *Ibid.,* paras. 62. and 68.

17 *Ibid.,* para. 68.

18 *Ibid.,* paras. 69-85.

19 *Ibid.,* para. 94

20 *Ibid.,* para. 89.

21 The Court of Cassation held as follows: "there is no doubt that the Statue of the 'Victorious Youth' … is part of the State's artistic heritage. This conclusion is based … on its belonging to that cultural continuum that has, since its inception, linked Italic and Roman civilisation to Greek culture, of which the Roman culture can well be regarded as carrying the torch. As Mr [S.C.]'s defence expertly reminds [us] … substantial military incursions into Greece on the part of the Romans only began in 146 B.C.

" ... it may be reasonably inferred that, whether the Statue was carried by a ship that in turn had sailed from Italian territory – the presence of Lysippus of Sicyon in what used to be Taranto has been indeed documented – or whether it was transported by a ship that had set sail from the Ionian coast of the Greek peninsula, the final destination was one of the Adriatic ports of the Italian peninsula, in further support of the artefact's place within our country cultural orbit from as far back as that time."[22]

For these reasons, the J. Paul Getty Trust contested the confiscation, alleging a breach of property rights under Article 1 of Protocol No. 1 of the European Convention on Human Rights (ECHR). In details, they claimed that under Article 1 of Protocol No. 1 to the Convention of an allegedly unjustified interference with their right to the peaceful enjoyment of their possessions. They argued that the confiscation measure had been unlawful, within the meaning of this provision, on account of the lack of foreseeability of the legal basis; that it had not pursued any legitimate aim as, in their view, the Statue was not part of Italy's cultural heritage; and that it had placed an excessive burden on them.[23] In 2024, the ECtHR found that the confiscation order complied with international consensus on protecting cultural heritage and the obligations under the ECHR, thus upholding the position of Italy.

The *J. Paul Getty Trust and Others v. Italy* decision represents a focal point for the future development of cultural heritage law and private international law. The incentive that it gives, that even after 50 years still the rightful owner can have a claim for restitution opens the door that cultural property removed illegally from

---

with the fall of Corinth and the defeat of the Achaean League (although the conquest of Macedonia occurred before then, which is not a coincidence when one considers that the sculptor Lysippus owes part of his fame to his bronze statue depicting, with astounding realism, the features of Alexander the Great, who favoured him as the master of the craft; see the Anthology of Planudes, epigram no. 119), so much so that only in the proto-imperial era Horace, in his Epistle to Augustus, mentioned, in the famous couplet, Graecia capta, ferum victorem cepit/et artes intulit agresti Latio ("Greece, the captive, made her savage victor captive, and brought the arts into rustic Latium", from Horace's Epistles, 1, 2, v. 156 et seq.), the Greek influence on Italian territory goes back much further; many of the most important Greek historical figures were born in what were then the Greek colonies on Italic territory (Gorgias was born in Leontinoi, Archimedes in Syracuse, to name but a few of the major figures), other lived there to the point of claiming a sense of belonging (notably, Herodotus, born in Halicarnassus in Asia Minor, was called 'Herodotus of Thurium', due to his lengthy stay in the Greek colony of Thurium, today's Apulia); the first literary and artistic expressions referring to Latin culture can easily be attributed to figures educated in a Greek environment (one for all, Livius Andronicus, who arrived in Rome – following Livius Salinator, whose family name he took – from his native Taranto, the city where Lysippus of Sicyon had stayed and worked.", *Ibid.,* para. 100.

22 *Ibid.,* para. 101.

23 *Ibid.,* para. 190.

its country of origin must be returned, thereby rejecting traditional defenses like good-faith acquisition or statutes of limitations that have historically impeded recovery efforts. With other words, the ECtHR ruling, provides impetus to the 1970 UNESCO Convention and the 1995 UNIDROIT Convention and shifts the burden to the purchaser to properly inspect not just the legal papers, but to provide for a more thorough due diligence when acquiring cultural property. This means systematic investigation of documented ownership history, expert consultations, and scrutiny of export permits, effectively shifting the burden of proof onto purchaser and creating a deterrent against the illicit market. For the national legal systems, this decision provides a normative framework by mandating more specific export controls through centralized registries of protected cultural assets, standardized certification procedures, and customs coordination. These measures have to be taken very cautiously, because this case goes to the core of the balance of an owner's rights against a state's sovereign interest in preserving cultural identity by weighing factors like the artifact's archaeological significance, the circumstances of its removal, and the acquirer's conduct. Furthermore, the decision operationalizes transnational cooperation by institutionalizing mechanisms for information-sharing between INTERPOL, UNESCO's Database of National Cultural Heritage Laws, and domestic enforcement agencies, thereby creating an interconnected system for tracing looted artifacts and streamlining restitution claims across jurisdictions, ultimately setting a harmonized approach that reduces forum-shopping and conflicting judgments in cross-border cultural property disputes.

In essence, Victorious Youth's legal odyssey—from Adriatic depths to courtroom battles—has crystallized a new era where cultural justice transcends borders, and the past's rightful guardianship prevails over possessory interests. It will have significant output towards illegal trafficking since it will destabilize the market for unprovenanced antiquities. In the same time, it gives a transparency push towards museums and action houses that now have to prioritize documented provenance over aesthetic or financial value. Lastly, it needs to be seen how this decision will affect the long-contested artifacts (e.g., Parthenon Marbles, Benin Bronzes) and should it create a global restitution momentum guided through legal and diplomatic channels.

2. PRIVATE INTERNATIONAL LAW AND CROSS-BORDER DISPUTES OF CULTURAL PROPERTY

Private International Law as a legal discipline is not intended to hold direct creative prerogatives- to designed and shape certain social aspects, rather it tends to harmonize or make it easier for the legal systems to cooperate and coordinate among themselves. Such particular aspects are the reason, why PIL comes after a

certain social or economic problem persist and different approaches of its solution are provided. It comes at a stage when the discoordination of the legal orders has produced additional legal problems and insecurities.

The development of cultural heritage law and private international law on international level shows disproportional growth. While regarding the cultural heritage, there are several international agreements that tackle the problems of cultural heritage law[24] (such as illicit trafficking) there is exponential growth in private international law sources both in international and regional context.[25] However, the intersection of these two legal aspects is very vague with very few specific private international law provisions regarding cultural property.[26]

Such parallel disproportionate development fuels a tension in the relation between these two legal disciplines and creates several problematic points. Firstly, one of the main concerns is that private international law provisions, which are often designed for general commercial transactions, tend to frustrate the resolution of restitution claims for misappropriated cultural property[27] and may not adequately address the unique cultural, historical ethical and often-noneconomic value of inherent cultural heritage.[28] Secondly, very problematic aspect is the application of the *lex situs* principle, that means that the place where the object is located determines the applicable law for the acquisition of the property by which the protective laws of the country of origin can be undermined (inalienability rules or export controls) that can hinder the restitution claims and fuel the title laundering.[29] Also in this context the differing statutes of limitations play important role in the

---

[24] UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995) 34 ILM 1322; UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) 823 UNTS 231; Convention Concerning the Protection of the World Cultural and Natural Heritage (1972) 1037 UNTS 151.

[25] On the development of PIL in recent years in context of property see Pertegás Sender M., *International property law and territoriality,* in: Fogt M. (Ed.), Private International Law in an Era of Change Edwards Elgar Publishing, 2024, pp. 221-237.; Carruthers J.; Weller M.; Property, in: Beaumont P.; Holliday J., (eds.) A Guide to Global Private International Law, Hart Publishing, 2022, pp. 295-309.

[26] There are some provisions on special jurisdiction regarding stollen cultural object in the egulation (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 [2012] OJ L351/1. and some conflict of law provisions in national legislation (Art. 67 of the PILA of N. Macedonia, Art. 69 of the PILA of Kosovo, Art.33 of the PILA of Montenegro etc.).

[27] Chechi, A., *When Private International Law Meets Cultural Heritage Law - Problems and Prospects*, Yearbook of Private International Law Vol. XIX - 2017/2018, p. 282.

[28] Roodt C., *Private International Law, Art and Cultural Heritage*, Edward Elgar Publishing, 2015.; Chechi A., *The Settlement of International Cultural Heritage Disputes*, Oxford University Press, 2014, p. 2.

[29] *Ibid.,* pp. 94-95.

shaping of the private international law landscapes regarding cultural property because the cultural object often tend to pass through several jurisdictions and this could help those involved in the illicit activities to benefit from passage of time and could lead to potential injustices.[30] The alternative for the *lex situs* principle is the *lex originis*, i.e the law of the country of origin. Although on first glimpse it gives some certainty, that the law of the country of origin should determine the applicable law regarding the cultural property, it also has some protentional drawbacks that fuels the discussion in context of the most appropriate law. Firstly, it is very hard to determine which country represents the country of origin, since some cultural properties were traded or changed jurisdictions since the antiquity (for example as it is the case regarding the sculpture "Victorious Youth" commissioned by Romans, produced by Greek Sculptor). Secondly, lex origins may have even weaker protection than the lex situs. Thirdly, it would be very detrimental for the protection of cultural objects, to take the stand that only the lex origins provides for effective protection.[31]

Such ambivalent position creates a perfect opportunity for forum shopping.[32] Claimants can choose jurisdictions with laws more favorable to their case, which poses a risk to the consistent and just resolution of cultural heritage disputes that can undermine the protective measures of country of origin and disregard the special nature of cultural heritage.[33] Moreover, the UNIDROIT Convention in Article 8 does not resolve the problem of forum shopping, because it provides for very broad jurisdictional provisions allowing the court or other competent authority in the Contracting State where the object is located or other courts that have jurisdiction under the provisions in force in the Contracting State to hear the case regarding stolen cultural objects. Additionally, this provision allows the parties to choose the appropriate court or to submit the case to arbitration.[34] Such broad jurisdictional provision, not only does not resolve the forum shopping, but it actually facilitates it. This is one of the reasons why arbitration becomes a dominant dispute resolution modality for these highly complex cases.[35]

Another problematic aspect concerns the application of the foreign law. Although it is widely accepted that law is applicable still there are certain ambiguities regarding the type of provisions that can be applied in foreign country. Such aspect is

---

30 Chechi, *op. cit.*, note 27, p. 274.

31 Chechi A., The Settlement of International Cultural Heritage Disputes (OUP 2014), pp.97-98.

32 Roodt, *op. cit.*,note, 28, p. 80.

33 *Ibid*., p. 345

34 Article 8(2) of the UNIDROIT Convention, *op. cit*., note 24.

35 Roodt, *op. cit.*,note, 28, p. 160.

very important regarding cultural property law were for example foreign public law (such as patrimony law) or export restrictions are not applied or recognized in a foreign country.[36] This principle of inapplicability of foreign public law directly impacts the ability of countries of origin to reclaim cultural objects that were illegally removed.[37] Moreover, this principle inapplicability of foreign law is made even more complex by the huge importance that public policy plays in these cases.[38] Nevertheless, there is growing trend in jurisprudence where domestic courts are taking into account the foreign patrimony law regarding cultural object, bust still these countries are more reluctant regarding export restrictions.[39]

Now the Case *J. Paul Getty Trust and Other v. Italy* contains several points that could influence private international law in context of cultural heritage. These influences could be seen how national courts interpret and apply their private international law provisions in similar cases involving cultural objects that are subject to ownership disputes and cross-border recovery efforts.

Firstly, regarding the good faith acquisition of property, this case puts additional aspect on the purchaser which must take into consideration the specific circumstances surrounding the purchase, providing for thorough due diligence. The traditional private international law principles, such as protection of bona fide purchasers, may need to be reconsidered in cases involving cultural property to prevent the trafficking of looted artifacts. However, a certain problem arises, i.e upon which standards the due diligence should be considered. The logical aspect is that this should be done according to the lex originis (Italian law in the Case), however, the problem of categorization of lex origins plays significant role. This leads to the second problem, i.e the determination of lex originis. This case accepts the Italian Government standpoint on the determination of lex originis and that is providing for continuation from one historical epoch to another. This understanding could potentially lead to very broad understanding of historical issues and create very liberal notion of what represents lex originis. Thirdly, regarding the recognition and enforcement of foreign decisions and application of foreign law, this case opens the possibility of application of traditional decisions of public law, such as export restrictions to be applied in foreign country. The clear division of public and private law decisions in these cases is very rigid and goes against the protection that is attributed with other multilateral agreements. With the division of these instruments, the benefit goes only to the smugglers and traffickers of these

---

36 *Ibid.,* p. 40.

37 Chechi, *When Private International…, op. cit.,* note 27, p. 280.

38 *Ibid.,* p. 290; Roodt C., *op. cit.*, note 28, p. 42.

39 *Ibid.*

objects and is against the protection of the cultural heritage because they use the forum shopping in obtaining a more favorable place for title laundering.

3. INTERNATIONAL COOPERATION AND LEGAL FRAMEWORKS

The two main instruments that protect the cultural property regarding the restitution of illegally stolen objects are the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995). Both of these instruments have significant impact on the protection of stolen cultural object; however, they are limited concerning the restitution. In such circumstances, the *J. Paul Getty Trust and Other v. Italy* case gives impetus to the return of the cultural property and upholds both instruments.

The UNESCO Convention is designed to be legal framework based upon which the parties to the convention recognize each other's rights to retrieve stolen or illegally exported cultural property.[40] Such legal framework is built upon the intergovernmental collaboration regarding the prevention of illicit trafficking of cultural property trough administrative procedures and State action.[41] In the same time, the UNESCO Convention highlights the public interest that there should be a legal interexchange of cultural property for scientific, cultural and educational reasons, the value of provenance information and the necessity of both national and international cooperation for the effective protection of cultural property.[42] With such position, the UNESCO Convention has external and internal effect in each of its parties. Externally, it raises international recognition that States should assist one another to prevent the unlawful removal of cultural objects[43] and internally, it acts as a catalyst for the adoption of numerous subsequent national laws aimed at regulating illicit trade of cultural property.[44] However, this internal aspect of the UNESCO Convention serves as its drawback, since this convention is not self-executing and thereof requires state parties to pass the necessary implementing regulation.[45] Such approach diminishes the uniform application of this convention

---

40 Blake J., *International Cultural Heritage Law,* Cultural Heritage Law and Policy, (OUP 2015), p. 38.

41 Prott L., *Commentary on the UNIDROITE Convention*, on Stolen and Illegally Exported Cultural Objects 1995, Institute of Art and Law, 1997, p. 15.

42 Blake*, op. cit.,* note 40, p. 38.

43 *Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd.* [2007] EWCA Civ. 1374, paras. 154-155.

44 Roodt, *op. cit.,* note 28, p. 160.

45 Chechi, *The Settlement of International…*, *op. cit.,* note 31, p. 101.

because it leads to variations in the application across different countries.[46] This leads to the second drawback of the UNESCO Conventions and that is the lack of uniform definition and application of its terms such as "cultural property"[47], "cultural objects"[48] or "illicit export, import or transfer of ownership".[49] The third drawback of the Convention is that has nor retroactive application, meaning it does not address the historic cases of removal of cultural treasures that occurred before its entry into force for the involved states.[50] The fourth drawback for this convention is that it admits no private actions for restitution which means that individuals and businesses are entitled to claim restitution only where the law of the state party in question permits such action and makes no reference to limitation periods, and does not deal with the question of the impact of its rules on domestic laws concerning the treatment of bona fide purchasers.[51]

The UNIDROIT Convention is intended to fill the gaps and remedy the weaknesses of the UNESCO Convention[52] such as lack of private action, restricted restitution procedures and absence of rules on limitation periods and bona fide purchasers.[53] However the intention of the UNIDROIT Convention is not to substitute the UNESCO Convention, but rather it is designed to complement each other or as it is sometimes stated, the UNIDROIT Convention can be seen as Protocol to the UNESCO Convention.[54] The UNIDROIT Convention provides for direct access to the courts of one State by the owner of a stolen cultural object or by a State from which it has been illicitly exported.[55] This means that recovery under the UNIDROIT Convention does not depend on government intervention or state designation of property.[56] However, as it was stated before,[57] Article 8 of the UNIDROIT Convention generally refers the jurisdiction to the courts of *res situ* (where the object is located) alongside with jurisdiction designated by national and regional jurisdiction rules.[58] This means that national provision (US

---

46 Roodt, *op. cit.,* note 28, p. 124.

47 *Ibid.,* p. 131.

48 *Ibid.,* p. 134.

49 *Ibid.,* p. 131.

50 Chechi, *The Settlement of International…*, *loc.cit.*

51 Roodt, *op. cit.,* note 28, p. 123.

52 *Ibid.*

53 Chechi, *The Settlement of International…*, *op. cit.,* note 31, p. 106.

54 *Ibid.*

55 Prott, *op. cit.,* note 41, p. 15; Blake, *op. cit.,* note 40, p. 42; Roodt, *op. cit.,* note 28, p. 168.

56 Roodt, *op. cit.,* note 28, p. 125.

57 Text to note 32.

58 Roodt, *op. cit.,* note 28, p. 168.

jurisdictional provision) and regional (EU Brussels regime) are still in play.[59] Such jurisdictional structure gives more space to the owners to ascertain jurisdiction in places which is most effective to address the issue of stollen property however it does not resolve the problem with forum shopping.[60] This Convention in Article 3 is based upon the common law presumption *nemo dat quod non habet,* providing duty for return of the stollen object. Such presumption plays significant role to the good faith acquisition weighing the balance towards the original owner.[61] The most significant gain from the UNIDROIT Convention can be seen in the elaboration of the terms, specifically giving certain explanation to the term "stolen". Article 3(2) of the Convention provides that

"…a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place."

The limitation periods for the restitution of the cultural objects differ depending on the discovery of the stolen property. The general limitation period is 50 years, but is reduced to 3 years if knowledge of the location or the identity of the possessor of the cultural object is gained.[62] Moreover, one big difference from the UNESCO Conventions is that according to Articles 4(1) and 6(1) of the UNIDROIT Convention a good-faith purchaser who is able to show due diligence in the compensation stage is entitled to reasonable compensation.[63]

These modalities present in the UNIDROIT Convention however are not without certain drawbacks. The first problem encountered in the UNIDROIT Convention is that it tends to refer to private law disputes, however it does not in details cover cross border judicial cooperation issues such as choice of law, application of foreign public law, sale and transfer of ownership and international legal assistance.[64] Secondly, the lack definitions of certain terms used in the Convention provide for lack of uniform interpretation.[65] "Due diligence", "Fair and reasonable compensation", "stolen/theft", "possessor", "illegal export" all of these terms are subject to interpretation by national courts.[66] Thirdly, the UNESCO Convention

---

59 *Ibid.*

60 Roodt, *op. cit.,* note 28, p. 169.

61 Because the Convention assumes that the current possessor of the object will have no legal right thereto, it does not take account of due diligence on the part of a good faith purchaser. Roodt, *op. cit.,* note 28, p. 126.

62 *Ibid.*

63 Articles 4(1) and 6(1) of the UNIDROIT Convention, *op. cit.*, note 24.

64 *Ibid.*

65 Roodt, *op. cit.,* note 28, p. 128.

66 *Ibid.*

in Article 8 provides that states may impose penalties or administrative sanctions on any person responsible for infringing the prohibitions provided in the Convention, however, the UNIDROIT Convention tackles these issues from point of civil and commercial aspect, depriving this instrument from sanctions.[67]

The *J. Paul Getty Trust and Other v. Italy* case underscores the importance of international cooperation in protection of cultural heritage. Instruments like 1970 UNESCO Convention and 1995 UNIDROIT Convention provide foundation for addressing the illegal trafficking of cultural property, but their implementation varies among the countries. The duties imposed by the ECtHR could serve as a very important impetus for national legislation alignment: States now will need to sling their domestic laws with international conventions and the ECHR to ensure effective enforcement. This will refer to two points: first regarding the improvement of the national mechanisms for the implementation of these international agreements and secondly regarding the intensification of the cross-border cooperation between the contracting parties in order to provide for more uniform application.

The timing of the *J. Paul Getty Trust v. Italy* decision cannot be better, because we are witnessing increased interest in cultural property while the countries even after 50 years have not established uniform application of these conventions. This provides for impetus to these conventions to build a more comprehensive and uniform understanding of the legal terms and use modern digital tools at their disposal for building a more serious network of databases for the stollen property.

The focus of the European Court of Human Rights' (ECtHR) on these issues will provide for a greater harmonization. Member states are now compelled to align their domestic legislation with both international conventions and the European Convention on Human Rights, creating a more cohesive legal landscape for cultural heritage protection. This alignment requires:

1. Developing a more comprehensive restitution mechanism at national level to facilitate the unlawfully removed cultural objects;
2. Enhancing cross border judicial cooperation to combat trafficking networks operating across jurisdictions;
3. Establish more uniform interpretation of key legal concepts to reduce forum shopping and ensure consistent application of the measures for the protection of the cultural heritage.

[67] *Ibid.,* p. 129.

In essence, this case demonstrates that effective cultural heritage preservation demands not just international legal frameworks, but their meaningful implementation through coordinated national action and intergovernmental collaboration.

4. IMPLICATIONS OF THE CASE *J. PAUL GETTY TRUST AND OTHER V. ITALY* ON NATIONAL LEGISLATION IN THE WESTERN BALKANS AND CROATIA

The *J. Paul Getty Trust v. Italy* Case serves as a very important warning for museums, collectors and art dealers, emphasizing the need for thorough due diligence when acquiring cultural artefacts. In the same time, it also highlights the growing trend of restitution claims and the potential legal and reputational risks for institutions holding disputed items. National legislation may increasingly require institutions to conduct thorough provenance research to ensure that artifacts were not illegally acquired or exported. In essence, the national legislation should consider the balance between the rights of private owners with the public interest in preserving cultural heritage, particularly in cases involving historical injustices.

A comparative examination of cultural heritage legislation in Albania,[68] Croatia,[69] North Macedonia[70] and Serbia,[71] reveals significant divergences in addressing illicit trafficking. First, regarding the terminological aspects, there are differences in regard to the understanding of what compose "stolen" objects or theft, since there are no specific definitions in the legislation on what represents stolen objects or theft, rather more implicit descriptions of these measures in context of their preservation and restitution. For example, the Albanian law provides for obligations of individuals who "discover or find, accidentally, objects of cultural heritage" to notify the relevant authorities[72] implicitly providing that cultural heritage should be acquired through legal means, and accidental finds require reporting rather than appropriation. The Macedonian Cultural Heritage Law, provides for ban for import of stollen cultural heritage, but limits it only for cultural heritage stollen from

---

[68] LIGJ Nr.9048, date 07.04.2003 "PËR TRASHËGIMINË KULTURORE" (Ligjin nr.9592, datë 27.07.2006 • Ligjin nr.9882, datë 28.02.2008 • Ligjin nr.10 137, datë 11.5.2009).

[69] Zakon o zaštiti i očuvanju kulturnih dobara, Official Gazette, No. 145/24.

[70] ЗАКОН ЗА ЗАШТИТА НА КУЛТУРНОТО НАСЛЕДСТВО Сл.Весник на РМ бр.20/04, бр.71/04, бр.115/07, бр.18/11, бр.148/11, бр.23/13, бр.137/13, бр.164/13, бр.38/14, бр.44/14, бр.199/14, бр.18/15, бр.104/15, бр.154/15, бр.192/15.

[71] ЗАКОН О КУЛТУРНОМ НАСЛЕЂУ („Службени гласник РС", број 129/21, ЗАКОН о културним добрима
"Службени гласник РС", бр. 71 од 22. децембра 1994, 52 од 15. јула 2011 - др. закони, 99 од 27. децембра 2011 - др. Закон.

[72] Article 43 of the Albanian Law.

museums, religious buildings and other public institutions.[73] In context of restitution it also mentions stollen or illegally exported cultural heritage, but in context of administrative cooperation between the relevant authorities.[74] The Croatian and the Serbian Cultural heritage Laws are influenced by the Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods[75] provide for more detailed elaboration of "cultural objects unlawfully removed from the territory of a Member State".[76] Both of these laws, contain specific provisions regarding the restitution of cultural objects between the Member States of the EU and mechanisms based on international agreements.

In terms of due diligence, the laws differ in the standard which should be considered during sale or purchase of cultural object. The Serbian Law contains more detailed aspects, providing that it requires due diligence obligation to the seller to inform the authorities about the transaction so in the case of a sale of a cultural good, or a good presumed to possess cultural values, or a good under preliminary protection, the intention, place, time of sale, and price must be reported to the heritage protection institution.[77] The Macedonian law, in Article 92 provides only general consideration that the protection institutions and other holders of public and private collections are obliged to check the origin of the object.[78] They are obliged to inform the relevant authorities and the Ministry of Internal Affairs of any suspicious offer for purchase.[79]

However, the main problems that arise from the national legislation is that most of these countries do not provide for provisions regarding the determination of the applicable law and international jurisdiction regarding cultural property. If we exempt Croatia, because it is a Member State to the EU, only the Macedonian PIL Act contains provision on cultural property, providing for *lex origins* as a connecting factor or *lex rei sitae* if the state of origin chooses that law.[80] This law contains provision safeguarding the owner that obtained the object in good faith, that if the law of the state that has proclaimed an item as being its cultural heritage does

---

73 Article 53 of the Macedonian Cultural Heritage Law.

74 Article 101 of the Macedonian Cultural Heritage Law.

75 Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods, OJ L 39, 10.2.2009, pp. 1–7.

76 In this context the Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast) is relevant since together with the Regulation (EC) No.116/2009 introduces the Union system for the protection of Member States' cultural objects.

77 Article 103 (6) of the Serbian Law.

78 Article 92(1) of the Macedonian Cultural Heritage Law.

79 *Ibid.,* Article 92(2).

80 Article 67(1) of the Macedonian PIL Act.

not grant any protection to the possessor in good faith, the latter may invoke the protection that is attributed to him by the law of the state on the territory of which the item is located at the time of the revindication claim.[81] There are no other provisions regarding international jurisdiction, or provisions concerning the application off the foreign law and recognition of foreign decisions with specifics to the cultural property.

5. CONCLUSION

The J. Paul Getty Trust v. Italy ruling represents a historic moment in the intersection of cultural heritage law, property rights and private international law. By affirming states' rights to reclaim unlawfully removed cultural artifacts – even decades after their displacement – the ECtHR has redefined the balance between private ownership and public interest under the ECHR. This decision has provided for several critical imperatives for future legal and policy frameworks. Firstly, the case highlights the urgent need to reconcile divergent national approaches to restitution, particularly in defining key concepts such as "stolen" cultural property, or the application of lex originis or lex situs. Current frameworks—whether PIL's lex situs or cultural heritage law's lex originis—force artificial choices between competing legitimate interests. The Getty case reveals the inadequacy of this binary. One potential solution could be a hybrid conflict of law rules, that weigh both objects current location and its cultural significance to the origin state. Moreover, this conceptual aspect needs to extend to other definitions such as due diligence requirements and restitution procedures based on EU provisions and international agreements. Secondly, the ruling, exposes gaps in cross-border judicial cooperation, including the recognition of foreign patrimony laws and the curbing forum shopping. States must enhance mechanisms for information sharing (e.g., via INTERPOL and UNESCO databases) and provide for domestic courts to respect foreign export control. Thirdly, the most important aspect that comes out from this decision is the duty of museums, collectors and dealers to adopt rigorous provenance research as a legal and ethical obligation, moving beyond mere compliance to proactive accountability. National legislation should mandate transparency in acquisition that fail to meet due diligence standards. This would require institutions to asses not just the legal title but to take into account the historical context.

Ultimately, the Getty case signals a paradigm shift: cultural justice can no longer be secondary to market interests. As disputes over artifacts persist, this ruling provides a blueprint for resolving historical injustices through legal clarity, diplo-

[81] *Ibid.,* Article 67(2).

matic engagement, and a renewed commitment to preserving humanity's shared heritage. The path forward demands not only robust laws but their consistent enforcement—a challenge that requires unwavering international collaboration.

REFERENCES

BOOKS AND ARTICLES

1. Blake J, *International Cultural Heritage Law,* Oxford University Press, 2015
2. Carruthers J and Weller M, *Property*, in Beaumont P and Holliday J (eds), *A Guide to Global Private International Law*, Hart Publishing, 2022, pp. 295–309
3. Chechi A, *The Settlement of International Cultural Heritage Disputes*, Oxford University Press, 2014
4. Chechi A, *'When Private International Law Meets Cultural Heritage Law - Problems and Prospects'* (2017/2018) XIX *Yearbook of Private International Law* 274
5. Pertegás Sender M, 'International Property Law and Territoriality', in Fogt M (ed), *Private International Law in an Era of Change*, Edward Elgar Publishing, 2024, pp. 221–237
6. Prott L, *Commentary on the UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects (1995)*, Institute of Art and Law, 1997
7. Roodt C, *Private International Law, Art and Cultural Heritage*, Edward Elgar Publishing, 2015

INTERNATIONAL LAW

1. UNESCO, 'Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property' (adopted 14 November 1970, entered into force 24 April 1972)
2. UNIDROIT, 'Convention on Stolen or Illegally Exported Cultural Objects' (adopted 24 June 1995, entered into force 1 July 1998)

EU LAW

1. Council Regulation (EC) No 116/2009 of 18 December 2008 on the Export of Cultural Goods [2009] OJ L39/1
2. Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State (Recast) [2014] OJ L159/1

CASE LAW

1. *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* [2007] EWCA Civ 1374
2. *J Paul Getty Trust and Others v Italy,* Application No. 35271/19 (ECtHR)

NATIONAL LEGISLATION

1. Ligj Nr.9048, date 07.04.2003, 'Për Trashëgiminë Kulturore' (and subsequent amendments: Ligjin nr.9592, datë 27.07.2006; Ligjin nr.9882, datë 28.02.2008; Ligjin nr.10 137, datë 11.5.2009)
2. Zakon o zaštiti i očuvanju kulturnih dobara, Official Gazette, No. 145/24
3. Закон за заштита на културното наследство, Сл. Весник на РМ бр.20/04 (and subsequent amendments)
4. Закон о културном наслеђу, Службени гласник РС, број 129/21; Закон о културним добрима, Службени гласник РС, број 71/94 (and subsequent amendments)

FREEDOM OF SPEECH AND DEMOCRACY IN EUROPE: LEGAL CHALLENGES AND INSTITUTIONAL RESPONSES

Veronika Sudar, LLM, Teaching Assistant
Josip Juraj Strossmayer University of Osijek, Faculty of Law
Stjepana Radića 13, 31000 Osijek, Croatia
vsudar@pravos.hr

Sanja Mišević, PhD
Josip Juraj Strossmayer University of Osijek, Faculty of Law
Stjepana Radića 13, 31000 Osijek, Croatia
odv.sanja.misevic@gmail.com

ABSTRACT

Freedom of speech is a fundamental pillar of democracy, enabling citizens to participate in public debate, hold governments accountable, and advocate for social and political change. In the European Union (hereinafter: EU) and the Council of Europe (hereinafter: CoE), legal frameworks such as the European Convention on Human Rights (hereinafter: ECHR) and the Charter of Fundamental Rights of the EU (hereinafter: EU Charter) safeguard this right. However, freedom of speech is increasingly challenged by legal and political pressures, including Strategic Lawsuits Against Public Participation (hereinafter: SLAPPs), disinformation, and restrictions on media freedom. These threats pose significant risks to democratic resilience in Europe, necessitating stronger legal protections and policy responses.

This paper explores the relationship between freedom of speech and democracy in the EU and CoE, examining how institutions such as the European Court of Human Rights (hereainafter: ECtHR) and the European Court of Justice (hereinafter: CJEU) interpret and enforce free speech protections. The ECtHR has played a critical role in defining the boundaries of free expression, balancing the right to speech with concerns such as hate speech, national security, and privacy rights.

At the policy level, the European Democracy Action Plan represents a key initiative by the European Commission to strengthen media freedom, combat disinformation, and protect journalists from legal harassment. In response, legislative initiative such as the Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings aim to prevent the abuse of legal systems to suppress dissent.

By analyzing key legal cases, policy developments, and institutional responses, this paper underscores the need for continued vigilance in protecting freedom of speech as a core democratic value in Europe.

Keywords: *Council of Europe, Court of Justice of the EU, democracy, European Union, European Court of Human Rights, freedom of expression, freedom of speech, SLAPP*

1. INTRODUCTION

Freedom of speech stands as a foundational pillar of democratic societies, enabling citizens to engage in open public debate, scrutinize those in power, and advocate for social and political reform. In Europe, the right to freedom of expression is enshrined in key legal instruments, most notably the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (EU Charter). Article 10 of the ECHR and Article 11 of the EU Charter both guarantee the right to hold opinions and to receive and impart information and ideas without interference by public authorities, underscoring the centrality of this right to the European legal order. However, the exercise of free speech is not absolute; both instruments recognize that it may be subject to certain restrictions necessary to protect the rights of others, national security, or public order.

Despite these robust legal protections, freedom of speech in Europe faces mounting challenges. In recent years, legal and political pressures such as Strategic Lawsuits Against Public Participation (SLAPPs), the proliferation of disinformation, and increasing restrictions on media freedom have emerged as significant threats to democratic resilience. SLAPPs, in particular, are used to intimidate and silence journalists, activists, and public figures, undermining the essential role of free speech in holding power to account. The digital transformation of the public sphere has further complicated the landscape, as online platforms and algorithms increasingly shape public discourse, enabling both the rapid dissemination of valuable information and the spread of harmful content such as hate speech and disinformation.

This paper employs a doctrinal legal research methodology, analyzing primary legal sources including international treaties, European legislation, and landmark judicial decisions from the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). Through systematic examination of case law such as *Handyside v. United Kingdom*, *Delfi AS v. Estonia*, and *Google Spain SL v. Agencia Española de Protección de Datos* the paper explores how European courts have interpreted the boundaries of free expression, particularly in the context of balancing this right against competing interests like privacy, national security, and the prevention of hate speech. The research also incorporates

policy analysis, reviewing initiatives such as the European Democracy Action Plan and the Anti-SLAPP Directive, which aim to strengthen media freedom, combat disinformation, and protect those who participate in public debate from abusive legal actions.

By combining doctrinal legal analysis with policy review, the paper aims to provide a comprehensive understanding of the evolving relationship between freedom of speech and democracy in Europe. Special attention is paid to the challenges posed by the digital age, where the speed and reach of information dissemination have both empowered democratic participation and heightened the risks of manipulation and abuse. The findings underscore the importance of a balanced approach that reinforces legal protections, enhances judicial safeguards, and promotes media literacy, ensuring that freedom of speech remains a vibrant and effective cornerstone of European democracy.

2. FREEDOM OF SPEECH – LEGAL BASIS IN THE EU AND JUDICIAL INTERPRETATIONS OF FREE SPEECH PROTECTIONS

Freedom of speech represents a fundamental component of democratic societies. It enables individuals to engage in public discourse, hold authorities accountable, and advocate for social and political reform. The right to freedom of expression is protected by national constitutions and international treaties. It implies that it is superior to the rights granted by the laws in the hierarchy of legal norms.[1] The right to freedom of speech represents third generation of human rights, environmental and other rights.[2] It is established primarily by the Declaration of Human Rights (1948), in Article 19. Similarly, Article 19 of the International Covenant on Civil and Political Rights (ICCPR) defines freedom of expression as the right to "seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of one's choice." The Covenant also emphasizes that this right is not absolute, but is accompanied by specific duties and responsibilities. Any limitations on its exercise must be clearly established by law and must be necessary for the protection of legitimate interests.[3] Still, in the Europe, the most important charter of human rights and freedoms are CoE's European Convention on Human Rights (hereinafter: ECHR) and EU's Charter of Fundamental Rights of the

1 Tucak, I., *Analysis of Freedom of Speech*, JURA 2011/1, P.133.

2 Smerdel, B.; Sokol, S., *Ustavno pravo,* Fourth Edition, Official Gazette, Zagreb 2009, p. 107.

3 Petrašević, T.; Duić, D.; Sudar, V., *Overview of the ECJ and ECHR Practice on Human Rights - Freedom of Speech*, Harmonius J. Legal & Soc. Stud. Se. Eur. 119, 2022, p. 120.

European Union (hereinafter: EU Charter). ″Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers″ this is who it states in Article 10 ECHR. Furthermore, it also says that "This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.[4] Very similar expression of the same right is contained in the Charter in Article 11. There, more precisely, it states that the right to freedom of expression "shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers".[5] The ECHR and the EU Charter exhibit a shared commitment to the protection of fundamental rights; however, their differing judicial interpretations reveal notable structural and normative distinctions. The EU Charter, developed in response to the democratic demands of the 21st century, embodies a more nuanced approach to rights protection by including explicit provisions that are not present in the broader and more general framework of the ECHR. A salient instance of this divergence can be observed in their respective approaches to media freedoms. While Article 10 of the ECHR implicitly acknowledges media freedom through its generalized protection of the right to expression, Article 11(2) of the Charter explicitly enshrines media pluralism as an independent obligation, firmly stating that "the freedom and pluralism of the media shall be respected".[6] This represents a significant development, as it acknowledges media pluralism as an autonomous legal obligation rather than an implied component of general expression rights.

While both the ECHR and the EU Charter, demonstrate a shared commitment to the protection of fundamental freedoms, their legal structures and interpretative frameworks reveal notable distinctions. The ECHR, adopted in the mid-20th century, offers a broad and flexible protection of rights that has been progressively interpreted by the European Court of Human Rights. In contrast, the Charter, developed in response to the evolving democratic and technological landscape of the 21st century, provides a more detailed and context-specific articulation of rights. The inclusion of explicit provisions on media freedom and pluralism within the Charter reflects this modern approach and aligns with the EU's broader commitment to safeguarding democratic values in an increasingly complex information environment.

---

4 European Convention on Human Rights, Official Gazette – International Agreements, No. 6-142/99, 18.5.1999, Article 10; Petrašević, T.; Duić, D.; Sudar, V., *op. cit.*

5 Charter of Fundamental Rights, OJ C 326, 26.10.2012, p. 391–407, Article 11; Petrašević; Duić; Sudar, *op. cit.*

6 *Ibid.*

2.1. Case Law

In their judicial practice, the ECtHR and the CJEU significantly contributed to the protection of the right to freedom of expression by establishing a legal framework for the interpretation of the provisions of the Convention and the Charter. ECtHR has, in some cases, acted to uphold EU law when a national court failed to ask the CJEU for a preliminary ruling. In certain situations, the ECtHR has found that this failure violated Article 6(2) of the ECHR, which guarantees the right to a fair trial.[7] Human rights are becoming more important in EU law and policy. The CJEU is handling more and more cases related to human rights, covering many different issues. Since the EU Charter of Fundamental Rights was adopted, the CJEU has shown that it is willing to annul EU laws that go against the Charter.[8]

Both European courts have developed a body of case law that balances the right to free speech with other fundamental rights and societal interests. The ECtHR, interpreting Article 10 of the European Convention on Human Rights, has addressed various aspects of free expression. In *Handyside v. United Kingdom* (1976)[9], the ECtHR emphasized that freedom of expression applies not only to information and ideas that are favorably received but also to those that offend, shock, or disturb. In *Lingens v. Austria* (1986)[10], it distinguished between facts and value judgments, holding that the value judgments do not require proof of truth, thus protecting political criticism. In *Jersild v. Denmark* (1994)[11], the ECtHR protected a journalist who aired racist remarks during an interview, recognizing the importance of context and the journalist's intent to expose rather than promote such views. The ECtHR has also dealt with the liability of internet intermediaries; in *Delfi AS v. Estonia* (2015)[12], it upheld the liability of a news portal for offensive comments posted by users, considering the portal's failure to prevent such comments despite having moderation mechanisms, and in *Axel Springer AG v. Germany* (2022)[13] the ECtHR has highlighted that reporting on politicians' conduct serves the public interest and generally outweighs privacy claims, reinforcing robust political discourse. However, the ECtHR found in *Sanchez v. France* (2023)[14] that politicians could be held criminally liable if they failed to remove hateful comments made by third parties on social media, justifying the interference with

---

7 Craig, P., De Burca, G., *EU Law, Text, Cases, and Materials*, Sixth Edition, 2015, p. 426.

8 *Ibid.,* p. 427.

9 Case of *Handyside v. The United Kingdom*, Application No. 5493/72.

10 Case of *Lingens v. Austria*, Application No. 9815/82.

11 Case of *Jersild v. Denmark*, Application No. 15890/89.

12 Case of *Delfi As v. Estonia*, Application No. 64569/09.

13 Case of *Axel Springer Se v. Germany*, Application No. 8964/18.

14 Case of *Sanchez v. France*, Application no. 45581/15.

the applicant's right by the legitimate aim of protecting the reputation or rights of others and preventing disorder or crime in a democratic society.

The CJEU, interpreting Article 11 of the EU Charter, has also contributed to the development of free expression rights. In *Google Spain SL v. Agencia Española de Protección de Datos* (2014), the CJEU recognized the "right to be forgotten," allowing individuals to request the removal of personal data from search engine results under certain conditions, thereby balancing privacy rights with freedom of information. In *Glawischnig-Piesczek v. Facebook Ireland Limited* (2019), the CJEU held that platforms could be required to remove illegal content and prevent its reappearance, addressing the responsibilities of online intermediaries in combating hate speech.

These cases illustrate the European courts' efforts to adapt traditional free speech principles to the challenges posed by digital communication, ensuring that freedom of expression is protected while also considering the rights of others and the need for responsible discourse in the public sphere. It is clear that courts are keeping pace with social developments and developing new jurisprudence in parallel, despite sources of law that are older.

3. LEGAL CHALLENGES - CHALLENGES TO FREEDOM OF SPEECH

3.1. Disinformation, Misinformation, Hate Speech, and Freedom of Speech in the Digital Age and the Digital Public Sphere

The digital public space today includes many new forms of communication, such as blogs, podcasts, and videos by influencers. It also includes major platforms like WhatsApp, YouTube, Facebook, Instagram, TikTok, and X (Twitter). On these platforms, people do not only talk to each other for personal or business reasons, but also take part in political discussions. The flow of information is shaped by algorithms—computer programs used by search engines like Google and social media platforms. These algorithms decide what content each person sees, based on what they are assumed to like or prefer.[15] Digital technology has changed how people form their opinions. Traditional forms of communication, such as newspapers, radio, or public debates at community events, are now being supplemented or even replaced by online tools. One major advantage of digital communication is that people can access and share important information quickly, easily, and

[15] Von Ungern-Sternberg, A., *Freedom of Speech goes Europe* – EU Laws for Online Communication, in: von Ungern-Sternberg, A. (ed.), Content Moderation in the EU: The Digital Services Act, Trier Studies on Digital Law, Trier 2023 (Forthcoming), p. 3.

across national borders. However, the digital space also creates risks. First, harmful content such as hate speech or disinformation can spread very quickly. Second, some platforms use questionable methods, such as promoting sensational content to keep users engaged. Third, there is an important debate about how much power these large platforms have in shaping public opinion. Their influence raises concerns about fairness, transparency, and accountability in the digital age.[16]

In that the digital era, the rapid spread of disinformation, misinformation, and hate speech presents serious threats to democratic societies, public trust, and fundamental rights. Disinformation refers to deliberately false information spread to deceive people. According to the European Union, disinformation is false or misleading information that is shared on purpose to trick people or gain political or economic benefits. This kind of content can harm society, especially when it spreads widely. The key feature of disinformation is intentional deception it is created and shared with the goal of causing harm or gaining something unfairly.[17] On the other hand, misinformation involves sharing of false information or misleading, but without bad intentions. For example, someone might send incorrect information to family or friends, thinking it is true. Even though there is no intent to harm, misinformation can still cause damage, especially during health crises or elections.[18] The idea of focusing on the intent behind disinformation can be tricky. It is hard to judge what someone was thinking when they shared something. In some cases, like satire or parody, people purposely change facts for humor or criticism, which is protected as free speech. But even these can be used in bad faith to confuse or mislead others, creating effects similar to disinformation. According to that, the EU's Code of Practice[19] tries to stop disinformation, especially in political advertising. This includes any message created to support or oppose a political actor or to influence elections, laws, or public decisions. The rules are meant to

---

16 *Ibid*.; Kucina, I., *Effective Measures Against Harmful Disinformation in the EU in Digital Communication*, Conference paper, Conference: The 8th International Scientific Conference of the Faculty of Law of the University of Latvia, 2022, p. 147.

17 Koltay A., *Freedom of Expression and the Regulation of Disinformation in the European Union,* in: Krotoszynski, Jr. RJ, Koltay A, Garden C, (eds.) Disinformation, Misinformation, and Democracy: Legal Approaches in Comparative Context. Cambridge University Press; 2025:133-160, p. 135.

18 *Ibid.*

19 2022 Strengthened Code of Practice on Disinformation - The Code of Practice on Disinformation is an early and important set of rules designed to fight the spread of false information online. It was first introduced in 2018 and created with the help of key groups, including tech companies and policy makers. In 2022, the Code was updated and made stronger to meet new digital challenges. The goal was to have it officially accepted as a Code of Conduct under the Digital Services Act (DSA), a major EU law for safer online spaces. On 13 February 2025, the European Commission and the European Board for Digital Services agreed to include the updated 2022 version of the Code as part of the DSA system, making it a formal tool to help reduce disinformation in the EU.

make sure that political communication is fair and transparent. It is important to treat disinformation and misinformation differently. Disinformation, which is shared to deceive, may require strong action. Misinformation, shared by people who mean well, needs a more careful approach. If both are punished the same way, it could discourage people from joining public debates, especially those without access to fact checking tools.[20] The most dangerous disinformation is that which comes from governments or official sources, because people often trust them. The third problem is the hate speech that targets individuals or groups based on race, religion, gender, or other identities, often inciting discrimination, hostility, or violence. These phenomena are amplified by digital platforms, where content can reach wide audiences quickly and with minimal regulation. According to von Ungern-Sternberg (2023), disinformation and hate speech thrive in these spaces because content circulates rapidly, originators are hard to trace, and moderation standards vary widely across platforms. This undermines journalistic standards and creates an uneven playing field for fact-based discourse.[21]

Disinformation also affects democracy and the rule of law. It is often used to manipulate elections, discredit political institutions, and stir social division. Research commissioned by the European Parliament notes that both foreign actors and domestic political figures have exploited disinformation to gain influence, sometimes blending falsehoods with real societal concerns. This manipulation reduces public trust in media, science, and democratic processes, especially when spread by high-authority individuals.[22]

To counter these risks, experts recommend a multilayered approach. First, critical media literacy must be promoted across all age groups, helping people recognize false or manipulative content. Second, affirmative information strategies such as trustworthy science communication and networks of reliable media should be developed to preempt disinformation before it spreads.[23] Finally, platform regulations must balance the need to remove harmful content with the obligation to protect freedom of speech and diversity of opinion.[24]

---

20 Koltay A., *Freedom of Expression and the Regulation of Disinformation in the European Union*, *op. cit.*, p. 136.

21 Von Ungern-Sternberg, *Freedom of Speech goes Europe…, op. cit.,* note 15, pp. 4-5; Vukušić, I., *Comparative and dogmatic Issues of Hate Speech – Traditional and Modern Acts of Commission*, in: Petrašević, T.;Duić D. (eds.), EU and comparative law issues and challenges series, Vol. 7, 2023, Faculty of Law Osijek, p. 504.

22 Von Ungern-Sternberg, *Freedom of Speech goes Europe…, op. ci*t., note 15, p. 3.

23 Bayer, J., *Disinformation and propaganda: impact on the functioning of the rule of law and democratic processes in the EU and its Member States*, Policy Department for External Relations Directorate General for External Policies of the Union, 2021, p. 17.

24 *Ibid*., p. 102.

As Shearer and Maurer emphasize, the internet has the potential to support global democracy by providing universal access to information and public discourse. However, this requires a shared ethical foundation one that protects the right to speak freely while also ensuring that communication is fair, respectful, and evidence based.[25]

3.2. Strategic Lawsuits Against Public Participation (SLAPPs)

A possible reason for the appearance of SLAPP lawsuits is misinformation that is increasingly numerous in the media and digital public space. Strategic Lawsuits Against Public Participation (SLAPPs) represent a misuse of procedural rights. These lawsuits are typically unfounded and initiated with malicious intent. They are commonly filed by powerful individuals, interest groups, corporations, or state institutions against journalists, human rights defenders, or other individuals who publish information in the public interest. Novak[26] adopts the definition originally proposed by Pring and Canan (1988)[27], describing SLAPPs as legal actions aimed at silencing criticism and discouraging public participation. A similar definition is provided by Zdravković[28], who, citing the *Merriam-Webster* dictionary, emphasizes that SLAPPs are „often based on defamation claims and are intended to intimidate, burden, punish, or harass individuals for expressing views critical of the plaintiff".[29] In line with these perspectives, Directive (EU) 2024/1069 defines SLAPPs as "malicious legal proceedings against public action." According to the Directive, these proceedings are not brought to genuinely assert or protect legal rights. Instead, their primary purpose is to obstruct, limit, or penalize public engagement, exploiting the power imbalance between the parties involved.[30]

SLAPP lawsuits are not a recent phenomenon, particularly in the United States, where the concept and terminology first emerged. The earliest systematic research on SLAPPs was conducted in the 1970s by scholars Penelope Canan and George W. Pring. They carried out a study analyzing 228 cases classified as SLAPP law-

---

25 Shearer, J., Maurer, H., *Is Democracy Possible in the Internet?,* Journal of Universal Computer Science, Vol. 8, no. 3, 2002, pp. 396-407, p. 400.

26 Novak, *Anti-SLAPP directive: between the freedom of expression and the right to access to court*, Zbornik Pravnog fakulteta u Zagrebu, 74(2), 2024, pp. 279-303, p. 281.

27 Canan, P.; Pring, G.W., *Strategic Lawsuits against Public Participation, Social Problems*, Published By: Oxford University Press, Vol. 35, No. 5, 1988, pp. 506-519.

28 Zdravković, A. M., *Slapp abuse of the right to judical protection with the aim of restricting freedom of expression*, Strani Pravni život (Foreign Legal Life), Vol. 1, 2022, pp. 75-96, p. 77.

29 *Ibid.*

30 Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation'), PE/88/2023/REV/1, OJ L, 2024/1069, 16 April 2024.

suits, most of which were aimed at silencing critics of government policies and authorities in general. [31] The criteria used by Canan and Pring to identify and categorize SLAPP cases included the following: the lawsuit was a civil claim or counterclaim (seeking monetary damages and/or injunctive relief); it was filed against non-governmental organizations or individuals; and it was triggered by their communication concerning government bodies, officials, or matters of public interest. This analytical framework served as the basis for the definition of SLAPPs referenced earlier. [32] In Europe, SLAPP lawsuits have become a growing concern in recent years. This trend has prompted efforts to develop mechanisms to mitigate the rising number of such cases. A particular source of alarm has been the increase in physical and online threats and attacks directed at journalists, activists, and human rights defenders since 2020. This situation is addressed in Commission Recommendation (EU) 2021/1534[33], which highlights the need to protect freedom of expression and democratic values. The Recommendation is partly based on an analysis of the growing number of attacks against journalists during that period. In highlighting the urgency of the escalating threats against journalists, activists, and human rights defenders, the European Commission recalls a series of serious incidents that have shaped the current discourse on the need for stronger protections. The Commission references the 2015 terrorist attack on the French weekly *Charlie Hebdo*, in which 12 individuals were killed, as a pivotal moment. This was followed by the murders of investigative journalist Daphne Caruana Galizia in Malta (2017), and of Ján Kuciak and his fiancée Martina Kušnírová in Slovakia (2018). These events served as a strong warning regarding the vulnerability of journalists and the need for institutional responses. The urgency remained through to 2021 and beyond, with more recent high-profile cases under investigation, including the killings of Greek journalist Giorgios Karaivaz and Dutch journalist Peter R. de Vries.[34] These incidents have continued to underscore the risks faced by individuals engaged in public interest reporting. According to the *Media Pluralism Monitor* report for 2022, which assessed the state of media freedom across the 27 EU Member States and five candidate countries (Albania, Montenegro, North Macedonia, Serbia, and Turkey), the safety of journalists is in decline. The report documents numerous physical attacks and a notable rise in online threats and harassment. Only in 2021, the number of physical attacks on journalists increased

---

31 Pring, G.W., *SLAPPs: Strategic Lawsuita against Public Participation*, Pace Environmental Law Review, Vol. 7, Issues 1, 1989, p. 5.

32 *Ibid.,* p. 6.

33 Commission Recommendation (EU) 2021/1534 of 16 September 2021 on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union, C/2021/6650, OJ L 331, 20.9.2021, pp. 8–20.

34 *Ibid.*

by 61%, while cases of harassment and intimidation rose by 57% in the countries surveyed. Within the same year, two journalists were killed in the EU, and this number increases to three when candidate countries are included. [35]

SLAPP lawsuits are most commonly initiated by wealthy individuals or legal entities with significant political or public influence. These actors typically seek to protect their political or economic reputation through legal means. On the opposing side are frequently journalists, media outlets, activists, human rights defenders, scientists, researchers, or other citizens who engage in public discourse. These individuals often share information of public interest or express views that may conflict with the interests of powerful political or economic actors. The legal basis for such lawsuits usually involves claims of defamation or damage to honor and reputation. As a result, both civil and criminal proceedings may be initiated. [36] However, the underlying objective of SLAPP lawsuits is not the protection of legal rights per se, but rather the creation of a *chilling effect*. This effect aims to intimidate the defendant, deplete their financial and emotional resources[37], and discourage further public engagement. In doing so, such lawsuits serve as a warning to others, thereby promoting self-censorship and restricting freedom of expression. [38]

4. POLICY RESPONSES AND INSTITUTIONAL INITIATIVES

In order to prevent hate speech and the spread of disinformation, the European Union has responded with legislative initiatives such as the Digital Services Act (DSA), aiming to increase platform accountability and protect users from harmful content. While these laws seek to limit the spread of illegal or deceptive information, they also raise concerns about censorship and the overreach of private companies in moderating speech. Critics worry that platform control may restrict legitimate expression and reduce transparency, especially when moderation lacks public oversight.[39]

4.1. European democracy

Democracy is defined as a system of government and governance in which political power belongs to and derives from the people, who exercise it directly or,

---

35 Rafał Mańko, *Strategic lawsuits against public participation (SLAPPs),* EPRS | European Parliamentary Research Service, 2024, p. 2.

36 Zdravković, *op. cit.*, note 28.

37 Novak, *op. cit.*, note 26.

38 Zdravković, *op. cit.*, note 26.

39 Von Ungern-Sternberg, *Freedom of Speech goes Europe – EU Laws for Online Communication*, *op. cit.,* note 15, p. 3.

most commonly, through elected representatives. The term comes from the Greek words *dēmos* (people) and *kratos* (rule), meaning "rule by the people".[40] In modern terms, democracy has numerous forms, for example, direct democracy held directly by the people themselves and representative democracy a system of government in which power is held by elected representatives who are freely voted for by the people.[41] Key characteristics of democratic systems include free and fair elections, protection of human rights, the rule of law, and the separation of powers among government branches. These elements ensure that governance is conducted with the consent of the governed and that there are mechanisms to hold leaders accountable.[42]

The concept of liberal democracy further integrates principles of individual liberties and civil rights, ensuring that majority rule does not infringe upon minority rights. This form of democracy emphasizes not only the procedural aspects of elections but also the substantive protection of freedoms such as speech, assembly, and religion.[43]

Democracy's effectiveness relies on active citizen participation, informed public discourse, and institutions that uphold democratic norms and values. While the ideal of democracy is universally lauded, its implementation varies across different societies, and it continually evolves to address emerging challenges and the diverse needs of its populace.

Democracy is a fundamental European value and a prerequisite for EU membership, while EU citizens themselves consider democracy, the rule of law and human rights to be its most important advantage.[44] In the context of European democracy, freedom of speech and expression constitutes both a foundational right and a practical mechanism through which citizens participate in governance, critique public policy, and hold authorities accountable; its robust protection under EU charters and national constitutions reinforces pluralism, fosters informed debate,

---

40 Britanica, [https://www.britannica.com/topic/democracy], Accessed 10 May 2025; Pezo, V. (ed.) *Pravni leksikon*, Leksikografski zavod Miroslav Krleža, 2007, p. 202.

41 Cambridge dictionary, [https://dictionary.cambridge.org/us/dictionary/english/democracy], Accessed 10 May 2025; Vidaković Mukić, Marta, *Opći pravni riječnik*, Narodne novine, Zagreb, 2006, p. 136.

42 United Nations, [https://www.un.org/en/global-issues/democracy], Accessed 10 May 2025; Merriam Webster Dictionary, [https://www.merriam-webster.com/dictionary/democracy], Accessed 10 May 2025.

43 Britanica, [https://www.britannica.com/topic/democracy], Accessed 10 May 2025; Hlebec, I., Gardašević, Đ., *Pravna analiza govora mržnje*, p. 11.

44 Komunikacija Komisije Europskom parlamentu, Vijeću, Europskom gospodarskom i socijalnom odboru i Odboru regija o akcijskom planu za europsku demokraciju, Bruxelles, 3.12.2020., COM(2020) 790 final.

and thus enhances the legitimacy of democratic institutions. However, the unrestrained circulation of hate speech and disinformation[45] can corrode social cohesion, marginalize vulnerable groups, and distort electoral processes, prompting the EU and member states to adopt targeted regulations.[46] Striking an effective balance requires transparent rule-making, clear definitions of prohibited content, and proportionate enforcement that respects due process and judicial oversight; it also demands investment in media literacy, support for independent journalism, and inclusive online forums to cultivate critical engagement.[47] By combining legal safeguards with participatory initiatives, European democracies aim to preserve the vibrant exchange of ideas that underpins democratic legitimacy, even as they seek to protect individuals and communities from the destabilizing effects of hate and falsehood.

One of the most dangerous tools used against democracy is precisely the aforementioned disinformation, spreading false or misleading content with the intention of confusing, manipulating or dividing the public. Disinformation campaigns, especially those originating from foreign actors, are linked to efforts to destabilize European societies by targeting controversial issues, such as migration or public health crises such as COVID-19 in 2020.

4.2. Anti-SLAPP Directive and Legislative Proposals

As a response to the increasing number of SLAPP lawsuits, the EU decided to adopt an appropriate legislative framework that would direct the actions of the courts and at least somewhat limit the growing global problem. The already mentioned Recommendation of the Commission (EU) 2021/1534[48] provided an exhaustive analysis of the needs for the protection of the right to freedom of speech and expression, as well as the Recommendation of the Commission (EU) 2022/758 on journalists and human rights activists involved in the protection of public activities against clearly unfounded lawsuits or malicious legal proceedings

---

45 Koltay A., *Freedom of Expression and the Regulation of Disinformation in the European Union*, in: Krotoszynski, Jr. RJ.; Koltay A.; Garden C. (eds.), *Disinformation, Misinformation, and Democracy*: Legal Approaches in Comparative Context. Cambridge University Press, 2025, pp.133-160.

46 Mounk, Y., *Free Speech Crumbles in Europe*, 2025, [https://thedispatch.com/article/europe-germany-britain-free-speech-democracy-restriction/], Accessed 10 May 2025; CoE, Freedom of Expression, [https://www.coe.int/en/web/freedom-expression], Accessed 10 May 2025.

47 Commissioner for Human Rights, The Alarming Situation of Press Freedom in Europe, The Regent's Report 2014, [https://www.coe.int/en/web/commissioner/-/the-alarming-situation-of-press-freedom-in-europe], Accessed 10 May 2025.

48 Commission Recommendation (EU) 2021/1534*, op. cit*., note 33.

("strategic lawsuits directed against public activities")[49] provided an introduction to the adoption of Directive (EU) 2024/1069 of the European Parliament and the Council of April 11, 2024 on the protection of persons involved in public activity from clearly unfounded lawsuits or malicious court proceedings ("strategic lawsuits directed against public activity")[50], commonly known as the Anti-SLAPP Directive. Directive represents a significant advancement in the European Union's efforts to protect individuals engaged in public participation from strategic lawsuits aimed at silencing them. These lawsuits, often initiated by powerful entities, seek to intimidate and burden critics such as journalists, activists, and human rights defenders—with costly and time-consuming legal proceedings, thereby discouraging them from exercising their right to freedom of expression.

The Directive introduces several procedural safeguards to counteract such abusive litigation. Notably, it allows for the early dismissal of manifestly unfounded claims, shifting the burden of proof to the claimant to demonstrate the merit of their case. Additionally, courts are empowered to impose financial penalties on those who initiate SLAPPs, including ordering them to cover the legal costs of the defendant and, where appropriate, provide compensation for damages suffered. These measures aim to deter the misuse of legal systems to suppress public discourse and ensure that individuals can participate in matters of public interest without fear of retribution.

However, the Directive's effectiveness may be influenced by certain ambiguities and implementation challenges. For instance, the definition of "public participation" and "matters of public interest" remains broad and open to interpretation, potentially leading to inconsistent application across Member States. Furthermore, the Directive primarily addresses cross-border cases, which may limit its applicability to domestic SLAPPs unless Member States choose to extend its provisions. Critics also point out that the Directive does not sufficiently address the balance between protecting freedom of expression and ensuring access to justice for legitimate claims, raising concerns about potential misuse of its safeguards to evade accountability.

---

[49] Commission Recommendation (EU) 2022/758 of 27 April 2022 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ('Strategic lawsuits against public participation'), C/2022/2428, OJ L 138, 17 May 2022, pp. 30-44.

[50] Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation'), PE/88/2023/REV/1, OJ L, 2024/1069, 16 April 2024.

At the end, while Directive (EU) 2024/1069 marks a commendable step toward safeguarding freedom of expression and public participation, its success will largely depend on the clarity of its definitions, the consistency of its implementation across Member States, and the careful balancing of rights to prevent potential abuses of its provisions.

The ECtHR has also addressed the issue of SLAPPs in its case law. In 2022, for the first time, the ECtHR used the term SLAPP in the case *OOO Memo v. Russia*[51], recognizing the growing concern over such lawsuits. The ECtHR applied the principle of proportionality, assessing whether the actions taken were necessary and balanced. It acknowledged that, under Russian law, the civil defamation case brought against the applicant may have been legally allowed. However, the ECtHR concluded that the lawsuit did not serve a legitimate purpose and therefore violated Article 10 of the Convention, which protects freedom of expression. The ECtHR also clarified an important point: defamation claims brought by state authorities themselves cannot justify restrictions on freedom of speech under Article 10. However, individual public officials, as private persons, may still bring such claims if they believe their personal reputation was harmed.[52]

4.3. Freedom of expression and SLAPPs in Croatia

The Republic of Croatia is, according to a report by the Coalition Against SLAPPs in Europe (CASE), the sixth country in terms of the number of SLAPP lawsuits per year. The number of SLAPP lawsuits is monitored in the period from 2010 to 2023, and the data collected covers 29 European countries and 41 countries across Europe.[53] Number of active civil defamation cases: 951, which indicates that Croatia has a problematic situation with SLAPP, where large-scale lawsuits against media actors have become so common that collecting statistical data is impracticable. Moreover, as CASE states, members of the judiciary are often the plaintiffs in SLAPP cases. There are no mechanisms that provide protection to persons covered by SLAPP in these proceedings.[54]

However, even before CASE submitted its first report in 2022, the Government of the Republic of Croatia – Ministry of Culture and Media convened an Expert Working Group with the aim of shaping a policy for combating SLAPP lawsuits and harmonizing case law. This was followed by a public debate and several educational

---

51 Case of *Ooo Memo v. Russia*, Application no. 2840/10.

52 Novak, *op. cit.*, note 26, p. 286.

53 CASE, *A 2024 Report on SLAPPs in Europe*: Mapping Trends and Cases, Third Edition, p. 15.

54 CASE, [https://www.the-case.eu/slapps/], Accessed 6 June 2025.

workshops for judges and journalists.[55] By the end of 2023, the Government of the Republic of Croatia adopted the National Plan for the Development of Culture and Media for the period from 2023 to 2027 with key measures to ensure the protection of journalists from unfounded and malicious legal proceedings, and by establishing a mechanism for the early recognition and rejection of obviously unfounded or malicious legal proceedings - SLAPPs.[56] The aforementioned expert working group is carrying out a series of activities with the aim of raising awareness of SLAPP lawsuits in general, how to recognize them, but also raising awareness among the professional and general public about the negative consequences of SLAPP.

The research on SLAPP lawsuits against the media in Croatia was conducted by the Center for Democracy and Law Miko Tripalo (CMT) and the Croatian Journalists' Association (HND) as part of the Fighting SLAPP in Croatia project with financial support from the British organization Justice for Journalists Foundation, in cooperation with the international organization CASE.[57] The aim of the research was to collect data and analyze court decisions in civil and criminal proceedings that were conducted in the Republic of Croatia against publishers, editors and journalists for publicly published texts and reports. The study identifies SLAPP indicators and analyzes the most important features of possible SLAPP cases.[58] The research used quantitative analysis for statistical data processing (calculation of court decisions in relation to municipal and county courts and the Ministry, delivery in relation to all courts individually, number of civil and criminal cases, number of court decisions and minutes, frequency of cases in which at least one SLAPP indicator appears, type of decision made in the court case; type of case appearing and duration of the case until finality) and qualitative analysis for processing the content of court decisions and minutes in order to identify key patterns and motives for initiating court proceedings.[59] The research sample was based on data provided by the Ministry of Justice, Administration and Digital Transformation: 861 final decisions of municipal courts in civil and civil cases and 191 decisions of municipal courts in criminal cases, i.e. a total of 1,052 final court decisions.[60] The analysis of collected court decisions (and minutes) showed that

---

55 Stručna radna skupina za oblikovanje politike suzbijanja SLAPP tužbi, [https://min-kulture.gov.hr/strucna-radna-skupina-za-oblikovanje-politike-suzbijanja-slapp-tuzbi/22216/], Accessed 6 June 2025.

56 Ministarstvo kulture i medija, Nacionalni plan razvoja kulture i medija za razdoblje od 2023. do 2027. godine, prosinac 2023., [https://min-kulture.gov.hr/UserDocsImages/dokumenti/Nacionalni%20plan%20razvoja%20kulture%20i%20medija/Nacionalni%20plan_objava.pdf/], Accessed 6 June 2025.

57 [file:///C:/Users/Korisnik/Downloads/SLAPP_Report_final_eng-3.pdf], Accessed 6 June 2025.

58 Centar za demokreciju i pravo Mirko Tripalo, [https://tripalo.hr/strateske-tuzbe-protiv-javne-particicipacije-slapp-u-republici-hrvatskoj/], Accessed 6 June 2025.

59 [file:///C:/Users/Korisnik/Downloads/SLAPP_Report_final_eng-3.pdf], Accessed 6 June 2025, pp. 9-10.

60 *Ibid,* p. 9.

at least one given SLAPP indicator is present in over 40% of analyzed civil and criminal cases, while two or more occur in half of these cases.[61] It is particularly interesting that the analysis of the collected data revealed so-called "serial" plaintiffs, 12 of them, who often file lawsuits against the media and journalists, using the same or similar arguments and demanding the same amount of damages (for example, 5,308.91 EUR).[62]

It is evident that there is a problem with SLAPP in the Croatian legal system and that the Croatian legal system does not sufficiently prevent the use of civil proceedings for such purposes. Most lawsuits against the media are initiated by natural persons who could be concluded to be powerful individuals, such as politicians, members of parliament, judges, and the requested compensation is relatively high in the context of the economic situation in the Republic of Croatia.[63]

The Directive's (EU) 2024/1069 provisions align with existing legal frameworks that already offer certain protections against abusive litigation. Nonetheless, the Directive's emphasis on procedural safeguards and its potential to harmonize anti-SLAPP measures across the EU could enhance the protection of public participation in Croatia and beyond. Novak[64] also highlights the importance of upholding journalistic standards and ethical practices, suggesting that the Directive should reinforce the responsibility of media professionals to adhere to the highest principles of their profession. This approach would strengthen media pluralism and freedom while respecting the rights and freedoms guaranteed by the European Convention on Human Rights.

5. CONCLUSION

The analysis presented in this paper demonstrates that freedom of speech is not only a fundamental right but also a dynamic and evolving concept within European legal and political frameworks. The ECHR and the EU Charter provide a strong foundation for the protection of free expression, and the jurisprudence of the ECtHR and CJEU has played a pivotal role in clarifying the scope and limits of this right. Through landmark cases, European courts have consistently emphasized that freedom of expression extends to information and ideas that may offend, shock, or disturb, as well as to those that are favorably received. At the same time, the courts have recognized the necessity of balancing free speech with

61 *Ibid.,* pp. 26-27

62 *Ibid.*, p. 27.

63 *Ibid.,* p. 26

64 Novak, *Anti-SLAPP directive…, op. cit.,* note 26, p. 281.

other legitimate interests, including the prevention of hate speech, the protection of privacy, and the maintenance of public order.

The research highlights that the digital transformation of the public sphere presents both opportunities and challenges for the protection of freedom of speech. On one hand, digital platforms have democratized access to information and enabled new forms of civic engagement. On the other hand, they have facilitated the rapid spread of disinformation, hate speech, and other harmful content, raising complex questions about the responsibilities of online intermediaries and the appropriate scope of regulation. The European response has been multifaceted, combining judicial interpretation with legislative and policy initiatives. The European Democracy Action Plan and the Anti-SLAPP Directive represent important steps toward safeguarding media freedom, protecting journalists and activists, and ensuring that legal systems are not abused to stifle dissent.

The analysis of legal texts, systematic review of case law, and policy evaluation enables a nuanced understanding of the legal and institutional responses to the challenges facing freedom of speech in Europe. The findings indicate that while significant progress has been made, continued vigilance is required to protect this core democratic value. Overly restrictive measures risk chilling legitimate speech and undermining democratic engagement, while insufficient regulation may allow harmful practices to flourish. Achieving the right balance requires ongoing dialogue among legislators, courts, civil society, and the media, as well as a commitment to upholding the principles of transparency, accountability, and pluralism.

In conclusion, the protection of freedom of speech in Europe is at a critical juncture. The interplay between legal safeguards, judicial interpretation, and policy innovation will determine the resilience of European democracies in the face of evolving threats. By fostering a legal and institutional environment that both protects free expression and addresses its potential harms, Europe can ensure that freedom of speech continues to serve as a cornerstone of democratic life, enabling robust public debate, accountability, and social progress for generations to come.

REFERENCES

BOOKS AND ARTICLES

1. Bayer, J., *Disinformation and propaganda: impact on the functioning of the rule of law and democratic processes in the EU and its Member States*, Policy Department for External Relations Directorate General for External Policies of the Union, 2021
2. Canan, P.; Pring, G.W., *Strategic Lawsuits against Public Participation*, Social Problems, Vol. 35, No. 5, Published By: Oxford University Press, 1988, pp. 506-519

3. Craig, P.; De Burca, G., *EU Law, Text, Cases, and Materials*, Sixth Edition, 2015
4. Hlebec, I.; Gardašević, Đ., *Pravna analiza govora mržnje*, Pravnik: časopis za pravna i društvena pitanja, Vol. 55, No. 107, 2021
5. Koltay A., *Freedom of Expression and the Regulation of Disinformation in the European Union,* in: Krotoszynski, Jr. RJ.; Koltay A.; Garden C, (eds.) Disinformation, Misinformation, and Democracy: Legal Approaches in Comparative Context. Cambridge University Press; 2025, pp.133-160
6. Kucina, I.*, Effective Measures Against Harmful Disinformation in the EU in Digital Communication*, Conference paper, Conference: The 8th International Scientific Conference of the Faculty of Law of the University of Latvia, 2022
7. Novak, S., *Anti-SLAPP directive: between the freedom of expression and the right to access to court*, Zbornik Pravnog fakulteta u Zagrebu, 74(2), 2024, pp. 279-303
8. Petrašević, T.; Duić, D.; Sudar, V., *Overview of the ECJ and ECHR Practice on Human Rights - Freedom of Speech*, Harmonius J. Legal & Soc. Stud. Se. Eur. 119, 2022
9. Pezo, V. (ed.) *Pravni leksikon*, Leksikografski zavod Miroslav Krleža, 2007
10. Pring, G.W., *SLAPPs: Strategic Lawsuits against Public Participation*, Pace Environmental Law Review, Vol. 7, Issues 1, 1989
11. Mańko, R., *Strategic lawsuits against public participation (SLAPPs*), EPRS, European Parliamentary ResearchService, 2024
12. Shearer, J.; Maurer, H., *Is Democracy Possible in the Internet?,* Journal of Universal Computer Science, Vol. 8, No. 3, 2002, pp.396-407
13. Smerdel, B.; Sokol, S., *Ustavno pravo*, Fourth Edition, Narodne novine, Zagreb 2009
14. Tucak, I., *Analysis of Freedom of Speech*, JURA 2011/1, P.133
15. Vidaković Mukić, M., *Opći pravni riječnik*, Narodne novine, Zagreb, 2006
16. Von Ungern-Sternberg, A., *Freedom of Speech goes Europe – EU Laws for Online Communication*, in: von Ungern-Sternberg, A. (ed.), Content Moderation in the EU: The Digital Services Act, Trier Studies on Digital Law, Trier 2023 (Forthcoming)
17. Zdravković, A.M., *Slapp abuse of the right to judical protection with the aim of restricting freedom of expression,* Strani Pravni život (Foreign Legal Life), Vol. 1, 2022, pp.75-96

EUROPEAN COURT OF HUMAN RIGHTS

1. Case of *Handyside v. The United Kingdom*, Application No. 5493/72
2. Case of *Lingens v. Austria*, Application No. 9815/82
3. Case of *Jersild v. Denmark,* Application No. 15890/89
4. Case of *Delfi As v. Estonia*, Application No. 64569/09
5. Case of *Axel Springer Se v. Germany*, Application No. 8964/18
6. Case of *Sanchez v. France*, Application no. 45581/15
7. Case of *Ooo Memo V. Russia*, (Application no. 2840/10)

EU LAW

1. 2022 Strengthened Code of Practice on Disinformation
2. Charter of Fundamental Rights, OJ C 326, 26.10.2012
3. Commission Recommendation (EU) 2021/1534 of 16 September 2021 on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union, C/2021/6650, OJ L 331, 20.9.2021
4. Commission Recommendation (EU) 2022/758 of 27 April 2022 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ('Strategic lawsuits against public participation'), C/2022/2428, OJ L 138, 17.5.2022
5. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Pathway to a Healthy Planet for All EU Action Plan: 'Towards Zero Pollution for Air, Water and Soil', COM/2021/400 final
6. Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation'), PE/88/2023/REV/1, OJ L, 2024/1069, 16.4.2024
7. European Convention on Human Rights, Official Gazette – International Agreements, No. 6-142/99, 18.5.1999

WEBSITE REFERENCES

1. Britanica,
   [https://www.britannica.com/topic/democracy], Accessed 10 May 2025
2. Cambridge Dictionary,
   [https://dictionary.cambridge.org/us/dictionary/english/democracy], Accessed 10 May 2025
3. United Nations,
   [https://www.un.org/en/global-issues/democracy], Accessed 10 May 2025
4. Merriam Webster Dictionary,
   [https://www.merriam-webster.com/dictionary/democracy], Accessed 10 May 2025
5. Mounk, Y., *Free Speech Crumbles in Europe*, 2025,
   [https://thedispatch.com/article/europe-germany-britain-free-speech-democracy-restriction/], Accessed 10 May 2025
6. CoE, Freedom of Expression,
   [https://www.coe.int/en/web/freedom-expression], Accessed 10 May 2025
7. Commissioner for Human Rights, The Alarming Situation of Press Freedom in Europe, The Regent's Report 2014,
   [https://www.coe.int/en/web/commissioner/-/the-alarming-situation-of-press-freedom-in-europe], Accessed 10 May 2025
8. CASE, A 2024 Report on SLAPPs in Europe: Mapping Trends and Cases, Third Edition

9. CASE,
[https://www.the-case.eu/slapps/], Accessed 6 June 2025
10. Ministarstvo kulture i medija,
https://min-kulture.gov.hr/strucna-radna-skupina-za-oblikovanje-politike-suzbijanja-slapp-tuzbi/22216, visited: 07.06.2025.
11. Ministarstvo kulture i medija, Nacionalni plan razvoja kulture i medija za razdoblje od 2023. do 2027. godine, prosinac 2023,
[https://min-kulture.gov.hr/UserDocsImages/dokumenti/Nacionalni%20plan%20razvoja%20kulture%20i%20medija/Nacionalni%20plan_objava.pdf], Accessed 6 June 2025
12. Centre for Democracy fnd Law Miko Tripalo, Strategic Lawsuits Against Public Participation (SLAPP) in the Republic of Croatia,
[file:///C:/Users/Korisnik/Downloads/SLAPP_Report_final_eng-3.pdf], Accessed 7 June 2025
13. Centar za demokreciju i pravo Mirko Tripalo,
[https://tripalo.hr/strateske-tuzbe-protiv-javne-participacije-slapp-u-republici-hrvatskoj/], Accessed 6 June 2025.

HI BOSS, DON'T SEND ME AN E-MAIL WHEN I SLEEP: IMPLEMENTATION OF "THE RIGHT TO DISCONNECT" INTO THE EU LAW

Kosjenka Dumančić, PhD, Full Professor
University of Zagreb, Faculty of Economics and Business
Trg J.F.Kennedy 6, 10000 Zagreb, Croatia
kdumancic@net.efzg.hr

ABSTRACT

Digitalisation has introduced new possibilities in the world of work. New work concepts are being developed as almost all communication is supported by the Internet, and work is often not strictly tied to a particular location. The impact of digitalisation has mostly positive effects, but also raises some questions regarding the need to be connected and the erosion of differences in time spent on work and free time. When work is performed from home, the separation of time does not exist. This problem took on a new dimension during the COVID-19 pandemic, when employers extensively introduced work-from-home arrangements for all employees as a solution to avoid office-based work. Working from home is often identified as having no set working hours, which can be beneficial, but only when the worker chooses to work from home and is, therefore, prepared to do so.

This paper will focus on the problem of digital facilities, primarily emails, that interfere with both work and personal life, allowing workers to remain "connected" to their jobs with no time or place limitations. This concerns the impact of e-mails and other digital innovations enabled by smartphones and tablets on labour conditions and the protection of workers' rights and health, which will be analysed through the existing case law and legislation in force. This right is commonly known as the "right to disconnect," and its introduction into national law is constantly growing.

This paper aims to raise awareness of the importance of the "right to disconnect" from digital facilities outside working hours, thereby protecting workers' rights and health.

***Keywords**: digitalisation, EU Law, workers' rights, right to disconnect*

1. INTRODUCTION

Digitalisation has engendered transformative shifts in the structure of labour relations and the modality of work execution. In the digital era, work is no longer confined to a specific location or time frame; instead, it exists within a continuum of connectivity where the boundaries between professional obligations and per-

sonal autonomy become increasingly indistinct. This techno-organisational shift has introduced opportunities for greater labour market access and flexibility and, simultaneously, significant concerns about overexposure to work demands and the erosion of rest periods and personal life.

The legal concept of the right to disconnect, which is the entitlement of employees to refrain from work-related digital communications outside of working hours without adverse consequences, emerged as a response to this encroachment upon workers' fundamental rights. It reflects a recognition of digital fatigue and the psychological burdens associated with ubiquitous connectivity. As noted by Lagutina,[1] the right encapsulates the demand for time sovereignty in a digital context where the line between rest and work is continually blurred.

While the traditional framework of EU labour law has focused on minimum protection and guarantees to rest, defining the maximum number of working hours and occupational, health, and social safety, the digital environment[2] has disrupted these protections, necessitating novel regulatory approaches. Recent literature[3] emphasises that regulation must evolve from task-based definitions of work toward time-based and autonomy-based protections.

The COVID-19 pandemic accentuated this regulatory lacuna. With telework becoming a widespread norm, the permeability between work and non-work spheres has intensified. Workers were expected to remain continuously available, not through explicit extensions of working hours, but through implicit expectations to respond to digital communications—emails, messages, and platform notifications—regardless of the time. The result has been a deterioration in mental health and the undermining of decent work as defined in international legal instruments. During this period, Studies throughout the EU reported rising burnout cases and the erosion of psychological detachment from work.[4]

This paper argues for the need to anchor the right to disconnect within the acquis of EU labour law, considering the evolving nature of work, particularly as structured by digital platforms and algorithmic governance. In pursuing this objective, the paper will analyse digital platform regulation, the experience of Member States and the jurisprudence of the Court of Justice of the European Union (CJEU). The

---

1 Lagutina, I. V., *Right to Disconnect as One of the Employees' Digital Labour Rights*, Juris Europensis Scientia, Vol. 3, 2022, pp. 28–36.

2 Frosio, G. F., *Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy*, 112 NW. U. L. REV. ONLINE 18 (2017-2018), pp. 19-46.

3 Ginès A.; Fabrellas, *How to Ensure Employees' Well-being in the Digital Age?*, IDP, No. 35, 2022, pp. 4–6.

4 European Commission, *Study to Support the Impact Assessment of an EU Initiative to Improve the Working Conditions in Platform Work*, Brussels, 2021, p. 61.

aim is to advocate for a legally binding framework at the EU level to guarantee this emerging right. For the research, based on the selection of legal systems and jurisdictions, functional comparison of legal rules, institutions, or doctrines and analysis of similarities and differences will be prepared to answer which would be the most appropriate regulation.

2. THE IMPACT OF DIGITALISATION ON WORK-LIFE BALANCE

2.1. Structural Shifts in the Nature of Work

The digitalisation of labour has introduced a dual dynamic: on one hand, it provides greater flexibility and autonomy; on the other, it commodifies worker availability and erodes traditional boundaries of working time. The economics of digital platforms are driven by network effects, economies of scale, and data extraction as a commercial asset all of which contribute to workforce concentration and algorithmic management structures.[5] These systems increase labour fragmentation and shift risks to individual workers,[6] resulting in a structural extension of working hours without the legal safeguards typically afforded to dependent employees in the "regular"[7] employee-employer relation.

The best example of this shift is the platform work model. It is characterised by real-time, on-demand matching of labour supply and demand. However, workers are often incentivised to remain constantly available, as algorithms distribute work opportunities based on responsiveness. Consequently, workers may find themselves tethered to their devices, maintaining a perpetual state of readiness, which functionally extends their working time, without classification as paid overtime or guarantees of minimum rest periods.[8] Although the platform work is not always considered as a "regular" employee and employer form of work, it can be used as a model for the purpose of this article.

2.2. Work Intensity and Health Implications

The presence of smartphones, applications, and digital workspaces has effectively dismantled the spatial and temporal boundaries that once protected rest and pri-

5 de Groen, W., *et al, Digital Labour Platforms in the EU: Mapping and Business Models*, CEPS, Publications Office of the EU, Luxembourg, 2021, pp. 18–22.

6 Coveri, A.; Cozza, C.; Guarascio, D., *Monopoly Capitalism in the Digital Era*, RePEc, No.9 Research Papers in Economics, 2021

7 It is governed by labour law regulation and work contracts.

8 de Groen, *et al., op. cit.*, note 5, pp. 29–31.

vate life. This environment encourages constant connectivity, exacerbating legal ambiguity around working hours. Digital platforms often operate within regulatory grey zones, bypassing traditional labour law protections through the misclassification of workers and the exploitation of inconsistencies between national regulations.[9] This trend, often called the "uberisation"[10] of work, exemplifies the growing misalignment between platform-based labour models and the normative frameworks that govern occupational health and safety.

A growing body of empirical research links digital overexposure with negative health outcomes. Workers subjected to continuous algorithmic monitoring and availability requirements report higher stress levels, sleep disorders, and burnout. According to the European Trade Union Institute, platform workers, especially those in precarious or migrant conditions, suffer from low wages, unpredictable schedules, and restricted autonomy, all of which are detrimental to mental and physical health.[11]

2.3. Regulatory Implications

The challenges posed by digital labour platforms extend beyond individual employment contracts—they necessitate a shift in the regulatory perspective.[12] According to Nooren et al., attempts to regulate platform work through traditional labour law instruments are insufficient; instead, regulation must be tailored to the platform business model itself, accounting for the interplay of data, algorithms, and global labour dynamics.[13] The right to disconnect,[14] therefore, when analysing platform work, should not be seen merely as a discretionary labour protection but as an essential structural safeguard within a broader regulatory framework for the digital economy.

---

9 Strowel, A.; Vergote, W., *Towards a Global Approach to Digital Platform Regulation*, Egmont Institute, Brussels, 2024, pp. 8–11.

10 Based on the model of the taxi company Uber. See more in Dumančić, K.: Krupka, Z.: Čavlek, N. *Strategies for Urban Evolution: Analysing the Effects of Airbnb and Uber Business Models on the Transformation of Post-industrial Societies,* in Lakušić, S., *et al* (eds.) The Reimagining of Urban Spaces: A Journey Through Post-Industrial Cityscapes, Springer, Cham (2024).

11 European Trade Union Institute, Work-Related Psychosocial Risks in Digital Labour Platforms, ETUI Report, Brussels, 2023, pp. 29–35.

12 Adamski, D., *Lost on the digital platforms:Europas legal travails with the digital single market*, Common Market Law Review, 55(3), pp. 719-751

13 Nooren, P. et al., The Platformisation of Work: Challenges for EU Regulation, Policy and Internet, Vol. 10, No. 2, 2018, pp. 166–187.

14 Golding, G., Introducing Australia's New Right to Disconnect, Labour Law Issues, University of Adelaide, vol. 10, no. 1, 2024

Moreover, the international landscape reflects increasing recognition of the social harms of unregulated digital labour. While Member States diverge in regulatory philosophy—from market-based self-regulation to sovereignty-led enforcement, there is an emerging consensus that unchecked digital work leads to social fragmentation and the erosion of private time. Coherent EU action must address these cross-border regulatory inconsistencies and embed the right to disconnect within the Union's labour and digital strategy.

3. THE CONCEPT OF THE RIGHT TO DISCONNECT

The right to disconnect has emerged as a normative response to the intensification of digital labour and the erosion of traditional boundaries between work and private life, supported by digital tools. This is dominated by the development of Internet communication supported by email correspondence and specifically by mobile phone technology. It refers to the employee's entitlement not to engage in work-related communications—such as answering calls, emails, or messages—outside of regular working hours without fear of reprisal or disciplinary consequences. Its conceptual foundation lies at the intersection of fundamental rights to health, privacy, and decent working conditions, as recognised in Article 31(1) of the Charter of Fundamental Rights of the European Union.[15]

Doctrinally, the right to disconnect is not novel but an extension of pre-existing labour protections reinterpreted in light of technological realities. Lagutina[16] proposes that the right encompasses three interdependent elements: first, the right to refrain from performing work beyond contractual hours; second, protection from adverse consequences for disconnecting; and third, the employer's proactive duty to establish conditions that ensure disconnection. These dimensions are rooted in the principles of work-life balance, occupational health, and the protection of personal autonomy.

Legal scholarship increasingly views the right to disconnect as a soft social aspiration and a justifiable entitlement. Fenoglio argues that the emergence of digital omnipresence has transformed the classical notion of subordination in labour law. Employers' control no longer relies on spatial supervision but on algorithmic tracking, real-time surveillance, and hyper-connectivity, which demand a re-conceptualisation of working and rest periods.[17]

---

[15] Article 31(1) of the Charter of Fundamental Rights of the European Union: "Every worker has the right to working conditions which respect his or her health, safety and dignity."

[16] Lagutina, I. V., *Right to Disconnect as One of the Employees' Digital Labour Rights*, Juris Europensis Scientia, Vol. 3, 2022, pp. 28–36.

[17] Fenoglio, A., *Il tempo di lavoro nella new automation age: un quadro in trasformazione*, Rivista Italiana di Diritto del Lavoro, Vol. 37, No. 1, 2018, pp. 627–648.

From a regulatory standpoint, the right to disconnect can be seen as a protective countermeasure to Hesselberth's term the "regime of connectivism"—a socio-economic condition in which digital presence becomes a moral and economic imperative.[18] In this framework, the absence of response or online status may be interpreted as negligence, potentially affecting promotion, job stability, or algorithmic ranking. This dynamic places the burden of boundary enforcement on the worker, inverting traditional obligations of the employer to manage working time within legal limits.

The legal recognition of this right in several Member States reflects its growing acceptance as a component of modern labour law. Notably, the French Labour Code frames the right to disconnect as a topic of mandatory collective bargaining, thus embedding it in workplace governance. Other jurisdictions have adopted varying models, including statutory entitlements, guidance frameworks, and sectoral instruments. Nevertheless, the absence of harmonised EU legislation has produced regulatory fragmentation, undermining legal certainty and worker protection across borders.

The right to disconnect must therefore be understood as both a reactive measure—to address harms already inflicted by unregulated digital engagement—and a proactive right—that reaffirms the value of human dignity, rest, and mental health in the architecture of employment relations. In this sense, it is not merely a response to digitalisation but a legal articulation of the minimum conditions for sustainable and ethical work in the digital age.

4. NATIONAL PRACTICES ACROSS THE EU

Implementing the right to disconnect across EU Member States has been heterogeneous, reflecting diverse legal traditions, regulatory capacities, and labour market structures. While some countries have adopted binding legislation, others have preferred soft-law measures or delegated the matter to collective bargaining. This regulatory divergence has created a patchwork of protections with significant implications for cross-border consistency and the harmonisation of workers' rights under EU law.

4.1. France: From Collective Bargaining to Statutory Innovation

France is the pioneer in codifying the right to disconnect.[19] In 2016, the Loi Travail (Law No. 2016-1088) introduced a requirement for companies with more

[18] Hesselberth, P., *Discourses on Disconnectivity and the Right to Disconnect,* New Media & Society, Vol. 20, No. 11, 2018, pp. 1994–2010.

[19] Mettling, B.A., Transformation numérique et vie au travail, Rapport, Ministere de travaille, France, 2015.

than 50 employees to negotiate terms related to disconnection during mandatory annual collective bargaining on work-life balance.[20] Article L.2242-17 of the Code du travail institutionalises this obligation, encouraging employers and employee representatives to determine conditions for the exercise of disconnection and to implement awareness-raising mechanisms.

The French approach is notable for combining legal compulsion with contractual flexibility. While the law mandates negotiation, it does not prescribe a specific outcome, thereby preserving sectoral autonomy. This model embeds the right to disconnect within participatory workplace governance, rather than treating it as a static statutory entitlement.

4.2. Spain: A Data Protection Approach

Spain adopted the right to disconnect through Ley Orgánica 3/2018, which regulates the protection of personal data and digital rights. Article 88 recognises workers' right to disconnect in order to ensure respect for rest time, holidays, and personal and family life.[21] Unlike the French model, Spain frames disconnection primarily as a facet of digital privacy, situating it within the broader context of data protection.

This integration into information law signals a shift in the conceptual framing of labour protections in the digital age—acknowledging that privacy and rest are increasingly interdependent. However, the law essentially leaves implementation to internal company policies or collective bargaining, raising concerns about enforceability in weak-representation sectors.

4.3. Germany: Voluntary Corporate Policies and the Limits of Soft Law

Germany has not enacted a statutory right to disconnect. Instead, the German approach has relied heavily on internal corporate policies, social dialogue, and the normative framework provided by occupational health and safety legislation. Companies such as Volkswagen, BMW, and Deutsche Telekom have adopted internal disconnection rules that limit after-hours communication or restrict email server activity outside designated working hours.[22]

---

[20] Article L.2242-17 of the Code du travail (France), inserted by Loi No. 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels.

[21] Article 88 of Ley Orgánica 3/2018, de Protección de Datos Personales y garantía de los derechos digitales, Boletín Oficial del Estado No. 294, 6 December 2018.

[22] Eurofound, Right to Disconnect: Exploring Company Practices, Publications Office of the EU, Luxembourg, 2021, pp. 9–13.

These practices are often formalised through Betriebsvereinbarungen (works agreements) negotiated between employers and Betriebsräte (works councils) under the Betriebsverfassungsgesetz (Works Constitution Act). The Federal Ministry of Labour and Social Affairs has also issued guidance documents encouraging employers to respect work-life balance, but these remain non-binding.[23]

While this self-regulatory model has generated positive outcomes in large firms, its broader effectiveness is constrained by several factors. First, the absence of a universal statutory right means many employees remain unprotected, particularly in small or medium-sized enterprises. Second, enforcement depends on the strength of workplace representation, which varies significantly across sectors. Third, the cultural expectation of availability in competitive professional environments can override voluntary measures, especially in white-collar and knowledge-intensive industries.

Thus, Germany illustrates the limits of a soft-law, decentralised strategy in ensuring universal protection. Although the regulatory framework supports negotiated solutions, its reliance on company-level discretion creates legal asymmetry and can exacerbate inequality between well-organised and under-regulated workplaces.

4.4. Slovakia: A Cautious Experiment

Slovakia represents a more cautious and recent entrant to the right to disconnect debate. Amendments to the Slovak Labour Code in 2021 addressed telework arrangements and referred to disconnection in general terms. However, the legislation does not define the right concretely or impose binding obligations on employers.[24]

Bulla observes that the Slovak experience highlights the limits of legislative gesture without practical enforcement mechanisms. In contexts where collective bargaining coverage is low and employer awareness is limited, legal recognition alone may be insufficient to alter workplace behaviour or protect workers from digital overload.[25]

4.5. Fragmented Landscape

Overall, Member States can be categorised into three regulatory models: (i) statutory frameworks (e.g., France, Spain); (ii) collective bargaining-based models (e.g.,

---

[23] Federal Ministry of Labour and Social Affairs (BMAS), Working Time Report Germany 2016, Berlin, 2017.

[24] Act No. 311/2001 Coll., Labour Code of the Slovak Republic, as amended by Act No. 76/2021.

[25] Bulla, M., *Legal Regulation of Remote Work in Slovakia and the Covid-19 Pandemic*, East European Journal of Transnational Relations, Vol. 5, No. 2, 2021, pp. 61–75.

Italy, Belgium); and (iii) non-binding or soft-law approaches (e.g., Germany, the Netherlands). This divergence undermines legal certainty and creates differential protections for workers depending on geographic location and sectoral representation.

The lack of EU-wide harmonisation also raises questions about the internal market. Workers in cross-border settings or transnational companies may face uneven conditions, while employers operating in multiple jurisdictions must navigate a complex regulatory mosaic. The European Commission has acknowledged this gap in its impact assessments, noting that divergent national practices hamper efforts to ensure consistent working time protections in the digital environment.[26]

5. COMPARATIVE INSIGHTS: FRANCE AND GERMANY

The experiences of France and Germany offer contrasting yet instructive approaches to implementing the right to disconnect. Both countries recognise the social risks associated with digital overexposure, but their regulatory strategies differ in structure, legal formality, and institutional reliance. Comparing these two models reveals the strengths and limitations of statutory versus soft-law approaches in safeguarding workers' digital boundaries.

5.1. France: Legislating Disconnection through Collective Dialogue

France stands as the leading example of a statutory right to disconnect, anchored in the Code du travail through the 2016 Loi Travail reforms. Article L.2242-17 requires employers with more than 50 employees to engage in annual negotiations regarding the modalities of disconnection, integrating it into broader discussions on work-life balance.[27] Although the law does not prescribe the content of these agreements, it establishes disconnection as a topic of mandatory collective bargaining.

This model presents several advantages. First, it grants the right to disconnect legal status, ensuring that workers have a formally recognised claim to disengage from work communications. Second, by embedding disconnection into collective bargaining, the law ensures that measures are tailored to sectoral and enterprise-specific contexts. Third, it fosters worker participation through the representative structures of délégués syndicaux (union delegates).

---

[26] European Commission, Commission Staff Working Document: Impact Assessment Accompanying the Proposal for a Directive on Improving Working Conditions in Platform Work, Brussels, 2021, pp. 23–25.

[27] Article L.2242-17 of the Code du travail (France), inserted by Loi No. 2016-1088 du 8 août 2016.

However, the French approach is not without shortcomings. As the implementation is decentralised and outcome-dependent, the actual content of disconnection agreements varies significantly. In some enterprises, this results in robust policies and technical safeguards (e.g., email deactivation after hours), while in others it may yield little more than symbolic statements.[28] Moreover, enforcement mechanisms remain limited, especially in companies lacking strong union representation.

5.2. Germany: The Corporate Autonomy Model

By contrast, Germany has opted for a voluntary, decentralised, and largely employer-led framework. There is no general statutory right to disconnect under German federal law. Instead, companies such as Volkswagen, BMW, and SAP have introduced internal disconnection policies through works agreements (Betriebsvereinbarungen) negotiated with employee representatives pursuant to the Betriebsverfassungsgesetz (Works Constitution Act).[29]

These agreements often include restrictions on the sending or receipt of work emails outside normal business hours, encouragement of respect for employees' rest periods, and awareness campaigns promoting digital well-being. While these initiatives signal corporate responsibility and cultural change, they are not mandatory, nor uniformly implemented across sectors.

The German model reflects a broader philosophy of industrial democracy and corporate self-regulation. It allows tailored, context-specific solutions through co-determination and promotes managerial innovation in workplace policy. Yet, this very flexibility also entails the absence of universal protection. Employees in smaller firms or in sectors without strong Betriebsräte may remain entirely unprotected.[30]

Moreover, studies indicate that even in firms with disconnection policies, a workplace culture of availability persists. As work intensification increases—particularly in white-collar, high-responsibility roles—voluntary policies often fail to dislodge implicit expectations of responsiveness.[31]

---

[28] Lerouge, L.; Trujillo Pons, F., C*ontribution to the Study on the Right to Disconnect from Work: Are France and Spain Examples for Other Countries and EU Law?*, European Labour Law Journal, Vol. 13, No. 3, 2022, pp. 450–465.

[29] Eurofound, Right to Disconnect: Exploring Company Practices, Publications Office of the EU, Luxembourg, 2021, pp. 9–13.

[30] Federal Ministry of Labour and Social Affairs (BMAS), Working Time Report Germany 2016, Berlin, 2017.

[31] Gines i Fabrellas, A., How to Ensure Employees' Well-being in the Digital Age?, IDP, No. 35, 2022, pp. 7–11.

5.3. Legal Certainty vs. Cultural Flexibility

The juxtaposition of France and Germany reveals a trade-off between legal certainty and cultural flexibility. The French model offers clearer statutory guarantees and a harmonised national baseline but depends heavily on effective bargaining structures. The German model empowers enterprises to innovate and align policies with specific needs but lacks universal coverage and enforceability.

Both systems implicitly acknowledge the changing nature of work in the digital age, but their effectiveness hinges on the strength of social dialogue and institutional support. From a comparative EU perspective, these two cases illustrate the importance of balancing regulatory minimum standards with enterprise-level autonomy.

Ultimately, these national experiments offer valuable insights for EU-level harmonisation. A future directive on the right to disconnect could draw from both: mandating a minimum standard across Member States, while preserving the flexibility to tailor implementation through collective agreements or sectoral protocols.

6. EU LEGAL FRAMEWORK AND COURT PRACTICE

The right to disconnect is not yet explicitly enshrined in EU primary or secondary legislation. However, several existing legal instruments and interpretive developments in the case law of the Court of Justice of the European Union (CJEU) provide a normative basis from which such a right could be derived. These include provisions on working time, health and safety, and fundamental rights under EU law.

6.1. Existing Legal Frameworks

The most relevant secondary law is the Working Time Directive (Directive 2003/88/EC), which establishes rules on minimum daily and weekly rest periods, maximum working hours, and paid annual leave. Article 3 requires Member States to ensure that workers are entitled to a minimum daily rest period of 11 consecutive hours in every 24-hour period. However, the Directive does not address the role of digital communication in undermining such rest, nor does it provide mechanisms to enforce disconnection from ICT tools outside working hours.[32]

[32] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L299/9.

The framework Directive on Health and Safety at Work (Directive 89/391/EEC) obliges employers to assess and manage workplace risks, including psychosocial risks such as stress and burnout. In this context, continuous digital engagement could be considered a risk factor under Article 6, requiring preventive measures.[33] Yet, this Directive has rarely been invoked explicitly concerning digital overexposure.

At the constitutional level, Article 31(1) of the Charter of Fundamental Rights of the European Union affirms that "every worker has the right to working conditions which respect his or her health, safety and dignity." This provision is increasingly cited in academic and policy debates as a foundation for recognising the right to disconnect as a fundamental component of decent work in the digital age.[34]

6.2. Relevant CJEU Case Law

While the CJEU has not yet ruled directly on the right to disconnect, its jurisprudence on working time and rest periods provides strong interpretive support for such a right. Two key cases are instructive.

In this landmark judgment C-518/15 Ville de Nivelles v Matzak,[35] the CJEU ruled that standby time during which a worker is required to remain physically present at a location determined by the employer must be regarded as "working time" under the Working Time Directive.[36] The Court emphasised that constraints imposed by the employer on the worker's freedom of movement and use of time were determinative in this classification. Although the case involved physical presence, the logic of the ruling suggests that digital tethering—such as being required to respond to emails or remain contactable—could similarly amount to working time where it significantly limits personal autonomy.[37]

In case C-55/18 Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank, the CJEU required Member States to oblige employers to establish objective, reliable, and accessible systems for recording actual working

---

33 Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1.

34 Charter of Fundamental Rights of the European Union [2012] OJ C326/391, art. 31(1).

35 Case C-518/15 *Ville de Nivelles v Rudy Matzak* [2018] ECLI:EU:C:2018:82-

36 *Ibid.,* para. 60.

37 Garcia-Muñoz Alhambra, M. A.; Hiessl, C., T*he Matzak judgment of the CJEU: The concept of worker and the blurring frontiers of work and rest time*, European Labour Law Journal, vol. 10, No. 4, 2019., pp. 343 – 352.

time.[38] The Court reasoned that without such systems, ensuring compliance with workers' rights under the Working Time Directive would be impossible. This case reinforces the argument that monitoring digital engagement is essential to enforcing rest and disconnection. It also implies that employers have a positive duty to implement systems capable of distinguishing between working and non-working time—an obligation that becomes urgent in the context of remote and flexible work arrangements.

6.3. Implications for EU Legislation

These rulings indicate a juridical shift in EU labour law from a narrow, physical understanding of work to a more functional, time-based conception that aligns with digital realities. They provide interpretive support for an EU legislative initiative on the right to disconnect, grounded in the need to give practical effect to minimum rest periods and the right to dignity at work.

The European Parliament has recognised this need in several resolutions, calling for a directive that explicitly grants all workers the right to disconnect, ensures enforcement, and prohibits adverse consequences for exercising this right.[39] While the Commission has so far refrained from proposing such legislation, citing subsidiarity concerns, pressure continues to mount from trade unions, civil society, and certain Member States.

7. REGULATORY CHALLENGES AND THE ROLE OF PLATFORM WORK

While the right to disconnect is gaining traction in traditional employment contexts, it faces unique and intensified challenges within platform work. Digital labour platforms[40]—such as ride-hailing, food delivery, or online freelancing—have reconfigured the contours of the employment relationship by introducing algorithmic management,[41] fragmented contractual structures, and disguised subordination. These features complicate both the enforcement and conceptual application of the right to disconnect.

---

[38] Case C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank* [2019] ECLI:EU:C:2019:402, para. 45.

[39] European Parliament Resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2020/2121(INL)).

[40] Coyle, D.; Yeung, T.Y-C., *Understanding AirBnB in Fourteen European cities*, The Jean-Jacques Laffont digital chair, Working papers, 2017.

[41] Afina, Y., *et al., Towards a Global Approach to Digital Platform Regulation,* Egmont Institute, Brussels, 2024, pp. 11–13.

7.1. The Challenge of Misclassification and Fragmented Responsibility

A significant regulatory obstacle stems from the widespread misclassification of platform workers as independent contractors. This status often excludes them from the protections afforded to employees under national labour law and EU directives, including working time regulation and occupational health standards. Without a recognised employment relationship, platform workers are ineligible to assert any statutory or collectively bargained right to disconnect—even where they are functionally dependent on a single platform for their livelihood.[42]

Platform business models distribute managerial functions through algorithms that allocate tasks, monitor performance, and penalise unavailability. As a result, control over working time is indirect yet pervasive, and the lines between rest and work are deliberately blurred. Workers are incentivised to maintain continuous availability to maximise visibility and earnings, tethering them to the platform without formal scheduling obligations.[43]

This creates a condition of "digital piecework", where the worker is neither formally on nor off duty, yet remains perpetually responsive to the logic of algorithmic management. In such conditions, the traditional legal categories of working time, rest periods, and overtime lose operational clarity, challenging the enforcement of any protective time-bound right.[44]

7.2. Algorithmic Governance and the Psychology of Availability

The psychological effects of algorithmically structured work further complicate regulatory responses. Workers on platforms are exposed to performance ratings, task prioritisation, and payment thresholds, all of which depend on metrics of responsiveness. The constant possibility of receiving a task creates a "gamified" labour environment that fosters anxiety, overcommitment, and sleep disruption.[45]

Unlike conventional employment, where expectations of availability are set by contract or employer directives, platform work introduces a self-managed pres-

---

42 European Commission, Study to Support the Impact Assessment of an EU Initiative to Improve the Working Conditions in Platform Work, Brussels, 2021, pp. 46–52.

43 Dasgupta, S.; Williams, M., *Digital Labour Platforms in the EU: Mapping and Business Models*, Publications Office of the EU, Luxembourg, 2021, pp. 31–34.

44 Afina, Y., *et al., op. cit.,* note 41, pp. 11–13.

45 European Trade Union Institute, Work-Related Psychosocial Risks in Digital Labour Platforms, ETUI Report, Brussels, 2023, pp. 33–38.

sure[46] to remain connected. This produces what Hesselberth terms connective obligation—a moral and economic imperative to be reachable at all times, regardless of formal scheduling.[47] In this environment, disconnection becomes difficult and counterproductive to economic survival.

7.3. The Situation in Croatia

Croatia, like many Member States, has not yet introduced a statutory right to disconnect. The Croatian Labour Act regulates working hours, rest periods, and telework, but does not explicitly address disconnection from digital communications outside of working time. While employers may introduce internal policies to manage ICT use, there is no obligation to do so under national law. Grgurev and Potočnjak examine various aspects of remote work, including the use of ICT and the possibility of regulating worker availability. Their analysis is relevant for understanding how digital communication challenges the distinction between working time and rest periods.[48]

Bilić explores legal aspects of remote work and telework from international, European, and Croatian perspectives, with emphasis on the need for more robust regulation of digital availability. Although the right to disconnect is not codified as a separate legal entitlement in Croatian law, several legal provisions in the Labour Act (Zakon o radu)[49] and related legislation support its underlying principles: Article 8 of the Labour Act protects the dignity and privacy of the worker during the employment relationship, providing a basis for limiting employer interference in private time. Additionally, articles 44 and 46 define limits on working hours and prescribe daily and weekly rest periods, thereby indirectly affirming the importance of uninterrupted personal time. Article 17 prohibits discrimination based on private life and mental health, and Article 17a obliges employers to ensure adequate conditions in remote work settings. The Occupational Health and Safety Act[50] obliges employers to prevent psychosocial risks, which may include overexposure to digital communication outside working hours.

---

46 Busch, C., *The Sharing economy at the CJEU: Does Airbnb pass the „Uber test"?,* EUCML, Issue 4/2018, 2018, pp. 172-174.

47 Hesselberth, P., *Discourses on Disconnectivity and the Right to Disconnect*, New Media & Society, Vol. 20, No. 11, 2018, pp. 1996–1998.

48 Grgurev, I.; Potočnjak, Ž., *Unaprjeđenje zakonskog uređenja rada na daljinu*, Zbornik 59. susreta pravnika.
Zagreb: Hrvatski savez udruga pravnika u gospodarstvu, 2021, pp. 281-310.

49 Zakon o radu, Narodne novine, br. 93/2014, 127/2017, 98/2019, 151/2022.

50 Zakon o zaštiti na radu [Occupational Health and Safety Act], Official Gazette, No. 71/14, 118/14, 154/14, 94/18, 96/18, art. 5.

While these provisions do not establish a right to disconnect per se, they may be interpreted in a way that supports it, particularly in collective agreements or internal employer regulations. Analysing the systematic concept of the right to disconnect involves identifying its key components (the right to disconnect, protection from adverse consequences for not responding, and the employer's obligation to support its use. The right should apply to all workers, not only those formally engaged in remote work.[51] A broader interpretation of the right to rest and privacy, emphasising psychosocial risks and the right to health protection in the context of permanent digital connectivity, should be taken into consideration. According to the same author, the book often offers the most comprehensive legal overview and proposes a regulatory pathway that combines statutory reform and collective bargaining mechanisms.[52]

Croatia faces the same challenges of legal ambiguity and enforcement fragmentation in the context of platform work. Platform workers typically operate under service contracts and lack access to collective bargaining or judicial remedies. The absence of a national disconnection standard disproportionately affects these workers, leaving them exposed to exploitative forms of availability.[53]

8. RECOMMENDATIONS FOR EU-WIDE IMPLEMENTATION

The fragmented landscape of national regulations on the right to disconnect reveals the need for coordinated action at the EU level.[54] While subsidiarity allows Member States discretion in the organisation of labour law, certain minimum protections—particularly in cross-border digital contexts—require harmonisation to ensure a level playing field and safeguarding fundamental rights. A coherent EU initiative on the right to disconnect should be guided by both legal obligation and policy innovation.

The EU possesses a clear legal basis to legislate in this field under Article 153(1) TFEU, which empowers the Union to support and complement Member States' activities in improving working conditions, ensuring worker health and safety, and promoting social dialogue.[55] A directive would be the appropriate instrument, as it would allow for harmonised minimum standards while preserving national and sectoral flexibility in implementation.

---

51 Laleta, *op. cit.*

52 *Ibid.*

53 Zakon o radu, Official Gazette, No. 93/14, 127/17, 98/19, 151/22 (Croatian Labour Act).

54 ELI Guiding Principles on Implementing Workers' Right to Disconnect, Report of the European law institute, Vienna, 2023.

55 Article 153(1)(a) and (b) TFEU.

Such a directive should expressly articulate the right to disconnect as a fundamental labour right, anchored in Article 31(1) of the EU Charter of Fundamental Rights and supported by the purpose and logic of the Working Time Directive (2003/88/EC).[56] It should be applicable to all workers—regardless of sector or contractual status—reflecting the principle of equal treatment and the functional definition of employment endorsed by the CJEU.[57]

To ensure practical enforcement and meaningful protection, an EU directive on the right to disconnect should include clear definition of the right to disconnect as the freedom from digital work-related communication outside contractual working hours, without adverse employment consequences and employer obligations to adopt internal policies, in consultation with worker representatives, outlining procedures for disconnection, awareness-raising, and technological safeguards (e.g., server shutdown, delayed email delivery). Also, the document should be followed by enforcement mechanisms, including monitoring by national labour inspectorates and access to individual and collective redress.[58] Although the right to disconnect is mainly based on psychological protection and protection against reprisal, making it unlawful for employers to penalise or disadvantage employees who assert their right to disconnect is of importance to protect employees' rights.

Extension to platform work, ensuring that digitally managed workers—whether employees or not—are covered through rebuttable presumptions of employment or algorithmic accountability provisions.[59]

8.1. Promoting a Culture of Disconnection

Legal mandates alone are insufficient to shift entrenched workplace cultures of overconnectivity. The directive should be accompanied by soft-law measures, including:

EU-level guidelines on best practices for digital communication boundaries,[60] social partner involvement in shaping sectoral protocols, especially in high-intensity

---

56 Directive 2003/88/EC concerning certain aspects of the organisation of working time [2003] OJ L299/9.

57 See Case C-55/18 Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank [2019] ECLI:EU:C:2019:402, para. 45.

58 European Commission, Study to Support the Impact Assessment of an EU Initiative to Improve the Working Conditions in Platform Work, Brussels, 2021, pp. 76–80.

59 Ginès A. i Fabrellas, How to Ensure Employees' Well-being in the Digital Age?, IDP, No. 35, 2022, p. 12.

60 Eurofound, Right to Disconnect: Exploring Company Practices, Publications Office of the EU, 2021, pp. 19–22.

industries (e.g., tech, finance, healthcare), iIntegration with the European Pillar of Social Rights, particularly Principle 10, which affirms the right to a healthy, safe, and well-adapted work environment[61] and support for collective bargaining, particularly in Member States with weaker representation structures.

In implementing these obligations by producing methodological tools, risk assessments, and awareness campaigns tailored to diverse workplace realities, The European Agency for Safety and Health at Work (EU-OSHA) and Eurofound could support Member States.

8.2. Building Algorithmic Transparency

A forward-looking directive must address the digital governance layer of the modern workplace. Disconnection policies are ineffective if the underlying management systems remain opaque. Therefore, the right to disconnect must be linked to provisions on: algorithmic transparency, requiring platforms and employers to disclose how availability and responsiveness are monitored and rewarded;[62] human-in-command obligations, ensuring that work allocation and performance tracking do not rely solely on automated decision-making; and data protection, aligning with the General Data Protection Regulation (GDPR) to guarantee that digital activity tracking respects privacy and necessity principles.[63]

Embedding the right to disconnect within this broader digital regulatory framework ensures its relevance not only in traditional employment, but also in platform work and the evolving gig economy.

Finally, the transnational nature of many digital platforms poses enforcement challenges. Regulatory frameworks remain confined to national jurisdictions, while platforms operate across borders. This mismatch hinders effective oversight and creates regulatory arbitrage opportunities, whereby companies base operations in jurisdictions with weaker labour protections.

An EU-wide initiative on the right to disconnect would mitigate these discrepancies by harmonising minimum standards and ensuring protection across all forms of employment. However, implementation in the platform economy would also require rethinking employment classification, algorithmic transparency, and access to representation.

---

61 European Pillar of Social Rights, Interinstitutional Proclamation [2017] OJ C428/10.

62 Nooren, P. *et al., The Platformisation of Work: Challenges for EU Regulation*, Policy and Internet, Vol. 10, No. 2, 2018, p. 177.

63 Regulation (EU) 2016/679 (General Data Protection Regulation), [2016] OJ L119/1, arts. 5 and 22.

9. CONCLUSION

The digitalisation of work has introduced profound opportunities and equally significant risks. While new technologies have facilitated flexible work arrangements and increased accessibility to employment, they have also dissolved the traditional boundaries that separated professional responsibilities from private life. The resulting phenomenon of constant availability, whether implicit or enforced, poses critical challenges to health, dignity, and fundamental labour rights.

The right to disconnect has emerged as a normative and practical response to these challenges. Initially articulated through national implementation in France and Spain, and increasingly debated across Member States, the right reflects a growing awareness of the psychosocial and legal harms of digital overexposure. In parallel, soft-law initiatives and corporate policies—particularly in Germany—demonstrate that while useful, voluntary action is insufficient to ensure universal and enforceable protection standards.

This paper has demonstrated that the EU legal framework, though not yet explicitly inclusive of the right to disconnect, contains foundational principles upon which it can be built. These include the Working Time Directive, the Health and Safety Framework Directive, and Article 31(1) of the Charter of Fundamental Rights of the European Union. Moreover, CJEU case law has begun to evolve toward a functional and time-sensitive conception of working time, opening interpretive space for the legal recognition of disconnection as a right.

The situation is particularly acute in the platform economy. Algorithmic governance, ambiguous employment status, and transnational operations challenge the tools that national regulators have traditionally relied upon. Without explicit legal recognition and enforceable rights, platform workers remain exposed to a regime of hyper-availability in which refusal to connect equates to economic exclusion.

This fragmented regulatory landscape justifies EU-level legislative intervention. An EU directive on the right to disconnect—anchored in Article 153 TFEU—would harmonise minimum protections, promote legal certainty, and affirm the Union's commitment to upholding dignity in the digital age. Such a directive should not only define the right to disconnect but also impose employer obligations, protect against reprisal, and extend coverage to digitally managed labour.

The future of decent work in the EU will increasingly depend on the Union's capacity to anticipate and address structural risks associated with digital labour. The right to disconnect offers a concrete and timely starting point for reconciling technological progress with social justice.

REFERENCES

BOOKS AND ARTICLES

1. Adamski, D., *Lost on the digital platforms:Europas legal travails with the digital single market*, Common Market Law Review, 55(3), pp. 719-751
2. Afina, Y., *et al.*, *Towards a Global Approach to Digital Platform Regulation*, Egmont Institute, Brussels, 2024, pp. 11–13
3. Bauwens, M.; Niaros, V., *The emergence of peer production: challenges and opportunities for labour and unions*, ETUI Policy Brief European Economic, Employment and Social Policy, No. 3/2017
4. Beširević, I., *The right to rest and disconnect in the Slovenian legal system-a legal reform in the making,* Lex Economica, 2024, Vol. 16, No. 2, pp. 189–218
5. Busch, C., *The Sharing economy at the CJEU: Does Airbnb pass the „Uber test"?*, EUCML, Issue 4/2018, 2018, pp. 172-174
6. Charrié J.; Janin L., *Ficalité du numérique Le numérique : comment réguler une économie sans frontière ?,* La note d'analyse 35, Paris, France Stratégie, 2015, Vol 90 no 7-8, pp. 67-73. Available from [https://archives-gfp.revuesonline.com/article.jsp?articleId=37983. Accessed 1 May 2021
7. Coyle, D.; Yeung, T.Y-C., *Understanding AirBnB in Fourteen European cities*, The Jean-Jacques Laffont digital chair, Working papers, 2017
8. Davidov, G., *The status of Uber drivers: A Purposive approach*, Hebrew University of Jerusalem Legal studies Research Paper Series No. 17-7 to be published in the Spanish Labour law and Employment Relations Journal. 2017
9. Domurath, I., Platforms as contract partners: Uber and beyond, Maastricht Journal of European and Comparative Law, 2018. Vol. 25(5) pp. 565-581
10. Dumančić, K.; Krupka, Z.; Čavlek, N., *Strategies for Urban Evolution: Analysing the Effects of Airbnb and Uber Business Models on the Transformation of Post-industrial Societies,* in: Lakušić, S., *et al.,* (eds.), The Reimagining of Urban Spaces: A Journey Through Post-Industrial Cityscapes, Springer, Cham, 2024
11. Frosio, G. F.*, Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy*, 112 NW. U. L. REV. ONLINE 18 (2017-2018), pp. 19-46
12. Garcia-Muñoz Alhambra, M. A.; Hiessl, C., *The Matzak judgment of the CJEU: The concept of worker and the blurring frontiers of work and rest time*, European Labour Law Journal, vol. 10, No. 4, 2019., pp. 343 – 352
13. Golding, G., *Introducing Australia's New Right to Disconnect,* Labour Law Issues, University of Adelaide, vol. 10, no. 1, 2024
14. Grgurev, I.; Potočnjak, Ž., *Unaprjeđenje zakonskog uređenja rada na daljinu*, Zbornik 59. susreta pravnika. Zagreb: Hrvatski savez udruga pravnika u gospodarstvu, 2021. pp. 281-310
15. Goudin P., *The Cost of Non-Europe in the Sharing Economy: Economic, Social and Legal Challenges and Opportunities*, European Parliamentary Research Service, 2016

16. Guda, H.; Subramanian, U., *Your Uber is arriving: Managing on-demand workers through surge pricing, forest communication, and worker incentives*, Management Science, Vol. 65, No. 5. 2019
17. Juncker, J. C., *Extract from the Political Guidelines for the next European Commission – A New Start for Europe: My Agenda for Jobs, Growth*, Fairness and Democratic Change (15 July 2014)
18. Laleta, S., *Pravo radnika na (digitalno)isključivanje: izazovi i moguća rješenja*, 73. Zbornik Pravnog fakulteta u Zagrebu, No. 195, 2023.
19. Mettling, B.A., *Transformation numérique et vie au travail, Rapport, Ministere de travaille, France,* 2015. [https://travail-emploi.gouv.fr/sites/travail-emploi/files/files-spip/pdf/rapport_mettling_-transformation_numerique_vie_au_travail.pdf
20. Smorto G. in Goniadis, A., *Collaborative economy*, European Parlament. DG for internal policies. 2017
21. Sousa Ferro, M., *Uber Court: a look at recent sharing economy cases before the CJEU*, UNIO – EU Law Journal. Vol. 5, No.1., 2019, pp. 68-75
22. Todoli-Signes, A., *The "gig economy": employee, self-employed or the need for a special employment regulation,* ETUI, I-13, 2017, pp. 5-6
23. Valenduc, G.; Vendramin, P., *Work in the digital economy: sorting the old from the new, European Trade Union Institute*, Working paper 2016.03, 2016

COURT OF JUSTICE OF THE EUROPEAN UNION

1. Case C-320/16 *Criminal proceedings against Uber France* [2018] ECLI:EU:C:2018:221.
2. Case C-390/18 *Criminal proceedings against X* [2019] ECLI:EU:C:2019:1112 (Airbnb Ireland)
3. Case C-526/15 *Uber Belgium BVBA v Taxi Radio Bruxellois NV* [2016]ECLI:EU:C:2016:830
4. Case C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain* [2017] ECLIC:EU:C:2017:981

EU LAW

1. Commission Communication to the European Parliament, the Council, the European Economic and Social Council and the Council of Regions: European Agenda for the Sharing Economy, 356, Brussels, 2016
2. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and Tthe Committee of The Regions A Digital Single Market Strategy for Europe, Brussels, 6.5.2015, COM(2015) 192 final (Digital Single Market Strategy)
3. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the mid-term review of the implementation of the Digital Single Market Strategy, Brussels, COM (2017) 228 final 10.5.2017, (Digital Single Market for All)

4. Communication from the Commission to the European Parliament, the Council, the European Committee and the Committee of the Regions Shaping Europe's digital future COM/2020/67 final
5. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Council and the Council of the Regions: Online Platforms and the Digital Single Market Opportunities and Challenges for Europe, COM (2016) 288 final, Brussels, 25.5.2016
6. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Creating: A Common European Data Space, COM (2018) 232 Final Brussels, 25.4.2018.
7. Communication from the European Commission to the European Parliament, the Council and the European Economic and Social Council and the Council of the Regions: A Digital Agenda for Europe, COM (2010) 245, Brussels, 19.5.2010
8. Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union, OJ L 194, 19.7.2016, p. 1–3
9. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 17.7.2000, p. 1–16
10. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36–68
11. European Commission Joint Declaration on the EU's legislative priorities for 2018-19, 17 December 2017
12. ELI *Guiding Principles on Implementing Workers' Right to Disconnect,* Vienna, 2023
13. Policy Guidelines for the New European Commission - A New Beginning for Europe: My Agenda for Employment, Growth, Justice and Democratic Change, 15 July 2014
14. Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services. 186, 11.7.2019, pp. 57–79

NATIONAL LAW

1. Zakon o radu, National Gazette, No. 93/2014, 127/2017, 98/2019, 151/2022
2. Zakon o zaštiti na radu [Occupational Health and Safety Act], Official Gazette, No. 71/14, 118/14, 154/14, 94/18, 96/18

LIABILITY FOR DAMAGES CAUSED BY AUTONOMOUS DRIVING VEHICLES FROM THE EU LAW PERSPECTIVE

Kosjenka Dumančić, PhD, Full Professor
University of Zagreb, Faculty of Economics and Business
Trg J.F.Kennedy 6, 10000 Zagreb, Croatia
kdumancic@net.efzg.hr

Dominik Vuletić, PhD, Associate Professor
University of Zagreb, Faculty of Economics and Business
Trg J.F.Kennedy 6, 10000 Zagreb, Croatia
dvuletic@efzg.hr

ABSTRACT

The rise of autonomous driving vehicles and artificial intelligence systems presents significant legal challenges in various regulatory fields. Among them is main subject of this paper: liability for damages caused by autonomous driving vehicles. Common regulatory approach of liability caused by vehicles is based on fault or negligence. The legal subjects responsible for causing the accident are held liable for damages. Traditional liability legal frameworks, designed for human drivers, struggle to address the complexities introduced by vehicles operated with assistance of artificial intelligence. When it comes to artificial intelligence systems general regulatory approach varies from extensive risk-based framework best represented by the new European Union Artificial Intelligence Act to the liberal technology friendly approach like one adopted in the United States. Particular focus of this research is on the European Union Product Liability Directive. The new Directive plays a crucial role in holding manufacturers and software developers accountable with application of its rules on strict product liability. Paper explores its interconnection with Artificial Intelligence Act when it comes to liability for damages caused by autonomous driving vehicles. Other legislative efforts aiming to fill regulatory gaps and establish clear rules for liability of damages caused by autonomous driving vehicles are also explored. The interplay between existing and emerging European Union liability frameworks is elaborated. The paper detects the need for harmonized legal standards to ensure consumer protection, fair compensation mechanisms, and legal certainty in the context of accidents related to the use of autonomous driving vehicles.

Keywords: *Autonomous driving vehicles, Artificial intelligence, EU Law, Liability for damages*

1. INTRODUCTION

Nikola Tesla wrote in 1935: 'today the robot is an accepted fact, but the principle has not been pushed far enough. In the twenty-first century the robot will take the place which slave labor occupied in ancient civilization'.[1]

The emergence of autonomous vehicles (AVs) represents a significant transformation in the transportation sector, promising advancements in safety, efficiency and accessibility. Most importantly, AVs have the potential to save lives and prevent injuries.[2] In the US National Motor Vehicle Crash Causation Survey from 2015 crashes from a two-year period where researched. Survey determined that the critical reason, which is the last event in the crash causal chain, was assigned to the driver in 94 percent (±2.2%) of the crashes.[3] Study of RAND Corporation from 2016[4] estimated that the benefits of AV technology—including decreased crashes, increased mobility, and increases in fuel economy—outweigh the likely disadvantages and costs.

Rapid technological development of AV produces complex legal challenges in various regulatory fields. Among them is main subject of this paper: liability for damages caused by autonomous driving vehicles. The anticipated future shift from human-operated to vehicles driven with the artificial intelligence (AI) will necessitate a re-evaluation of existing legal norms on liability for damages.

Introductory, we should conceptualise the term autonomous vehicles. United States National Highway Traffic Safety Administration (NHTSA) has adopted a system created by the Society of Automotive Engineers (SAE)[5] to describe the levels of vehicle automation. The scale goes from 0 (no automation) to 5 (full automation). The concept of autonomy generally in AI refers to the system's ability to make decisions or take actions that are not entirely pre-programmed.[6] This sets autonomy apart from automation[7]. Vehicles operating at levels 0, 1, 2 or 3

---

1 Novak, M., *Nikola Tesla's Amazing Predictions for the 21st Century*, SMITHSONIAN Magazine, 2013., [https://perma.cc/29FU-MRYK], Accessed 21 March 2025.

2 Stanley, Karlyn D. *et al.*, *Autonomous Vehicles and the Future of Auto Insurance*, RAND Corporation, Santa Monica, Calif., 2020, p. 1.

3 *Ibid.*

4 Anderson, James M. *et al.*, Autonomous *Vehicle Technology: A Guide for Policymakers*, RAND Corporation, Santa Monica, Calif., 2016, p. xvii.

5 Stanley *et al.*, *op. cit.,* note 2, p. 2.

6 Buiten, M., *Product Liability for Defective AI*, European Journal of Law and Economics 57, 2024, pp. 239–273. [https://doi.org/10.1007/s10657-024-09794-z].

7 *Ibid.*

on this scale are called automated and those that operate at levels 4 or 5 are called autonomous:

• Level 4, or high automation: automated driving system (ADS) on the vehicle can itself perform all driving tasks and monitor the driving environment— essentially, do all the driving—in certain circumstances. The human need not pay attention in those circumstances.

• Level 5, or full automation: automated driving system (ADS) on the vehicle can do all the driving in all circumstances. The human occupants are just passengers and need never be involved in driving.[8] Previous classifications did not encompass level 5 (they were within 0-4 scale).[9]

In the European Union (EU) the legal landscape is evolving to accommodate the unique challenges posed by the emerging digital age and rise of AI. Regulatory framework on autonomous driving vehicles is and will be integral part of that legal evolution. For example, in the European Commission's White Paper on AI from 2021 proposes provisions explicitly covering new risks presented by the emerging digital technologies including existing regulatory framework for defective product.[10] This process was not without its failures. The European Commission published a Proposal for a Directive on adapting non-contractual civil liability rules to artificial intelligence, better known as AI liability directive[11], in 2022 only to redraw it in 2025.[12] Better luck accompanied the Proposal for a new Directive on liability for defective products published also in 2022.[13] In this paper we will explore existing legal framework applicable to liability for damages caused by autonomous driving vehicles within the EU Law and discuss possible pathways to its development.

---

8 Stanley *et al.*, *op. cit.,* note 2, p.2.

9 See for example in Webb, K.C., *Products liability and autonomous vehicles: who's driving whom*, Richmond Journal of Law & Technology, Vol. 23, No. 4, 2016, pp. 1-52.

10 European Commission, White Paper on Artificial Intelligence: A European Approach to Excellence and Trust. COM(2020) 65 final, Brussels, 2020.

11 European Commission, Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive), COM(2022) 496 final, 2022/0303(COD). Brussels, 2022.

12 See more in Spindler, G., *Different Approaches for Liability of Artificial Intelligence – Pros and Cons – the New Proposal of the EU Commission on Liability for Defective Products and AI Systems*, 2023. [http://dx.doi.org/10.2139/ssrn.4354468].

13 See more in Karanikić Mirić, M., *Product Liability Reform in the EU*, EU and Comparative Law Issues and Challenges Series (ECLIC), 7, 2023, pp. 383–413. [https://doi.org/10.25234/eclic/27456].

2. THE NEW EU PRODUCT LIABILITY DIRECTIVE

The new European Union's Product Liability Directive (PLD)[14] has been enacted in 2024 with transposition deadline for national legal orders of Member States by 9 December 2026 . Old PLD, that remains in legal force[15] until 9 December 2026, has long served as a cornerstone in harmonizing product liability laws across Member States, ensuring that consumers can seek compensation for damages caused by defective products. Both product liability directives are of maximum harmonization within the EU Secondary Law. Originally enacted in 1985, the first PLD[16] established a strict liability regime, holding producers accountable for harm caused by defects in their products, irrespective of fault - claimants are required to prove the defect, the damage, and the causal link. This framework was designed to balance the interests of consumers and producers, facilitating a fair mechanism for addressing claims related to product defects. The Court of Justice of the European Union (CJEU) has crated extensive case-law over time in interpreting the provisions of the old PLD.

The new PLD has been enacted with digital age in mind -that was main impetus for the initiation of its legislative process. The European Law Institute (ELI) published in 2021, same year when European Commission's White Paper on AI was published, Guiding Principles for Updating the Product Liability Directive for the Digital Age[17]. The ELI Guiding Principles provide good summarization of the necessities that revision of the product liability legal framework had to encompass:

- simple mechanism for seeking compensation should be available to a person who has suffered harm caused by a defective product;

- product liability system for the digital era must ensure an appropriate balance between protecting individuals and fostering innovation and utilisation of digital technology;

- PLD must be aligned with measures in related areas of law, as well as with non-legal measures such as insurance or compensation schemes;

---

14 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 (Text with EEA relevance), OJ L, 2024/2853.

15 Old PLD shall continue to apply with regard to products placed on the market or put into service before that date (9 December 2026).

16 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 210.

17 Twigg-Flesner, C., *Guiding Principles for Updating the Product Liability Directive for the Digital Age*, Pilot ELI Innovation Paper, European Law Institute, 2021, [https://ssrn.com/abstract=3770796], Accessed 21 March 2025.

- definition of 'product' in the PLD should be updated to cover (i) the combination of goods with digital elements and (ii) digital content and digital services supplied as 'digital products';

- category of persons liable towards an individual (the notion of 'producer') should be revised to reflect the different actors involved;

- notion of 'defect' which triggers the producer's liability should be reconsidered to reflect the particular features of digital products and digital elements;

- revisions of the notion of 'damage' could be considered to include damage to digital elements and data;

- burden of proof should be adjusted to reflect the complexity of goods with digital elements and of digital products;

- defences available to a producer need to reflect the impact of digitalisation on products;

- system for allocating the financial consequences of a successful claim by an individual to the party responsible for that loss should be an integral part of a revised product liability system.[18]

Under the old PLD the product was defined as mainly tangible, movable object. Products were distinguished from services, which are not covered by the old Directive. Thus, it was disputable[19] weather software at all was covered by the old PLD and if so to what extent (differentiation between software updates, which are services, and software upgrades as separate products was discussed). New PLD broadens the definition of product[20] to include digital products such as software (both standalone and integrated), digital manufacturing files, and artificial intelligence systems.

New PLD extends liability to digital services that influence a product's functionality, such as cloud-based services and real-time data services. AI systems are also explicitly covered, ensuring that developers and providers can be held accountable for defects. Liability is expanded to a broader range of economic operators[21]

---

18 *Ibid.*

19 Chatzipanagiotis, M., *Product Liability Directive and Software Updates of Automated Vehicle*, Proceedings of SETN 2020 - 11th Hellenic Conference on Artificial Intelligence, 2020, pp. 123–130.

20 Definition of product in new PLD is contained in Art. 4 (1):
'product' means all movables, even if integrated into, or inter-connected with, another movable or an immovable; it includes electricity, digital manufacturing files, raw materials and software.

21 Definition of economic operator is stipulated in Art 4 (15): 'economic operator' means a manufacturer of a product or component, a provider of a related service, an authorised representative, an importer, a fulfilment service provider or a distributor.

including authorised representatives, fulfilment service providers and online platforms. They can be held liable jointly and severally (this is not a novelty).

New PLD introduces provisions to ease the claimant's burden of proof in complex cases which is particularly applicable to those involving advanced technologies. The defectiveness of the product shall be presumed if the defendant fails to disclose relevant evidence and the claimant demonstrates along with the casual link that the product does not comply with mandatory product safety requirements.[22] The causal link between the defectiveness of the product and the damage shall be presumed where it has been established that the product is defective and that the damage caused is of a kind typically consistent with the defect in question.[23]

Definition of damage was expanded in the new PLD to include destruction or corruption of data. Thus, new notion of damage encompasses personal injury, property damage and data loss. New PLD regulates that any party making substantial modifications to a product that affect its safety is considered a manufacturer and can be held liable for resulting defects (old PLD was silent on the subject of modifications). While old PLD established a 10-year long-stop period for bringing claims new PLD extends this period to 25 years in cases where the damage is latent and not immediately discoverable.

3. APPLICABILITY OF THE OLD AND NEW PLD ON AUTONOMOUS DRIVING VEHICLES

While the old Product Liability Directive is still in the legal force until 9 December 2026 is suitability for world of autonomous driving vehicles in the digital age is obviously inadequate. However, we cannot exclude its applicability on damages caused by AV put into circulation on the EU Internal Market. Furthermore, provisions of the old PLD will be applicable and after 2026 to products put in circulation before that date. Thus, since this is the current legal framework we should firstly examine the applicability of the old PLD on damages caused by AV. Autonomous driving vehicles are vehicles and therefore they are to be considered as products under the old provisions (tangible, movable object). There are several important legal question arising in this examination.

Firstly, what constituents a defective AV? According to Art. 6(1) of the old PLD, a product is defective, when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including (a) the presentation of the product, (b) the use to which it could reasonably be expected that the product

[22] Art. 10 (2).

[23] Art. 10 (3).

would be put, (c) the time when the product was put into circulation[24]. Recital (6) of the old PLD clarifies that the defectiveness of the product is determined by reference to the lack of the safety which the public at large is entitled to expect. Therefore, the safety expectations are determined objectively, which means that reference is not made to the expectations of the specific user. In addition, the PLD establishes a duty to put into circulation products that are reasonably safe, taking into account all the circumstances not products that are absolutely safe[25]. The CJEU has ruled in the *Boston Scientific Medizintechnik* joint cases[26] that, where it is found that products belonging to the same group or forming part of the same production series have a potential defect, an individual product of such series may be classified as defective without there being any need to establish that this product has such a defect. If the damages are caused by the fully autonomous AV operating on level 5 (as explained in the introduction of this paper) we can conclude that AV is defective. Since the level of autonomy exclude the need for direct human control if damage is caused by the AV then it its defective product under old PLD. However, answer is not so clear with AV operating on level 4 and below. Because there is an element of direct human control liability of a driver or other occupant's defectiveness should be limited by the possibility of preventing damage with excising corrective human control. This is quite different when comparing to the damages caused by standard vehicles operating outside ADS. Courts usually do not have to delineate such nuances between human operation and level of automation when it comes to them. Thus, standard for defectiveness of AV will be harder to determine for level 4 or lower.

Secondly, who is liable for damages caused by the defective AV? Art. 3(1) of the old PLD includes in the definition of producers the manufacturer of the end product, the component manufacturer, the producer of any raw material, as well as any persons who, by putting their name, trade mark or other distinguishing feature on products present themselves as their producers. Furthermore, the importer of the product in the EU is also deemed a producer.[27] Where the producer of the product cannot be identified, each supplier of the product is treated as its producer, unless it informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied it with the product. Therefore, producer,

---

24 Chatzipanagiotis, *op. cit.*, note 19.

25 *Ibid.*

26 Court of Justice of the European Union, Joined Cases C-503/13 and C-504/*13 Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt – Die Gesundheitskasse and Betriebskrankenkasse RWE* [2015], ECLI:EU:C:2015:148.

27 Chatzipanagiotis, *op. cit.*, note 19.

importers and suppliers of defective AV are deemed liable for damages caused even under the provisions of the old PLD.

Additional question relates the liability of third-party software providers to AV systems. It seems the existing liability regulatory framework does not encompass such providers as product providers and thus they are excluded from the scope of the old PLD. Some legal commentators, like *Michael Chatzipanagiotis*, have concluded that the PLD is inapplicable to software updates[28] even when they are coming from the producer.

New PLD is undoubtedly more suitable for the world autonomous driving vehicles. Software is now included in the notion of a product. Liability encompasses now both software updates to AV by producer and compatible third-party software providers. Liability is extended to the providers of services used by AV such as cloud services and third-party navigation sources. Therefore, scope of liable subject is much wider under the new regulatory framework.

Notion of damage is expanded in the new PLD to include data loss which can occur in the operation of the AV. This is one of the major changes in the regulatory regime of liability for damages. Cybersecurity concerns of operating AV are now met by holding manufacturers accountable for ensuring robust cybersecurity measures and timely updates. Primary conclusion that damages caused by the fully automated AV operating on level 5 makes AV a defective product remains. Problematic is, however, applicability of that standard to all the same AV regarding the case-law of the CJEU in the *Boston Scientific Medizintechnik* cases. AV operating on the level 5 have integrated AI systems that generate autonomous solutions differentiated form other AV of the same type or product series. Thus, liability for damages caused by a particular AV does not have to relate to the same group or the same production series.

4. EU AI ACT AND AUTONOMOUS DRIVING VEHICLES

European Union legislative process during the last several years experienced regulatory stampede[29] with Regulation on AI[30], generally known as EU AI Act, being at its forefront. The AI Act entered into force on 1 August 2024, following its pub-

---

28 *Ibid.*

29 Vuletić, D., *High Risk Artificial Intelligence Systems and Legal Doctrine of Essential Facilities: in Search for a Dynamic Model*, Interdisciplinary Description of Complex Systems Vol. 23, No. 1, 2025, pp. 72-81. [https://doi.org/10.7906/indecs.23.1.4].

30 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 Di-

lication in the Official Journal on 12 July 2024. However, the legal applicability starts partially on 2 February 2025 and continues in phases until full applicably of all provisions on 2 August 2027. Majority of provision will become legally applicable on 2 August 2026. The Act applies to manufactures, providers and deployers of AI systems both within and outside of the EU. The Act also applies to importers and distributors, authorised representatives of providers and affected persons (including users) that are located in the Union.

Primary object of regulation of EU AI Act is artificial intelligence system (AI system).[31] The Act sets harmonised rules for the development, placement on the market and use of AI systems in the Internal Market following a proportionate risk-based approach. The risk based approach of the EU AI Act basically means that artificial intelligence systems are classified into four tiers of risk:

- unacceptable;
- high;
- limited;
- minimal or low risk.

The AI system unacceptable practices are generally prohibited by the EU AI Act (with certain exemptions) and have already become legally applicable (since 2 February 2025). High risk AI system practices are subject to specific requirements and conformity assessments. Limited risk AI practices are subject to transparency and information obligations. Minimal or low risks AI practices are permitted with no restrictions under the Act.

The main subject of analysis of EU AI Act for purposes of this paper is EU AI Act applicability on autonomous driving vehicles. Firstly, we should note that AV are inherently interconnected with use of AI systems. All AV operating on levels 5 and 4 of automation (as described in introduction of this paper) are by technological necessity using some kind of AI systems. Consequently, there cannot be any doubt that EU AI Act will be applicable to them to certain extent. Real subject of examination is what is the classification of AV under AI Act risk-based approach in regards to obligations and requirements imposed.

---

rectives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (Text with EEA relevance), OJ L, 2024/1689.

31 More on definition of AI system in Vuletić, D. *et al., Algorithmic Collusion in Competition Law: Overview*, EU and Comparative Law Issues and Challenges Series (ECLIC), 8, pp. 377-394. [https://doi.org/10.25234/eclic/35845].

The EU AI Act expressly stipulates[32] that following AI systems intended to be used as a safety component of a product, or is itself a product, covered by the Union harmonisation legislation are deemed as high risk:

- two or three-wheel vehicles and quadricycles;
- agricultural and forestry vehicles.

Therefore, we can conclude that when it comes to two or three-wheel vehicles and quadricycles and agricultural and forestry vehicles that can be considered AV (using levels 5 or 4 of autonomy) classification as high-risk AI systems is presumed. The requirements and conformity assessments for high risks AI systems from AI Act include: risk management systems; data governance; technical documentation; record keeping; transparency and provision of information to users; human oversight; accuracy, robustness and cybersecurity[33]. When it comes to other AV there is no general answer to our examination. Answer is dependable on the specific characteristics of the AI system used by AV. This has to be examined on the case-to-case basis bearing in mind that AI systems assisting AV generate autonomous solutions differentiated even form other AV's of the same type and series.

This examination is important because violation of the applicable obligations and requirements effects liability for damages caused by use of AV. Therefore, unconformity of AI system used by AV with EU AI Act will bring liability for the caused damages within the broad conceptualisation of the term in the new PLD (now encompassing and liability for data loss). Unconformity of AI system used by the AV with applicable requirements of AI Act would made AV inherently defective under the provisions of new PLD. We can conclude that AI Act and PLD are intrinsically interconnected when it comes to the liability for the damages caused by use of AV.

5. CONCLUSIONS

The legal landscape of the EU Law is in the process of evolution in order accommodate the unique challenges posed by the emerging digital age and rise of AI. This legislative evolution has by technological necessity include regulation of autonomous driving vehicles and damages caused by their operation. The new Product Liability Directive (PLD) enacted in 2024 with transposition deadline by 9 December 2026 represents expected progress in the regulatory framework more fitting for the digital age. Definition of product is expanded to include digital products such as software, digital manufacturing files and artificial intelligence

[32] Art. 6 (1) (a) in relation to Annex I.

[33] Vuletić, *op. cit.*, note 29.

systems. Liability in the new Directive is expanded to include digital services that influence a product's functionality, such as cloud-based services and real-time data services. AI systems are also explicitly covered, ensuring that developers and providers can be held accountable for defects. Liability is expanded to a broader range of economic operators including authorised representatives, fulfilment service providers and online platforms. Definition of damage was expanded to include destruction or corruption of data. Thus, new notion of damage encompasses personal injury, property damage and data loss. This all makes the future new regulatory framework more suitable for the world of autonomous driving vehicles. However, provisions of the old Product Liability Directive are still applicable and will continue to be applicable even after 9 December 2026 when it comes to products put in circulation on the Internal Market before that date.

This paper brings examination of the applicability of the provisions of old and new Product Liability Directives on the liability for damages caused by autonomous driving vehicles. Examination concludes that under provisions of the old Directive producer (including manufacturer of the end product, the component manufacturer, the producer of any raw material, as well as any persons who, by putting their name, trade mark or other distinguishing feature on products present themselves as their producers) can be held liable for damages caused by defective AV. However, unlike with new regulatory framework liability does not extend to software providers and software updates. Furthermore, since the definition of damage has been expanded possible damage caused by the AV will be wider in scope once when the provisions of the new Directive became applicable. Analysis concludes that if the damages are caused by the fully autonomous AV operating on level 5 product is to be considered defective both under the provisions of the new and old Directive. Standard for defectiveness of AV will be harder to determine for level 4 or lower levels classified under the system created by the Society of Automotive Engineers.

The case-law of the Court of Justice of the EU will have to be adjusted to new regulatory framework. The CJEU rule from the *Boston Scientific Medizintechnik* joined cases that when products belonging to the same group or forming part of the same production series have a potential defect, an individual product of such series may be classified as defective without there being any need to establish that this product has such a defect, will have to be revised when it comes to damages caused by the AV operating under level 5. Reason for that is that autonomous driving vehicles operating on the level 5 have integrated AI systems that generate autonomous solutions differentiated form other vehicles of the same type or product series. Thus, liability for damages caused by a particular AV does not have to relate to the same group or the same production series.

The research also explores interconnectedness of the product liability regime with the new EU AI Act that has been enacted in 2024. Conclusion here is that EU AI Act will be applicable to operation of autonomous driving vehicles to certain extent. The EU AI Act expressly stipulates that AI systems in two or three-wheel vehicles and quadricycles and agricultural and forestry vehicles intended to be used as a safety component of a product, or is itself a product, are deemed as high risk. Thus, specific requirements and conformity assessments for high risks AI systems under EU AI Act will be applicable to these vehicles in the future if they operate on the levels 5 and 4 of autonomy. When it comes to other AV applicability of EU AI Act is dependable on the specific characteristics of the AI system used by AV. It has to be examined on the case-to-case basis bearing in mind that AI systems assisting AV generate autonomous solutions differentiated even form other AV's. Unconformity of AI system used by AV with the provisions of the EU AI Act will lead to the conclusion that vehicle concerned is defective product. General conclusion is that EU AI Act and new product liability regime are intrinsically interconnected when it comes to the liability for the damages caused by use of autonomous driving vehicles.

REFERENCES

BOOKS AND ARTICLES

1. Anderson, James M.; Kalra, N.; Stanley, Karlyn D.; Sorensen, P.; Samaras, C.; Oluwatola, Oluwatobi A., *Autonomous Vehicle Technology: A Guide for Policymakers*, RAND Corporation, Santa Monica, Calif., 2016
2. Buiten, M., *Product Liability for Defective AI*, European Journal of Law and Economics Vol. 57, 2024, pp. 239–273. [https://doi.org/10.1007/s10657-024-09794-z]
3. Chatzipanagiotis, M., *Product Liability Directive and Software Updates of Automated Vehicle*, Proceedings of SETN 2020 - 11th Hellenic Conference on Artificial Intelligence, 2020, pp. 123–130.
4. Karanikić Mirić, M., *Product Liability Reform in the EU*, EU and Comparative Law Issues and Challenges Series (ECLIC), 7, 2023, pp. 383–413. [https://doi.org/10.25234/eclic/27456]
5. Novak, M., *Nikola Tesla's Amazing Predictions for the 21st Century*, SMITHSONIAN Magazine, 2013, [https://perma.cc/29FU-MRYK], Accessed 21 March 2025
6. Spindler, G., *Different Approaches for Liability of Artificial Intelligence – Pros and Cons – the New Proposal of the EU Commission on Liability for Defective Products and AI Systems*, 2023 [http://dx.doi.org/10.2139/ssrn.4354468].
7. Stanley, Karlyn D.; Grisé, M.; Anderson, James M, *Autonomous Vehicles and the Future of Auto Insurance*, RAND Corporation, Santa Monica, Calif., 2020.

8. Twigg-Flesner, C., *Guiding Principles for Updating the Product Liability Directive for the Digital Age*, Pilot ELI Innovation Paper, European Law Institute, 2021, [https://ssrn.com/abstract=3770796], Accessed 21 March 2025
9. Vuletić, D.; Bradvica, M.; Krstulović, D.; Gvozdić, S.; Kachkouche, R., *Algorithmic Collusion ikn Competition Law: Overview*,. EU and Comparative Law Issues and Challenges Series (ECLIC), 8, pp. 377–394. [https://doi.org/10.25234/eclic/35845],
10. Vuletić, Dominik, *High Risk Artificial Intelligence Systems and Legal Doctrine of Essential Facilities: in Search for a Dynamic Model*, Interdisciplinary Description of Complex Systems Vol. 23, No. 1, 2025, pp. 72-81. [https://doi.org/10.7906/indecs.23.1.4], Accessed 21 March 2025.
11. Webb, K.C., *Products liability and autonomous vehicles: who's driving whom*, Richmond Journal of Law & Technology, Vol. 23, No. 4, 2016, pp. 1-52.

COURT OF JUSTICE OF THE EUROPEAN UNION

1. CJEU, Joined Cases C-503/13 and C-504/13 *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt – Die Gesundheitskasse and Betriebskrankenkasse RWE* [2015], ECLI:EU:C:2015:148

EU LAW AND OFFICIAL DOCUMENTS

1. Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 210
2. 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 (Text with EEA relevance), OJ L 2024/2853
3. European Commission (2022) Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive) COM(2022) 496 final, 2022/0303(COD). Brussels, 2022.
4. European Commission, White Paper on Artificial Intelligence: A European Approach to Excellence and Trust COM(2020) 65 final, Brussels, 2020.
5. 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) (Text with EEA relevance), OJ L, 2024/1689

Original scientific paper

DESIGNING EUROPEAN "POLICIES FIT FOR THE FUTURE": HOW ABOUT REVIVING THE IDEA OF A EUROPEAN FOREIGN MINISTER?

Vladimir Mikić, PhD, Research Associate
Institute for Comparative Law
Terazije 41, Belgrade, Serbia
v.mikic@iup.rs, mikic.vlada@gmail.com

ABSTRACT

On December 19, 2024, the European Council adopted a highly significant document, which represents a strengthened reflection of traditional visionary tendencies of the European project. In its Conclusions, this body reminded that European Union has a continuing obligation to re-inforce its global engagement. These official remarks should probably be taken seriously, because they seem to be entirely in line with the European Union's Strategic Agenda for 2024-2029, adopted earlier in 2024. The Agenda calls for "ensuring coherent and influential external action" of the European Union, reminding at the same time that its institutional structures are ripe for "the necessary internal reforms". Re-imagining the European foreign policy can be based, at least partially, on thinking over an idea of creating the post of the European Minister for Foreign Affairs.

In this paper, the patterns for reforming the European foreign policy institutional structure and normative framework are explored. After the introductory part, crucial explanations why the Union's foreign policy is in dire need to be reformed are summed up. In the following section of the paper, some of the weaknesses of the existing foundations of the European diplomacy, personalized by the partly anachronistic office of the High Representative for Foreign Affairs and Security Policy, are exposed. The fourth part is dedicated to exploring potential roles of a unique European foreign minister in creating a more coherent European foreign policy, including the predictable challenges that might stand in the way of reviewing the existing European political and legal framework in this regard. The paper ends with conclusions that, in the field of its foreign affairs, the European Union may and should be rearranged to develop into a coherent entity representing more than just a sum of its parts.

***Keywords**: Common Foreign and Security Policy, European Union, European Union foreign policy, European Foreign Minister, European Union institutions*

1. INTRODUCTION

"Boxer could not get beyond the letter D. He would trace out A, B, C, D, in the dust with his great hoof, and then would stand staring at the letters with his ears

back, sometimes shaking his forelock, trying with all his might to remember what came next and never succeeding. On several occasions, indeed, he did learn E, F, G, H, but by the time he knew them, it was always discovered that he had forgotten A, B, C, and D. Finally he decided to be content with the first four letters, and used to write them out once or twice every day to refresh his memory."

(George Orwell, *Animal Farm*, 1945)

In George Orwell's satirical novella, Boxer is a workhorse loyal to the master of the *Animal Farm*, whose whims tend to irritate the ever more sensitive animals. The horse obviously cannot take a *step more* to learn the letters of alphabet, an undertaking he (as it appears, *temporarily*) considers particularly valuable. As a result, Boxer concedes defeat and tries continuously only to preserve the limits of his hard-won "knowledge" of the first four letters. The comparison with the aspirations to change the institutional framework of the European Union (EU) in the field of Common Foreign and Security Policy (CFSP) may appear to some to be too radical, but the parallel remains appropriate to the author of this paper.

Global positioning of the EU has recently been leading to confusion as whether its structures are well-suited for brave international aspirations which are laid out in its basic documents. Striving for its greater global visibility, several founding treaties of the EU have steadily been calling for the establishment of an institutional and legal framework deemed necessary for it to captivate an adequate attention of other international actors. The EU Strategic Agenda for 2024-2029 (EUSA),[1] adopted by the European Council in June 2024 (the year in which the 35th anniversary of the fall of the Berlin Wall was marked), obviously aimed at designing innovative instruments for strengthening the values of the EU in a complex global environment. Thus, the EUSA calls for "ensuring coherent and influential external action" of the EU, reminding at the same time that its institutional structures are ripe for "the necessary internal reforms". Perfectly in line with the EUSA's aspiring wording, in December 2024, the European Council adopted the Conclusions,[2] stating that the world "has become more confrontational, transactional and uncertain", which invites the EU to "adapt to the ever-evolving circumstances", asserting its "ambition and role as a strategic global player in the new multipolar geopolitical context".[3]

---

1 European Union Strategic Agenda for 2024-2029 (hereinafter: EUSA), Brussels, 27 June 2024, [https://www.consilium.europa.eu/media/yxrc05pz/sn02167en24_web.pdf.], Accessed 20 January 2025.

2 European Council Meeting Conclusions, Brussels, 19 December 2024, EUCO 50/24, [https://www.consilium.europa.eu/media/jhlenhaj/euco-conclusions-19122024-en.pdf], Accessed 20 January 2025.

3 EUSA, *op. cit.*, note 1, p. 4.

Not much surprisingly, the two documents reflect a statement of grand ambitions carried by the EU in international arena. Both represent a potentially significant European response to the aggravating set of internal and external challenges shaped by numerous threatening events and tendencies. The latter include: a worsening climate change situation, the Brexit, a major ongoing war in the EU's immediate neighborhood (Ukraine), the apparent immigration compassion-fatigue, and potential immense security risks at the EU's eastern (Poland, the Baltic states) and south-eastern frontiers (the Western Balkans, the Israel-Hamas War). Engagements of European diplomacy appear to be suboptimal, in comparison with the ones conducted by the United States of America (USA), the Russian Federation (Russia), and China, to shorten the ever growing list of relevant actors. Actual international environment in Europe's close vicinity may safely be esteemed to be marked with a very high degree of instability. During the relative retreat of the USA from the global political scene during the first term of the President Donald Trump (2017-2021), the EU "failed spectacularly at seizing the role of world leader", whilst "a power vacuum" has gradually been filled by China, Russia, and other international actors.[4]

In law and politics, certain initiatives do not need to be invented from the scratch; they should sometimes only be reminded of. Thus, one of the possible remedies for the not-much-favorable global position of the EU had already been conceived in the first half of the opening decade of the 21th century. The medicine for most of the recognised risks contained in the formal *constitutionalisation* of the EU legal framework, *via* the adoption of the Treaty establishing a Constitution for Europe (the Constitution),[5] signed in 2004. However, even before constitutional mechanisms for the ratification were employed in *all* of the member states, the Constitution was rejected.

So why do we return to the topic of a *defunct* project, as the Constitution is? The answer revolves around one important ingredient of the entire project – the introduction of the post of the EU Minister for Foreign Affairs (Minister) – a united, strong, and determined voice of Europe in international relations. Namely, the inter-governmental conference to which the task of drafting the Constitution was assigned assessed that it would be necessary to fuse the functions of the EU Commissary for Foreign Affairs with those pertaining to the Secretary General of the European Council and the High Representative for Foreign Affairs and Security Policy (HR), in order to create a single highest European diplomatic post – that of the Minister.

4 Bindi, F., *The Foreign Policy of the EU: Assessing Europe's Role in the World*, Brookings Press, 2022, p. 1.

5 Draft Treaty Establishing a Constitution for Europe [2003] C169/01.

The post of the Minister was envisioned to serve as a *major* institutional solution introduced by the Constitution. Destined to represent the intention of the EU to strengthen its international effectiveness and coherence of its external action, a never-delivered Minister (*Mr. Foreign Policy*, as Jean Monnet had predicted[6]) appears to be sorely missing in the current state of international affairs. Nevertheless, significantly less has been written and discussed about the post after the collapse of the Constitution project, although, arguably, certain elements of the current disillusionment with further political integration of the EU might have been thwarted if the topic had been kept living. The main purpose of this paper is to re-ignite the debate on the question whether the concept of *a politically stronger Europe* could be reinforced by introducing the post of its unique foreign representative.

The first part of the paper is devoted to exploring which elements of the CFSP are most urgently needed to be replaced in order to ensure a truly *Strong and Secure Europe*, the formulation adopted in 2024 by the European heads of states and governments to manifest Europe's ultimate priorities. An introductory analysis of the normative framework serves to prepare the reader for investigating the shortcomings of the current EU legal framework, including the somewhat underdefined position of the HR, particularly in the context of a complex international reality, even when it comes to the EU's immediate security, which the third part of the paper is addressing. In the third part, I reinforce the claim that the Minister might represent one of the instruments the appliance of which would help propel the EU to broaden its role in global affairs and transform the EU into a convincing international power. The paper closes with remarks intended to summarize the explanations in which way the long-running European foreign policy debate could and should be re-intensified by thinking again about the idea about introducing the post of the Minister, to the best possible interest of the EU and its member states.

2. EUROPEAN FOREIGN POLICY: WHY IS IT IN DIRE NEED TO BE REFORMED?

After the defeat of the Constitution's ratification, the EU moved on. Relatively soon after the Treaty of Nice (signed in 2001, came into force in 2003), which had already been approved at the time of the ratification of the Constitution, the Treaty of Lisbon was adopted (signed in 2007, in force since 2009).[7] In comparison with the earlier Treaty of Amsterdam (adopted in 1997, entered into force

[6] Lamassoure, A., *Histoire secrète de la Convention européenne*, Albin Michel, Fondation Robert Schuman, 2004, p. 37.

[7] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01.

in 1999), the former two documents have provided an institutional framework which would bestow a more prominent role of the CFSP. However, the content of none of the three mentioned acts could have competed with the institutional scope of the EU's international aspirations inspired by relevant provisions of the Constitution.

Institutional framework for the EU functioning has not been changed since 2007 (or – regarding the date of entry of the Treaty of Lisbon (the TEU) into force – since 2009, but it is all the same). The EU's normative framework was regularly modified, by the means of adopting a fully new treaty, in 1992 (the Maastricht Treaty), 1997, 2001, and 2007. Anyone might easily assess that any commitment of the EU institutions or its member states to reshape the European political and institutional order has resulted in a very limited outcome in previous two decades. During a period of 15 years, the basic framework of the functioning of the EU was changed four times. Nevertheless, in the following 18 years, no new treaty of a kind has been adopted, despite the need for a fervent resolution of important internal and foreign political issues. Thus, the EU institutional framework has been adapted to change once in a great while. Perhaps the time has come to diagnose a true *sclerosis* of the EU's institutional and legal structure.

In the meantime, serious international problems did not wait for the EU to consolidate. Although the invasion of Ukraine in 2022 has unequivocally undermined the security of the EU, its response to the crisis demanded "a rethink of the premises that have underpinned our understanding of collective European foreign policy-making over decades".[8] The obvious underperformance of the CFSP wass very strikingly presented by the disturbing cover of the February 22, 2025 edition of the renowned British weekly political magazine, *The Economist*. Under the title "Europe's worst nightmare", the cover presents a drawing in which the presidents of Russia (Vladimir Putin) and the USA America (Donald Trump) talk confidentially, while all the other chairs on the long table are kept empty. Obviously, the magazine illustrates a widely held concern that Europe will be completely excluded from the process of determining the post-war order once the conflict in Ukraine is concluded. The same may be the case with "another "hot" region in Europe's neighborhood, the Balkans".[9]

Without a clearly defined set of effective roles between several institutional actors of the CFSP, Europe is expected to steer safely between a (at least relatively) untrustworthy USA, authoritarian Russia and an ascending China, the EU's "formi-

---

8 Maurer, H.; Whitman, R. G.; Wright, N., *The EU and the invasion of Ukraine: a collective responsibility to act?* International Affairs, Vol. 99, Issue 1, January 2023, pp. 219-238, p. 236.

9 Bindi, *op. cit.*, note 4, p. 1.

dable economic competitor",[10] and a "systemic rival".[11] In an international setting which represents a blueprint for global instability, it seems that meddling through ordinariness is over. The EU's institutional foreign policy and security frame must be changed, in order for the entity to stop being recognized as an actor enjoying "the privilege of irresponsability".[12]

Part of the problem of an inactive CFSP is contained in the EU's inward-focused approach. After the Brexit, as well as the continuing rise of deteriorating democracies within its borders and its immediate neighbourhood,[13] the success of the EU has been defined in terms of its mere survival. Europe holding together has become the achievement in itself. Simultaneously, the sovereignists' ascendancy in many of the EU member states – which "are central nodes/actors in this collective system" of the CFSP[14] – represents another thorny topic when it comes to reasserting the EU's regional and global role. Any meaningful tendency of achieving greater visibility of the EU in international relations cannot be realized while (some of) the EU member states "insist on the Westphalian approach to foreign policy",[15] expressing the heartbeats of "a traditional realist paradigm".[16] Additionally, the defensive approach of the CFSP is manifested by the emergence of the project of the so-called European Political Community – the proposition destined to torpedo aspirations and perspectives of several Eastern European countries to join the EU. Therefore, "without major reform the EU could face a situation where the advantages of the EU are smaller than the disadvantages, with the consequence of destroying the EU," the process which could start with the EU's implosion.[17]

---

10 García Herrero, A.; Grabbe, H.; Pisani-Ferry, J., *Adapt to a harsher world: Memo to the high representative for foreign and security policy*, Bruegel Policy Brief, No. 15/2024, p. 2.

11 Müftüler-Bac M.; Aydın-Düzgit, S.; Uzun-Teker, E., *The EU's global strategic partner(ship): a tool for thematuration of European foreign policy?*, European Security, Vol. 33, No. 3, 2024, pp. 426 – 448, p. 436.

12 Terpan, F., *La politique étrangère et de sécurité commune de l'Union européenne*, Bruylant, Bruxelles, 2003, p. 25.

13 It is punctually noted that "democracies undermined by disinformation have reduced Europe's self-confidence in defending its values abroad": García Herrero, Grabbe, Pisani-Ferry, *op. cit.*, note 10, p. 2.-3.

14 Maurer; Whitman; Wright, *op. cit.*, note 8, p. 229.

15 Bindi, *op. cit.*, note 4, p. 1.

16 Øhrgaard, J, C.; Tonra, B.; Christiansen, T., *International relations or European integration: is the CFSP* sui generis*?,* in: Tonra, B., Christiansen, T. (eds.), Rethinking European Foreign Policy, Manchester University Press, 2004, pp. 26-44, p. 35.

17 Schneider, F., *Is a Minimal Federal European Constitution for the European Union Necessary? Some Preliminary Suggestions Using Public Choice Analysis*, Homo Oeconomicus (published online on June 20, 2022), p. 2. [doi.org/10.1007/s41412-022-00125-8].

The "essential innovation",[18] or "substantial changes",[19] brought by the TEU consisted in strengthening of the CFSP's institutional capacities.[20] The High Representative was empowered with a number of new competences. Today, the HR is: Vice-President of the European Commission (the Commission), Head of the European Defence Agency, Head of the European External Action Service (EEAS), and is "responsible for the [EU] Special Representatives and participant in the meetings of the European Council when foreign affairs issues are discussed."[21] The HR conducts the CFSP, contributing also by his proposal to the development of the CFSP and of the Common Security and Defence Policy (Art 9E Para. 2 of the TEU). In accordance with Art 9E Para. 3, she/he also presides over the Foreign Affairs Council (FAC), one of the more than 20 various incarnations of the Council of Ministers. As one of the Vice-Presidents of the Commission, the HR "ensure[s] the consistency of the [EU's] external action", and is "responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the [EU's] external action" (Art 9E Para. 4). On the other hand, some official initiatives have been proposed in order to consolidate the European international influence. Thus, the EU 2016 Security Strategy, prepared by the HR, is marked by "the vision" which "has changed from limiting the EU to being a soft power in the mission to spread democracy".[22] This "document of great importance" put the EU "on the path to metamorphosis into hard(er) power", and introduced "a new approach to conflict and crises".[23]

The EU has already confirmed its readiness to take decisive steps in the direction of determining its own responsibility in certain fields for which it is entrusted with competence by the treaties, and which look like a truly super-state structure. This was the case with: 1) the EU citizenship, 2) the EU Agency for Criminal Justice Cooperation (*Eurojust*), 3) Frontex (The European Border and Coast Guard Agency), 4) the European Economic and Monetary Union, which created the progressively closer monetary integration of the member states, 5) the European Court of Justice, which convincingly serves as a true European Supreme Court, and: 6) the European Public Prosecutor's Office, which is encharged with initiating criminal proceedings for activities which endanger the EU's financial interests.

---

18 Prolović, N., *Lisabonski ugovor: institucionalne izmene u oblasti spoljne politike Evropske unije*, Međunarodna politika LXI/1138, pp. 62-75, p. 63.

19 Duić, D., *EU Global Strategy on Foreign and Security Policy and the Role of High Representative of the Union For Foreign Affairs and Security* in: Primorac, Ž.; Bussoli, C.; Recker, N. (eds.) Economic and Social Development – The Legal Challenges of Modern World, 2016, pp. 289-299, p. 289.

20 Prolović, *op. cit.*, note 18, p. 63.

21 Duić, *op. cit.*, note 19, p. 289.

22 *Ibid*, p. 296 and p. 289.

23 *Ibid*.

When in deep crisis, the EU has manifested a surprising level of resilience and decisiveness. At the beginning of the 2020 Covid-19 pandemic, the EU's initial response to the ongoing crisis was marked by "chaos and ineffectiveness", but its "approach dramatically changed over the spring of 2020", resulting in "a joint EU approach to external engagement".[24] The comparison can be made with the strengthening of the EU coordinated counter-terrorism measures, adopted after the gruesome attack on *Charlie Hebdo* newspaper headquarters in Paris in 2015.[25] The establishment of these institutions has shown that the EU, when determined to do so, is capable of setting relevant frameworks for its own empowerment in various areas. If "Ensuring coherent and influential external action" is the title of the first part of the EUSA's chapter named "A Strong and Secure Europe",[26] the EU should *walk its talk* in the field of foreign policy as it has so done in other areas of its competence.

Although the failure of the Constitution rendered discussions of its contributions rather hypothetical, the document went a bit towards "addressing issues key to [the EU] concerns".[27] To speak with one single voice, Europe could return to a previously proposed solution for the problems of its global visibility, by introducing the institution of the Minister. The primary need for the establishment of the Minister has come about through the absurdity of the current arrangement. Perpetuating the duality between a commissioner in charge of external relations and the HR only serves to maintain the already existing confusion. In the words of the former Commissioner for Development Poul Nielsen, the CFSP needs to become more a truly "common", than a "convenient" foreign policy.[28] According to the Isaac Newton's first law of motion, a body continues to uniformly move forward until "it is compelled to change its state by the forces impressed". The involvement of the EU in the field of expanding its powers has always, like Pavlov's reflex, represented a response to the increasingly numerous challenges, both in terms of its internal organization and in the area of its international recognition. The European Council recognised this need when it promised to "undertake the necessary

---

24 Badanjak, S. EU *External Action and Development Spending in a Time of Covid-19, The Peace and Conflict Resolution Evidence Platform School of Law*, Old College, The University of Edinburgh South Bridge, Edinburgh, available at: [https://peacerep.org/wp-content/uploads/2023/08/Badanjak-2023-EU-External-Action.pdf, 5.], Accessed 23 February 2025.

25 Bindi, *op. cit.*, note 4, p. 3.

26 EUSA, note 1, p. 4-5.

27 Walker, N., *The Place of European Law,* in: De Búrca, G.; Weiler, J. H. H. (eds.), The Worlds of European Constitutionalism, Cambridge University Press, 2012, pp. 57-104, p. 99.

28 Lamassoure, *op. cit.*, note 6, p. 270.

internal reforms to ensure that our policies are fit for the future", and "that the EU institutions continue to function and act effectively".[29]

3. HIGH REPRESENTATIVE FOR FOREIGN AFFAIRS AND SECURITY POLICY: LEGAL FRAMEWORK AND OBSTACLES TO ITS APPLICATION

The post of the HR was created by the Treaty of Amsterdam (Article J (8.3), and Article J (16)) in 1997, and it represented the Treaty's profound innovation. Created on the initiative of France, the position of "'Mister' or 'Madame' PESC" had the "role of animation and representation" in the field of European foreign policy, and enjoys the "advantage of stability" in comparison with rotating presidencies of the EU.[30] The new institution was established "because the [EU] wanted to be a stronger actor on the global stage",[31] and was, thus, destined to become "the post that is in charge of strategic planning".[32] We should remember that in the Jacques Santer's Commission (1995-1999) no less than *four* out of 21 of its members were responsible for the EU's external relations.[33] The introduction of the HR probably reflected the intention of the European leaders to overcome such sloppiness in the institutional management of the EU foreign policy.

Although the innovations brought by the Treaty of Amsterdam, a number of authors rose concerns about the efficiency of institutional framework for the European foreign policy. Basically, the emergence of the HR increased confusion in the distribution of tasks within the current institutional framework,[34] and the legitimacy of the post which has yet to represent "the embodiment (*l'incarnation*) of Europe" was disputed, because it remained under the "political direction" of

---

29 EUSA, *op. cit.*, note 1, p. 5.

30 Terpan, *op. cit.*, note 12, p. 359.

31 Herber, F.-R., *The Legal Constitution of the European Union*, European Scientific Journal August 2018, Special Edition, pp. 103-128, p. 107.

32 Duić, *op. cit.*, note 19, p. 289.

33 The names and portfolios were: 1) Manuel Marin (External relations with the Mediterranean (South), Middle and Near East, Latin America and Asia (except Japan, China, South Korea, Hong Kong, Macao, Taiwan); 2) Sir Leon Brittan (External relations with North America, Australia, New Zealand, Japan, China, South Korea, Hong Kong, Macao, Taiwan, Common commercial policy, and Relations with OECD and WTO); 3) Hans van den Broek (External relations with the countries of Central and Eastern Europe and countries of former Soviet Union, Turkey, Cyprus, Malta and other European Countries, CFSP, External service; 4) Joao de Deus Pinheiro (External relations with the countries of Africa Caribbean and Pacific (ACP), South Africa, Lomé Convention). The list of portfolios and the commissionaires is available at:
[https://ec.europa.eu/commission/presscorner/detail/en/ip_94_1002.], Accessed 20 January 2025.

34 Terpan, *op. cit.*, note 12, p. 360.

the Presidency and the European Council.[35] Although the Preamble of the TEU declares that member states are 'resolved to implement a [CFSP], the EU institutional framework in the field of foreign policy is marked by confusion, overlapping of jurisdictions, and visible inefficacy. The CFSP had already in past been condemned as "a declaratory diplomacy, which reacts rather than acts", and is "reduced to decisions taken on the basis of the lowest common denominator".[36]

Framing of the CFSP is nowadays assured by the European Council, with the HR taking part in its work (Article 15 (2) of the TEU). Its President ensures the "external representation" of the EU, "without prejudice to the powers of" the HR (Article 15 (6. 2)). In addition, the European Council lays down "strategic guidelines" on which the FAC elaborates the EU's "external action" (Article 9C (6.3)). Finally, with the *notable* exception of the CFSP, the Commission ensures the EU's "external representation" (Article 9D (1)), as the body which is authorized to pivot all the main policies of the EU.

Due to its international composition, the European Council represents the highest political authority of the EU, while, thanks to its regular, often informal, sessions, it remains the EU's essential decision-making body. Its Secretary-General (the HR) plays a role of proposal, coordination and representation. As from November 2014, the Commission *also* encompasses the HR (Article 17 (4) of the TEU). Under the TEU, the EU's decision-making in the area of foreign policy area remains dominated by the bodies in which the Member States are represented – the European Council and the Council of Ministers, but now in coordination with an important new post of the President of the European Council, as well as within the context of expanded powers of the HR. Additionally, the Commission has been granted major powers in the field of the EU's broader external action.[37]

On the other hand, the EU expressed its determination to "ensure consistency between the different areas of its external action and between these and its other policies", which is ensured by the European Council and the Commission, in which task they are "assisted" by the HR (Article 21 (3.2) of the TEU). In the field of the CFSP, the European Council identifies "the strategic interests and objectives" of the EU (Article 22 (1)). The CFSP is "defined and implemented" by the European Council and the Council of Ministers, which act "unanimously", except otherwise provided by "the Treaties". At the same time, it is "put into effect" by the HR and the Member States (Article 24 (1.1), while the HR contributes "through

35 *Ibid*, p. 360.

36 *Ibid*, p. 7.

37 Novičić, Ž.; Lađevac, I., *Evropska služba spoljnih poslova*, Evropsko zakonodavstvo, X/35–36 (2011), pp. 164-183, p. 166.

his proposals towards the preparation of the [CFSP]" and ensures implementation, in this regard, "of the decisions adopted by the European Council and the Council" (Article 27 (1)). The HR represents the EU "for matters relating to" the CFSP, and conducts "political dialogue with third parties on the [EU's] behalf", and expresses its "position in international organisations and at international conferences" (Article 27 (2)).

Although the TEU introduced certain improvements in terms of representing the EU in international area, there is room for criticism of certain solutions contained in it. At the first place, the document creates very real possibilities of continuous political *skirmishes* between the HR and some other institutional actors in the field of the CFSP.

Although nominally the President of the European Council ensures the external representation of the EU "without prejudice" to the HR's responsibilities (as mentioned earlier in the paper), "such wording surely speaks in favour of the [HR], but instead of bringing harmony among foreign relations actors, it paves the way for further tension."[38] The mere *existence* of the post of the President of the European Council "implies that [the HR] will not be alone in the international representation of the organization".[39] The menacing competition between the two posts appears to had been verified during the first half of the 2010s, when "the circumstances (…) indicate[d] that the President of the European Council has established himself more as the face of EU foreign policy, whereas the [HR] has positioned herself as more of an operative who is not the face of EU foreign policy but rather carries out her work 'on the field' (visits regions that are experiencing difficulties, conducts peace talks etc.)", which represents a "state of affairs" which is "contrary to the [TEU]".[40]

Relations between the HR and the Commission have also been proven to be complicated, to say the least. The importance of the fact that the HR is one of the Commission's Vice-Presidents is undeniable, because the relevant provision of the TEU may be crucial "for the strengthening of coherence" within the Commission, but "it is also one of the causes of interinstitutional tension".[41] The current state of affairs "requires a clear division of labour with other commissioners whose portfolios have an external dimension".[42] Aditionally, Article 17 (6.2) of the TEU stipulates that if the President of the Commission so requests, the HR "shall resign",

---

38 Duić, *op. cit.*, note 19, p. 294.

39 Prolović, *op. cit.*, note 18, p. 67.

40 Duić, *op. cit.*, note 19, p. 294-295.

41 *Ibid*, p. 295.

42 García Herrero; Grabbe; Pisani-Ferry, *op. cit.*, note 10, p. 2.

in accordance with the procedure stipulated by Article 18 (1). This provision indicates that the President of the Commission and the European Council have a very significant tool for influencing the HR, who is not free to develop her/his own mechanisms to strengthen the CFSP, even though being the Head of such an important structure as the EEAS is. Finally, Article 17 (7.3) states that members of the Commission – including its President *and the HR* – are subject "as a body to a vote of consent" by the European Parliament. This means that the HR is put in the position to be simultaneously responsible for his/her actions to the European Council, the President of the Commission, and the European Parliament.

It is also useful to mention that the TEU does not set any qualifications for the post of the HR. Under its Article 18 (1), the HR is appointed (and dismissed) by the European Council, voting by the means of a qualified majority, and with the agreement of the President of the Commission. However, the Treaty stipulates no detailed qualifications for the post of the HR.[43] A preferred option, and perhaps a necessary one in order to strengthen her/his position, would consist in providing for a truly reputable HR by requiring that the candidate for the post should have a measurable political (preferably *executive*) or diplomatic experience on national, European, or international level.

Perhaps HR should not be a member of the Commission anymore. In one academic *memorandum* sent in 2024 to the HR, it was noted that "the job of [HR] and Vice-President of the [Commission] was designed for a different world than the one the [EU] now grapples with: a world built on principles and governed by law, in which the EU was a force of attraction because of its mass, prosperity and good governance".[44] A fine proposal consists in amending the TEU in order for the HR *either* be "relieved of the duties relating to representing the [EU] for matters relating to the CFSP", while "the said power [should be attributed] to the President of the European Council", or (the HR) should be removed from the Commission.[45] Alternatively, in "a world dominated by intimidation and brute force", the European Council should give the HR "a stronger mandate to act on matters on which member states have decided to take common action", which "would require stronger legal and financial capabilities to coordinate relevant policies in the EU institutions"; in this way, the HR "would be 'first among equals', both among the foreign ministers and among all commissioners".[46]

43 Duić, *op. cit.*, note 19, p. 293.

44 García Herrero; Grabbe; Pisani-Ferry, *op. cit.*, note 10, p. 3.

45 Duić, *op. cit.*, note 19, p. 295.

46 García Herrero; Grabbe; Pisani-Ferry, *op. cit.*, note 10, p. 2.

Simultaneously, some member states remain set on protecting what they see as their sovereign right to conduct their own foreign policy. This is strongly resembling of the old ruling by the Supreme Court of Ireland, in *Crotty v An Taoiseach* (1972), in accordance to which the ratification of the Single European Act (adopted in 1987), the first extensive revision of the Treaty of Rome (1957), "would unconstitutionally fetter the freedom of the Government to conduct foreign policy on behalf of the state". The Court's minority (as if almost ironically) "dissented on the basis that [the Single European Act] was too aspirational and vague to constrain the Government in any meaningful way".[47] Related to the subject of the paper, one may claim today that certain provisions of the TEU are also *too aspirational and vague*, and, thus, not sufficient for establishing a truly *common* foreign policy of the EU. The same skepticism can be attached to the 2024 promise of the European Council members who claimed that they "will leverage (…) external EU policies in the best interests of the [EU] in a well-coordinated manner".[48] For example, it can be mentioned mention that France, one of the EU founders, remains the only permanent member of the United Nations Security Council (UNSC) from the ranks of the EU member states, with no visible intention to propose that, for example, the EU take the place in its stead at this highly influential forum. At the same time, national politicians from predominant member states of the EU (France included) endangered the public authority of the HR, who "had little difficulty to compete with the foreign minister, or even the prime minister, from for example Slovenia for media attention", but "national politicians from France, Germany and the United Kingdom in the seat of the Presidency, on the other hand, were difficult to ignore".[49]

Although the introduction of the post of the HR by the Treaty of Amsterdam represented a step towards creating a true *foreign ministry* of the EU, the main question remains, almost thirty years later – "is the EU considered a relevant international actor?"[50] With many of the EU institutions' overlapping tasks and somewhat confusing procedures in the field of the formulation and implementation of the CFSP, the EU is destined to often be misunderstood by its partners and rivals, in terms of the clarity of its attitudes. Thus, European diplomacy remains limited for structural reasons related to complex and confusing procedures of the EU, including the fact that the institutional position of the HR is not clearly defined, and that the post

47 Doyle, O., *Constitutional Identity, Legal Autonomy, and Sovereignty: Costello v Government of Ireland [2022] IESC 44*, European Constitutional Law Review, Vol. 19/4 (2023), pp. 715-737, p. 722.

48 EUSA, *op. cit.*, note 1, p. 4.

49 Dijkstra, H., *EU External Representation in Conflict Resolution: When Does the Presidency or the High Representative Speak for Europe?*, European Integration online Papers (EIoP), Vol. 15, No. 1, 2011, pp. 1-23, p. 5.

50 Bindi, *op. cit.*, note 4, p. 2.

suffers from vulnerability from other institutional actors. Maybe, simply, after two and a half decades of its existence, the post of the HR has come of age.

If it aims to promote a more efficient and coherent European foreign policy, the EU must take a more integrationist approach. This means, among other things, that it should start weaning itself from being overly sensitive to national diplomatic priorities and methods, particularly of the bigger (and therefore more influential) member states. Creating a Europe which would be more than a sum of its parts is not that much of a Sisyphean task. To comprehend that, the EU leadership is invited to recall the earlier historical crises of the EU and decisive self-confidence-building measures that represented an adequate response to many of the historical challenges. Truly, "the EU legal order has been remarkably adept at responding to processes of political change",[51] and the impressive task of constructing a *Strong and Secure Europe* fits conveniently in patterns of this decades-long historical evolution.

At the present moment of the development of the European project, one of the first steps in the favored direction would be to simplify the structure of the EU foreign policy bodies. To become a unified actor in the international scene, the EU must change its consisting set of foreign policy mechanisms and procedures and introduce one which would be truly *responsible* for its diplomacy. In this regard, the Constitution envisaged essential ameliorations, including outlaying *an old idea about a new post* – that of a European Foreign Minister (and not just in name).

4. A EUROPEAN FOREIGN MINISTER FOR AN HONESTLY 'STRONG AND SECURE EUROPE'

With experience accumulated for twenty years, for some, the rejection of the Constitution reveals as a regretful misjudgment. For others, it looks like an announcement of justified resistance to attempts to centralize EU powers. Regardless of which position the reader of this paper is attached to, it is crucial to remind how the idea of one of the most important innovations of the Constitution came about in the first place, as well as how this topic has been esteemed in the previous two decades.

The idea of creating the Minister obviously arrived from the necessity to answer to the famous question of Dr. Henry Kissinger, former USA National Security Adviser and Secretary of State: "Europe, what telephone number?"[52] Current in-

[51] Dawson, M., *The Changing Substance of European Law*, European Constitutional Law Review, Vol. 20, Issue 3, September 2024, pp. 451-482, p. 479.

[52] Constantinesco, V. ; Gautier Y. ; Michel V., *Le Traité établissant une Constitution pour l'Europe: analyses et commentaires*, Strasbourg, Centre d'Etudes Internationales et Européennes, Presses Universitaires de

adequacies of European foreign policy are best exposed by reminding that "who speaks for Europe is one of the major questions in European integration", because the continent "has a plethora of external representatives".[53]

The Constitution laid the foundations for a more coordinated European foreign policy. Its authors proposed to merge the posts of the HR and of the Commissioner for External Relations in order to create a *single* post of the Minister. Maybe one of the origins of this idea was contained in the fact that "the coexistence of the two political roles and the communication of their bureaucracy was difficult and made the foreign political action ineffective".[54] Understanding the concept of the Minister and his roles in strengthening the CFSP has in the meantime become a somewhat sidelined topic. This tendency takes place despite the existence of "a confusing and contested institutional structure in which multiple external representatives speak on behalf of Europe and control different external instruments",[55] while, at the same time, the EU remains nominally loyal to its devotion of promoting "an international system based on stronger multilateral cooperation and good global governance" (Article 21 (2."h") of the TEU).

The CFSP was one of the principal issues in the debate that evolved around the Constitution. This probably had a lot to do with the fact that the constitutional process occurred simultaneously with the "EU's very public display of disunity before and during the 2003 Iraq war".[56] It is useful to remind that the EEAS was the innovation proposed by the Constitution (Article III-197(3)), and created after the adoption of the TEU. The competences of the *Union Minister for Foreign Affairs* were laid out in Article 27 of the Constitution, and its Chapter II, dedicated to the CFSP (Article III-195 to Article III-214), but are also scattered throughout the document.

When it comes to making comparisons between the posts of the Minister and of the HR, there are many parallels to be found between the Constitution and the TEU. Thus, the Constitution assured that the Minister takes part in work of the European Council (Article 20 (2)), whose President ensures the external representation of the EU "without prejudice" to the responsibilities of the Minister (Article 21 (2.2)). The Minister chairs the FAC (Article 23 (2) and Article III-197

Strasbourg, 2005, p. 11.

53 Dijkstra, *op. cit.*, note 49, p. 2 and 3.

54 Duić, *op. cit.*, note 19, p. 292.

55 García Herrero; Grabbe; Pisani-Ferry, *op. cit.*, note 10, p. 5.

56 Tonra, B.; Christiansen, T., *The study of EU foreign policy: between international relations and European studies*, in: Tonra, B.; Christiansen, T. (eds.), Rethinking European Foreign Policy, Manchester University Press, 2004, pp. 1-9, p. 9.

(1)), *conducts* the CFSP, *contributes* "by his or her proposals" to the development of the CFSP (Article 27 (1-2)), and proposes "European decisions on the implementation" of the CFSP (Article 40 (4)). She/he is appointed by the European Council, "acting by qualified majority, with the agreement of the President of the Commission", and can be dismissed by the European Council (Article 27 (1)). The Minister is one of the Vice-Presidents of the Commission, and is "responsible there for handling external relations and for coordinating other aspects of the Union's external action" (Article 27 (3)). The Minister is authorized to propose decisions in the area of the CFSP, which can only be adopted unanimously by the European Council and the Council of Ministers. Finally, under the Constitution it was envisaged that "in the case requiring a rapid decision", the Minister would be authorized to convene an extraordinary meeting of the European Council, acting so either on his own initiative or at the request of a member state (Article III-299 (2)). The CFSP is "put into effect" by the Minister "and by the Member States, using national and EU resources" (Article 39 (4) of the Constitution, and, for the HR, Article 11 (1.2) of the TEU). The Minister was to be entrusted with the "political dialogue with third parties" (Article III-296 (2)), and is assisted by the EEAS (Article III-197 (3)), as the HR is today.

Obviously, many solutions introduced by the TEU and related to the HR are modeled after the provisions of the Constitution dedicated to regulating the position of the Minister. However, there also provisions that set the basis for *a stronger influence* of the Minister, in comparison with the position of the HR. Hence, in exercising hers/his "responsibilities within the Commission, and only for these responsibilities, the [Minister] shall be bound by Commission procedures". It is obvious that, in relation to other members of the Commission (and its President), the Minister is entrusted with greater autonomy than is given to the HR. Further, the Constitution ensures an important position for the Minister by conferring on her/him the duty of close cooperation with the member states, and of their coordination within international organisations and during multinational conferences. He is always regularly informed by the member states on any issue of common interest (Article III-305 (2)). An important new feature compared to the Treaty of Nice was the fact that "when the [EU] defines a position on a topic on the agenda of the [UNSC], the member States that sit on it request that the [Minister] be invited to present the position of the Union" (Article III-300 (2)). Together with the Council of Ministers, the Minister ensures the compliance of member states with the principles of the CFSP (Article III-195 (2.3)).

The European leaders *meant business* when they put their signatures on the Constitution which guaranteed a more coherent foreign policy of the EU. Concrete arrangements have already been made. They agreed at the European Council meet-

ing of 29 June 2004 that Javier Solana, the then HR, would be appointed Minister as from the entry into force of the Constitution.[57] When making the decision, they certainly had a high regard to Solana's previous political expertise as a mediator in conflict resolution processes.[58] It is useful to note that, within the consultations which led to the drafting of the Constitution, more *modest* titles for the post were proposed: "the Representative of the EU for Foreign Affairs", and (following the US example) the "EU Secretary for Foreign Affairs". Finally, the title of the Minister was finally chosen in order to "raise the status" of the post.[59]

The EUSA might serve as a method for renewing the promise the European Council offered slightly more than two decades ago. If the EU's position in global environment is already plainly visible, orderly, and in good shape, why would then the document claim that only "a strong and sovereign Europe" would represent the EU's response to "growing global instability"?[60] Certainly, some responsibility for the current state of the CFSP must rest in its actual institutional framework. I suggest that it should be, and just in a symbolic way, reconstructed so that it includes the Minister.

Naturally, the rearrangement of the CFSP represents a reform deemed to be divisive. The thorny issue of relative centralization of the EU's foreign policy cannot be avoided without properly managing certain member states' resistance and procedural difficulties, posed primarily by the necessary ratification of the amendments to the TEU, or, preferably, of *a completely new treaty*, although this (again) might appear as moving off from an international treaty pathway on to a constitutional pathway. Arguably, a sensible adaptation of the TEU might do the job and deliver the goods in the field of ensuring a *Strong and Secure Europe*, and it is not inevitable that suggested innovations should be contained within the frame of "a constitutionalized Europe",[61] for, in 2003, a *mere* "treaty amendment has been

---

57 Priollaud F.-X.**;** Siritzky, D., *La Constitution européenne: Texte et commentaires*, Paris, La documentation française, 2005, p. 98.

58 Dijkstra, *op. cit.*, note 49, p. 5. "As it often is the case with political functions, the personality of an individual plays a role in the development of the function he or she holds. Owing to [Solana's] hard work and a network of international relations, the EU foreign policy managed to leave a mark on the international scene for the first time (and to this day the only time)" (Duić, D., *op. cit.*, note 19, p. 292). As the head of the European Defense Agency (which was founded in 2004), Solana "led political dialogues with third parties" on behalf of the European Council, and he "also represented the EU in the Middle East Quartet (a four-member group that mediates the peace process in the Middle East conflict, along with the USA, Russia and the UN)", Prolović, *op. cit.*, note 18, p. 66.

59 Priollaud; Siritzky, *op. cit.*, note 57, p. 98.

60 EUSA, *op. cit.*, note 1, p. 2.

61 Weiler, J. H. H., *On the power of the Word: Europe's constitutional iconography*, International Journal of Constitutional Law, Vol. 3, Issue 2-3, May 2005, pp. 173-190, p. 180.

given the grand name of Constitution".[62] This part of the paper serves to lay out the concept that an individual post of the Minister might serve as a true center of EU's foreign ambitions.

From the political point of view, the Constitution was an *undercooked* project – a confusing, long document, which was served to rather unapproachable and distanced audience, while arousing grave concerns about national sovereignty. These anxieties might be relieved with arguments about the continuation of particular influences of member states, as well as possibilities of engaging in different degrees of the CFSP integration (*opting-out* provisions). Just as the European Constitutional Convention process "was intended as a way of smoothing the passage of the instrument, as well as bringing a broader range of national political and civil society voices to the table",[63] the introduction of the Minister in the EU's set of bodies has to be done cautiously and in a transparent way, continually reminding the voters that a *Strong and Secure Europe* cannot be achieved by the already existing instruments for implementing the CFSP.

The logic of restructuring the CFSP is deeply interconnected with the partial redefinition of the post of the EU's foreign representative – let us call it the Minister – when it comes to its relations with other EU institutions. Thus, the European Council, as the implicit guardian of member states' sensibilities and the body with the highest legitimacy within the set of the EU bodies, should become a *sole* actor in the procedure of electing the Minister, and would continue to control his/hers official activities. As noted earlier in the paper, it would be more than welcome to set official qualifications for the election of the Minister, including appropriate experience in the field of diplomacy, and, potentially, to introduce the condition that the elected person has not held an elective office at the national level for a certain period of time in the previous period (in order to avoid any conflict of interests between the function of the Minister and the interests of some of the member states, especially the more influential ones among them). Member States, which remain *masters* of the EU treaties, could along these lines continue to control the way in which the CFSP is effectively conducted.

The mentioned solution might contribute to avoiding the effectiveness of current critics in accordance to which the HR, as "an actor in his own right", represents the reflection of "the bureaucratic politics model".[64] In order to counter these observations, it would be preferable to introduce a one-time renewable term of office for the post of the Minister. This suggestion is perfectly in line with a proposition that

[62] *Ibid*, pp. 172-173.

[63] Walker, *op. cit.*, note 27, p. 100.

[64] Dijkstra, *op. cit.*, note 49, p. 2 and 5.

"the President of the European Council should keep the power of external representation of the Union, whereas the [HR][65] should expand his or her influence with a view to strengthening the position of the [EU]" in the area of the CFSP.[66]

The latter proposition naturally suggests that the Minister should be officially detached from the Commission. There is no visible need to maintain the current state of affairs within which the EU's foreign policy representative is the member of the Commission. Although it seems that the key motive for the existing solution reflects an attempt to raise the reputation and institutional status of the Minister, it is subject to arouse constant (although mostly tacit) competition between the Minister and his colleagues from the Commission, including its President. The Minister (or, as the very author of the suggestion mentions – the HR) "should be dismissed from the post of the Vice-President of the Commission", while her/his role as President of the FAC and Head of the EEAS "should be strengthened".[67] Alternatively, if the HR (or the Minister) should remain within the Commission, its President "should have a greater role in the selection" of the HR (the Minister).[68]

Of course, amendments to the TUE should provide that the Minister maintains constant consultations with the President of the Commission and with the commissioners whose responsibilities are directly related to the EU foreign policy, in order to ensure its coherency and future continuity. Within the same line of reasoning, there is no need to claim that any connection with the European Parliament and the Minister is necessary. Thus, as a representative of the policies formulated and controlled by the European Council, she/he should be relieved from responsibility to a 720-members' body, which, as might be assumed, is only partially versed in the daily variable global politics.

The introduction of the post of the Minister would not reflect a deviation from the traditional gradualist approach to the European construction. Representing a synthetic figure of external representation of the EU, and speaking in the name of 450 millions of the EU citizens, the Minister, as a highly legitimized representative of the European Council, could make help Europe to be observed more cautiously by other relevant actors in the area of international policy. The post of the Minister may also represent a proof of the desire of the EU leadership to contribute to future avoidance of inter-institutional quarrels and conflicts between key actors in the field of CFSP.

---

65 I would humbly suggest: 'the Minister', instead of the 'HR'.

66 Duić, *op. cit.*, note 19, p. 295.

67 *Ibid*, p. 297.

68 *Ibid*.

The final verse of the first stanza of the text of the anthem of the EU (and of the Council of Europe) contains an admiring expression (in Latin): *pacem mundi augeat*, meaning that Europe declares itself responsible for augmenting "the peace of the world". At the current moment, the list of most dangerous ongoing international conflicts includes the war in Ukraine – a country which in 2022 submitted application to the membership in the EU – as well as several other armed conflicts or political antagonisms in the EU's immediate vicinity. In order to maintain (or regain) the status of a respected and widely understandable international actor, the EU must take a more active approach to resolving these – and many other – risks to global stability. This *will* require certain re-arrangements in its institutional framework, potentially in line with those proposed by authors of the Constitution (whose ideas were perhaps brought forward before their time). The creation or, more accurately, the *re-imagination* of the office of the Minister might represent a formidable advantage in that direction.

5. CONCLUSION

This paper argues that the EU's strategic determination to reinforce its active role in international relations needs to be reflected in designing an innovative approach to its institutional framework. A long-desired more coherent European external action demands taking creative steps, including bringing up again the topic of introducing a visible representative of the EU in its foreign policy. If wisely designed and carefully developed, the establishment of the post of the EU Minister for Foreign Affairs might represent a key contribution to assert the EU's "ambition and role as a strategic global player", as it was announced in the EU Strategic Agenda for 2024-2029. The main goal of this paper is to steer the discussion of the existing mechanisms for conducting EU foreign policy in the direction of a partial return to the solutions proposed by the Treaty establishing a Constitution for Europe.

Deteriorating global security circumstances, which endangered the very boundaries of the EU, call for re-considering whether the post of the High Representative, included in the complex and somewhat confused system of the European foreign policy, satisfies European international ambitions, interpreted beyond its strategic rhetoric. Seen from the institutional point of view, a more efficient system of adoption and enforcement of the Common Foreign and Security Policy could be established by making one noticeable step forward.

In this paper, it is asserted that the EU Foreign Minister should be appointed by the European Council, in accordance with relatively clearly defined criteria. She or he should not be a member (one of the Vice Presidents) of the European Commission, although this does not mean that the two influential actors should not

cooperate in their mutual relations. The key alteration which could be brought by introducing the post of a single foreign representative of the EU consists in reducing the field for possible inter-institutional conflicts, without imperiling democratic control of the ways in which the European foreign policy is conducted.

REFERENCES

BOOKS AND ARTICLES

1. Bindi, F., The Foreign Policy of the EU: Assessing Europe's Role in the World, Brookings Press, 2022.
2. Constantinesco, V.; Gautier Y.; Michel V., *Le Traité établissant une Constitution pour l'Europe: analyses et commentaires*, Strasbourg, Centre d'Etudes Internationales et Européennes, Presses Universitaires de Strasbourg, 2005.
3. Dawson, M., *The Changing Substance of European Law*, European Constitutional Law Review, Vol. 20, Issue 3, September 2024, pp. 451 – 481.
4. Dijkstra, H., *EU External Representation in Conflict Resolution: When Does the Presidency or the High Representative Speak for Europe?*, European Integration online Papers (EIoP), Vol. 15, No. 1, 2011, pp. 1 – 23.
5. Doyle, O., *Constitutional Identity, Legal Autonomy, and Sovereignty: Costello v Government of Ireland [2022] IESC 44*, European Constitutional Law Review, Vol. 19/4 2023, pp. 715 – 737.
6. Duić, D., *EU Global Strategy on Foreign and Security Policy and the Role of High Representative of the Union For Foreign Affairs and Security* in: Primorac, Ž.; Bussoli, C.; Recker, N. (eds.) Economic and Social Development – The Legal Challenges of Modern World, 2016, pp. 289-299.
7. García Herrero, A.; Grabbe, H.; Pisani-Ferry, J., *Adapt to a harsher world: Memo to the high representative for foreign and security policy*, Bruegel Policy Brief, No. 15/2024.
8. Herber, F.-R., *The Legal Constitution of the European Union*, European Scientific Journal August 2018, Special Edition, pp. 103 – 128.
9. Lamassoure, A., *Histoire secrète de la Convention européenne*, Albin Michel, Fondation Robert Schuman, 2004.
10. Maurer, H.; Whitman, R. G.; Wright, N., *The EU and the invasion of Ukraine: a collective responsibility to act?* International Affairs, Vol. 99, Issue 1, January 2023, pp. 219 – 238.
11. Müftüler-Bac M.; Aydın-Düzgit, S.; Uzun-Teker, E., *The EU's global strategic partner(ship): a tool for thematuration of European foreign policy?*, European Security, Vol. 33, No. 3, 2024, pp. 426 – 448.
12. Novičić, Ž.; Lađevac, I., *Evropska služba spoljnih poslova*, Evropsko zakonodavstvo, X/35–36, 2011, pp. 164 – 183.
13. Øhrgaard, J, C.; Tonra, B.; Christiansen, T., *International relations or European integration: is the CFSP* sui generis*?,* in: Tonra, B., Christiansen, T. (eds.), Rethinking European Foreign Policy, Manchester University Press, 2004, pp. 26 – 44.

14. Priollaud F.-X., Siritzky, D., *La Constitution européenne: Texte et commentaires*, Paris, La documentation française, 2005.
15. Prolović, N., *Lisabonski ugovor: institucionalne izmene u oblasti spoljne politike Evropske unije*, Međunarodna politika LXI/1138, pp. 62 – 75.
16. Terpan, F., *La politique étrangère et de sécurité commune de l'Union européenne*, Bruylant, Bruxelles, 2003.
17. Walker, N., *The Place of European Law,* in: De Búrca, G.; Weiler, J. H. (eds.), The Worlds of European Constitutionalism, Cambridge University Press, 2012, pp. 57 – 104.
18. Weiler, J. H. H., *On the power of the Word: Europe's constitutional iconography*, International Journal of Constitutional Law, Vol. 3, Issue 2-3, May 2005, pp. 173 – 190.

EU LAW

1. Draft Treaty Establishing a Constitution for Europe [2003] C169/01
2. European Council Meeting Conclusions, Brussels, 19 December 2024, EUCO 50/24, https://www.consilium.europa.eu/media/jhlenhaj/euco-conclusions-19122024-en.pdf.
3. European Union Strategic Agenda for 2024-2029, https://www.consilium.europa.eu/media/yxrc05pz/sn02167en24_web.pdf.
4. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01.

WEBSITE REFERENCES

1. Badanjak, S., *EU External Action and Development Spending in a Time of Covid-19, The Peace and Conflict Resolution Evidence Platform School of Law*, Old College, The University of Edinburgh South Bridge, Edinburgh, available at:
2. [https://peacerep.org/wp-content/uploads/2023/08/Badanjak-2023-EU-External-Action.pdf], Accessed 23 February 2025.
3. Schneider, F., *Is a Minimal Federal European Constitution for the European Union Necessary? Some Preliminary Suggestions Using Public Choice Analysis*, Homo Oeconomicus. [doi.org/10.1007/s41412-022-00125-8], Accessed 20 January 2025.
4. Division of portfolios in the European Commission headed by Jacques Santer (1995-1999): [https://ec.europa.eu/commission/presscorner/detail/en/ip_94_1002], Accessed 3 March 2025.

Original scientific paper

HAPING GLOBAL TRADE NORMS: THE EU-MERCOSUR AGREEMENT AND THE EU'S ROLE IN THE INTERNATIONAL ORDER

Eimys Ortiz-Hernández, Serra Húnter Tenure-Eligible Lecturer of Public International Law and International Relations
University of Lleida
Jaume II, 73. Lleida, PC: 25001, Spain
eimys.ortiz@udl.cat

ABSTRACT

This paper examines the EU-Mercosur Association Agreement as a critical test of the Union's capacity to project normative influence through trade while preserving strategic interests. It reconstructs two decades of negotiations, compares the final text with CETA (EU-Canada) and the EPA (EU-Japan), and assesses whether the 2024 revisions convert aspirational clauses on sustainability, labour rights and climate action into justiciable obligations. A qualitative analysis of topic exposes an asymmetry: extensive tariff liberalisation and regulatory gains coexist with fragile enforcement mechanisms and the complex ratification requirements of a mixed agreement. The revised annex designates the Paris Agreement and anti-deforestation commitments as "essential elements", yet their effectiveness depends on administrative capacity, participatory monitoring and an untested rebalancing procedure. The paper concludes that the Agreement's implementation will reveal whether the EU can reconcile market power with normative credibility amid intensifying geo-economic competition in Latin America and beyond today.

Keywords: *EU-Mercosur, mixed agreement, trade, sustainability, strategic autonomy*

1. INTRODUCTION

Trade agreements have moved well beyond mere tariff reductions or market access. They now function as strategic frameworks through which States and regional blocs project not only their economic clout but also their values.[1] The European Union (EU), arguably more than any other global actor, has sought to combine these roles. By embedding environmental, labour, and human rights standards

[1] *Vid.*, Blanc Altemir, A. (ed.), *Trade relations of the European Union after the pandemic and the Russian invasion of Ukraine*, Aranzadi, Navarra, 2023.

into its trade agreements, the EU aspires to be a "normative power,"[2] though it simultaneously depends on trade to support growth, employment, and strategic autonomy. In particular, the Commission has identified trade as a fundamental driver of competitiveness and job creation, insisting on the need for diversified, rules-based partnerships in an increasingly volatile global order.[3]

Yet, as Siles-Brügge contends, the EU's trade agenda is neither neutral nor monolithic; it is shaped by tensions between economic liberalism and regulatory ambition.[4] Similarly, Bailey highlights the "quiet influence" of diffuse interests -such as environmental NGOs and consumer associations- that challenge purely top-down, business-driven approaches to trade policy and amplify sustainability concerns.[5] This duality is visible in the EU-Mercosur Association Agreement (hereinafter, EU-Mercosur Agreement), which was negotiated over two decades and reached political conclusion in December 2024.[6] It promises significant economic opportunities, including the potential liberalisation of up to 90% of trade flows between both regions, but also raises questions about the enforceability of its sustainability provisions, particularly its commitments on deforestation and climate action. While the updated 2024 text incorporates the Paris Agreement as an "essential element", thereby allowing for suspensions if a party reneges on climate obligations, critics and civil society organisations remain concerned about whether the agreement's laudable goals will translate into robust implementation.

Against this backdrop, this paper examines the EU-Mercosur Agreement[7] as a crucial test of the Union's self-proclaimed capacity to shape global trade rules while defending its regulatory and strategic interests.[8] It explores whether the Agreement's legal structure reflects genuine normative commitments, assesses the sufficiency of its enforcement provisions, and considers how it might affect the EU's

---

2 Manners, I., *Normative Power Europe: A Contradiction in Terms?*, Journal of Common Market Studies, Vol. 40, No. 2, 2002, p. 252.

3 European Commission, Trade, Growth and Jobs: Commission Contribution to the European Council (COM(2013) 22 final, [2013], p. 3-6.

4 *Vid.,* Siles-Brügge, G., *Constructing European Union Trade Policy: A Global Idea*, Palgrave Macmillan, 2014.

5 *Vid*., Bailey, M., *Quiet Influence: The Representation of Diffuse Interests on Trade Policy, 1983–94,* Legislative Studies Quarterly, Vol. 26, No. 1, 2001, pp. 45-80.

6 European Commission, *EU and Mercosur reach political agreement on groundbreaking partnership*, 2024,
[https://ec.europa.eu/commission/presscorner/detail/en/ip_24_6244], Accessed 1 April 2025.

7 European Commission, EU-Mercosur: text of agreement, 2024,
[https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/text-agreement_en], Accessed 1 April 2025.

8 *Vid*., Poletti, A.; Sicurelli, D., *The Political Economy of Normative Trade Power Europe*, Palgrave Macmillan, 2018.

credibility as a values-driven actor. Methodologically, the analysis is grounded in qualitative legal research, focusing on the main treaty texts, institutional documents, and secondary literature in EU external relations law. To gauge whether the EU-Mercosur deal aligns with or diverges from previous practice, the paper also draws on comparative insights from the Comprehensive Economic and Trade Agreement (CETA) with Canada and the Economic Partnership Agreement (EPA) with Japan, both of which contain trade and sustainable development (TSD) chapters with varying degrees of enforceability.

Ultimately, the study addresses the tensions between rhetoric and realpolitik in the EU's external trade policy: Can the Union simultaneously uphold high sustainability standards and secure a competitive foothold in Latin America, especially in light of growing Chinese and American influence? In order to answer it, the paper is structured as follows: Section 2 outlines the legal and political evolution of the EU-Mercosur negotiations; Section 3 discusses the core trade commitments; Section 4 analyses the sustainability chapter and its normative ambitions; Section 5 examines the challenges of ratification and the broader geopolitical context; and Section 6 offers concluding reflections on the EU's capacity to reconcile economic interests with principled governance in shaping the future of global trade.

2. LEGAL AND POLITICAL EVOLUTION OF THE EU-MERCOSUR AGREEMENT

The EU-Mercosur Agreement is the product of over two decades of political ambition, regional dynamics, and institutional evolution.[9] While formal negotiations were launched in 1999, their diplomatic and legal foundations were laid several years earlier with the 1995 EU-Mercosur Framework Cooperation Agreement.[10] This instrument reflected a shared vision for interregional collaboration based on economic cooperation, political dialogue, and gradual trade liberalisation aligned with WTO principles It also exemplified the EU's strategic use of interregionalism as a tool of external governance in the post-Cold War order.[11]

Mercosur, created in 1991 by the Treaty of Asunción[12], drew inspiration from the European integration model, albeit without supranational authority. Despite

---

9 Haboba, S. E., *et al., Hacia el acuerdo de asociación birregional Mercosur-UE. Proceso de negociación y factores condicionantes*, Revista Electrónica Iberoamericana, Vol. 12, No. 1, 2018, p. 122.

10 EU-Mercosur Framework Cooperation Agreement [1995], OJ L 112/3.

11 Torres Jarrín, M.; Daza Aramayo, L. G., *EU-MERCOSUR Interregionalism: Diplomatic and Trade Relations*, Springer, 2023, pp. 11-14.

12 Mercosur (*Southern Common Market*): composed of Brazil, Argentina, Uruguay and Paraguay; Bolivia is in the process of accession, while Venezuela has been suspended since 2016 for failing to com-

ambitious goals, the bloc has often been described as an "incomplete customs union" due to persistent tariff barriers, regulatory fragmentation, and divergent national interests.[13] Nevertheless, it has remained a significant partner for the EU -both politically and commercially- with over 60,000 European companies active in the region.[14]

The negotiation process has unfolded in four main phases.[15] The first (2000-2004) began with optimism but quickly stalled amid dissatisfaction over the EU's limited offer on agriculture and the rise of left-leaning governments in South America that were less receptive to liberal trade agendas. The second phase (2005-2009) was marked by a complete impasse. Mercosur criticised what it viewed as an unbalanced proposal favouring EU industrial exports, while external factors -most notably the collapse of the WTO Doha Round- undermined the broader multilateral context. A third phase (2010-2015) saw cautious attempts to revive negotiations following the EU-CELAC summit in Madrid. However, internal crises on both sides constrained progress. The EU was contending with the Eurozone debt crisis, while Mercosur faced instability in Paraguay, institutional uncertainty

---

ply with democratic obligations under the Ushuaia Protocol. Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (*Treaty of Asunción*), signed on 26 March 1991, entered into force on 29 November 1991,
[https://www.mercosur.int/documento/tratado-asuncion-constitucion-mercado-comun/], Accessed 5 April 2025.

13 Ortiz-Hernández, E., *Acuerdo UE–Mercosur más allá de la dimensión comercial ¿una ventana de oportunidad?*, in Díaz Galán, E. (dir.), La Unión Europea como actor global: desafíos políticos, jurídicos y de seguridad, Ediciones Olejnik, 2024, pp. 278-302; Caichioloü, C.R., *The Mercosur experience and theories of regional integration,* Contexto Internacional, Vol. 39, No. 1, January/April 2017, pp. 117-134.

14 European Commission, Press statement by President von der Leyen on the occasion of the Mercosur leaders' meeting, 2024,
[https://ec.europa.eu/commission/presscorner/detail/da/statement_24_6261]. Accessed 5 April 2025.

15 Concerning the phase of the negotiations, *Vid.,* Aldecoa Luzárraga, F., *El acuerdo entre la Unión Europea y el Mercosur en el marco de la intensificación de relaciones entre Europa y América Latina*, Revista de Instituciones Europeas, Vol. 22, No. 3, 1995, pp. 761-792; Blanc Altemir, A., ¿Hacia un nuevo paradigma de los Acuerdos de Asociación de la Unión Europea? La negociación del nuevo acuerdo con el Mercosur, Anuario Español de Derecho Internacional, Vol. 34, 2018, pp. 921-968; Thudium, G.; Geiger, L.M. Castilo, M.; Sapper, S., *Décadas en proceso: el Acuerdo UE-Mercosur*, Revista de la Secretaría del Tribunal Permanente de Revisión, No. 17, March 2021, pp. 220-233; Cienfuegos Mateo, M., *La anhelada asociación euromercosureña tras quince años de negociaciones*, Revista CIDOB d'Afers Internacionals, No. 112, 2016, pp. 225-253; Coppelli Ortiz, G., *Acuerdos de la Unión Europea con Chile y Mercosur*, in: Blanc Altemir, A. (dir), *Las relaciones comerciales de la Unión Europea con el resto del mundo: un análisis desde la postpandemia y la agresión rusa a Ucrania*, Pamplona, Aranzadi, 2023, pp. 375-389; Accioly, E., *Timeline - Acordo Mercosul-UE*, in Molina del Pozo Martín, P. C. (coord.), *Derecho de la Unión Europea e integración regional: liber amicorum al profesor Dr. Carlos Francisco Molina del Pozo*, Valencia, Tirant lo Blanch, 2020, pp. 1029-1042; Bizzozero Revelez, L., *Negociaciones Mercosur-Unión Europea*, Cuadernos de Integración Europea, No. 5, 2006, pp. 10-12.

around Venezuela's membership, and political shifts in Brazil and Argentina. As Malamud notes, these dynamics revealed not only the challenges of asymmetry in interregional integration but also the deep fragmentation within Mercosur itself.[16] The fourth and most decisive phase (2016-2019) was driven by political change in Argentina and Brazil. Former Presidents Macri and Temer, and later Bolsonaro, favoured a return to global markets and renewed the push for trade liberalisation. Although President Bolsonaro initially expressed scepticism towards multilateralism, his administration ultimately supported concluding the agreement with the EU. In June 2019, after intensive rounds of negotiation, the parties announced the agreement in principle.[17] This was followed by further talks that led to a political agreement formally concluded on 6 December 2024. This diplomatic milestone was seen as a powerful signal of commitment to rules-based trade in an increasingly protectionist global environment.[18]

The agreement was negotiated under the "single undertaking" principle, meaning all chapters formed an indivisible package requiring consensus across the board.[19] The resulting instrument is structured around three pillars: political dialogue, cooperation, and trade. The trade pillar, which is the most detailed and operationally significant, addresses tariff reduction, services, procurement, intellectual property rights, geographical indications, and sustainable development.[20]

Legally, the agreement qualifies as a mixed agreement, combining areas under exclusive EU competence (such as trade policy) with areas of shared or national competence (such as cultural cooperation and environmental protection).[21] As a result, it must be ratified not only by the European Parliament and the Council, but also by the parliaments of all Member States: a requirement that introduces considerable political complexity.[22] Moreover, as a mixed agreement, it may be subject to scrutiny before national constitutional courts, potentially challeng-

---

16 Malamud, A., *Assessing the Political Dialogue and Cooperation Pillar of the EU–Mercosur Association Agreement*, European Parliament, 2023, p. 6.

17 European Commission, *EU-Mercosur Trade Agreement: Text of the Agreement in Principle*, 2019, [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/documents_en], Accessed 5 April 2025.

18 Malamud, C.; Steinberg, F., *El acuerdo UE - Mercosur: ¿quién gana, quién pierde y qué significa el acuerdo?,* Documento ARI 78/2019 - Real Instituto Elcano, July 2019, p. 2.

19 Blanc Altemir, A., *op. cit.,* note 15, p. 922.

20 Hagemejer, J., *et al., Trade Aspects of the EU–Mercosur Association Agreement*, European Parliament, DG Internal Policies, 2020, pp. 5–8.

21 Articles 3 and 4 TFEU (Lisbon).

22 Cremona, M. (ed.), *EU Foreign Relations Law: Constitutional Fundamentals*, Hart Publishing, 2008, pp. 89–93.

ing the legal validity of certain sustainability or regulatory provisions if they are deemed to impinge on Member States' exclusive competences.

In response to these challenges, the European Commission has considered separating the trade pillar -which falls under exclusive EU competence- from the rest of the agreement. Such a move would allow for its provisional application following approval by the European Parliament and the Council, thus bypassing national ratifications and accelerating implementation.[23]

In short, the EU-Mercosur Association Agreement reflects both longstanding ambitions for closer bi-regional relations and the recurring political and legal hurdles that have shaped its trajectory. These legal-institutional foundations set the stage for examining the agreement's substantive commitments, particularly its trade and regulatory provisions, which are analysed in the following section.

3. TRADE COMMITMENTS AND REGULATORY PROVISIONS

The trade pillar of the EU-Mercosur Agreement constitutes one of the most legally ambitious and politically contested components of the interregional partnership. Its structure encompasses a comprehensive legal framework for reciprocal liberalisation, institutionalised regulatory dialogue, and access to key sectors, advancing the EU's broader strategy of deploying trade agreements as vectors of external regulatory influence.

3.1. Tariff liberalisation and asymmetric commitments

The agreement foresees the progressive elimination of tariffs on over 90% of bilateral trade flow, with 92% of Mercosur exports and 91% of EU exports becoming tariff-free once fully implemented.[24] These liberalisation schedules -spread over transition periods of up to 15 years- are outlined in detailed annexes and form an integral part of the treaty's legal obligations.[25] While both parties benefit from improved market access, the design reveals a deliberate asymmetry in sectoral priorities. In the agricultural domain, the EU grants tariff-rate quotas for politically sensitive products: 99,000 tonnes of beef at 7.5% duty, 180,000 tonnes of poul-

[23] European Parliamentary Research Service, *Ratification Scenarios for the EU–Mercosur Agreement*, 20 December 2024, [https://epthinktank.eu/2024/12/20/ratification-scenarios-for-the-eu%E2%80%91mercosur-agreement/], Accessed 5 April 2025.

[24] Bank of Spain, Against the tide: the EU-Mercosur trade deal, 2025, [https://www.bde.es/wbe/en/noticias-eventos/blog/a-contracorriente-el-acuerdo-comercial-union-europea-mercosur.html], Accessed 5 April 2025.

[25] Trade in Goods, EU-Mercosur Agreement (consolidated text 2024), art. 2 and Annex I.

try, 180,000 tonnes of sugar, and 650,000 tonnes of ethanol, differentiated by end use.[26] These quotas were subject to extensive negotiation, particularly with regard to beef and ethanol.[27] While these concessions are significant, they are accompanied by regulatory safeguards and phased implementation mechanism[28].

In return, Mercosur commits to gradually dismantling of tariffs on EU exports in key industrial sectors, including vehicles, pharmaceuticals, chemicals and machinery. For instance, passenger car tariffs will be eliminated over a 15-year period, beginning with a 50,000-unit quota at reduced duties.[29] Analysts have described this as a "managed asymmetry," whereby the EU retains defensive positions in agriculture while securing offensive gains in high-value industrial exports.[30] Mercosur, conversely, prioritises agri-food liberalisation while cautiously opening its industrial base.[31] This asymmetry reflects traditional North-South trade patterns and mirrors the economic profiles of both blocs.[32] Additionally, the agreement includes provisions to modernise customs procedures through risk-based inspections, digitalisation tools, and cooperation on border facilitation standards exceeding WTO baselines.

3.2. Services liberalisation and public procurement

The EU-Mercosur Agreement's chapter on services adopts a negative list approach, liberalising all sectors except those explicitly excluded.[33] The chapter applies to all four modes of supply defined under the GATS framework and covers key sectors including financial services, telecommunications, maritime transport, and professional services.[34]

Both Parties reaffirm the right to regulate in pursuit of legitimate public policy objectives, and the agreement explicitly safeguards services supplied in the exercise

---

26 European Commission, *Questions and Answers: EU–Mercosur Trade Agreement*, 2024, [https://policy.trade.ec.europa.eu/eu-mercosur-agreement_en], Accessed 5 April 2025.

27 Center for Strategic and International Studies, *What Are the Implications of the EU–Mercosur Free Trade Agreement?*, 2024, [https://www.csis.org/analysis/what-are-implications-eu-mercosur-free-trade-agreement], Accessed 5 April 2025.

28 Hagemejer et al., *op. cit*., note 20, pp. 5-9.

29 European Commission*, op. cit., note 26.*

30 Torres Jarrín et al., *op. cit*., note 11, pp. 122-124.

31 *Ibid.,* pp. 133-135.

32 Pose-Ferraro, N., *The political economy of industry organizations and Mercosur's North-South trade negotiations: the cases of Brazil and Argentina*, Palgrave Macmillan, 2023, pp. 113-116.

33 EU-Mercosur Agreement, *Chapter on Services*, Art. 1.

34 *Ibid*., Art. 1.8(a)–(d).

of governmental authority, including public health, education, and social security.[35] These exclusions align with the EU's approach in previous free trade areas and ensure that services provided in a non-commercial or non-competitive manner are not subject to liberalisation disciplines.[36] The chapter enhances legal certainty through provisions on national treatment, market access, and transparency, while maintaining general exceptions and carve-outs for sensitive sectors.[37] This legal architecture facilitates access for foreign service providers while preserving domestic regulatory space.

The government procurement chapter of the agreement marks a significant development for Mercosur, as it opens public tenders at the federal level to EU suppliers, under conditions of non-discrimination and transparency.[38] Although the level of access is not as comprehensive as in CETA or the World Trade Organisation (WTO) Government Procurement Agreement, it represents a notable shift toward regulatory convergence and institutional alignment. For the Union, this chapter serves not only commercial objectives but also supports its strategy of promoting good governance, accountability, and legal certainty in partner countries.

3.3. Intellectual property and regulatory alignment

The intellectual property chapter establishes a comprehensive and Trade-Related Aspects of Intellectual Property Rights (TRIPS)-consistent framework, covering copyright, trademarks, patents, geographical indications (GIs), industrial designs, trade secrets, and enforcement procedures.[39] While the chapter does not create supranational enforcement powers, it introduces TRIPS-plus standards**,** reinforcing the EU's objective of exporting its internal regulatory model through external agreements.[40]

A central component of the chapter is the mutual recognition and legal protection of geographical indications. The EU secures protection for 355 GIs, while recognising 220 from Mercosur.[41] These protections include safeguards such as the prohibition of misleading labels (e.g. "style," "type," or "imitation") and transitional clauses for prior users or generic terms, particularly relevant for local producers.[42]

---

35 *Ibid.*, Arts. 1.4 and 1.7.

36 European Commission, *op. cit.*, note 26.

37 EU-Mercosur Agreement, *Chapter on Services*, Arts. 3-5.

38 EU–Mercosur Agreement, *Chapter on Government Procurement*, Arts. GP.3-GP.6.

39 EU–Mercosur Association Agreement, *Intellectual Property Chapter*, Arts. X.1–X.3.

40 European Commission, *op. cit.*, note 26.

41 *Ibid.*

42 EU–Mercosur Agreement, Art. X.35(1)(e)–(f), X.36 and Annex X-B (list of GIs).

While designed to protect commercial reputation and ensure fair competition, they have also raised concerns in Mercosur about market access for traditional denominations.[43]

The chapter also addresses judicial and administrative enforcement, outlining civil and border procedures for IP rights violations.[44] These include access to injunctions, damages, destruction of infringing goods, and border seizure of counterfeit merchandise.[45] The agreement aligns with the EU's broader "external governance" approach, by which the Union promotes its internal regulatory norms abroad via legally binding instruments.[46] Scholars have characterised this strategy as a form of rule export that combines economic interests with regulatory influence.[47]

In the area of technical barriers to trade (TBT), the agreement commits to WTO-plus provisions, including the mutual recognition of conformity assessment procedures, institutionalised regulatory dialogue, and promotion of regulatory convergence in priority sectors.[48] These commitments are particularly beneficial for small and medium-sized enterprises, as they reduce compliance costs and simplify access to markets.[49] They also complement the EU's geopolitical strategy of shaping global regulatory environments in line with its internal standards.

3.4. Digital trade and phytosanitary measures cooperation

The EU-Mercosur Association Agreement does not include a dedicated digital trade chapter. Instead, digital matters are addressed only indirectly and minimally, through general commitments consistent with WTO practice, such as the prohibition of customs duties on electronic transmissions and non-discriminatory treatment of digital products. However, the agreement does not contain binding provisions on cross-border data flows, data localisation requirements, or privacy protection, despite the EU's strong regulatory position on these issues under the General Data Protection Regulation.[50] This limited scope has prompted criticism

---

43 Bernal-Meza, R.; Cifuentes, M., *Las indicaciones geográficas en el Acuerdo de Asociación entre MERCOSUR y la Unión Europea: el espíritu de la integración en cuestionamiento*, Brazilian Journal of International Relations, Vol. 10, No. 1, 2021, pp. 20-22.

44 EU–Mercosur Agreement, Arts. X.44–X.58.

45 *Ibid*., Art. X.49 (civil remedies), X.57 (border enforcement).

46 *Vid*., Lavenex, S., *The power of functionalist extension: how EU rules travel*, *Journal of European Public Policy,* Vol. 21, No. 6, 2014, pp. 938-957.

47 Torres Jarrín et al., *op. cit*., note 11, pp, p. 135.

48 EU–Mercosur Agreement, *TBT Chapter*, Arts. TBT.4–TBT.8.

49 European Commission, *op. cit.*, note 26.

50 European Parliament and the Council Regulation (EU) 2016/679 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 L119/1.

from analysts and policymakers, who consider it a missed opportunity to advance the EU's digital normative agenda in line with more recent agreements, such as those with Japan and Chile.[51] According to the European Parliamentary Research Service (EPRS), this omission reflects the fact that the EU's negotiating mandate, issued in 1999 and never updated, predates the Lisbon Treaty and the EU's current digital regulatory framework.[52] As such, the Agreement adopts a minimum baseline approach, offering little in terms of future-oriented digital governance.

In contrast, the chapter on sanitary and phytosanitary (SPS) measures offers a more institutionalised and technically robust framework for cooperation. It seeks to facilitate trade while protecting public, animal and plant health**,** drawing on principles of science-based risk assessment, equivalence, and recognition of pest- and disease-free zones.[53] It also affirms commitments to international standards, including those of the Codex Alimentarius, the World Organisation for Animal Health, and the International Plant Protection Convention.[54]

The chapter contains operational provisions on approval of establishments**,** import checks, and pre-listing, and it promotes collaboration in areas such as food safety, technical assistance, and antimicrobial resistance.[55] These measures reflect the EU's external SPS strategy and align with the European Parliament's "One Health" approach, which connects human, animal and environmental health.[56] Nevertheless, the SPS chapter does not enshrine the precautionary principle, a core element of EU environmental law as articulated in Article 191(2) TFEU. While the TSD chapter includes a general reference to precaution, that chapter is not subject to enforceable dispute settlement, limiting its legal effect.[57] The EPRS notes that this omission undermines the EU's ability to justify restrictive SPS measures based on scientific uncertainty, potentially weakening its capacity to uphold high health and safety standards without risking accusations of disguised protectionism.[58] As Torres Jarrín and Daza Aramayo observe, this reflects an un-

---

51 Patrocínio, J.C.P., *Electronic commerce and digital services: from international concepts and normative development in the European Bloc to prospects fro the European-Mercosur Agreement*, Editora Dialéctica, Belo Horizone, 2023, pp. 88-91.

52 European Parliamentary Research Service (EPRS), *EU-Mercosur Partnership Agreement: Trade Pillar*, PE 769.537, March 2025, p. 5.

53 EU-Mercosur Agreement, *Sanitary and Phytosanitary Measures Chapter*, Arts. 1–5.

54 *Ibid*., Art. 3.

55 *Ibid.,* Arts. 6–10, 15–17.

56 European Parliament, *Resolution on the "One Health" approach*, P9_TA(2020)0157, 17 April 2020.

57 EU-Mercosur Agreement, *Trade and Sustainable Development Chapter*, Annex.

58 EPRS, *EU–Mercosur Partnership Agreement: Trade Pillar*, PE 769.537, March 2025, p. 10.

derlying regulatory asymmetry in the agreement's institutional architecture.[59] The agreement establishes a Joint SPS Subcommittee to oversee implementation, encourage dialogue, and address technical barriers.[60] While this supports regulatory cooperation, it also raises concerns about democratic accountability, as much of the decision-making authority is delegated to a technocratic body with limited political oversight.

This contrast between the limited scope of the digital commitments and the relative legal sophistication of the SPS chapter highlights a broader normative asymmetry within the EU-Mercosur Agreement. While the SPS provisions reflect institutional ambition and technical detail -albeit with critical gaps such as the omission of the precautionary principle- the digital dimension remains underdeveloped, offering little beyond baseline WTO-level principles. Such divergence illustrates a recurring pattern in the Agreement: the EU succeeds in projecting its regulatory preferences in areas like food safety and animal health, but refrains from embedding its digital governance model where political sensitivities or outdated mandates prevail. This imbalance raises questions about the coherence, enforceability, and strategic consistency of the EU's external trade agenda. These tensions become even more evident in the TSD chapter, which aims to operationalise the EU's normative leadership on climate and labour standards but encounters limitations in legal enforceability. The next section turns to this critical dimension, where the agreement's ambition and credibility are most directly tested.

4. SUSTAINABILITY AND NORMATIVE AMBITIONS

The sustainability chapter of the EU-Mercosur Agreement occupies a pivotal position in both the political debate and the normative self-perception of the EU. It is in this chapter that the Union's ambition to act as a normative power -that is, a global actor promoting environmental and labour standards through trade- faces its most acute tests of enforceability, legitimacy, and geopolitical balance. The original 2019 version of the TSD chapter was widely criticised for its limited legal effect, lack of binding commitments, and detachment from the agreement's core dispute settlement mechanisms.

The revised 2024 text, however, significantly upgrades this framework. It introduces a legally binding annex that gives treaty-level enforceability to several sustainability commitments, including obligations on deforestation, labour rights, and gender equality, as well as references to the Paris Agreement as an "essential el-

[59] Torres Jarrín et al., *op. cit.*, note 11, pp. 126-127.

[60] EU–Mercosur Agreement, *Sanitary and Phytosanitary Measures Chapter*, Art. 18.

ement" of the broader agreement.[61] These reforms emerged in response to internal pressure from EU Member States, civil society organisations, and the European Parliament, as well as external contestation from Mercosur stakeholders.[62] Yet, the new framework also raises fresh legal and political questions about coherence with EU law, proportionality, and the practical feasibility of enforcement in an inter-regional context.

4.1. Labour and environmental commitments

The upgraded TSD chapter reaffirms the parties' commitments to the International Labour Organisation Core Conventions and to multilateral environmental agreements, including the Paris Agreement, the Convention on Biological Diversity, and the United Nations Framework Convention on Climate Change.[63] It addresses a broad spectrum of sustainable development priorities, such as non-discrimination, corporate due diligence, labour inspections, and the sustainable management of forests and biodiversity.[64] Crucially, the 2024 legally binding annex grants enforceable status to several of these commitments.[65] Among the most significant innovations is the explicit and justiciable obligation to halt deforestation by 2030. This is the first time that such a commitment has been made subject to dispute settlement procedures in a bilateral EU agreement.[66] It also reinforces ILO obligations, particularly with regard to forced and child labour, and introduces dedicated provisions on women's economic empowerment, the development of green supply chains, and the protection of Indigenous livelihoods.[67]

Despite these developments, academic commentators have raised concerns about the legal and normative consistency of the chapter. Krämer and Verheyen and Winter argue that the revised agreement fails to translate the EU's environmental objectives into binding legal duties compatible with the Union's broader climate obligations.[68] In particular, they highlight the weak integration of EU secondary

61 European Commission, *The upgraded EU–Mercosur agreement: What is new compared to the 2019 agreement*, December 2024, pp. 2–3.

62 *Ibid*., p. 3.

63 EU-Mercosur Agreement, *Trade and Sustainable Development Chapter*, Art. TSD.2; Annex 2024.

64 European Commission, *Factsheet: Trade and Sustainable Development in the EU–Mercosur Agreement*, 2024.

65 EU-Mercosur Agreement, *Annex to the Trade and Sustainable Development Chapter*, 2024, Section I.

66 *Ibid*., Section III, para. 2(c); see also *Dispute Settlement – Annexes*, 2024.

67 EU-Mercosur Agreement, *Annex to the TSD Chapter*, Section IV.

68 Krämer, L., *A lost opportunity? The environment and the EU-Mercosur Trade Agreement*, Journal for European environmental and planning law, Vol. 18, No. 1-2, 2021, pp. 143-163; Verheyen, R.; Winter,

legislation, including the European Climate Law and the Regulation on deforestation-free products.[69]

From a Mercosur perspective, the sustainability annex is sometimes perceived as a vehicle for regulatory imposition, especially in sectors like agriculture, land use, and extractive industries, where environmental clauses could constrain development autonomy. González and Cesar de Oliveira et al. warn that such conditionality risks reinforcing North-South asymmetries, locking Mercosur countries into low-value commodity exports while the EU retains regulatory control over high-value segments of global value chains.[70] The upgraded text does include provisions for technical assistance and cooperation, but these remain politically dependent and financially underdefined. As such, the chapter reflects the ambivalence of the EU's normative ambitions: it strengthens legal enforceability and institutional mechanisms, yet remains contested in both substantive content and practical application.

4.2. Climate commitments and regulatory asymmetry

One of the most significant legal upgrades in the 2024 version of the agreement is the inclusion of the Paris Agreement as an "essential element". This formulation, previously absent from the 2019 text, allows either party to suspend trade benefits if the other withdraws from or acts in bad faith towards the Paris Agreement's objectives.[71] The inclusion of this clause aligns the agreement with the EU's revised approach to conditionality and reflects increasing political pressure from both European institutions and Member States for enforceable environmental standards in external trade.[72]

This innovation provides a symbolically powerful mechanism, but its operational impact remains uncertain. Although suspension is legally permitted, it depends on a high threshold of evidence, and its application may risk politicisation. Moreover,

G., The compatibility of the draft EU-Mercosur Free Trade Agreement with EU and International Climate Protection Law, Journal of world trade, Vol. 58, No. 6, 2024, pp. 963-988.

69 European Parliament and the Council Regulation (EU) 2023/1115 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 [2023] OJ L150/206.

70 González, G.*, Sustainable development in the EU-Mercosur agreement*, Latin American Journal European Studies, Vol. 2, No1 2, 2022, pp. 145-171; Cesar de Oliveira, S.E M. et al., The European Union-Mercosur Free Trade Agreement as a tool for environmentally sustainable land use governance, Environmental science & policy, 2024, Vol. 161, pp. 1-12.

71 EU-Mercosur Agreement*, Paris Agreement as an Essential Element*, 2024; *Annex to the Trade and Sustainable Development Chapter*, Section III.

72 European Commission, *op. cit.,* note 61, p. 3.

from a Mercosur standpoint, this form of climate-based conditionality is viewed with deep scepticism. Several governments in the region, notably Brazil, have expressed concerns that such provisions may function as disguised trade restrictions, undermining sovereignty over domestic environmental regulation.[73]

These concerns have been intensified by the entry into force of Regulation (EU) 2023/1115 on deforestation-free supply chains, which prohibits the placing on the EU market of commodities such as beef, soy, cocoa and palm oil if linked to deforestation after 31 December 2020. Although this regulation is formally external to the agreement, its extraterritorial implications directly affect Mercosur's main exports. The 2024 annex attempts to mitigate this friction by including cooperation mechanisms to support traceability, capacity-building, and access to geospatial data.[74]

However, scholars such as Lehmen and Vidigal highlight that this regulatory asymmetry reveals a persistent strategic ambiguity in EU trade policy: while the EU affirms climate leadership rhetorically, it avoids binding bilateral emissions reduction targets or specific obligations on carbon pricing or methane control.[75] In contrast, Rudloff argues that the EU's unilateral sustainability regulations -such as the carbon border adjustment mechanism or the deforestation regulation- may undermine the cooperative spirit of bilateral trade and reinforce perceptions of regulatory imperialism, particularly in North-South relations.[76]

This asymmetry is also evident in Mercosur political discourse. Statements by Brazilian officials have criticised the selective use of environmental clauses to restrict agricultural exports, especially beef and soy, while the EU continues to subsidise its own agricultural sector and apply trade defence instruments that limit Mercosur competitiveness.[77] In this context, sustainability is often perceived not as a shared goal, but as a precondition for market access imposed unilaterally by the EU. Nonetheless, it would be misleading to portray Mercosur as a monolithic bloc of resistance. Civil society organisations -including environmental NGOs, Indigenous groups, and academic institutions in countries such as Brazil and Para-

---

73 El País, *El ministro de Exteriores de Brasil: El acuerdo de Mercosur con la UE es importantísimo en un momento de amenazas de guerras comerciales*, 2025, [https://elpais.com/internacional/2025-02-19/el-ministro-de-exteriores-de-brasil-el-acuerdo-de-mercosur-con-la-ue-es-importantisimo-en-un-momento-de-amenazas-de-guerras-comerciales.html], Accessed 1 April 2025.

74 *Annex to the TSD Chapter*, Section IV, paras. 5-7.

75 Lehmen, A.,; Vidigal, G., *Trade and Environment in EU–Mercosur Relations: negotiating in the shadow of unilateralism, European foreign affairs review*, Vol. 30, No. 1, 2025, pp. 87-114.

76 Rudloff, B., *The EU between sustainability unilateralism and bilateral trade agreements. Paths to better partnerships*, SWP, No. 5, March 2025, pp. 12–14.

77 *Vid.*, Krämer, L., *op. cit.*, note 68.

guay- have mobilised in support of stronger sustainability safeguards.[78] For them, the agreement offers a platform to leverage external scrutiny in the face of weak domestic governance, and to promote accountability in land use, deforestation, and human rights.

4.3. Dispute settlement, dialogue and institutional architecture

The institutional design of the TSD chapter has undergone a substantial upgrade in the 2024 revision. While the original 2019 text was criticised for being legally toothless and detached from the core enforcement mechanisms of the Agreement, the revised version introduces a legally binding annex that elevates several sustainability obligations to the level of the core treaty.[79] Crucially, the revised framework allows for the activation of formal dispute resolution mechanisms through expert panels, the issuance of public recommendations, and -in cases of persistent non-compliance- the possibility of invoking "appropriate measures".[80] Although the TSD chapter remains outside the general dispute settlement procedure under the main agreement, the annex's language provides greater legal certainty by linking sustainability breaches to structured follow-up procedures.[81]

In line with this architecture, the agreement establishes a Committee on Trade and Sustainable Development, complemented by subcommittees, expert groups, and civil society dialogue fora. These bodies are tasked with overseeing implementation, reviewing progress, and facilitating transnational stakeholder engagement.[82] NGOs, trade unions, employer associations, and academic institutions are formally recognised as participants in the monitoring process, with rights to provide feedback, request clarifications, and publish shadow reports. However, the effectiveness of these mechanisms depends heavily on political will, institutional capacity, and resource availability on both sides. In the EU, civil society participation in TSD mechanisms is relatively well institutionalised, supported by the Domestic Advisory Groups and the European Economic and Social Committee. In contrast, Mercosur countries often face significant structural constraints, including limited

78 *Vid.*, Cesar de Oliveira, S.E.M., *et al., op. cit.,* note 70.

79 EU-Mercosur Agreement, *Annex to the Trade and Sustainable Development Chapter*, Section I; see also *Dispute Settlement – Annexes*, 2024.

80 *Ibid.*, Section III, paras. 3-6.

81 EU-Mercosur Agreement, *Dispute Settlement Chapter*, Art. 4 and Annex; *European Commission*, *Fact-sheet: Trade and Sustainable Development in the EU-Mercosur Agreement*, 2024.

82 EU-Mercosur Agreement, *TSD Chapter*, Art. TSD.13-TSD.15; *Annex*, Section V.

funding, weak administrative coordination, and low participation from non-state actors, particularly in rural and Indigenous communities.[83]

From a critical perspective, scholars warn that these institutions -while formally symmetrical- may become asymmetrical in practice. If the EU is able to mobilise legal, technical, and civil society resources to interpret and enforce sustainability standards, while Mercosur counterparts struggle to do so, the dialogue fora risk functioning as vehicles of EU regulatory projection rather than as platforms for genuine co-governance.[84] This concern is amplified by the fact that sustainability disputes are not subject to traditional sanctions, but rather to flexible instruments whose deterrent effect remains uncertain.[85]Yet, the institutional framework is not without promise. The inclusion of a review clause -allowing the agreement's sustainability commitments to be reassessed three years after entry into force- offers a potential safeguard for adaptation and recalibration.[86] If combined with adequate funding, inclusive participation, and independent monitoring, this structure could evolve into a meaningful tool for democratic accountability and regulatory convergence.

4.4. Contestation, conditionality and the rebalancing of normative power

The sustainability provisions of the EU-Mercosur Agreement lie at the heart of ongoing interregional tensions. On the European side, the revised 2024 framework -anchored in legally binding commitments on deforestation, labour standards, and climate obligations- has been presented as a landmark in value-based trade policy. However, within the EU itself, Member States such as France, Ireland, and Austria have continued to oppose the agreement's ratification, arguing that the chapter falls short of the EU's environmental and climate goals. These critiques are reinforced by civil society actors who view the agreement as insufficiently aligned with the EU's Green Deal and biodiversity strategies.

From the perspective of Mercosur governments, these demands are often perceived as a form of regulatory unilateralism.[87] Officials from Brazil and Argentina have warned that linking trade benefits to environmental conditions amounts to

---

83 Torres Jarrín et al., *op. cit.*, note 11, pp. 133-135.

84 Rudloff, B., *op. cit.*, note 76, pp. 12-14.

85 *Vid.*, Harrison, J.; Paulini, S., *Reinventing trade, environment and development interlinkages: lessons from the EU-Mercosur Association Agreement, Journal of international economic law, Vol. 27, No. 4, 2025, pp. 723-740.*

86 EU-Mercosur Agreement, *Annex to the TSD Chapter*, Section VI, para. 2.

87 Rudloff, B., *op. cit.*, note 76.

a redefinition of negotiated terms and a potential infringement on sovereignty.[88] This position has been reinforced by recent EU actions -particularly the adoption of Regulation (EU) 2023/1115 on deforestation-free products- which, while formally external to the Agreement, exert direct pressure on Mercosur's agricultural exports, especially beef and soy.

This asymmetry between regulatory power and economic exposure has led to accusations of conditional market access. Latin American scholars and negotiators argue that sustainability clauses may entrench a global division of labour: Mercosur countries remain suppliers of primary commodities, while the EU consolidates control over regulatory frameworks and high-value segments of trade. According to Rudloff, such strategic unilateralism threatens the legitimacy of bilateral cooperation and may foster resentment rather than convergence.[89] At the same time, civil society across Mercosur is not uniformly opposed to stricter sustainability provisions. Environmental NGOs, Indigenous communities, and progressive unions in Brazil, Paraguay, and Uruguay have expressed support for stronger safeguards, especially where national enforcement mechanisms are weak or absent.[90] These actors see the agreement as a lever for externalising accountability, improving transparency, and embedding sustainability standards into domestic legal systems.

To reconcile normative ambition with geopolitical legitimacy, the upgraded agreement introduces a rebalancing mechanism. Inspired by WTO non-violation complaints, this instrument allows either party to request compensation where regulatory changes -though legal- undermine the balance of concessions.[91] A panel must confirm the impairment before rebalancing measures (e.g., adjustments in concessions or other compensatory actions) are authorised. Importantly, the mechanism respects each party's right to regulate: no government is obliged to amend or repeal its laws. In principle, this approach offers a pragmatic compromise between flexibility and legal certainty. It acknowledges the reality of regulatory divergence in a multipolar world while providing a structured forum for managing disputes that fall outside the scope of formal violations. However, its effectiveness will depend on institutional balance, mutual trust, and transparency in implementation. Without political commitment and meaningful civil society involvement, it may remain a procedural buffer rather than a transformative tool.

---

88 El País, *op. cit*, note 73.

89 Rudloff, *op. cit.*, note 76, pp. 12-14.

90 Torres Jarrín et al., *op. cit.*, note 11, pp. 126-127.

91 EU-Mercosur Agreement*, Annex to the TSD Chapter*, Section V.

As Harrison and Paulini argue, a normative power must do more than codify principles -it must create enforceable, inclusive, and participatory frameworks that redistribute authority and empower marginalised voices.[92] For Mercosur, the true test of sustainability conditionality will not lie in the legal text but in the material consequences of implementation: Will the EU provide co-financing for forest protection? Will Mercosur governments invest in traceability, inspections, and civil oversight? Will smallholders and Indigenous communities be included in benefit-sharing mechanisms? In this light, the TSD chapter reflects both the ambitions and contradictions of the EU's external trade policy: it is normatively assertive, legally improved, yet still politically contested and structurally asymmetrical. Bridging this gap requires not only technical instruments -such as rebalancing and review clauses- but a deeper commitment to co-governance, transparency, and shared responsibility.

5. RATIFICATION CHALLENGES AND GEOPOLITICAL IMPLICATIONS

The ratification of the EU-Mercosur Association Agreement has proven to be a complex and politically fraught process. While the trade negotiations concluded in principle in 2019 and the legal scrubbing of the text was completed in December 2024, the agreement's final approval remains uncertain. This uncertainty is not merely procedural but reflects deeper institutional, legal, and normative tensions across both blocs. At the legal level, the agreement is classified as a mixed agreement, involving both EU and Member State competences. Under Articles 3 and 4 of the TFEU, trade policy is an exclusive competence of the Union, while areas such as environmental protection, labour rights, and cultural cooperation remain shared. As a result, the agreement requires ratification not only by the Council and the European Parliament under Article 218 TFEU, but also by the national parliaments of all 27 Member States. This renders the process vulnerable to vetoes at multiple levels, increasing the political sensitivity and legal exposure of the agreement.

Yet, the debate around the EU's role in global trade cannot be fully understood without considering conceptual frameworks such as "normative power Europe"[93], "market power Europe"[94], and the internal constraints arising from the EU's own

[92] *Vid.*, Harrison; Paulini, *op. cit.,* note 85.

[93] Manners, *op. cit.*, note 2, pp. 235-258.

[94] Damro, *Market Power Europe*, Journal of European Public Policy, Vol. 19, No. 5, 2012, pp. 682-699.

political structures and treaties[95]. Manners' concept of "normative power Europe" highlights the EU's self-perception as a promoter of universal norms, while Damro's "market power Europe" underscores the Union's ability to influence through sheer economic weight. In practice, the EU-Mercosur deal illustrates how these two roles intersect, exposing tensions between rhetorical value promotion and strategic trade imperatives. These perspectives shed light on the inherent tension between the Union's aspirational identity as a guardian of sustainability standards and the pressures of realpolitik embedded in large-scale trade deals.

This institutional complexity is compounded by a strong wave of domestic political opposition in several Member States. France, Germany, Ireland, Austria, the Netherlands and Belgium have all expressed concerns regarding the environmental implications of the agreement, particularly with regard to deforestation in the Amazon and the initial lack of enforceable commitments under the TSD chapter. Although the 2024 annex introduces binding obligations on deforestation and social rights -enforceable through dedicated expert panels and follow-up procedures- the political feasibility of ratification remains contested, especially among those demanding stronger enforcement of the sustainability chapter. In Germany, while the federal government has shown cautious support for the agreement, significant opposition has emerged from the Green Party, civil society organisations, and regional parliaments. In particular, the Bundesrat passed a non-binding resolution expressing environmental and procedural concerns regarding the EU-Mercosur deal.[96] This has raised doubts about whether Germany's eventual ratification can be secured without further sustainability guarantees. Austria's parliament was among the first to formally oppose ratification, citing risks to both climate action and domestic agriculture.[97] France's position has been especially forceful: President Macron has repeatedly declared the agreement unratifiable in its current form, aligning with the recommendations of the Ambec Report commissioned by the French government.[98] The Belgian regional parliament of Wallonia, a historical actor in European trade resistance, has also threatened to block ratification,

---

95 Meunier, S.; Nicolaïdis, K., "The European Union as a conflicted trade power", *Journal of European Public Policy*, Vol. 13, No. 6, 2006, pp. 906–925.

96 Bundesrat, *Entschließung des Bundesrates zur Ratifizierung des EU-Mercosur-Abkommens*, Drucksache 508/22, 2022, [https://www.bundesrat.de/SharedDocs/drucksachen/2022/0501-0600/508-22(B).pdf], Accessed 14 April 2025.

97 The Guardian, Austria rejects EU-Mercosur trade deal over Amazon fires, 2019, [https://www.theguardian.com/world/2019/sep/19/austria-rejects-eu-mercosur-trade-deal-over-amazon-fires], Accessed 5 April 2025.

98 Ambec, S., *Impact de l'accord UE–Mercosur sur le développement durable* (Gouvernement de France 2020), pp. 2-6.

echoing its role in the CETA debate.[99] These political dynamics reflect a broader unease with the asymmetries embedded in the Agreement, between market access and sustainability, between liberalisation and enforceability.

The European Parliament has played a particularly active role in scrutinising the agreement's normative coherence. In several resolutions adopted since 2020, the Parliament has warned that the agreement fails to meet the environmental and labour standards necessary for ratification under the EU's Green Deal and the commitments made under the Paris Agreement.[100] While the Parliament does not have a direct veto over Member State ratifications, its consent is required for the agreement's entry into force at EU level, and its symbolic weight is considerable. Civil society organisations, ranging from environmental NGOs and trade unions to consumer associations, have mobilised extensively against the agreement. Their critiques centre on the risk of carbon leakage, regulatory dilution, and democratic deficit in the implementation and monitoring phases.[101] These critiques gain additional weight when contrasted explicitly with prior EU trade agreements, notably the CETA with Canada and the EPA with Japan. Like the EU-Mercosur Agreement, CETA includes a TSD chapter that affirms commitments to environmental and labour standards. However, both CETA and the 2019 version of the EU-Mercosur Agreement relied primarily on soft enforcement tools: consultations and expert panels. In contrast, the revised 2024 annex to the EU-Mercosur Agreement introduces binding obligations and structured dispute resolution, placing it -at least on paper- beyond baseline set by CETA and the EU-Japan EPA.

In contrast, the EU-Japan EPA includes structured frameworks for civil society dialogue, monitoring, and review, which, despite also lacking sanctions, offer greater procedural transparency and participation.[102] The EU-Mercosur Agreement has adopted similar participatory structures, including subcommittees and civil society fora, but their effectiveness will depend on institutional capacity and balanced implementation across both regions.

Regarding dispute resolution, CETA introduced the Investment Court System as a transparent alternative to traditional investment dispute settlement mechanisms,

---

99 *Vid*., Van der Loo, G.; Pelkmans, J., *Does Wallonia's veto of CETA spell the beginning of the end of EU trade policy?*, CEPS Commentary, October 2016.

100 European Parliament, *Resolution on the Implementation of the Common Commercial Policy*, (2020/2015(INI), 7 October 2020.

101 Greenpeace EU, *Why the EU–Mercosur Deal Fails the Climate Test*, Brussels 2021.

102 Suzuki, H., *The New Politics of Trade: EU–Japan*, Journal of European Integration, Vol. 41, No. 7, 2019, pp. 875-889.

intended to ensure impartiality and legal certainty in investment protection.[103] The EU-Mercosur Agreement, by contrast, does not currently contain an investor-state dispute settlement mechanism. Although it leaves open the possibility of a future protocol, the issue remains undefined, creating uncertainty over how potential investment conflicts will be handled.

Finally, lessons can be drawn from how CETA's "Joint Interpretative Instrument" clarified politically sensitive provisions without altering the treaty's text. A similar tool in the EU-Mercosur context could enhance ratification prospects especially when coupled with the new rebalancing mechanism, which offers a path to address perceived asymmetries without renegotiating the core text. Conversely, sectors of European industry-particularly chemical and agricultural exporters have welcomed the finalisation of negotiations, viewing the agreement as a valuable opportunity to expand access to Latin American markets.[104] This support illustrates the competing economic and normative priorities that have shaped the internal debate.

On the Mercosur side, ratification also presents structural challenges. While the legal procedure varies among Member States, the lack of supranational authority within Mercosur means that each national parliament must individually approve the agreement. This creates potential for divergence, delay, or even rejection-especially in politically volatile contexts such as Brazil and Argentina. Moreover, domestic opposition exists within Mercosur as well: agricultural cooperatives in Argentina have expressed scepticism about increased European competition, while indigenous movements and environmental groups in Brazil have denounced the absence of strong social and environmental guarantees.[105] Recent academic research has also highlighted how the agreement has been perceived within Brazil as an example of normative asymmetry and externally imposed conditionality. Tostes and Albuquerque argue that the EU's approach to sustainability and trade liberalisation has created both institutional tensions and political backlash among domestic actors in the South.[106]

---

103 Schill, S.W., *The European Union's Investment Court System: A Model for Reform?*, Columbia FDI Perspectives, No. 217, 2017.

104 Frantzanas, S., *Industry Welcomes Finalisation of EU–Mercosur Trade Negotiations*, Chemical Week, 2024 .

105 Fundación Carolina, *Percepciones Sociales del Acuerdo UE–Mercosur en América Latina*, Documento de Trabajo No. 15, 2021.

106 Tostes, A.P.; Albuquerque, M., *Unpacking the Impact of Mega-Regional Agreements: The EU-Mercosur Case, Third World Quarterly*, Vol. 45, No. 8, 2024, pp. 1418-1435.

Beyond these legal and political hurdles, the ratification process is also shaped by intensifying geopolitical tensions involving China and the United States. Following the reelection of Donald Trump in 2024, the U.S. has raised tariffs on a range of Chinese imports to 145%, prompting retaliatory measures from Beijing.[107] Analysts note that this renewed escalation has disrupted global supply chains and undermined confidence in multilateral frameworks. According to the Real Instituto Elcano, the EU must reinforce its industrial and technological resilience in sectors such as semiconductors and artificial intelligence, to maintain global competitiveness amid a deepening U.S.-China rivalry.[108] The European Parliament's internal think tank similarly highlights the need for greater strategic autonomy, including more robust mechanisms to shield European markets from external protectionism.[109]

Against this backdrop, China continues expanding its footprint in Latin America through the Belt and Road Initiative, offering flexible financing and infrastructure investments that often come with fewer regulatory constraints than those demanded by the EU.[110] For Mercosur countries, balancing these offers with the EU's stricter sustainability clauses presents a dilemma: embracing EU standards might secure better long-term market access and environmental credibility, but it could also bring immediate challenges compared to China's more flexible terms. This dynamic underscores the broader competition for influence in the region, one in which the EU, the U.S. and China all vie for economic and strategic partnerships.

For the EU, the Mercosur agreement was initially framed as a response to the erosion of multilateralism, a way to reaffirm its role as a defender of rules-based trade in the global order. However, early criticisms regarding the absence of enforceable sustainability provisions, partially addressed in the revised 2024 framework, have led to accusations of inconsistency between the EU's normative discourse and its trade practice. The EU is perceived by many as willing to compromise on its values for the sake of geopolitical influence, particularly in the context of growing Chi-

---

107 The New York Times, *Tracking Trump's on-again, off-again tariffs and the global trade war*, 2025, [https://www.nytimes.com/article/trump-tariffs-canada-mexico-china.html], Accessed 12 April 2025.

108 Real Instituto Elcano, *La guerra tecnológica EE.UU.-China y sus efectos sobre Europa*, 2025, [https://www.realinstitutoelcano.org/analisis/la-guerra-tecnologica-eeuu-china-y-sus-efectos-sobre-europa/], Accessed 12 April 2025.

109 Real Instituto Elcano, *Cómo debe responder Europa a los aranceles de Trump*, 2025, [https://www.realinstitutoelcano.org/comentarios/como-debe-responder-europa-a-los-aranceles-de-trump/], Accessed 12 April 2025.

110 *Vid.*, EPRS, *China's increasing presence in Latin America: implications for the European Union*, 2025.

nese and US engagement in Latin America.[111] This tension is particularly stark in light of Article 21 of the Treaty on European Union, which obliges the Union to ensure consistency between its internal values and its external actions.

From a legal perspective, the complexity of mixed agreements has been further clarified by the Court of Justice of the European Union in *Opinion 2/15*, which established that trade agreements encompassing areas of shared competence require full ratification by all Member States.[112] This reinforces the multidimensional nature of ratification, but also subjects EU external action to greater democratic scrutiny and potential fragmentation.

One possible way forward lies in the adoption of interpretative instruments and in using the review clause foreseen three years after entry into force to reinforce enforcement and monitoring frameworks. Such instruments have precedent in EU practice, including in the case of CETA, and could serve to bridge the gap between formal ratification and political acceptability. Yet, even such mechanisms may not suffice to overcome the structural asymmetries and political distrust that now surround the agreement.

In sum, the ratification of the EU-Mercosur Agreement faces a convergence of legal complexity, political opposition, and normative contention. These challenges do not simply reflect technical hurdles, but go to the heart of what the EU claims to be: a normative actor, a democratic union, and a global trade leader. Whether these identities can be sustained simultaneously in the face of contested agreements like Mercosur remains an open and pressing question. The Mercosur case may ultimately compel the Union to rethink not just the contents, but the very structure and instruments of its external trade architecture.

6. CONCLUSION

The EU-Mercosur Association Agreement encapsulates both the promise and fragility of the EU's strategy to align economic liberalisation with value-based trade. While the agreement aims to embed sustainability into interregional cooperation, its ratification has been delayed by legal complexity, political resistance, and questions over the credibility of enforcement. The sustainability chapter, originally criticised for weak legal effect, has become a focal point of debate. Although the 2024 annex introduces binding commitments on deforestation, labour rights, and gender equality, Member States like France, Germany and Austria continue

[111] Sanahuja, J.A.; Rodríguez, J.D., *El acuerdo Mercosur–UE y la autonomía estratégica europea*, Fundación Carolina, Documento de Trabajo No. 30, 2021.

[112] CJEU, *Opinion 2/15 (EU–Singapore Free Trade Agreement)*, ECLI:EU:C:2017:376, paras 292-293.

to question its sufficiency. In parallel, Mercosur governments see these obligations as potential constraints on development autonomy, highlighting structural asymmetries in how trade conditionality operates. Without credible enforcement, inclusive monitoring, and sustained political support, these commitments risk remaining aspirational.

Geopolitically, the EU faces mounting pressure. Rising protectionism under the re-elected U.S. administration and China's expanding influence in Latin America challenge Europe's strategic positioning. Delays or fragmentation in the EU's trade agenda weaken its leverage, especially when alternative partners offer flexible financing without strong sustainability clauses. Think tanks such as the Real Instituto Elcano warn that the EU's credibility as a global actor may suffer if major agreements like this fail to materialise. From a legal perspective, the agreement's classification as "mixed" triggers a demanding ratification process, requiring unanimity across 27 Member States. While tools like interpretative declarations or review clauses -as used in CETA- offer ways forward, they may prove insufficient unless they directly address enforcement gaps and institutional asymmetries.

At the heart of the matter lies a deeper test: whether the EU can reconcile trade liberalisation with credible, enforceable sustainability obligations. Strategic autonomy cannot rest on market access alone; it requires consistent normative leadership. The revised EU-Mercosur Agreement moves in that direction, but its success depends on the Union's capacity to deliver not just texts, but outcomes.

Ultimately, the EU–Mercosur deal will be judged on three fronts:

i. Enforceability: Are sustainability provisions implemented, monitored, and backed by dispute resolution?
ii. Fairness: Are Mercosur partners supported to meet higher standards without compromising development?
iii. Unity: Can the EU overcome internal fragmentation to uphold a coherent, strategic position?

If these conditions are met, through rebalancing mechanisms, inclusive governance, and targeted support, the agreement could mark a turning point for rules-based trade. If not, it may come to symbolise the EU's limits as a normative power, undermined by internal divisions and external competition. The EU-Mercosur Agreement is thus more than a commercial pact: it is a test of the Union's ability to lead by law in a fractured world.

REFERENCES

BOOKS AND ARTICLES

1. Accioly, E., *Timeline - Acordo Mercosul-UE*, in Molina del Pozo Martín, P. C. (coord.), *Derecho de la Unión Europea e integración regional: liber amicorum al profesor Dr. Carlos Francisco Molina del Pozo*, Valencia, Tirant lo Blanch, 2020, pp. 1029-1042
2. Aldecoa Luzárraga, F., *El acuerdo entre la Unión Europea y el Mercosur en el marco de la intensificación de relaciones entre Europa y América Latina*, Revista de Instituciones Europeas, Vol. 22, No. 3, 1995, pp. 761-792
3. Bailey, M., *Quiet Influence: The Representation of Diffuse Interests on Trade Policy, 1983–94,* Legislative Studies Quarterly, Vol. 26, No. 1, 2001, pp. 45-80
4. Bernal-Meza, R.; Cifuentes, M., *Las indicaciones geográficas en el Acuerdo de Asociación entre MERCOSUR y la Unión Europea: el espíritu de la integración en cuestionamiento*, Brazilian Journal of International Relations, Vol. 10, No. 1, 2021, pp. 9-31
5. Bizzozero Revelez, L., *Negociaciones Mercosur-Unión Europea*, Cuadernos de Integración Europea, No. 5, 2006, pp. 5-27
6. Blanc Altemir, A. (ed.), *Trade relations of the European Union after the pandemic and the Russian invasion of Ukraine*, Aranzadi, Navarra, 2023
7. Blanc Altemir, A., ¿Hacia un nuevo paradigma de los Acuerdos de Asociación de la Unión Europea? La negociación del nuevo acuerdo con el Mercosur, Anuario Español de Derecho Internacional, Vol. 34, 2018, pp. 921-968
8. Caichioloü, C.R., *The Mercosur experience and theories of regional integration,* Contexto Internacional, Vol. 39, No. 1, January/April 2017, pp. 117-134
9. Cienfuegos Mateo, M., *La anhelada asociación euromercosureña tras quince años de negociaciones*, Revista CIDOB d'Afers Internacionals, No. 112, 2016, pp. 225-253
10. Coppelli Ortiz, G., *Acuerdos de la Unión Europea con Chile y Mercosur*, in: Blanc Altemir, A. (dir), *Las relaciones comerciales de la Unión Europea con el resto del mundo: un análisis desde la postpandemia y la agresión rusa a Ucrania*, Pamplona, Aranzadi, 2023, pp. 375-389
11. Cremona, M. (ed.), *EU Foreign Relations Law: Constitutional Fundamentals*, Hart Publishing, 2008
12. Damro, C., *Market Power Europe*, Journal of European Public Policy, Vol. 19, No. 5, 2012, pp. 682-699
13. González, G*., Sustainable development in the EU-Mercosur agreement*, Latin American Journal European Studies, Vol. 2, No1 2, 2022, pp. 145-171; Cesar de Oliveira, S.E M. et al., The European Union-Mercosur Free Trade Agreement as a tool for environmentally sustainable land use governance, Environmental science & policy, 2024, Vol. 161, pp. 1-12
14. Haboba, S. E.; Losada Olmos, I.; Mensah Medehue, B.; Riveros, S., *Hacia el acuerdo de asociación birregional Mercosur-UE. Proceso de negociación y factores condicionantes*, Revista Electrónica Iberoamericana, Vol. 12, No. 1, 2018, pp. 115-150
15. Hagemejer, J. *et al., Trade Aspects of the EU–Mercosur Association Agreement*, European Parliament, DG Internal Policies, 2020

16. Harrison, J.,; Paulini, S., *Reinventing trade, environment and development interlinkages: lessons from the EU-Mercosur Association Agreement, Journal of international economic law, Vol. 27, No. 4, 2025, pp. 723-740*
17. Krämer, L., *A lost opportunity? The environment and the EU-Mercosur Trade Agreement*, Journal for European environmental and planning law, Vol. 18, No. 1-2, 2021, pp. 143-163; Verheyen, R.; Winter, G., The compatibility of the draft EU-Mercosur Free Trade Agreement with EU and International Climate Protection Law, Journal of world trade, Vol. 58, No. 6, 2024, pp. 963-988
18. Lavenex, S., *The power of functionalist extension: how EU rules travel*, *Journal of European Public Policy,* Vol. 21, No. 6, 2014, pp. 938-957
19. Lehmen, A.,; Vidigal, G., *Trade and Environment in EU–Mercosur Relations: negotiating in the shadow of unilateralism, European foreign affairs review, Vol. 30, No. 1, 2025, pp. 87-114*
20. Malamud, A., *Assessing the Political Dialogue and Cooperation Pillar of the EU–Mercosur Association Agreement*, European Parliament, 2023
21. Manners, I., *Normative Power Europe: A Contradiction in Terms?*, Journal of Common Market Studies, Vol. 40, No. 2, 2002, pp. 235-258
22. Ortiz Hernández, E., *Acuerdo UE–Mercosur más allá de la dimensión comercial ¿una ventana de oportunidad?*, in Díaz Galán, E. (dir.), La Unión Europea como actor global: desafíos políticos, jurídicos y de seguridad, Ediciones Olejnik, 2024, pp. 278-302
23. Patrocínio, J.C.P., *Electronic commerce and digital services: from international concepts and normative development in the European Bloc to prospects fro the European-Mercosur Agreement*, Editora Dialéctica, Belo Horizone, 2023
24. Poletti, A.; Sicurelli, D., *The Political Economy of Normative Trade Power Europe*, Palgrave Macmillan, 2018
25. Pose-Ferraro, N., *The political economy of industry organizations and Mercosur's North-South trade negotiations: the cases of Brazil and Argentina*, Palgrave Macmillan, 2023
26. Rudloff, B., *The EU between sustainability unilateralism and bilateral trade agreements. Paths to better partnerships*, SWP, No. 5, March 2025
27. Schill, S.W., *The European Union's Investment Court System: A Model for Reform?*, Columbia FDI Perspectives, No. 217, 2017
28. Siles-Brügge, G., *Constructing European Union Trade Policy: A Global Idea*, Palgrave Macmillan, 2014
29. Suzuki, H., *The New Politics of Trade: EU–Japan*, Journal of European Integration, Vol. 41, No. 7, 2019, pp. 875-889
30. Thudium, G.; Geiger, L.M. Castilo, M.; Sapper, S., *Décadas en proceso: el Acuerdo UE-Mercosur*, Revista de la Secretaría del Tribunal Permanente de Revisión, No. 17, March 2021, pp. 220-233
31. Torres Jarrín, M.; Daza Aramayo, L. G., *EU-MERCOSUR Interregionalism: Diplomatic and Trade Relations*, Springer, 2023
32. Wigell, M.; Aría, M.P., *China's Belt and Road in Latin America: Economic Statecraft and Strategic Implications*, Journal of Global Affairs, Vol. 12, No. 2, 2024, pp. 45-49

EU LAW

1. European Parliament, Resolution on the Implementation of the Common Commercial Policy, (2020/2015(INI), 7 October 2020
2. European Commission, The upgraded EU–Mercosur agreement: What is new compared to the 2019 agreement, December 2024
3. EU-Mercosur Agreement, Trade and Sustainable Development Chapter, Art. TSD.2; Annex 2024
4. European Commission, Factsheet: Trade and Sustainable Development in the EU–Mercosur Agreement, 2024
5. European Parliament and the Council Regulation (EU) 2016/679 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 L119/1
6. EU-Mercosur Agreement, Sanitary and Phytosanitary Measures Chapter, Arts. 1–5
7. European Parliament, Resolution on the "One Health" approach, P9_TA(2020)0157, 17 April 2020
8. EU-Mercosur Agreement, Trade and Sustainable Development Chapter, Annex

COURT OF JUSTICE OF THE EUROPEAN UNION

1. CJEU, Opinion 2/15 (EU–Singapore Free Trade Agreement), ECLI:EU:C:2017:376

OTHER LEGAL DOCUMENTS

1. EU-Mercosur Agreement, Annex to the TSD Chapter, Section V
2. Fundación Carolina, *Percepciones Sociales del Acuerdo UE–Mercosur en América Latina*, Documento de Trabajo No. 15, 2021
3. EU-Mercosur Agreement, Annex to the Trade and Sustainable Development Chapter, Section I; see also Dispute Settlement – Annexes, 2024
4. EU-Mercosur Agreement, Dispute Settlement Chapter, Art. 4 and Annex; European Commission, Factsheet: Trade and Sustainable Development in the EU-Mercosur Agreement, 2024
5. EU-Mercosur Agreement, Annex to the TSD Chapter, Section VI
6. El País, El ministro de Exteriores de Brasil: El acuerdo de Mercosur con la UE es importantísimo en un momento de amenazas de guerras comerciales, 2025, [https://elpais.com/internacional/2025-02-19/el-ministro-de-exteriores-de-brasil-el-acuerdo-de-mercosur-con-la-ue-es-importantisimo-en-un-momento-de-amenazas-de-guerras-comerciales.html], Accessed 1 April 2025

WEBSITE REFERENCES

1. The New York Times, Tracking Trump's on-again, off-again tariffs and the global trade war, 2025, [https://www.nytimes.com/article/trump-tariffs-canada-mexico-china.html], Accessed 12 April 2025
2. Real Instituto Elcano, La guerra tecnológica EE.UU.-China y sus efectos sobre Europa, 2025, [https://www.realinstitutoelcano.org/analisis/la-guerra-tecnologica-eeuu-china-y-sus-efectos-sobre-europa/], Accessed 12 April 2025
3. Real Instituto Elcano, Cómo debe responder Europa a los aranceles de Trump, 2025, [https://www.realinstitutoelcano.org/comentarios/como-debe-responder-europa-a-los-aranceles-de-trump/], Accessed 12 April 2025
4. EPRS, China's increasing presence in Latin America: implications for the European Union, 2025
5. Bundesrat, Entschließung des Bundesrates zur Ratifizierung des EU-Mercosur-Abkommens, Drucksache 508/22, 2022, [https://www.bundesrat.de/SharedDocs/drucksachen/2022/0501-0600/508-22(B).pdf], Accessed 14 April 2025
6. The Guardian, Austria rejects EU-Mercosur trade deal over Amazon fires, 2019, [https://www.theguardian.com/world/2019/sep/19/austria-rejects-eu-mercosur-trade-deal-over-amazon-fires], Accessed 5 April 2025
7. Greenpeace EU, Why the EU–Mercosur Deal Fails the Climate Test, Brussels 2021
8. European Parliamentary Research Service, Ratification Scenarios for the EU–Mercosur Agreement, 20 December 2024, [https://epthinktank.eu/2024/12/20/ratification-scenarios-for-the-eu%E2%80%91mercosur-agreement/], Accessed 5 April 2025
9. Bank of Spain, Against the tide: the EU-Mercosur trade deal, 2025, [https://www.bde.es/wbe/en/noticias-eventos/blog/a-contracorriente-el-acuerdo-comercial-union-europea-mercosur.html], Accessed 5 April 2025
10. European Commission, Questions and Answers: EU–Mercosur Trade Agreement, 2024, [https://policy.trade.ec.europa.eu/eu-mercosur-agreement_en], Accessed 5 April 2025
11. Center for Strategic and International Studies, What Are the Implications of the EU–Mercosur Free Trade Agreement?, 2024, [https://www.csis.org/analysis/what-are-implications-eu-mercosur-free-trade-agreement], Accessed 5 April 2025

FREEDOM OF EXPRESSION ON THE INTERNET VS. DIGITAL SERVICES ACT: CHOSEN ASPECTS*

Diana Treščáková, PhD, Associate Professor
Pavol Jozef Šafárik University in Košice, Slovakia, Faculty of Law
Kov.čska 26, 040 75 Košice, Slovakia
diana.trescakova@upjs.sk

ABSTRACT

With the development of information technologies and the digitalization of every area of our lives, we are increasingly encountering violations of individuals' digital rights, which can be classified among fundamental human rights and freedoms. Digital rights are not sufficiently protected on the internet. The use of information technologies also reveals vulnerable areas of our digital space. These vulnerable areas mainly include the field of e-commerce, online shopping, and active or passive participation on social networks, where massive data collection from individuals operating in the online space occurs. This raises questions regarding the adherence to ethical principles in the online environment. However, the issue is not limited to the protection of individuals' personal data and their privacy, but also extends to the overall activities of various entities operating online. It is evident that internet platforms are gaining in power and need to be legally regulated.

At the level of the European Union, a regulation—the Digital Services Act (hereinafter referred to as DSA)—has therefore been adopted with the aim of both regulating online platforms and protecting users themselves.

The aim of this article is to analyze digital rights and their observance on the internet. It is necessary to ask whether these digital rights are adequately protected by current legislation. In this context, the author will focus on the controversial issue of the relationship between freedom of expression and the principles established in the DSA. For this purpose, specific provisions of the DSA will be analyzed, in particular Articles 34 and 35, which introduce the obligation to identify and mitigate systemic risks by very large online platforms (VLOPs) and very large online search engines (VLOSEs).

To achieve the stated goals, standard scientific research methods will be used—primarily those typical of the social sciences, even though the topic overlaps with the field of technology. These methods will be specifically applied in processing the collected data, evaluating them, and formulating conclusions. To examine the raised questions and achieve the defined goals, we

* This article was prepared within the investigation of Grant Project VV-MVP-24-0038 Analysis of liability for internet torts with machine learning methods and APVV 21 – 0336 Analysis of judicial decisions using artificial intelligence.

will primarily use formal-logical methods, comparative methods, and methods of historical, economic, and legal analysis. In addition, methods of induction, deduction, synthesis, interpretation of legal norms, and abstraction will also be employed.

Keywords: *Digital Service Act, digital rights, freedom of expression, illegal content*

1. INTRODUCTION

On October 19, 2022, 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) was adopted, which entered into force on February 17, 2024. Alongside this regulation, its "twin" was also adopted: 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).[1]

The Digital Markets Act (DMA) was adopted with the aim of regulating competition in the digital environment, notably by establishing rules that prevent the abuse of dominant positions by large technolog,ical giants holding the status of gatekeepers (such as Google, Meta, Amazon, etc.). The Digital Services Act (DSA) - the focus of this contributio was adopted as a twin regulation to the DMA. Its primary objective is to regulate content and the accountability of online platforms, to ensure transparency of algorithms and advertising, to strengthen the fight against disinformation, and to enhance user protection.

According to the explanatory memorandum to the DSA Regulation, this legal act constitutes a new pan-European framework for regulating online content within the provision of intermediary services. Based on the principle that "what is illegal offline is also illegal online," it introduces harmonized rules for providers of intermediary services, including social networks, online marketplaces, internet search engines, web hosting and cloud services, online travel and accommodation platforms, app stores, and other types of online platforms. The regulation will also apply to providers from third countries, provided they offer services to users within the EU.

There are several reasons why it became necessary to adopt legislative measures in the form of the Digital Services Act (DSA). First and foremost, recent years have seen a significant increase in risks related to the enforcement of individual

[1] 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) available at: [https://eur-lex.europa.eu/eli/reg/2022/1925/oj/eng]. Accessed on 5th of April 2025.

users' rights in connection with the use of digital services. These risks ranged from the dissemination of illegal content online to violations of personal data protection and privacy. It became imperative to create a safe and trustworthy online environment for various categories of users. For this reason, it was necessary to establish clear rules for the use of digital services, ensuring that users' digital rights - particularly the right to privacy, freedom of expression, and protection against discrimination - are respected.

Furthermore, it was essential to curb the spread of illegal content on the internet, as well as disinformation and other forms of content posing societal risks.[2] The DSA introduces mechanisms aimed at minimizing these risks.

Based on the above, it can be concluded that the primary objective of the DSA is to contribute to the development of a safer and more transparent online environment, to improve the conditions for the provision of cross-border intermediary services, to strengthen the position of consumers, and to enhance the protection of fundamental rights of users in the digital space.

Another key reason for the adoption of the Digital Services Act (DSA) was the need to eliminate the fragmentation of rules governing digital services across individual Member States, which is closely linked to the creation of a Digital Single Market.

Generally speaking, the Digital Services Act (DSA) constitutes a comprehensive legal framework of the European Union aimed at establishing a safer, more transparent, and fairer digital environment. As previously noted, the DSA was adopted with the objective of harmonising divergent legal regulations across Member States, particularly in response to the cross-border nature of online platforms.

An analysis of the DSA's implementation at the national level reveals considerable variation in the approaches adopted by individual Member States following its entry into force. This is particularly evident in relation to the interpretation of issues concerning potential threats to the fundamental right to freedom of expression, especially with regard to the assessment and removal of online content. Even within individual Member States, divergent views may be observed concerning the application of the DSA and the protection of freedom of expression. For example, in Germany, emphasis is placed on the view that the primary aim of the DSA is not censorship, but the safeguarding of freedom of expression. The assessment of online content must not be arbitrary, and legitimate expressions must be

[2] Guide of The Council for Media Services available at: [https://rpms.sk/sites/default/files/2025-02/Prirucka_pre_sprostredkovatelske_sluzby.pdf)]. Accessed 5 April 2025.

duly respected.[3] In France, however, critics have openly expressed the view that the implementation of the DSA is incompatible with the right to freedom of expression.[4] Even in light of these differing perspectives, it must be acknowledged that each Member State will be tasked with implementing the DSA in accordance with its own values and traditions, which inevitably shape this process, while also striving to strike a proportionate balance between the enforcement of the DSA's provisions and the preservation of freedom of expression.

The comprehensive legal framework in the area of digital content established by the DSA is further affirmed by its interaction with other legislative instruments, most notably the Regulation on the transparency of political advertising[5] as well as the Audiovisual Media Services Directive[6] as well as with the General Data Protection Regulation (GDPR), which constitutes a major legal act in the field. The interaction between the DSA and the GDPR is particularly significan because the Regulation also addresses the issue of user profiling, which involves the use of personal data to assess certain personal aspects related to a natural person - most notably the analysis or prediction of aspects such as work performance, economic situation, health status, personal preferences, interests, and other characteristics. This part of the DSA responds to concerns about non-transparent algorithms and recommendation systems, which may reinforce or exacerbate existing societal issues such as discrimination, polarization, or addictive behaviors.[7]

This constitutes one of the reasons why it is imperative to regulate the online environment through appropriate legislation, which will oblige online platforms to implement transparent procedures that are accessible to all users of the platform, thereby enabling them to make an informed and voluntary decision regarding their use of the platform.

---

3 Digital Service Act: Trusted Flagger and freedom of expression available at: [https://www.heise.de/en/background/Digital-Services-Act-Trusted-Flagger-and-freedom-of-expression-9986899.html?utm_source=chatgpt.com], Accessed 18 June 2025.

4 EU digital law restricts freedom of expression, says French whistleblowers group available at: [https://brusselssignal.eu/2024/08/eu-digital-law-restricts-freedom-of-expression-says-french-whistleblowers-group/], Accessed 18 June 2025.

5 Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising available at: [https://eur-lex.europa.eu/eli/reg/2024/900/oj], Accessed 19 June 2025.

6 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) available at: [https://eur-lex.europa.eu/eli/dir/2010/13/oj], Accessed 19 June 2025.

7 Guide of the Council for Media Services available at: [https://rpms.sk/sites/default/files/2025-02/Prirucka_pre_sprostredkovatelske_sluzby.pdf)], Accessed 5 April 2025.

2. DIGITAL SERVICE ACT AND THE PROTECTION OF DIGITAL RIGHTS

The Digital Services Act (DSA) was adopted, among other objectives, primarily to protect the rights of every individual who engages with the online environment and online platforms. These rights can generally be referred to as digital rights, which pertain to individuals who are both active and passive participants in the digital sphere. The DSA is based on the principle that "what is illegal offline should also be illegal online." This could also be paraphrased as follows: if an individual is granted fundamental human rights and freedoms in the offline world, these rights must equally be upheld in the digital world.

Accordingly, it is essential to address the human rights dimension of individual activity in the online environment, as well as how these rights are enshrined in the relevant legislation. In this context, the human rights perspective focuses on safeguarding individual rights in the digital sphere. As digital technologies continue to evolve, we are increasingly confronted with critical questions regarding how to ensure the protection of fundamental human rights - such as the right to privacy, access to information, and protection of personal data from misuse.

At the same time, it is vital to guarantee equal access to digital services and to prevent discrimination or the misuse of technologies in ways that violate individual rights - such as surveillance, the dissemination of disinformation, or the manipulation of information through opaque algorithmic systems.

In general terms, digital rights can be understood as an extension of fundamental human rights into the online space, and they are essential for protecting individuals from the potential abuses of technological platforms and corporations.

Digital rights are enshrined in several legal acts. The Universal Declaration of Human Rights adopted by the United Nations in 1948 includes fundamental human rights that can also be applied to the online environment. Article 12 of the Declaration defines the protection of privacy and data, stating: "*No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks*." Additionally, Article 19 establishes the right to freedom of opinion and expression, which also encompasses the right to seek, receive, and impart information and ideas by any means and regardless of frontiers - rights that can likewise be applied in the digital world.

Similarly, the European Convention on Human Rights defines the protection of privacy in Article 8 and the right to freedom of expression in Article 10. In 2018,

the General Data Protection Regulation (GDPR) came into effect, introducing stringent rules regarding the protection of personal data of EU citizens. Among the fundamental rights it established, which also apply in the digital sphere, is the explicit consent of individuals for the processing of their personal data, easier access to personal data for the data subjects, the right to object to the use of personal data for profiling purposes, the right to erasure (right to be forgotten), and the right to data portability (the ability to transfer data from one service provider to another).

Furthermore, the regulation requires data controllers (those responsible for data processing) to provide individuals with transparent and easily accessible information regarding the processing of their data.

Digital rights can be divided into three basic categories:

1. Violations of right resulting from (the use of) new technologies
2. Conflicting rights from (the use of) new technologies
3. New issues resulting from (the use of) new techlologies for which no rights exist yet[8]

As Custers says a typical examples in the first category are questions regarding the extent to which sophisticated data analytics interfere with someone's privacy, or the extent to which the use of risk profiling is potentially discriminatory against particular groups of people.[9]

Typical examples in the second category are questions regarding the extent to which someone may be wiretapped (privacy interest) for the purpose of criminal investigation (security interest) or the extent to which someone may insult a religion (freedom of religion versus freedom of speech). On all such questions large amounts of literature and case law are available.

The third category, however, is much less discussed in literature, legal practice and academic debates. A typical example in the third category is the 'right to be forgotten', sometimes referred to as the 'right to oblivion'.[10]

The Digital Services Act (DSA) also addresses digital rights, which are reflected in this regulation with the purpose of protecting individuals' rights when using

---

8 Custers, B., *New digital rights: Imagining additional fundamental rights for the digital era,* Computer Law & Security Review, Volume 44, 2022, p.1 [https://doi.org/10.1016/j.clsr.2021.105636], Accessed 11 April 2025.

9 Barocas, S.; Selbst, A.D., *Big Data's Disparate Impact*, 104 California Law Review 671, 2016.

10 Xanthoulis, N., *Conceptualizing a Right to Oblivion in the Digital World: A Human Rights-Based Approach*, 2012, avalilable at: [https://ssrn.com/ abstract=2064503], Accessed 11 April 2025.

online platforms and services. This is in line with the DSA's goal to modernize and improve the rules for digital services in the EU to better respond to the challenges of the digital age. This legislative framework provides stronger tools for the protection of users' digital rights and ensures better regulation and oversight of the digital market in the EU. The aim is to make digital services safer, more transparent, and fairer for everyone.

If we were to approach the basic definition of digital rights, the following core digital rights can be identified:

a) Right to Privacy and Protection of Personal Data, which primarily includes the aspect of controlling one's personal data. This means that every user has the right to control their personal data. Digital platforms must also transparently inform users about how their data is processed. This right also encompasses protection against surveillance and the misuse of data, such as targeted behavioral advertising.

b) Right to Access Information, which can be defined as the right to free and non-discriminatory access to information. On one hand, it includes the fight against censorship, and on the other hand, it protects individuals from disinformation and manipulation through information.

c) Right to Digital Security, or cybersecurity, which involves protection against disruptions in the secure online space caused by security incidents, cyberbullying, and various forms of online fraud. This right also includes communication security, ensuring that it is not accessible to third parties who are not part of the communication, nor will it be controlled from a position of power, e.g., by the state. It should be noted that the responsibility for securing user accounts rests with the platform itself.

d) Right to Be Forgotten, according to which the user has the right to erase or request the deletion of their digital footprints, such as old posts, and the right to remove their personal data from various online databases.

e) Right to Digital Identity, which includes the right to control one's digital identity and protection from the misuse of personal data.

f) Right to Fair Treatment and Non-Discrimination, which requires the application of a ban on discrimination based on digital profiles, e.g., in hiring processes. This right also includes transparency in decision-making algorithms, such as when approving loans, credits, etc. This right can also be linked to profiling, where it is clearly defined that the individual should have the right to avoid decisions based solely on automated processing that evaluates personal aspects affecting them, which have legal

consequences, such as an automatic rejection of an online loan application or electronic recruitment processes without any human intervention. In such cases, appropriate safeguards for the protection of the individual's rights must be established, including the right to review decisions made in a non-automated manner by the relevant authority – recital 71 of the GDPR regulation.[11]

g) Right to Freedom of Expression, based on which users have the right to express their opinions online, provided they do not violate the law. This right also includes protection from arbitrary censorship by digital platforms, with content moderation being transparent and fair. However, it is important to note that the right to freedom of expression on the internet is not unlimited.

Subsequently, it is possible to define the main areas that the protective mechanisms of the Digital Services Act (DSA) are focused on, which reflect the existence of digital rights. The first area is consumer protection. To protect consumers, online platforms will take measures to safeguard them from illegal content, fraud, and manipulation.

Another area that has the potential to infringe upon digital rights is the dissemination of illegal content. According to the DSA (Articles 34 and 35), platforms are obligated to remove or prevent access to illegal content.

Another important area is the transparency of platforms, specifically in disclosing how algorithms work so that users can choose whether they want content to be tailored to them or not. The DSA also introduces mechanisms to give users more control over their personal data and to make it easier for them to request the deletion or correction of their personal data. Under the DSA, platforms are required to ensure that their algorithms do not discriminate against users based on their gender, race, nationality, religion, or other so-called special categories of personal data.

3. FREEDOM OF EXPRESSION ON THE INTERNET VS. DSA

As mentioned earlier, one of the primary digital rights is the right to freedom of expression. In our opinion this right requires particular attention, as it may come into conflict with the principles and mechanisms introduced by the DSA.

[11] 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) avalilable at: [https://eur-lex.europa.eu/legal-content/SK/TXT/?uri=celex:32016R0679], Accessed 5 April 2025.

First of all, it is important to note that freedom of expression, whether in the virtual world or offline, is a fundamental right. The right to freedom of expression is enshrined in many documents, both at the national and international levels. The Charter of Fundamental Rights of the EU regulates it in Article 11, paragraph 1, which states: "*Everyone has the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers*."[12]

It is also enshrined in the European Convention on Human Rights in Article 10, paragraph 1, which states: "*Everyone has the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*"[13]

In the Slovak Republic, freedom of expression is enshrined in the Constitution of the Slovak Republic in Article 26, paragraph 1, which guarantees: "*Freedom of expression and the right to information are guaranteed.*" Paragraph 2 complements this freedom as follows: "*Everyone has the right to express their opinions by word, writing, print, image, or by any other means, as well as the freedom to seek, receive, and disseminate ideas and information without regard to state boundaries. The publication of printed matter is not subject to approval. Broadcasting and television activities may be subject to state permission. Conditions shall be established by law*."

In legal theory as well as in practical application, there are ongoing discussions regarding the "tension" that arises between the right to freedom of expression and the new rules introduced by the DSA. In our opinion the conflicts primarily arise because, on the one hand, the new legal framework established through the DSA seeks to regulate the digital space in a way that maximizes the protection of users' rights and ensures that their fundamental freedoms are upheld. On the other hand, it imposes obligations on online platforms, whose activities could potentially lead to restrictions on freedom of expression in the online environment.

Article 34(1)(b) DSA provides a detailed list of potentially affected rights with explicit references to the Charter of Fundamental Rights of the European Union, between which is freedom of expression and information.[14]

---

12 Charter of fundamental rights of the European Union avalilable at: [https://www.europarl.europa.eu/charter/pdf/text_en.pdf], Accessed 10 April 2025.

13 European convention on human rights available at: [https://www.echr.coe.int/documents/d/echr/convention_slk], Accessed 10 April 2025.

14 Manterelo, A., Fundamental Rights Impact Assesment in the DSA in: Hoboken, J. *et al.* (eds.), Putting the DSA into Practice, p. 112. Available at: [https://www.ivir.nl/publicaties/download/vHoboken-et-al_Putting-the-DSA-into-Practice.pdf.], Accessed 15 June 2025.

Content regulation on digital platforms by DSA can result in the removal of legitimate content, which can lead to censorship. The issue becomes evident in the process of determining what constitutes illegal content. It is our position that, with regard to freedom of expression, very large online platforms (VLOPs) and very large online search engines (VLOSEs)[15] are required to assess the risk of disproportionate removal of lawful content, particularly in cases where an algorithm or automated system mistakenly deletes content that is not unlawful. There is also a risk of interference with the plurality of opinions, where algorithms may, for example, favor extreme viewpoints while suppressing less popular perspectives in discussions (e.g., on political matters). These concerns arise from the principle of due diligence obligations (such as the ones on the assessment of systemic risks, access to research data and crisis protocols)[16], on which the DSA is based. As noted by Husovec, the real novelty of the DSA lies in the creation of fully fledged tiers of due diligence obligations. Instead of liability, the DSA insists on the responsibility that grows with the service's size and social impact.[17]

In accordance with due diligence obligations, platforms are required to proactively identify risks that may arise in the provision of their services (e.g. dissemination of harmful or illegal content, threats to freedom of expression, manipulation of public opinion), as stipulated in Article 34 of the DSA.

This reflects the application of a risk-based approach within the DSA framework. Subsequently, under Article 35 of the DSA, platforms are also required to implement specific measures to mitigate these risks (e.g. algorithm adjustments, publication of content moderation rules, user control mechanisms). It can be said that the DSA thus shifts responsibility from users and authorities to the platforms themselves.

In addition, platforms are obliged to ensure transparency toward both users and regulatory authorities, which also includes the publication of reports that cover:

- dissemination of illegal content;
- any negative effects for the exercise of the fundamental rights for private and family life, freedom of expression and information, the prohibition of

---

15 Article 34 of the DSA imposes an obligation on providers of very large online platforms (VLOPs) and very large online search engines (VLOSEs) to diligently identify, analyze, and assess all systemic risks within the Union arising from the design or operation of their service and its relevant systems, including algorithmic systems, or from the use of their services.

16 Buri, I., A Regulator Caught Between Conflicting Policy Objectives: Reflections on the European Commission's Role as DSA Enforcer in: Hoboken, J. *et al.* (eds.).: Putting the DSA into Practice, p. 7. Available at: [https://www.ivir.nl/publicaties/download/vHoboken-et-al_Putting-the-DSA-into-Practice.pdf.], Accessed 17 June 2025.

17 Husovec, M., *Principles of the Digital Services Act,* Oxford University Press. 2024, p. 22, ISBN 978 – 0 – 19 – 288245 – 5. [DOI: 10.1093/law-ocl/9780192882455.001.0001].

discrimination, and the rights of the child as set out in the EU's Charter of Fundamental Rights; and

- intentional manipulation of their service with actual or foreseeable negative effects on the protection of public health, minors, civic discourse, or related to electoral processes and public security.[18]

Reports must be submitted to the European Commission alongside an independent audit. When specifying this requirement with regard to freedom of expression, it is evident that the reports submitted by very large online platforms (VLOPs), prepared in accordance with Articles 34 and 35 of the Digital Services Act (DSA), frequently identify systemic risks to freedom of expression. However, the mitigating measures adopted often fail to effectively address these risks, as they tend to be outlined in a general manner without concrete interventions. For instance, Meta's report concerning the Facebook and Instagram platforms highlights risks related to the suppression of political content and the diminished visibility of sensitive societal issues. Nevertheless, the algorithmic adjustments implemented as part of the mitigation efforts were not accompanied by transparent explanations regarding their impact on the visibility of political speech.[19] Similarly, the TikTok platform acknowledged the risk of so-called "filter bubbles" and the potential suppression of minority viewpoints resulting from recommendation algorithms. Yet, the specific measures intended to mitigate these effects remained at the level of broad declarations without demonstrable outcomes.[20]

Closely related to the above is the so-called asymmetric approach of the Digital Services Act (DSA) towards different platforms, which has a direct impact on freedom of expression and its potential restrictions. The asymmetric approach of the DSA means that the obligations imposed by the regulation are not uniform across all digital services but vary depending on the size and type of the provider, as well as the influence and risk profile of the platform. Very large online platforms (VLOPs) and very large online search engines (VLOSEs) are subject to the strictest regime, which includes, for example, the assessment and mitigation of systemic risks (as outlined in

---

18 Latham; Watkins, *The Digital Services Act: Practical Implications for Online Services and Platforms* available at: [https://www.lw.com/admin/upload/SiteAttachments/Digital-Services-Act-Practical-Implications-for-Online-Services-and-Platforms.pdf], Accessed 23 June 2025.

19 Meta's Progress Implementing the Digital Services Act available at: [https://about.fb.com/news/2024/11/metas-progress-implementing-the-digital-services-act/], Accessed 23 June 2025.

20 DSA Risk Assesment Report 2024 available at: [https://sf16-va.tiktokcdn.com/obj/eden-va2/zayvwlY_fjulyhwzuhy[/ljhwZthlaukjlkulzlp/DSA/TikTok_DSA_Risk_Assessment_Report_2024.pdf], Accessed 23 June 2025.

Articles 34–35), algorithm auditing, the establishment of compliance officers, and the obligation to publish data for research purposes. For them, the DSA lists special due diligence requirements (Articles 33-43).[21] Compliance with these due diligence requirements is monitored solely by the Commission (Articles 56, 65-78), with the aim of ensuring a consistent, EU-wide application.[22]

Medium-sized platforms, in comparison to very large online platforms, must fulfill additional requirements regarding transparency, cooperation with relevant authorities, and the implementation of internal control mechanisms. Conversely, small and micro platforms (e.g., small online forums or e-shops) are subject only to basic obligations, such as establishing mechanisms for reporting illegal content. The asymmetric approach thus prevents the disproportionate burdening of small and medium-sized platforms, which under an equal regulatory load might be compelled to engage in preventive censorship out of fear of sanctions. It is argued that such behavior could lead to the so-called chilling effect — a deterrent effect on freedom of expression.

As noted above, to manage the overwhelming volume of online content and comply with the obligations arising from the DSA, it is essential for platforms to employ automated filtering and monitoring mechanisms, which are carried out through algorithmic tools.

As noted by Barata, however, these automated systems can have a very significant negative impact on human rights. He also points out that the regulation lacks clear and binding guidelines on the design and implementation of such technologies, particularly with regard to ensuring effective protection of user rights.[23] The use of artificial intelligence tools to detect illegal and harmful content presents several challenges. Automated filtering based on AI utilizes probabilistic methods and depends on the training data used, which can lead to both false positives (removal of harmless or useful content) and false negatives (leaving harmful content online). Strict parameters can easily lead to a large number of false positives, resulting in the unjust removal or reduced reach of useful information, and even the possible exclusion of valuable contributors.

---

21 Notice also Husovec, M., *Principles of the Digital Services Act,* Oxford University Press. 2024, p. 28, [DOI: 10.1093/law-ocl/9780192882455.001.0001].

22 Jaursch, J., in: Hoboken, *et al.*, Putting the DSA into Practice, p. 93. [DOI 10.17176/20230208-093135-0]. Available at: [https://www.ivir.nl/publicaties/download/vHoboken-et-al_Putting-the-DSA-into-Practice.pdf.], Accessed 17 June 2025.

23 Barata, J.: The Digital Service Act and its impact on the right to freedom of expression: special focus on risk mitigation obligations. In: Platforma por la Libertad de información, 2021, p.12 available at [https://libertadinformacion.cc/wp-content/uploads/2021/06/DSA-AND-ITS-IMPACT-ON-FREEDOM-OF-EXPRESSION-JOAN-BARATA-PDLI.pdf.], Accessed 13 April 2025.

This can have a direct impact on freedom of expression**,** protection from discrimination**,** fair process, and access to information, leading to the erosion of societal value in shared information, media pluralism, and open public discourse.[24] As Atzori points out, the obligations under the DSA that require platforms to assess risks and take mitigation measures can be detrimental to freedom of expression. This is particularly true because they focus on broad and strategic areas, such as public safety, public health, civil discourse, and electoral processes (Article 34, Paragraph 1, Letters a, c, d). The risk of removing politically sensitive content is high, and it is precisely in these areas where freedom of expression and media pluralism should be most protected, as they are key to the functioning of democratic life.[25]

This approach can lead to a contradiction with the freedom of expression, which is enshrined in many legal documents, both at the national and international levels, as discussed at the beginning of this chapter. Actions carried out by online platforms under the DSA could, in some cases, be likened to censorship, which is prohibited (for example, under Article 26, Paragraph 3 of the Constitution of the Slovak Republic).[26]

In summary, it should be noted that for online platforms, it can be problematic to assess whether certain content is illegal or not based on the mechanisms they use to evaluate digital content, as the definition of illegal content can be subject to different interpretations. As a result, there is a risk that online platforms, under the threat of sanctions, may be forced to remove borderline content that is still legal and legitimate, thereby leading to a clear violation of freedom of expression.

4. CONCLUSION

In this article, we focused on the digital rights in the light of the relatively new legal regulation from the EU concerning digital services – the DSA (Digital Services Act). We analyzed the digital rights considered by the DSA, with a particular focus on freedom of expression, which comes into controversy with the application of the rules outlined in the DSA.

---

24 Thiago, D.O., *Content Moderation Technologies: Applying Human Rights Standards to Protect Freedom of Expression*, in: Atzori, M. (ed.), The Digital Services Act and the Freedom of Expression in the European Union: A Political Perspective, 2024, p. 14 available at: [http://dx.doi.org/10.2139/ssrn.4887181.], Accessed 13 April 2025.

25 *Ibid.*

26 Constitution of Slovak republic available at: [https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/1992/460/.], Accessed 7 April 2025.

It should be noted that the DSA, as a significant legislative framework, provides stronger tools for protecting users' digital rights and ensures better regulation and oversight of the digital market within the EU. Protecting users from harmful content without excessive interference in their privacy is one of the main challenges of the DSA. It is about finding a balance between protection from harmful information and the preservation of privacy and freedom of expression. From an ideal standpoint, the outcome of applying the rules introduced by the DSA should be that digital services become safer, more transparent, and fairer for all.

Despite the intent behind the DSA, several challenges and problematic areas remain. Among the most prominent ones are:

- Insufficient control over the algorithms used by online platforms to monitor digital content.
- Exploitation of users' personal data by technology giants.
- Excessive interference with users' privacy.
- Infringement of freedom of expression through the removal or blocking of illegal content, which may border on censorship, which is prohibited.

The problematic areas mentioned above, in our opinion, are related to the so-called gaps that can be observed within the framework of the DSA. First and foremost, it is necessary to point out the definition of illegal content within the DSA. The DSA does not provide a legal definition of illegal content on the internet. Recital 12 of the DSA only outlines what could be considered illegal content. It states that, in order to achieve the objective of ensuring a safe, predictable, and trustworthy online environment, the term "illegal content" should broadly reflect existing rules in the offline environment. Specifically, the term "illegal content" should be defined in a broad sense to include information related to illegal content, products, services, and activities. Above all, this term should be understood to cover information that is, according to applicable law, either inherently illegal, such as illegal hate speech, terrorist content, and illegal discriminatory content, or that the applicable rules are illegal due to the fact that they concern illegal activities. The DSA provides demonstrative examples of illegal content.

In relation to the definition of illegal content, a problem may arise when assessing whether the content is already harmful or not, especially if it is evaluated in an automated manner using artificial intelligence tools. A further issue may emerge in the assessment of illegal content by individual Member States. While some Member States may not consider certain expressions harmful or illegal, others may evaluate them as harmful. This discrepancy leads to fragmentation within the

unified digital market, which is one of the objectives of the DSA- removing this fragmentation.

A significant problematic area that arises here, as highlighted in the article, is the collision between freedom of expression and the rules introduced by the DSA. On one hand, there is the protection from harmful content, and on the other, there is freedom of expression. This relates not only to fundamental human rights and freedoms, and the resulting digital rights, but also to ethical dilemmas and challenges. One of the key ethical challenges is finding a balance between maintaining freedom of expression and blocking or removing illegal content. The problem arises when there is excessive moderation of digital content, which may be controversial but not necessarily illegal. Striking a balance between freedom of expression and the regulation of digital content is a critical challenge.

A potential solution could be a clearer and more precise definition of illegal content, which would minimize the room for arbitrary interpretation and thus prevent censorship. Another solution is the introduction of transparent content moderation processes, with the possibility of appealing decisions to remove content. The DSA attempts to address this issue through Article 21. Additionally, a tool for addressing these challenges could be the regular assessment of the regulatory impact on freedom of expression, as well as other digital rights and freedoms.

In our opinion another problematic area that we perceive is the impact of the DSA on other fundamental human rights and freedoms, which could be threatened by the ambiguous provisions of the DSA. As Barata points out, the DSA includes numerous references to the need to uphold freedom of expression and information, the right to non-discrimination, media freedom, and pluralism – all of which are human rights and core European values. However, most of these references are found either in recitals, which have more interpretive than normative value, and/or are still insufficient in practical application. For instance, Article 34(b) requires platforms to consider "any real or foreseeable negative effects on the exercise of fundamental rights" in connection with identifying and managing systemic risks. However, this provision lacks specificity, as it does not specify particular practices or binding guarantees that should be put in place to effectively protect users' rights, whether by platforms or supervisory authorities.[27]

It is necessary to reflect on the future of the online environment, which is already being influenced by the DSA. It is appropriate to pose the question of whether the DSA will be successful in its implementation, and under what conditions?

[27] Barata, *loc. cit.*, note 23.

As Hoboken et al. points out a crucial aspect of the success of the DSA relates to the application of its due diligence requirements in practice and the effective implementation of its enforcement framework. The enforcement framework includes a combination of new regulatory authorities at the national (Digital Services Coordinators) and EU level (as part of the European Commission). These elements will be decisive as to whether the DSAwill deliver on its goals, and whether its rules will be capable of meaningfully protecting fundamental rights.[28]

To conclude, we may express the view that it is necessary to state that society must avoid two extremes – on one hand, the complete absence of regulation, which could lead to the spread of harmful content, and on the other hand, overly strict regulation, which could suppress legitimate freedom of expression and restrict public discourse. Finding this balance will require continuous dialogue between legislators, platforms, civil society, and users of digital services.

REFERENCES

BOOKS AND ARTICLES

1. Atzori, M., *The Digital Services Act and the Freedom of Expression in the European Union: A Political Perspective*, SSRN, 2024, available at: [http://dx.doi.org/10.2139/ssrn.4887181.]
2. Barata, J., *The Digital Service Act and its impact on the right to freedom of expression: special focus on risk mitigation obligations*, Platforma por la Libertad de información, 2021, available at: [https://libertadinformacion.cc/wp-content/uploads/2021/06/DSA-AND-ITS-IMPACT-ON-FREEDOM-OF-EXPRESSION-JOAN-BARATA-PDLI.pdf.], Accessed 13 April 2025
3. Barocas, S.; Selbst, A.D., *Big Data's Disparate Impact*, 2016, 104 California Law Review 671
4. Custers, B., *New digital rights: Imagining additional fundamental rights for the digital era*, Computer Law & Security Review, Vol. 44, 2022. [https://doi.org/10.1016/j.clsr.2021.105636]
5. Hoboken, J.: Quintais, J. P.; Appelman, N.; Fahy, R.; Buri, I.; Straub, M., *Putting the DSA into Practice*, available at: [https://www.ivir.nl/publicaties/download/vHoboken-et-al_Putting-the-DSA-into-Practice.pdf], Accessed 15 June 2025
6. Husovec, M., *Principles of the Digital Services Act*, Oxford University Press. 2024. [DOI: 10.1093/law-ocl/9780192882455.001.0001]
7. Latham; Watkins, *The Digital Services Act: Practical Implications for Online Services and Platforms*, available at:

[28] Hoboken, *et al. Putting the DSA into Practice*, available at [https://www.ivir.nl/publicaties/download/vHoboken-et-al_Putting-the-DSA-into-Practice.pdf], Accessed 15 June 2025.

[https://www.lw.com/admin/upload/SiteAttachments/Digital-Services-Act-Practical-Implications-for-Online-Services-and-Platforms.pdf], Accessed on 23rd of June 2025

8. Xanthoulis, N., *Conceptualizing a Right to Oblivion in the Digital World: A Human Rights-Based Approach*, 2012.
[https://ssrn.com/ abstract=2064503], Accessed 11 April 2025

COURT OF JUSTICE OF THE EUROPEAN UNION

1. Judgement of CJEU from 04 July 2023. C-252/21 Meta Platforms Inc., before Facebook Inc.,Meta Platforms Ireland Ltd, before Facebook Ireland Ltd,Facebook Deutschland GmbH against Bundeskartellamt. ECLI:EU:C:2023:537. Available at:
[https://curia.europa.eu/juris/document/document.jsf?text=&docid=275125&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1], Accessed 14 April 2025.

EU LAW

1. European convention on human rights available at:
[https://www.echr.coe.int/documents/d/echr/convention_slk], Accessed 10 April 2025.
2. Charter of fundamental rights of the European Union avalilable at Charter of fundamental rigts of European Union available at:
[https://www.europarl.europa.eu/charter/pdf/text_en.pdf], Accessed 10 April 2025.
3. 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) available at:
[https://eur-lex.europa.eu/legal-content/SK/TXT/?uri=celex:32016R0679], Accessed 5 April 2025.
4. 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) available at:
[https://eur-lex.europa.eu/eli/reg/2022/1925/oj/eng], Accessed 5 April 2025.

LIST OF NATIONAL REGULATIONS, ACTS AND COURT DECISIONS
WEBSITE REFERENCES

1. Constitution of Slovak republic available at:
[https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/1992/460/.], Accessed 7 April 2025.
2. DSA Risk Assesment Report 2024 available at:
[https://sf16-va.tiktokcdn.com/obj/eden-va2/zayvwlY_fjulyhwzuhy[/ljhwZthlaukjlkulzlp/DSA/TikTok_DSA_Risk_Assessment_Report_2024.pdf], Accessed 23 June 2025.
3. Guide of The Council for Media Services available at:

[https://rpms.sk/sites/default/files/2025-02/Prirucka_pre_sprostredkovatelske_sluzby.pdf)], Accessed 5 April 2025.

4. Meta's Progress Implementing the Digital Services Act available at: [https://about.fb.com/news/2024/11/metas-progress-implementing-the-digital-services-act/], Accessed 23 June 2025.

Chapter 2

Original scientific paper

JUDICIAL LAW-MAKING AND THE UNIFORM APPLICATION OF LAW AFTER ECJ'S JUDGMENT IN THE *HANN INVEST* CASE – A MISSION FOR CROATIA AND THE LESSON FOR OTHER MEMBER STATES

Zvonimir Jelinić, PhD, Associate Professor
Josip Juraj Strossmayer University of Osijek, Faculty of Law
Stjepana Radića 13, 31000 Osijek, Croatia
zjelinic@pravos.hr

ABSTRACT

The Member States of the European Union employ various mechanisms to ensure the uniform application of law. While appeals and supreme court precedents are regarded as the common methods for resolving case law conflicts, other procedures like preliminary rulings and pilot judgments also play a role. In Croatia, the adoption of binding legal positions at higher courts' and the Supreme Court's sectional meetings has historically been a significant tool for maintaining jurisprudential consistency.

The European Court of Justice (ECJ) in the Hann Invest case challenged this system. The ECJ's Grand Chamber ruled that internal judicial procedures requiring a registration judge's approval violate the right to effective judicial protection and undermine judicial independence, the core principle of the rule of law. This ruling presents a significant challenge for Croatia, which has long struggled with conflicting court decisions and inconsistent application of the law.

This paper explores the implications of the Hann Invest case for Croatia, and possibly for some other states, particularly those with legacies of socialist and communist pasts. It questions whether binding legal positions should in any event be prohibited under European law and examines the underlying issues contributing to the problem of ensuring consistency in case law. Ultimately, this analysis seeks to understand how these challenges can be resolved to facilitate further integration of Croatia's legal system within the EU framework.

Keywords: *case law, consistency, European Court of Justice, Hann Invest case, judicial independence*

1. WHY IS THE UNIFORMITY OF CASE LAW IMPORTANT, AND HOW DOES IT RELATE TO THE RULE OF LAW?

The uniform application of the law has long been and still is a pivotal issue in contemporary legal systems. A substantial body of literature has explored the role and

interpretation of case law within the common law tradition[1], while shifts in the functions of supreme courts in civil law jurisdictions towards courts that primarily serve the public function have opened a whole new debate about the proper way of ensuring the uniform application of law.[2] In Central and Eastern Europe (CEE) the problem came into focus also because of the integration of the CEE countries into the European Union (EU) and Council of Europe (CoE), formations which had shown deep respect for rule of law and its inherent values.

The simplest answer to the question of why uniform application of law is important is that it guarantees legal certainty and equality before the law, both essential to the rule of law.[3] While it is easy to make a logical connection between the legal certainty and equality before the law, the problem is more prominent with explaining the notion of the rule of law (*imperium legum*[4]). Namely, the rule of law has many meanings, and it is understood differently across cultures and different historical contexts.[5] Any attempt to define it comprehensively in just a few sentences would likely miss its full scope, as well as the benefits it offers for countries wishing to become stable democracies. However, in the context of the European Union, where the rule of law is proclaimed as one of fundamental values and where it has been strongly defended by the European Commission, and many

---

1 About the origins of civil law and common law legal families see Ortolani, A., *Civil Law*, and Shivprasad, S., *Common Law,* in: Siems, M.; Jen Yap, P. (eds.) The Cambridge Handbook of Comparative Law, Cambridge University Press, 2024, pp. 211-256. About the doctrine of precedent see Duxbury, N., *The Nature and Authority of Precedent,* Cambridge University Press, 2008. About the U.S. Supreme Court precedents see Hansford, T. G.; Spriggs II, J. F., *The Politics of Precedent on the U.S. Supreme Court,* Princeton & Oxford, 2006.

2 Aleš Galič was questioning the functions of supreme courts and one of his important points is that the division into cassation, revision and appeal courts is not a reliable basis for understanding the functions of supreme courts in civil law jurisdictions. What matters according to Galič is the function which supreme courts serve, and that function can be predominantly public or private. So, according to Galič the most important criterion is whether supreme courts act in public or private interest. See Galič, A., *The Functions of the Supreme Court Issues of Process and Administration of Justice,* in: Ereciński, T. *et. al.* (eds.), Studia Iuridica, Vol: 81, Warsaw, 2019, pp. 44-86.

3 Of course, the need to ensure uniform application of the law should not lead to its rigidity and unduly restrict the proper development of law. See Consultative Council of European Judges (CCJE) Opinion no. 20 (2017) on the role of courts with respect to the uniform application of the law (Strassbourg, 10 November 2017, CCJE(2017)4).

4 *Imperium legum* (rule of law i.e. the empire of laws and not of men) should not be confused with „rule by law", i.e. „*Rechtstaat*". About the rule of law and its importance see, for instance, Sellers, M., *What is the Rule of Law and Why Is It So Important?*, in: , Ernst M.H., Ballin H. (eds.), Democracy and Rule of Law in the European Union. Essays in Honour of Jaap W. de Zwaan, Flora A.N.J. GoudappelAsser Press / Springer, 2016, pp. 3-15. About the main differences between the Rechtsstaat and the rule of law see Krygier, M., *Rule of Law (and Rechtstaat)*, in: Silkenat, J. E.; Barenboim, P. D. (eds.), Ius Gentium: Comparative Perspectives on Law and Justice 38, Springer, 2014., pp. 45-61.

5 About the long history of the rule of law and different understandings of the meaning see the book edited by Costa, P.; Zolo D. (eds.) *The Rule of Law, History, Theory and Criticism*, Springer, 2007.

times upheld by the Court of Justice of the European Union (ECJ), it is probably best to say that the rule of law is cultural commitment that is essential for political stability and long-term economic development.

The rule of law principle requires all public bodies to act within the boundaries established by law, in accordance with democratic values, respect for fundamental rights and under the supervision of independent and impartial courts. It also embraces principles such as legality, separation of the law from arbitrary power and effective judicial protection.[6] Legal certainty is also an integral part of the rule of law, ensuring stability and predictability in both governance and legal proceedings. To a great degree, legal certainty is linked up with effective judicial protection and the system of precedent. In Community law, which also embraces the system of precedent, the system of precedent is viewed as a rational and sensible step that has ultimately led to a more effective regime of the entire Community law.[7] In reality, it is a fundamental characteristic of all developed legal systems as good judges look for guidance from past experiences. Not only it is natural for judges to follow the pattern of conduct laid down by their predecessors but also practitioners too must know what the expected outcome of the legal trouble is. Otherwise, they could never explain to their clients where they stand with their cases.[8] Furthermore, the greater the reliability of the previous decisions, the greater becomes the desire to follow them, whether the follower is a judge, lawyer or a layman.[9]

The concept of precedent could be also tracked in the jurisprudence of the European Court of Human Rights (ECtHR). While the precedents established by the ECtHR are not considered formally binding, they are generally adhered to, and lawyers know that the ECtHR rarely departs from its own decisions.[10] The coherence and discipline demonstrated by the ECtHR is actually astonishing and

---

6 See para. 18(3-6) of the judgement of the ECJ of 16 February 2022 in the case Hungary v. European Parliament and Council of the European Union (Case C-156/21., Hungary v European Parliament and Council of the European Union, ECLI:EU:C:2022:97, 16/02/2022.). The Court has clearly stated that the laws and practices of Member States should comply with the common values on which the Union is founded such as freedom, democracy, equality and respect for human rights. There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa.

7 About the precedent in the law of the EU and the relationship between national and community courts see Craig, P.; De Búrca, G., *EU Law, Text, Cases and Materials*, Third Edition, Oxford, 2003., pp. 449-451.

8 See Hosten, W. J.; Bosman, F.; Nathan, C., *Introduction to South African Law and Legal Theory*, Butterworth, 1980, p. 225.

9 *Ibid*.

10 See Wojtyczek, K., *Precedent in the system of the European Convention on Human Rights*, in: Florczak-Wator, M. (ed.), Constitutional Law and Precedent. International Perspectives on Case-Based Reasoning, Routledge, 2022, pp. 233-250.

remarkable, given the sheer number of decisions it issues annually.[11] It could be also said that it is therefore unsurprising that the Court expects a certain level of judicial effectiveness, discipline and uniformity in case law from national justice systems.

In well-known judgement in case Beian vs. Romania the ECtHR correctly stated that it is hard for the judicial system which is based on a network of trial and appeal courts not to have an issue with the divergence in case law, but also that the profound and lasting divergences within the system are contrary to the principle of legal certainty, which constitutes one of the basic elements of the rights to a fair trial, the procedural human right which is crucial for upholding all guarantees stemming from the European Convention on Human Rights and the Charter of Fundamental Rights of the EU.[12] If divergences in case law persist, parties can hardly know where they stand, which then contributes to deterioration of public confidence in the courts and the overall perception of fairness and justice.[13] Above all, taking a case to a court is both time and money consuming and in a situation where the system is unable to secure the uniform application of law, expectations of the parties can easily become unmet.

Croatia's accession to the EU and inclusion in European judicial processes gave Croatian law one new momentum and it triggered many changes in Croatian legislation.[14] One significant change was the need to understand and implement the right to a fair trial within the court system. It is therefore not surprising that the Croatian Constitutional Court has repeatedly determined violations of the right to a fair trial due to courts arbitrarily delivering decisions that depart from established case law without reasonable justification or any justification at all. In one of the cases, the Constitutional Court stated that the lack of a mechanism ensuring consistency leads to a violation of the principle of legal certainty and undermines

---

11 At present the total number of pending applications before the ECtHR exceeds 60 000. See statistical report of the ECtHR [https://www.echr.coe.int/statistical-reports], Accessed 15 March 2025.

12 See *Beian v. Romania* (2007) para. 36-38, app. 30658/05.

13 See Opinion of the CCJE on the role of courts with respect to the uniform application of the law (note 3).

14 In the realm of the law of civil procedure, it is worth noting that the Croatian Code of Civil Procedure (Zakon o parničnom postupku, "Službeni list SFRJ" br. 4/77., 36/77., 36/80., 6/80., 69/82., 43/82., 58/84., 74/87., 57/89., 20/90., 27/90., 35/91., "Narodne novine" (Official Gazette) br. 53/91., 91/92., 112/99., 129/00., 88/01., 117/03., 88/05., 2/07., 96/08., 84/08., 123/08., 57/11., 148/11., 25/13., 89/14., 70/19., 80/22., 114/22., 155/23.) was amended several times following the established violations of Art. 6(1). Likewise, the Law on Enforcement was revised in response to the European Court of Justice's decision in *the Zulfirkapašić and Pula Parking case* (See judgements in Case C-484/15., *Ibrica Zulfikarpašić v Slaven Gajer,* ECLI:EU:C:2017:199 and Case C-551/15., *Pula Parking d.o.o. v Sven Klaus Tederahn*, ECLI:EU:C:2017:193). Finaly, the core focus of this paper is yet another decision by the European Court of Justice, which is certain to drive further legislative changes.

public trust in the judiciary, a fundamental element of a state that upholds the rule of law.[15] In Vusić v. Croatia, the ECtHR found that the Croatian Supreme Court issued contradictory decisions, which is incompatible with the principle of legal certainty and the Court's established case law.[16]

On the other hand, it is no wonder that problems with ensuring consistency in case law are significant. Croatia's adherence to the European Union has led to an unprecedented infusion of thousands of pages of *acquis communautaire* into its legal landscape. Barbić has noted more than once that approximately one hundred thousand pages of *acquis* have been incorporated into the Croatian legal system, resulting in significant inconsistencies.[17] Under these conditions, having effective mechanism to ensure the consistency of case law is crucial, and the lack of such means makes achieving legal certainty and the rule of law impossible.

This issue thus appears more important than ever, especially in countries where legal culture is still being shaped by post-socialist legal discourse.[18]

However, by rejoining Europe, Croatia reaffirmed the importance and relevance of case law and the principle of legal certainty, and this stance has spilled over into legal practice. Among Croatian lawyers, the reliance on case law has become highly significant, with both domestic and international precedents frequently used to support arguments in various briefs and motions. It is neither unusual nor uncommon for Croatian lawyers to cite decisions from the European Court of Human Rights, just as the Croatian Constitutional Court frequently does. However, as Croatia ranks high among the countries that violate Convention, the practical

---

15 See decision of the Croatian Constitutional Court U-III/374/2008, para. 10. The interpretations of the Croatian Constitutional Court regarding the consistency in case law match the views of the European Court of Human Rights.

16 *Vusić v. Croatia* (2010), Application no. 48101/07, Judgement of 1 July 2010.

17 See Barbić, J., *Pravosuđe i vladavina prava u Hrvatskoj* (Administration of Justice and the Rule of Law in the Republic of Croatia), Godišnjak Akademije pravnih znanosti Hrvatske (Yearbook of the Croatian Academy of Legal Sciences), Vol. XIII No. 1, 2022., pp. 161-172.

18 Post socialist legal discourse in Croatia and within extended - Eastern European context has been examined by Rodin, who concludes that the culture of the Croatian legal profession remains deeply rooted in the formalist legal tradition. In such a system courts often refuse to acknowledge that judicial decisions carry social consequences and play a role in shaping policy. As Rodin aptly observes, this approach renders adjudication non-transparent, makes the prediction of outcomes challenging, and opens the door to undeclared policies pursued sporadically by courts or even individual judges. See Rodin, S., *Discourse and Authority in European and Post-communist Legal Culture,* Croatian Yearbook of European Law & Policy, Vol. 1 No. 1, 2005, pp. 12-13. See also Kühn, Z., *Interpretational Statement of Supreme Courts in Central and Eastern Europe*, 2016 [https://evropeiskipravenpregled.eu/interpretational-statements-of-supreme-courts-in-central-and-eastern-europe/], Accessed 1 April 2025.

impact of this reaffirmation is still to be seen.[19] The problem can even be tracked in the political life. Newspapers often bring news about two judicial panels delivering opposing decisions regarding the same matter.[20]

There is no need to mention that this kind of situation, especially if it is long lasting, has a bad impact on equality before the law and the rule of law as a fundamental feature of democratic societies, despite the fact that, as some would observe, the relationship between the rule of law and democracy is quite complex, as there are many versions of democracy and the rule of law has been differently understood in different times.[21]

2. OBSERVATIONS ABOUT BINDING LEGAL POSITIONS IN CROATIAN LAW FROM HISTORICAL PERSPECTIVE

The CCJE Opinion no. 20 (2017) on the role of courts with respect to the uniform application of the law[22] categorizes the means for ensuring the uniform case law as formal, semi-formal and informal. Formal methods include appeals, interpretative statements, and preliminary rulings on specific legal points. Semi-formal mechanisms consider institutionalized judge meetings to discuss issues and sometimes issue guidelines. Informal mechanisms include unofficial consultations among judges to build consensus on legal questions.

As might be expected, CCJE favors formal mechanisms and among the formal mechanisms, a proper filtering system of appeals has a prominent place. That is perfectly in line with the primary role of supreme courts, which is to resolve contradictions in law.[23]

But it is also acknowledged that making law *in abstracto* may have a positive impact on uniformity of the case law and legal certainty. However, this method of ensuring consistency in case law defies the rule of law principle, which considers

---

19 See ECtHR recent statistical data [https://www.echr.coe.int/statistical-reports], Accessed 15 March 2025.

20 Recently we even have a situation where the Supreme Court is struggling to reach a uniform decision. The issue at question relates to the well-known problem of Swiss Franc Denominated loans. The scale of the problem is so large that the ECJ has repeatedly been dealing with CHF loans in the context of the Unfair Terms Directive (93/13/EEC). See, for instance, Manko, R., *Unfair terms in Swiss franc loans Overview of European Court of Justice case law*, European Parliamentary Research Service PE 689.361 – March 2021.

21 See Gowder, P., *The Rule of Law in the Real World*, Cambridge, 2016, pp. 158-161.

22 See note 3.

23 See Opinion, note 3, pp. 4-5.

the protection of human rights and the separation of powers as one of the most important virtues of democratic societies.

Any mention of socialism and communism in the eyes of the people from the West could eventually lead to the (false) conclusion that Croatia was underdeveloped Soviet-type country fifty years ago. The truth, however, is different. In reality, especially since mid-1970s, Yugoslavia and the Socialist Republic of Croatia could be described as relatively liberal and progressive countries, with many laws that closely followed the developments in Western nations.[24] The issue of application and interpretation of laws is another matter, as one must consider that private ownership over the means of production did not exist in Yugoslavia, and that preserving the unity of the socio-political system was the primary goal of the ruling elites at that time. All companies and big businesses were indirectly controlled by the Communist Party and considering that the state ownership of land and production means was widely spread, most economically important disputes could hardly reach the courts.[25] At that time, primarily due to restrictions on private ownership, the courts were left with mostly criminal and low value civil cases. As a result, the judiciary did not enjoy high social esteem, nor was its work considered particularly important by the citizens.[26]

But despite the small number of cases, the uniformity of case law was also an issue. Even the Constitution of the Socialist Republic of Croatia emphasized that the

---

[24] One could say that this is the case both with Code of Civil Procedure from 1976. and Civil Code from 1978. The latter is especially important as it was essentially, as Tot mentions, an amalgam of various comparative legal institutes and rules, borrowed on the one hand from Romanesque legal systems (French and Italian law) and, on the other hand, from Germanic legal systems (primarily Swiss and German, and later Austrian law). It also included elements of institutes taken from legal systems that, at the time, belonged to the socialist legal tradition, along with additions from certain international conventions and even traces of influence from the common law tradition. More about influences from comparative law on Yugoslav Civil Code see Tot, I., *Poredbenopravni utjecaji na Zakon o obveznim odnosima* (Comparative Legal Influences on the Law on Obligations), [https://www.researchgate.net/publication/366812060], Accessed 15 March 2025.

[25] Uzelac points out that at that time, just as now, international trade disputes were mostly handled by international arbitration or political negotiations. See Uzelac, A., *Survival of the Third Legal Tradition,* Supreme Court Law Review (2010), 49 S.C.L.R. (2d), pp. 377-396.

[26] *Ibid.* One might easily guess what followed the bloody dissolution of Yugoslavia and the political changes of the 1990s. The overhaul of the legal system, reintroduction of private property, and numerous legal issues arising from the inability to adapt the system to new circumstances led to a significant increase in court cases, resulting in big delays and backlogs. At the same time, as Uzelac correctly observes in his paper cited in a previous reference, people who had to turn to the courts to protect their rights often faced decentralized proceedings, excessive formalism, poor process planning, procedural indiscipline, impersonal appellate review, endless remittals, and a lack of accountability for delivering final judgments which have all been depicted as characteristic features of the socialist civil justice system.

primary role of the Supreme Court of Croatia was to establish general statements and legal interpretations to ensure the uniform application of laws by courts on the territory across the Republic.[27]

The question whether case law could actually be considered a source of law was one of the most contentious issues.[28] Higher court decisions were not formally binding on lower courts, but in practice, just like in the common law countries, lower courts often considered them for various reasons. What is even more interesting is that the role of courts in shaping the law after the World War II was very significant due to numerous legal voids created by the change in political regime and the annulment of laws that existed before and during the World War II. There is evidence that issues such as the general statute of limitations for monetary claims or the objective liability of companies for damages caused by their employees to third parties were firstly established in post war judicial practice, only later to became legal rules.[29] Even at that time law students and entire legal community could easily familiarize themselves with the common law system of precedent. The available legal literature, primarily books on maritime and commercial law, devoted considerable attention to the law of precedent and its role in promoting the values of uniformity, consistency, and certainty.

Still the fact remains that the case law was never regarded as the formal source of law in Croatia. Back then, courts were constitutionally obliged to render judgments based on the Constitution, laws, and self-governing general acts, while now it is different as they administrate justice according to the Constitution, law, international treaties and other valid sources of law.[30]

Nevertheless, the official standpoint at that time was that judicial practice did not carry the force of law but could only influence court decisions if judges were willing to adopt its reasoning.[31] Until 1954. it was different with so called judicial

---

27 See Art. 410 of the Constitution of the Socialist Republic of Croatia (Official Gazette, No. 8-86/74).

28 See Goldštajn, A., *Privredno ugovorno pravo*, Informator, Zagreb, 1980, pp 39-40. It worths noting that the opponents of recognizing the case law as a significant source of law at that time emphasized that such a status and attribute was not granted to judicial practice by any regulation, and that the system of precedent is not aligned with the constitutional position courts have within the judicial system. It should be noted also that in addition to Goldštajn, comprehensive interpretations of the system of precedent were at that time provided by Pallua. See Pallua, E., *Pomorsko uporedno pravo* (*Maritime Comparative Law*), Rijeka, 1975.

29 *Ibid.*

30 See Art. 115 of the Constitution of the Republic of Croatia (Official Gazette, No. 56/90., 135/97., 8/98, 113/00., 124/00., 28/01., 41/01., 76/10., 55/01., 5/14., 85/10.).

31 In academic literature this is pretty much unchanged. For instance, in the leading book on civil law (Vedriš, M.; Klarić, P., *Građansko pravo*, Official Gazette, 2008., p. 23.) it is explicitly stated that a judge who is convinced that a higher court has rendered a correct decision is expected to follow that

practice guidelines which were issued at the meetings of the judges of the supreme courts of republics (regarding the application of republican laws) and the Supreme Court of Yugoslavia (concerning the application of federal laws).[32] Those guidelines had significantly greater legal authority than ordinary court rulings, as they were binding not only on all the chambers of the supreme courts but also on all lower courts.[33] As these guidelines did not carry the force of law, courts could refuse to apply them only if they found them to be contrary to the law.[34]

This system significantly changed after the enactment of the 1954 Law on Courts, which prescribed that the legal positions adopted at sessions of judicial departments or at general sessions of the supreme courts were not binding for courts that did not participate in their adoption and that such legal interpretations were binding only on the chambers that were part of the department sessions.[35]

Without delving into the versions of the law governing the organization and jurisdiction of courts in Croatia from 1954 to the present, including the period after Croatia gained independence, and before addressing the Hann Invest case, it suffices to say that the concept of legal positions with precedential authority has persisted into modern times. Only at one point, the 2000 amendments of the Law on Courts reformed the system by specifying that legal positions adopted at the level of second-instance courts hold no binding authority, as issuing binding interpretations does not fall within the judiciary's role, which is primarily to enforce rather than create law. Additionally, it was argued that imposing an obligation on judges to apply interpretations adopted at court meetings undermines the independence of individual judges.[36]

However, this new rule was short lived as later amendments reinstated the previous system, despite heavy academic criticism. Simply put, it was argued that issuing decisions *in abstracto* at court department meetings should not be given any kind of quasi-legislative authority.[37]

---

ruling in similar cases, thereby avoiding the likelihood of having his decision overturned by the higher court.

32 This rule was introduced by the 1946 Law on the Organization of People's Courts.

33 See Zuglia, S., *Građanski parnični postupak FNRJ (Civil Procedure of the People's Federative Republic of Yugoslavia)*, Zagreb, 1957, pp. 60-63.

34 *Ibid*. In such cases, however, the courts were required to provide valid reasons when departing from the guidelines.

35 See Triva, S., *Građansko procesno pravo*, Narodne novine 1965, p. 35.

36 See Uzelac, A., *Jedinstvena primjena prava u hrvatskom parničnom postupku: tradicija i suvremenost (Uniform Application of Law in Croatian Civil Procedure: Tradition and Modernity*) in: Barbić, J. (eds.) Novine u parničnom procesnom pravu, HAZU, Zagreb, 2020, p. 129.

37 See Triva, S.; Dika, M., *Građansko parnično procesno pravo*, Narodne novine, Zagreb, 2004, p. 124.

Along these lines, it must be mentioned what is the current legislative solution. Art. 38 and 39 of the Law on Courts[38] give the right to county courts and specialized courts (High Commercial Court, High Administrative Court, High Criminal Court, High Misdemeanor Court) to hold section meetings during which different matters of interest to the work of sections may be examined. These issues concern the organization of the internal court activities, disputed points of law, the harmonization of case law and issues relevant to the application of the legislation in each field of law. Sectional court meetings are convened by the president of a section or the president of the court when necessary or at least once every three months. The first two paragraphs of Art. 40 of the Law on judicial bodies provide:

1. *A section meeting or a meeting of judges shall be convened where it is found that there are differences in interpretation between sections, chambers or judges regarding questions relating to the application of the law or where a chamber or a judge of a section departs from the legal position previously adopted.*

2. *The legal position adopted at the meeting of all the judges or of a section of the Vrhovni sud (Supreme Court), of the Visoki trgovački sud (High Commercial Court), of the Visoki upravni sud (High Administrative Court), of the Visoki kazneni sud (High Criminal Court), of the Visoki prekršajni sud (High Misdemeanour Court) or at the meeting of a section of a Županijski sud (County Court) shall be binding on all the chambers or judges at second instance of the section or court concerned.*[39]

Side observers might ask themselves what these legal positions look like, do they look like regular law provision, how many legal positions courts deliver annually, how often they are published, etc. A look at the Croatia's Supreme Court's website reveals that issuing legal positions was quite common practice until the midst of last year. For instance, since 2019 until now, the Civil Department of the Supreme Court held 27 sessions during which at least one legal position per session was adopted, sometimes more, with up to five positions adopted in a single session.[40] Positions cover a wide range of issues, mostly those relating to different issues with the substantive law (statutory limitation), but there are also many legal positions that resolve procedural issues and situations. For instance, in the most recently published minutes from a session held on May 27, 2024, two legal positions were adopted, both related to the issue of statutory limitations. The first position states

[38] The Law on Courts (Zakon o sudovima, Official Gazette, No. 28/13., 33/15., 82/15., 82/16., 67/18., 126/19., 130/20., 21/22., 60/22., 16/23., 155/23., 36/24.).

[39] This is the translation provided in the English version of the Judgement of Court of 11. 7. 2024. in joined Cases C-554/21 (*Hann-Invest d.o.o.*), C-622-21 (*Mineral-Sekuline d.o.o.)* and C-727/21 (*Udruga KHL Medveščak Zagreb*), ECLI:EU:C:2024:594.

[40] See the web page of the Supreme Court of the Republic of Croatia [https://www.vsrh.hr/].

that a claim for compensation for land taken for road construction without due legal process is subject to the general statute of limitations under art. 225 of the Civil Obligations Act. The second position concerns the parties' right to modify and increase the claim during the proceedings and the interruption of statute of limitations.[41] Apart from civil law and civil proceedings, there are many positions in relation to criminal proceedings as well.

Any lawyer can easily recognize that the legal positions mentioned essentially mirror the structure of rules that can be found in ordinary legislation. It would be incorrect to say that these positions are delivered without considering some real-life cases as this is pretty much impossible, but the fact remains that they are established *in camera*, without any involvement from the parties or lawyers. Another point is also worth noting: these legal positions lack context: no one knows who prompted the creation of the legal position, which judges were involved in the decision making, and, and as Uzelac correctly observes, the only known details are the court and the date of the session.[42] While it seems that the Supreme Court publishes legal positions without a big delay, the search of the web pages of the numerous county courts reveals that in most cases there is no information on their case law or the legal positions. There is no need to point out how troublesome this is for legal professionals who have problems investigating what might be the rule which is applied before certain courts.

While it would be wrong to assume that binding legal positions and statements are without any positive impact on consistency in case law[43], it remains an old concern that this kind of instrument for ensuring uniform case law contradicts the rule of law, and especially the constitutional principle of the separation of powers.

The issue is more pressing today as Croatia now, after many years of normative struggle, has finally established a clear system for seeking leave to appeal at the Supreme Court, a model aligned with the fundamental idea that supreme courts should predominantly serve their public function by ensuring uniformity of case law and developing the law through decisions of precedential value.[44]

---

41 See the minutes of the second session of the Civil Division of the Supreme Court of the Republic of Croatia, Su-IV-123/2024-5 dated May 27, 2024. It could be said that many legal positions address the issue of statutory limitations, which is, needless to say, one of the regular legal issues in the field of civil law.

42 See Uzelac, A., *op. cit.*, note 36. The situation is the same for civil and criminal legal positions.

43 The CCJE (note 3), accepts that „binding interpretive statements *in abstracto* could have positive impact on uniformity of case law, but also that the uniformity of the case law and the development of law should be achieved through the proper filtering system of appeals".

44 Bratković was repeatedly writing about the role of the Supreme Court and the need to set up a mechanism which would allow the Supreme Court to serve his constitutional role. In that regard see his book

3. THE HANN INVEST CASE AND ITS CONSEQUENCES FOR CROATIA AND THE LEGAL SYSTEMS OF THE MEMBER STATES

Next, we will consider the problem that emerged before the Grand Chamber of the Court of Justice of the European Union in the Hann Invest case.

The Hann Invest case arose from three separate requests for a preliminary ruling under Art. 267 of the Treaty on the Functioning of the European Union. All requests came from the Zagreb based High Commercial Court (Visoki trgovački sud) after panels of the court dismissed appeals and upheld the first instance judgements in insolvency cases.[45] However, as the High Commercial Court serves as the second instance court in commercial matters, within its internal organization it has a special department - a registration service with a registration judge who is appointed by the court president and is then authorized to check whether decisions, before they are served to the parties, depart from the previously established case law or show any inconsistencies in legal interpretation. If the registration judge identifies the problem, he is authorized to request the judicial panel to resolve the inconsistencies and amend the decision, or if the judicial panel refuses to alter the decision, the registration judge can refer the case to the section meeting. As we observed above, the Law on Courts prescribes that legal positions adopted at a section meeting are binding on all chambers and judges at the second instance.

Although the factual situation differs in all three cases[46], essentially the problem in Hann Invest relates to the question of judicial independence and impartiality. It is evident from the cases that the registration judge had the power to block the delivery of the judicial decision to the parties and thus hinder the decision making process, to send the case for reexamination in the light of their observations, and even to initiate the convening of a section meeting for the adoption of a legal position that would be binding on that judicial panel.[47]

Advocate general Priit Pikamäe (coming from Estonia) who eight months before the judgement of the Grand Chamber gave opinion on the case in which he found that the Croatian system of securing consistency in case law is compliant with Art. 19(1) of the Treaty of the European Union,[48] has correctly recognized that

---

on the topic, Bratković, M., *Revizija po dopuštenju*, Organizator, Zagreb, 2003.

45 The Judgment of the Court of 11. 7. 2024. in joined Cases, *loc. cit.*, note 41.

46 *Ibid.,* para. 12-14.

47 *Ibid*., para. 64.

48 See Opinion of the AG Pikamäe delivered on 26 October 2023. in joined Cases C-554/21, C-622-21 and C-727/21, ECLI:EU:C:2023:816. See also heavy critique of the opinion by Selanec and Petrić in Selanec, N.B., Petrić, D., *Internal Judicial Independence in the EU and Ghosts from the Socialist Past.*

although the existence of the registrations judge is provided for by the Law on Judicial Bodies neither the Law on Courts neither the Rules of Procedure of the Courts[49] neither the relevant Article 177(3) contain the definition of the nature of the function of the registration judge, nor do they contain the rule according to which they have the power to suspend the registration of a decision of a judicial panel.

Indeed, Art. 177(3) of the Rules of Procedure of the Courts provides that "a case before a court of second instance shall be deemed to be closed on the date on which the decision is sent from the court office, after the case has been returned by the Case law Monitoring and Registration Service". This gives rise to another issue closely related to the rule of law. Namely, the phrase "tribunal established by law", which is well known and often used in jurisprudence of the ECJ and ECtHR, covers not only the legal basis for the existence of a "tribunal", but also compliance by the tribunal with the particular rules that govern it.[50] In the eyes of the ECJ the problem was particularly visible because the registration judge, who was not responsible for the cases in question neither participated in the cases in question, could intervene and influence the final content of judicial decisions. In the ECJ's view, the right to manipulate the outcomes of the cases is incompatible with the requirements inherent in the right to effective judicial protection, and this view was reflected in the judgment.[51]

The situation is more complex with large court meetings and issuing binding legal positions. Despite numerous objections which could be raised against legal positions and court sectional meetings, it must be pointed out that the ECJ does rec-

---

Why the Court of Justice should not follow AG Pikamäe in Hann Invest, Croatian Yearbook of European Law & Policy, Vol. 20 No. 1, 2024, pp. 155-179.

49 Rules of Procedure of the Courts (Sudski poslovnik) Official Gazette, No. 37/14., 49/14., 8/15., 35/15., 123/15., 45/16., 29/17., 33/17., 34/17., 57/17., 101/18., 119/18., 81/19., 128/19., 39/20., 47/20., 138/20., 147/20., 70/21., 99/21., 145/21., 23/22., 12/23., 122/23., 55/24., 136/24.

50 See *Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (civil limb)*, updated to 31 December 2017., Council of Europe/European Court of Human Rights, 2017. p. 35.

51 See para. 81: *In the light of all of the foregoing considerations, the answer to the questions referred is that the second subparagraph of Article 19(1) TEU must be interpreted as precluding national law from providing for a mechanism internal to a national court pursuant to which:*

- *the judicial decision adopted by the judicial panel responsible for the case may be sent to the parties for the purpose of closing the case concerned only if its content has been approved by a registrations judge who is not a member of that judicial panel;*
- S*a section meeting of that court has the power to compel, by putting forward a 'legal position', the judicial panel responsible for a case to alter the content of the judicial decision which it previously adopted, even though that section meeting also includes judges other than those belonging to that judicial panel and, as the case may be, persons from outside the court concerned, before whom the parties do not have the opportunity to put forward their arguments.*

ognize that achieving legal certainty through a mechanism allowing a judge who is not a member of the judicial panel to refer a case to a panel of that court sitting in extended composition is not inherently contrary to the European law.[52] What is contrary to the European law is to have "*a national legislation which allows a section meeting of a national court to compel, by putting forward a "legal position", the judicial panel responsible for the case to alter the content of the judicial decision which it previously adopted, even though that section meeting also includes judges other than those belonging to that judicial panel and, as the case may be, persons from outside the court concerned, before whom the parties do not have the opportunity to put forward their arguments, is incompatible with the requirements inherent in the right to effective judicial protection and to a fair hearing*".[53]

The ECJ has clearly provided a comprehensive formula for a potentially legal way of resolving conflicts in case law within extended court meetings. As clearly stated in para. 79-80 of the judgement, if the case has not been deliberated by the judicial panel initially designed to resolve the case, if the circumstances in which such a referral may be made are clearly set out in the legislation and if the referral does not deprive the persons concerned of the possibility of participating in the proceedings before the large panel, the mechanism of legal positions adopted at the meetings of the court sections or in plenary sessions could be regarded as a legitimate way of resolving conflicts in case law.

While it is hard to envisage what the expected amendments of the Law on Judicial Bodies and the Rules of Procedure of the Courts will look like, it should be expected that the working groups will sooner or later come up with proposals of the new normative solutions. Some quality remarks and in-depth views of the problem, even touching upon other mechanisms for reaching uniformity in Croatian law, have already been published and revealed so it will be interesting to track how things will develop.[54] Still, knowing the way the system had addressed one previous issue which arose after the ECJ's judgement in Pula Parking and Zulfikarpašić case, one should not expect big changes to the present system.

---

52 *Ibid.,* para. 79-80.

53 *Ibid.*

54 See Uzelac, A., *Kraj obvezatnih pravnih shvaćanja – kako ujednačavati sudsku praksu nakon presude Suda EU? (The End of Mandatory „Legal Positions"– How to Unify Case Law after Judgments of the Court of Justice?*, in: Šago, D. (ed.), Zbornik radova X. međunarodnog savjetovanja „Aktualnosti građanskog procesnog prava – nacionalna i usporedna pravnoteorijska i praktična dostignuća", Sveučilište u Splitu, Pravni fakultet, 2024, pp. 32-38. See also Uzelac, A., *Što nakon Hann Investa? Posljedice odluke suda EU-a na domaći sustav ujednačavanja sudske prakse*, 2024. [https://www.iusinfo.hr/strucni-clanci/sto-nakon-hann-investa-posljedice-odluke-suda-eu-a-na-domaci-sustav-ujednacavanja-sudske-prakse], Accessed 1 April 2025.

Hann Invest is an important ruling for other Member States too, and not only post-communist states of Central and Eastern Europe, but also for those with long lasting peaceful development of societal norms and advanced democratic standards. De Werd, who discussed the problem of consistency and uniformity in case law by comparing the findings from Hann Invest with the current Dutch situation[55], mentions the case of Kuijt v. Netherlands in which the application concerned an alleged violation of Art. 6(1) because of the practice of the Dutch Supreme Court which allows judges "reservists" to sit in deliberations even when they do not form part of the formation to which the case has been assigned.[56] It should be observed that the difference with Croatian practice is that judges reservists do not take part in the final decision making but only participate in discussions, all according to transparent internal court rules.[57] While appreciating having sufficient safeguards against undue influence from within the court, De Werd finds that engaging in discussions among judges at internal court meetings is necessary to maintain the desired level of quality and consistency of court rulings, as well as that using the guarantee of independence as a stalking horse to avoid discussions with colleague judges has little ground to stand on.[58] Along these lines, having in mind that reaching broader consensus often will be inevitable to maintain desired level of uniformity, consistency and certainty within the legal system, for a Croatian policy maker it will be essential to think of the framework which will transform binding legal positions into opinions that will influence other decision making processes primarily with the clear and precise legal reasonings.

4. CONCLUDING REMARKS

The interpretation of law is a dynamic process that should always meet the requirements of courts and judges being independent and impartial. Binding legal positions have been for a long time viewed as a relic of the past, the remnant of the communism and authoritarian legal culture, something that could not only be tracked in Croatia, but also elsewhere in Europe.[59] In Croatian literature the problem was repeatedly mentioned and discussed but the main structure of the system which highly formalized the mechanisms of the undue internal influence has not

---

55 See De Werd, M., *Blog: Uninvited oversight:judges watching judges – the ECJ Hann-Invest case*, 2024. [https://aclpa.uva.nl/en/content/news/2024/07/blog-marc-de-werd.html], Accessed 1 April 2025.

56 See Application no. 19365/19 to the ECtHR made by *Johanna Kuijt vs. the Netherlands* of 4 April 2019.

57 See De Werd, *op. cit.*.

58 *Ibid.*

59 See Kühn, Z., *Interpretational Statement of Supreme Courts in Central and Eastern Europe*, 2016 [https://evropeiskipravenpregled.eu/interpretational-statements-of-supreme-courts-in-central-and-eastern-europe/], Accessed 1 April 2025.

changed in years. A long time ago, it has been clearly stated in academic literature that binding interpretive statements are not in line with democratic standards and the rule of law. Hence, historical observations of the problem, coupled with the long standing operation of the system of binding legal positions and interventions by the registration judge, offer no basis for supposing that the problem will be easily eliminated.

The system we used to have is the model which had grown out of centralism and formalism associated with the authoritarian model of power, the justice system model which had never embraced neither properly understood the system of precedent in the true sense of the word.[60]

De facto, after Hann Invest Croatia does not have the registration judges with functions and competences they used to have before, and this has become a well-known fact among the judges. De iure, nothing has changed yet, and even when it does, whatever the new legislative solutions will be, it is easy to envisage that the problem with ensuring consistency in case law will persist. It is just "hard to teach an old dog new tricks", so in the system which never embraced nor properly understood the concept of the precedent, it should not be expected that true positive changes can occur overnight.

Once the system becomes able to produce judgements with influential reasonings that will be readily embraced among legal professionals and even the wider public, things will start to change, and before that happens, the findings of the ECJ in the Hann Invest case will serve as significant guidance for the court system and the policy makers in Croatia and elsewhere in Europe.

REFERENCES

BOOKS AND ARTICLES

1. Ballin H. (eds.), *Democracy and Rule of Law in the European Union,* Essays in Honour of Jaap W. de Zwaan, Flora A.N.J., GoudappelAsser Press / Springer, 2016, pp. 3-15
2. Barbić, J., *Pravosuđe i vladavina prava u Hrvatskoj* (*Administration of Justice and the Rule of Law in the Republic of Croatia)*, Godišnjak Akademije pravnih znanosti Hrvatske (Yearbook of the Croatian Academy of Legal Sciences), Vol. XIII No. 1, 2022, pp. 161-172
3. Costa, P.; Zolo D. (eds.), *The Rule of Law, History*, Theory and Criticism, Springer 2007
4. Craig, P.; De Búrca, G., *EU Law, Text, Cases and Materials*, Third Edition, Oxford, 2003

[60] As Duxbury puts it, the precedents are past decisions that are respected as guides for present actions, but not to the extent that judges must maintain outdated attitudes and a commitment to repeating their predecessors' mistakes. See Duxbury, N., *The Nature and Authority of Precedent*, Cambridge, 2008. p. 183.

5. Duxbury, N., *The Nature and Authority of Precedent*, Cambridge University Press, 2008
6. Galič, A., *A Civil Law Perspective on the Supreme Court and its Functions*, in: Ereciński T. *et. al.* (eds.), The Functions of the Supreme Court Issues of Process and Administration of Justice, Studia Iuridica, Warsaw, 2019., pp. 44-86
7. Goldštajn, A.*, Privredno ugovorno pravo*, Informator, Zagreb, 1980
8. Gowder, P., *The Rule of Law in the Real World*, Cambridge, 2016
9. Hansford, T. G.; Spriggs II, J. F., *The Politics of Precedent on the U.S. Supreme Court,* Princeton & Oxford, 2006
10. Hosten, W. J.; Bosman, F.; Nathan, C., *Introduction to South African Law and Legal Theory,* Butterworth, 1980
11. Krygier, M., *Rule of Law (and Rechtstaat*), in: Silkenat, J. E.; Barenboim, P. D. (eds.), Ius Gentium: Comparative Perspectives on Law and Justice 38, Springer, 2014, pp. 45-61
12. Manko, R., *Unfair terms in Swiss franc loans Overview of European Court of Justice case law*, European Parliamentary Research Service PE 689.361 – March 2021
13. Ortolani, A., *Civil Law*, in: Siems, M.; Jen Yap, P. (eds.) The Cambridge Handbook of Comparative Law, Cambridge University Press, 2024., pp. 211-235
14. Pallua, E., *Pomorsko uporedno pravo*, Rijeka, 1975
15. Rodin, S., *Discourse and Authority in European and Post-communist Legal Culture*, Croatian Yearbook of European Law & Policy, Vol. 1 No. 1, 2005, pp. 1-22
16. Selanec, N.B.; Petrić, D., *Internal Judicial Independence in the EU and Ghosts from the Socialist Past. Why the Court of Justice should not follow AG Pikamäe in Hann Invest*, Croatian Yearbook of European Law & Policy, Vol. 20 No. 1, 2024, pp. 155-179
17. Sellers, M., *What is the Rule of Law and Why is It so Important?*, in: Silkenat; Barenboim; Hickey, (eds.), The Legal Doctrines of the Rule of Law and the Legal State, Springer, 2014, University of Baltimore School of Law Legal Studies Research Paper No. 2015-15
18. Shivprasad, S., *Common Law,* in: Siems, M.; Jen Yap, P. (eds.) The Cambridge Handbook of Comparative Law, Cambridge University Press, 2024., pp. 235-256
19. Triva, S., *Građansko procesno pravo*, Narodne novine 1965
20. Triva, S.; Dika, M., *Građansko parnično procesno pravo*, Narodne novine, Zagreb, 2004
21. Uzelac, A., *Kraj obvezatnih pravnih shvaćanja – kako ujednačavati sudsku praksu nakon presude Suda EU? (The End of Mandatory „Legal Positions"– How to Unify Case Law after Judgemnts of the Court of Justice*?), in: Šago, D. (ed.), Zbornik radova X. međunarodnog savjetovanja „Aktualnosti građanskog procesnog prava – nacionalna i usporedna pravnoteorijska i praktična dostignuća", Sveučilište u Splitu, Pravni fakultet, 2024, pp. 1-47
22. Uzelac, A., Što *nakon Hann Investa? Posljedice odluke suda EU-a na domaći sustav ujednačavanja sudske prakse*, [https://www.iusinfo.hr/strucni-clanci/sto-nakon-hann-investa-posljedice-odluke-suda-eu-a-na-domaci-sustav-ujednacavanja-sudske-prakse], Accessed 1 April 2025
23. Uzelac, A., *Survival of the Third Legal Tradition?*, Supreme Court Law Review (2010), 49 S.C.L.R. (2d), pp. 377-396
24. Uzelac,A., *Jedinstvena primjena prava u hrvatskom parničnom postupku: tradicija i suvremenost (Uniform Application of Law in Croatian Civil Procedure: Tradition and Modernity)*,

in: Barbić, J. (eds.) Novine u parničnom procesnom pravu, HAZU, Zagreb, 2020., pp. 111-171

25. Vedriš, M.; Klarić, P., *Građansko pravo*, Narodne novine, 2008
26. Wojtyczek, K., *Precedent in the system of the European Convention on Human Rights*, in: Florczak-Wator, M. (ed.), Constitutional Law and Precedent. International Perspectives on Case-Based Reasoning, Routledge, 2022, pp. 233-250
27. Zuglia, S., *Građanski parnični postupak FNRJ (Civil Procedure of the People's Federative Republic of Yugoslavia*), Zagreb, 1957

EUROPEAN COURT OF HUMAN RIGHTS AND COUNCIL OF EUROPE

1. *Beian v. Romania* (2007), Application 30658/05
2. Consultative Council of European Judges (CCJE) Opinion no. 20 (2017) on the role of courts with respect to the uniform application of the law (Strassbourg, 10 November 2017, CCJE(2017)4)
3. Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (civil limb), updated to 31 December 2017., Council of Europe/European Court of Human Rights, 2017
4. *Vusić v. Croatia* (2010), Application 48101/07

COURT OF JUSTICE OF THE EUROPEAN UNION

1. Case C-156/21., *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, 16/02/2022
2. Case C-484/15., *Ibrica Zulfikarpašić v Slaven Gajer*, ECLI:EU:C:2017:199
3. Case C-551/15., *Pula Parking d.o.o. v Sven Klaus Tederahn*, ECLI:EU:C:2017:193
4. Case C-554/21., *Hann-Invest* (Joined Cases C-554/21, C-622/21, C-727/21), ECLI:EU:C:2024:594
5. Opinion of the AG Pikamäe delivered on 26 October 2023 in joined Cases C-554/21, C-622-21 and C-727/21, ECLI:EU:C:2023:816

LIST OF NATIONAL REGULATIONS, ACTS AND COURT DECISIONS

1. Code of Civil Procedure (Zakon o parničnom postupku, Službeni list SFRJ br. 4/77., 36/77., 36/80., 6/80., 69/82., 43/82., 58/84., 74/87., 57/89., 20/90., 27/90., 35/91., Official Gazette, No. 53/91., 91/92., 112/99., 129/00., 88/01., 117/03., 88/05., 2/07., 96/08., 84/08., 123/08., 57/11., 148/11., 25/13., 89/14., 70/19., 80/22., 114/22., 155/23.)
2. Constitution of the Republic of Croatia (Ustav Republike Hrvastske, Official Gazette, No. 56/90., 135/97., 8/98, 113/00., 124/00., 28/01., 41/01., 76/10., 55/01., 5/14., 85/10.)
3. Constitutional Court of the Republic of Croatia decision no. U-III/374/2008

4. Minutes of the second session of the Civil Division of the Supreme Court of the
5. Republic of Croatia, Su-IV-123/2024-5 dated May 27, 2024
6. Rules of Procedure of the Courts (Sudski poslovnik, Official Gazette, No. 37/14., 49/14., 8/15., 35/15., 123/15., 45/16., 29/17., 33/17., 34/17., 57/17., 101/18., 119/18., 81/19., 128/19., 39/20., 47/20., 138/20., 147/20., 70/21., 99/21., 145/21., 23/22., 12/23., 122/23., 55/24., 136/24.)
7. The Law on Courts (Zakon o sudovima, Official Gazette, No. 28/13., 33/15., 82/15., 82/16., 67/18., 126/19., 130/20., 21/22., 60/22., 16/23., 155/23., 36/24.)

WEBSITE REFERENCES

1. De Werd, M., *Blog: Uninvited oversight:judges watching judges – the ECJ Hann-Invest case*, 2024,
[https://aclpa.uva.nl/en/content/news/2024/07/blog-marc-de-werd.html], Accessed 1 April 2025
2. Kühn, Z., *Interpretational Statement of Supreme Courts in Central and Eastern Europe*, 2016 [https://evropeiskipravenpregled.eu/interpretational-statements-of-supreme-courts-in-central-and-eastern-europe/], Accessed 1 April 2025

CIVIL LAW ASPECTS OF THE CONFLICT OF PRIVATE AND PUBLIC INTERESTS AND REALIZATION OF GUARANTEE OF THE RIGHT OF OWNERSHIP IN THE BOUNDARY REGULATION PROCEDURE*

Davorin Pichler, PhD, Associate Professor
Josip Juraj Storssmayer University of Osijek, Faculty of Law Osijek
Stjepana Radića 17, 31000 Osijek, Croatia
dpichler@pravos.hr

Marija Pavošević, LLM, Teaching Assistant
Josip Juraj Strossmayer University of Osijek, Faculty of Law Osijek
Stjepana Radića 13, 31000 Osijek, Croatia
mpavosevi@pravos.hr

ABSTRACT

The right of ownership has become the paradigm of modern life. On the one hand categorically guaranteed by the Universal Declaration of Human Rights, The Convention for the Protection of Human Rights and Fundamental Freedoms, and even the Constitution of the Republic of Croatia as one of the highest values that the state can offer an individual, the right of ownership is at the same time subject to public restrictions. In that sense, the question arises as to whether any interference with the right of ownership under the pretext of public interest is really justified. This paper will focus on the issue of the realization of guarantee of the right of ownership, especially by analysing the boundary regulation procedure based on the Act on the State Survey and Cadastre of Real Estates. The main emphasis in on the realization on private, proprietary interests versus the public interest. Through the presentation of court practice and the procedures of administrative bodies, the authors will analyse the protection reach of the institute of the right of ownership and provide guidelines for the regulation of certain open questions de lege ferenda.

Keywords: *boundary line, construction, ownership, public interest*

1. INTRODUCTION

The right of ownership presents a central role the Croatian and European legal system. As one of the fundamental rights of individuals, it is strongly protected

by international, European, and national regulations. On the one hand, the role of the right of ownership in the legal system is exceptional and the application of the right of ownership institute is spread across all aspects of everyday life, on the other hand it is subject to limitations. The balance of private right of property is particularly evident in procedures where they come into conflict with public interests. In this way, an attempt is made to maintain a balance between the needs of the wider community and the needs or rights of individuals. The guarantee of the right of ownership may be particularly at risk in boundary regulation procedure. Although such procedures do not determine the right of ownership, the regulation of boundary lines implies a presumption of ownership up to the marked boundary line. In this respect, the first part of this paper deals with the general definitions of the right of ownership, guarantee of the right of ownership, and legal protection. The second part of the paper is devoted to boundary regulation procedure[1], particularly through the Act on State Survey and Cadastre of Real Estates, as well as the judicial protection available through civil proceedings when a boundary line is marked.

2. GENERAL CONSIDERATIONS ON THE INSTITUTE OF THE RIGHT OF OWNERSHIP, ITS GUARANTEE AND PROTECTION IN THE LEGAL ORDER

The right of ownership is the central and most important institute of real rights, from which the development of other areas within the entire system of civil law arises.[2] The importance of the right of ownership is also demonstrated by the fact that it is reflected in the overall socio-economic system of individual states.[3] The prevailing concept of ownership relations has determined the entire structure and organization of a country's national economy and society, depending on the

---

1 In addition to civil law, or property law relations, the area of state surveying includes also administrative law relations. Due to the interdisciplinary nature of the procedures that in relation to real estates, cadastral parcels and land register plots, take place before public authorities, administrative and civil courts, we can speak of private construction and public construction law. Private construction law holds norms that regulate private law relations in the field of constriction, in which the principle of equality between the parties is present. Public constriction law regulates the public law matter of construction in which the principle of subordination is present. Rajčić, D., Nikšić, S., *Uvod u građevinsko pravo*, Hrvatska sveučilišna naklada, Zagora - Zagorje, 2008, pp. 15-17.

2 Among the institutes of civil law in general and among the institutes of real rights law in particular, the institute of the right of ownership holds a central position. The importance of the institute of the right of ownership in the social and legal order of a country is demonstrated by the fact that it is regularly subject to constitutional regulations, which is not the case with any other institute of property or civil law. Klarić, P.; Vedriš, M., *Građansko pravo*, Narodne novine, Zagreb, 2006., pp. 225 – 226.

3 Jurin, Bakotić, V., *Građanskopravna zaštita prava vlasništava i njihovo ostvarivanje pred sudom*, Elektronički zbornik radova Veleučilišta u Šibeniku, Vol. 8., No. 1-2, 2014, p. 143.

ownership model dominant within that state.[4] The latter particularly applies to the legal systems of the continental European circle, in which the right of private property, freedom of contract, and the right of inheritance form the outline of the entire civil law system.[5] For this reason, changes in the right of ownership inevitably affect almost all legal relationships.[6]

2.1. THE RIGHT OF OWNERSHIP IN POSITIVE LEGAL PROVISIONS

The significance of the institute of the right of ownership in the functioning of the entire state system is recognized through important international documents. The Universal Declaration of Human Rights (hereinafter: the Declaration)[7] explicitly states that everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.[8] Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) establishes the protection of property.[9] According to this instrument, all legal subjects - whether natural or legal persons - enjoy the right to the peaceful enjoyment of their possessions.

However, it should be emphasized that the right of ownership does not give its holder unlimited legal power.[10] The limits of the right of ownership are clearly outlined under the ECHR in cases where the public interest prevails over proprietary interests. As the Court has stated on numerous occasions, Article 1 of Protocol No. 1 comprises three rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful

---

4 *Ibid.*

5 The Republic of Croatia has long shared the continental European legal tradition, which we re-adopted after moving away from the socialist legal system. Gavella, N., *et. al. Teorijske osnove građanskog prava – Građansko pravo i pripadnost hrvatskog pravnog poretka kontinentalnoeuropskom pravnom krugu*, Zagreb, Pravni fakultet, 2005, p. 7.

6 Gavella, N., *et. al., Stvarno pravo*, Narodne novine, Zagreb, 2007, pp. 343 – 344.

7 The Universal Declaration of Human Rights was adopted and proclaimed at the General Assembly of the United Nations No. 217/III on December, 10 1948. In the Republic of Croatia a Decision on the Publication of the Universal Declaration of Human Rights was enacted, Official Gazette, No. 12/09 (hereinafter: Declaration).

8 Art. 17 of the Declaration.

9 The (European) Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette, International Treaties, No. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10, 3/17 was signed in Rome on November 4, 1950. Protocol No. 1 to the Convention was adopted in Paris on March 20, 1952, while the Republic of Croatia signed it on November 6, 1996. It was ratified and entered into force on November 5, 1997.

10 Gavella, N., *et. al. op. cit.*, note 6, p. 401.

enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of property and subjects it to conditions; the third rule, stated in the second paragraph, recognizes that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should be construed in the light of the general principle enunciated in the first rule.[11] When the European Court determines whether this requirement has been met, it recognizes that the state enjoys a wide margin of appreciation both in selecting the means of implementation and in assessing whether the consequences of that implementation are justified by the public interest, in order to achieve the aim of the law in question.[12] Urban and regional planning policies are, *par excellence*, spheres in which the State intervenes, particularly through control of property in the general or public interest. In such circumstances, where the community's general interest is pre-eminent, the Court takes the view that the State's margin of appreciation is greater than when exclusively civil rights are at stake.[13] These difficulties constitute a part of the process of transition from a socialist legal order and its property regime to one compatible with the rule of law and the market economy, the process which, by the very nature of things, is fraught with difficulties. However, these difficulties and the enormity of the tasks facing legislators having to deal with all the complex issues involved in such transition do not exempt the Member States from the obligations stemming from the Convention or its Protocols.[14] It is precisely the notion of public and general interest that is sometimes questionable, because the determination of such interest requires not only compliance with the form and procedure of all proceedings in which decisions are made to limit the right of ownership under the justification of public interest, but also the actual exhaustion of all mechanisms available to the public during the procedure.

Starting from international provisions that recognize the right of ownership as a fundamental private right of the individual, one arrives at national regulations governing the institute of the right of ownership. Through the prism of the Con-

---

11 *Ališić and others v Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* (2014) European Court of Human Rights, Application No. 60642/08, § 63; See: Elijaš, D.; Marković, S.; Trgovac, S.; *Povreda konvencijskog prava na mirno uživanje vlasništva*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 36, No. 2, 2015, pp. 239 – 258.

12 Jelušić, M; Šarin D., *Ustavnopravni aspekti određivanja naknade za potpuno izvlaštenje*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 36, No. 2, 2015, p. 838.

13 *Gorraiz Lizarraga and others v Spain* (2004) European Court of Human Rights, Application No. 62543/00, § 70, Judgement of 27 April 2004.

14 *Schirmer v Poland* (2004) European Court of Human Rights Application No. 68880/01, § 38.

stitution of the Republic of Croatia (hereinafter: the Constitution), the inviolability of ownership is recognized as a highest value of the constitutional order of the Republic of Croatia.[15] Article 48 of the Constitution guarantees the right of ownership, but holders of property rights and their users are also obliged to contribute to the common good. Likewise, Article 50 of the Constitution provides for the restriction or expropriation of the right of ownership in the interest of the Republic of Croatia, with compensation at market value. In this way, the social function of the right of ownership is realized through the imposition of limits on the right of ownership. Under the social bond of the right of ownership, one must understand the connection between the owner's fundamental freedom and their duties towards other entities and society. In this regard, the scope of restrictions that the legal order imposes on the owner depends on the role and social function of the owner's property, which, in addition to serving the private interests of the owner, also serves the common interest.[16] The social function of ownership does not affect the substance of the right of ownership, but it does affect the exercise of that right - by limiting it.[17] When public authorities have a legal basis to interfere with private ownership, from a constitutional perspective, they should guarantee compensation at market value. The fact is that the European Court of Human Rights (hereinafter: ECtHR) has developed a different approach in certain cases, taking the position that legitimate objectives of public interest, such as measures of economic reform or those aimed at achieving a greater degree of social justice, may justify the payment of an amount lower than the market value.[18]

The right of ownership is defined by the Act on Ownership and Other Real Rights (hereinafter: the AOORR) as a real right on a particular thing authorizing the holder to use the thing and any benefits arising from it as he sees fit, and to exclude any person from it, unless that is contrary to such other person's rights or limitations imposed by law.[19] The very legal provision outlines the social relationship inherent in the institute of the right of ownership through the exclusion of third parties who might undertake certain legal actions to the detriment of the owner. On the other hand, if the right of ownership is observed from the perspective of a legal subject - a natural or legal person - then, in relation to the object of owner-

---

15 Art. 3. of The Constitution of the Republic of Croatia, Official Gazette, No. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14 (hereinafter: Constitution).

16 Gavella, N., *et. al. op. cit.*, note 6, p. 378.

17 *Ibid.*

18 *James and others v UK* (1986) European Court of Human Rights Application No. 8793/79, § 54.

19 Art. 30 of Act on Ownership and Other Real Rights, Official Gazette, No. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14, 81/15, 94/17.

ship, the subject holds specific entitlements: the right to possession, use, utilization, and disposition of a thing.

2.2. GUARANTEE OF THE RIGHT OF OWNERSHIP AGAINST INTERFERENCE BY PUBLIC AUTHORITIES AND LEGAL PROTECTION

Modern legal systems guarantee that interventions done by public authorities will not violate the right of ownership. This is an emanation of the guarantee of personal freedom of legal subjects for their actions in the property law area.[20] The restriction of the right of ownership is permitted if it is determined in accordance with the constitutional prerequisites for legal restrictions on ownership. These prerequisites are that the restriction of property rights is necessary for the protection of the interests and security of the Republic of Croatia, nature, the human environment, and public health, and that it is based on law. Additionally, it is necessary that each restriction of the right of ownership is proportional to the nature of the need for restriction in each individual case.[21] If a violation of the right of ownership occurs through a decision made in judicial proceedings, protection is sought before the Constitutional Court of the Republic of Croatia (hereinafter: CCRC) by filing a constitutional complaint.[22] Articles 62, paragraphs 1–3 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (hereinafter: CACCRC) stipulate that any person may file a constitutional complaint with the CCRC if they believe that a human right or fundamental freedom guaranteed by the Constitution has been violated by an individual act of a state authority, a body of local or regional self-government, or a legal person with public authority, by which a decision was made regarding their rights or obligations. If another legal remedy is allowed due to the violation of constitutional rights, a constitutional complaint can be filed after that legal remedy has been exhausted. In cases where administrative dispute is allowed, or where a revision is permitted in civil or non-contentious proceedings, the legal remedy is considered exhausted after decisions have been made regarding those legal means. Once all legal remedies before domestic courts have been exhausted, protection of the right of ownership can be pursued before the ECtHR.[23]

---

20 Gavella, N., *et. al. op. cit.*, note 6, p. 354.

21 Art. 50 p. 2 of the Constitution.

22 Art. 62 of The Constitutional Act on the Constitutional Court of the Republic of Croatia, Official Gazette, No. 99/99, 29/02, 49/02.

23 In relation to the application of the ECHR and the initiation of proceedings before the ECtHR, it should be emphasized that such proceedings are initiated by the party themselves. To meet the formal admissibility requirements for applying to the ECtHR, and in accordance with the principle of

Protection from unlawful interference with the right of ownership by acts of the legislative authority is provided through the guarantee of ownership, which is exercised by the CCRC through the review of the conformity of laws with the Constitution and the conformity of other legislation with the Constitution and the law. Thus, the CCRC will annul a law or specific provisions of a law if it determines that they are inconsistent with the Constitution and will invalidate a subordinate legislation that violates fundamental freedoms and rights of man and citizen, among which is the inviolability of ownership.[24]

It can be concluded that public authorities are authorized, under certain assumptions, to intervene in the right of ownership of private legal subjects, to limit those rights, or even to deprive them. In the not-so-distant past, public authorities used confiscation of property as a form of punishment (sometimes confiscating of entire property of certain individuals). However, in the contemporary Croatian legal system**,** confiscation of property and the mechanisms by which public authorities affect citizens' property rights are subject to strict control of the judicial authority.[25]

However, it should be pointed out that the need for the intervention of the CCRC in the procedures before public authorities also arises in the recent cases of violation of the right of ownership. Moreover, new regulations in the field of spatial planning create unpredictable situations and in relation with the issue of interference in the right of ownership on real estate's emerge open questions which have not received satisfactory answers in practice. In this context, the decision of the CCRC U-III-5095/2017 from 3rd December 2019 is important. Namely, administrative bodies in procedures for issuing locations permit[26] for the construction of infrastructure facilities have limited their actions to checking the compliance with spatial planning documents and complaints of landowners that the burden and encroachment in the right of the ownership should be distributed more evenly

subsidiarity, the party must first exhaust all available legal remedies before domestic courts. Only after doing so is, it permitted to turn to the court in Strasbourg for the protection of fundamental human rights and freedoms. In the Croatian legal system, seeking legal protection from the ECtHR is allowed only after the CCRC has rendered a decision in response to a constitutional complaint. If the applicant succeeds in proving a violation of rights under the ECHR, the next legal step is to return to the domestic courts and propose the reopening of the proceedings. Gović Penić, I., *Izabrana praksa europskog suda Europskog suda za ljudska prava i građanski postupci pred hrvatskim sudovima*, Organizator, 2022, p. XXVI.

24 Gavella, N., *et al. op. cit.*, note 6, pp. 359 – 360.

25 Pichler, D., *Građanskopravni aspekti politike kontrole oružja*, Politička misao: časopis za politologiju, Vol. 61 No. 3, 2024, p. 105.

26 A location permit determines whether the planned project complies with the spatial planning documents and other relevant regulations and under what conditions it can be carried out. Mrak-Taritaš, A., *Lokacijska dozvola od prostornog plana do upravnog akta*, Četrnaesti forum poslovanja nekretnina, Zagreb, Hrvatska gospodarska komora, 2009, p. 61.

between the subjects in the procedure were rejected with the explanation that the procedure for issuing location permit does not resolve property relations, but only determines the location conditions of the intervention in the space and that the landowners may present their property - related complaints in the expropriation procedure. This position was taken not only by the competent administrative bodies, but also by the administrative courts that have been involved in these proceedings. [27]

In constitutional complaint, the applicants pointed out that their right of the ownership, which has been guaranteed in the Article 48 p 1 of the Constitution was violated because public authorities and courts, during the procedure of adopting the decision on the determination of a building plot, failed to take into account that the building plot [28] was formed in a way it included land owned by the applicants. Moreover, the applicants stated that their right should be protected by administrative as well as judicial bodies in decision making.[29]

The CCRC has adopted the constitutional complaint and had abolished judgements of the High Administrative Court of the Republic of Croatia, the Administrative Court of Zagreb as well as decisions of the Ministry of Construction and Physical Planning and the decision of the City of Zagreb, City Office for Physical Planning, Construction of the City, Utility Service and Transport, and returned case for a new procedure. In this decision, the CCRC pointed out that all state authorities must respect the Constitution, meaning that they must ensure that the highest values of the legal order of the Republic of Croatia won't be taken into question in protection of the right of ownership, whose content is defined by the

---

[27] In this context, the question arises: What exactly does the term "property relations" cover? Does it refer exclusively to the protection of the right of ownership, or should it also include a broader range of property law institutions, such as those that may arise between co-owners of real estate, between owners and investors, holders of compulsory rights on a land register plot, or holders of other real rights on the property? Another important question is the meaning of the phrase "resolved property relations" - specifically, can property relations be considered clarified if there are ongoing disputes with owners of neighboring properties, disputes concerning the disposal, utilization or possession of the property or disputes concerning limited real rights on real estate? Josipović, T., *Zaštita vlasništva u postupku izdavanja lokacijske i građevinske dozvole*, in: Galić, A., Novosti u upravnom pravu i upravnosudskoj praksi, Organizator, Zagreb, 2022, pp. 89 – 91. See: Žagar, A.; *Zaštita prava vlasništva u postupcima provedbe prostornih planova*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 39, No. 1, 2018, p. 689.

[28] A building plot is essentially a single cadastral parcel whose shape, location and size correspond to the spatial plan, and which has access to a traffic surface. The building plot is defined in accordance with the spatial plan, and if this is not possible, then in accordance with professional standards, but it must be ensured that the building plot is defined in such a way that its shape and size allow regular use of the building. Šikić, M.; Held, M., *Prostorni planovi i tržišna vrijednost nekretnine (pravni interes)*, in: Galić, A., Novosti u upravnom pravu i upravnosudskoj praksi, Organizator, Zagreb, 2022, pp. 73 – 74.

[29] Constitutional Court of the Republic of Croatia, U-III-5095/2017, Judgement of 3rd December 2019.

Constitution. That bodies are obliged to ensure equitable balance of private interests and public interest in sense of opposing interest for the protection of the right of ownership and those established by the public interest which may include the protection of conflicting rights and interests of third parties.[30] The CCRC cited four rules that public authorities and administrative courts must follow when a complaint of breach of the right of ownership is brought in proceedings before them. First rule is that the competent body or court must examine whether it involves property that is included in the scope of the protection of the guarantee of the right of ownership prescribed in the Article 48 p. 1 of the Constitution. Second rule is that the competent body or court must examine whether required interference with the guarantee of the right of ownership is based on the law. Third rule is that the competent body or court must examine whether the required interference aims to achieve a legitimate objective.[31] Fourt rule is that the competent body or court must examine whether the legitimate objective which sought to be achieved is proportionate to the proposed means of interference. These rules are not self-contained and unrelated. Any interference in the right of ownership must ensure equitable balance between the demands to respect and protect the constitutional right of ownership of private persons and the demands that are set by state or the public or general interests of the community.[32]

Therefore, although all real rights that may exist on land according to the general rules of our property law can also exist on the building land, building land is considered a good of interest to the Republic of Croatia and enjoys its special protection. Because of that, there is a constant need of judicial supervision over the influence of public authorities on the exercise of the subjective rights of civil law subjects on that land.[33]

---

30 Constitutional Court of the Republic of Croatia, U-III-5095/2017, § 36, Judgement of 3rd December 2019.

31 According to the ECtHR, in the field of land management and spatial planning, the Contracting States should have a wide margin of appreciation in the area of land management and spatial planning in order to implement a spatial planning policy. The margin of appreciation refers to the "room for manoeuvre" granted by the Convention bodies, which allows national authorities of the Contracting States a certain degree of discretion in their actions. This national discretion, which is reserved to the Contracting States, is not examined or affected by the ECtHR. Omejec, J., *Ustavno i konvencijsko jamstvo prava vlasništva*, *Liber amicorum in honorem* Jadranko Crnić, Zagreb, Novi informator, 2009, p. 144.

32 Constitutional Court of the Republic of Croatia, U-III-5095/2017, § 34, Judgement of 3rd December 2019.

33 It should be noted that building land may be subject to another special legal regime for certain types of things or several such regimes. The application of the norms of these other special regimes may bring some other specific legal restrictions, but also that there are some special types of real rights on building land, e.g. on building land that is an immovable property - a cemetery, there may be specific subjective

3. THE ISSUE OF BOUNDARY REGULATION PROCEDURE

The state of the real estate cadastre and land registers in the Republic of Croatia has been an issue addressed by legal theory and practice since the beginning of the reintegration of the Croatian property law system into the continental European legal tradition.[34] This topic has also generated exceptional disputes in finding adequate solutions for the regulation of our land registry system.

The Act on State Survey and Cadastre Of Real Estates (hereinafter: the ASSCRE) clearly states that the data from the real estate cadastre form the basis of the land registers maintained by the land registry departments of municipal courts.[35] However, a problem has been observed in that the data from the real estate cadastre are very often not a suitable basis in cadastral survey procedures, particularly prior to the preparation of geodetic reports. For this reason, on October 1, 2021, the Croatian Parliament adopted the "Multi-Year Program of Cadastral Surveys of Construction Areas for the Period 2021–2030", which emphasizes the primary goal of establishing cadastral records for the real estate cadastre and the renewal, i.e., establishment of land registers based precisely on data obtained through cadastral surveys for properties located in construction areas. The importance of implementing this program arises from the fact that the surface area of construction zones in the Republic of Croatia amounts to approximately 550,000 hectares, which represents 9.7% of the country's total area, and where more than 80% of all economic activities take place.[36] In the Proposal of the Act on Amendments to the Land Registration Act from 2017, it was emphasized that in the period from 2000 to 2014, only 5% of land register plot and cadastral parcels had been harmonized, a figure that is concerning, especially considering that it refers to a period of a fourteen years.[37]

By regulating boundaries, the borders of individual properties, cadastral parcels are also organized, and thus, the boundaries of ownership of individual proper-

rights to utilize burial places. Gavella N., *et. al.*, *Stvarno pravo – posebna pravna uređenja*, Narodne novine, Zagreb, 2011, p. 49.

34 Gavella, N., *et. al. op. cit.*, note 6, p. 14.

35 Art. 7 of the Act on the State Survey and Cadastre of Real Estates, Official Gazette, No. 112/18, 39/22, 152/24.

36 Multi – Year Program of the Cadastral Surveys of Construction Areas for the Period 2021 - 2030, Official Gazette, No. 109/21.

37 Proposal of the Act on Amendments to the Land Registration Act, 2017, [https://vlada.gov.hr/UserDocsImages//2016/Sjednice/2017/06%20lipanj/44%20sjednica%20Vlade%20Republike%20Hrvatske//44%20-%202.pdf], Accessed 1 March 2025.

ties belonging to legal subjects are determined and marked.[38] The prerequisites for boundary regulation procedure are prescribed in Article 103 of the AOORR.[39] In this regard, it is important to highlight the terminological inconsistency between the cited provision of the AOORR, which uses the term "cadastral sketch", and the ASSCRE, as the fundamental regulation governing cadastral surveys, as well as the subordinate legislation, the Rulebook on the Land Cadastre (hereinafter: RLC), which defines the documents containing data on cadastral parcels but do not recognize the term "cadastral sketch".[40, 41] Instead, the ASSCRE and the RLC refer to the cadastral plan, which is a composite graphical representation of cadastral data, maintained in electronic form, and contains information on the numbers of cadastral parcels, boundaries and other limits of cadastral parcels, addresses of cadastral parcels, and buildings (including their position, shape, and house number).[42] For this reason, for the sake of legal certainty, it is therefore necessary, *de lege ferenda*, to harmonize the terminology of the provision in the AOORR with the special regulation, in the sense that the "boundary is aligned with the cadastral plan".[43]

It should be emphasized that the correctness of the cadastral survey procedure is influenced by many factors. For example, in cadastral survey procedures conducted by the State Geodetic Administration, professional geodetic tasks are carried out by geodetic engineers who use satellite systems that provide a higher level of precision for the data obtained through measurement. Although the use of advanced technologies increases precision, the system still has deviations. Cadastral surveying involves collection and processing of all data necessary to form cadastral

---

38 The designations of cadastral parcels must be consistent with the data from the cadastral records. Until the data in the cadastre and the land registers are harmonized with respect to the holders of registered rights, the relevant data are those recorded in the land registers. This reflects the principle of the protection of trust in the land registers, which are presumed to truthfully and completely reflect the factual and legal status of the land. Pichler, D., *Novo zemljišnoknjižno uređenje*, Pravni fakultet Osijek, Osijek, 2022, p. 41.

39 The court shall restore or correct the property line according to the cadastral sketch, if this is possible and if the parties agree to it. If the court is unable to regulate the boundary in accordance with the cadastral plan, it shall restore or correct the line based on the agreement of the neighboring owners whose shared boundary is in question. If no agreement is reached, the court shall proceed based on the most recent peaceful possession, and if that cannot be determined - according to an equitable assessment. Art. 103. Act on Ownership and Other Real Rights, Official Gazette, No. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14, 81/15, 94/17 (hereinafter: AOOR).

40 Rulebook on the Land Cadastre, Official Gazette, No. 84/07, 148/09 (hereinafter: RLC).

41 RLC was adopted under the previous ASSCRE from 1999. Although it has since then been amended, it is still in force despite the adoption of the new ASSCRE.

42 Art. 60 of the The Act on State Survey and Cadastre Of Real Estates, Official Gazette, No. 112/18, 39/22, 152/24 (hereinafter: ASSCRE), Art. 10 of the RLC, Official Gazette, No. 84/07, 148/09.

43 Gavella, N., *et. al., op. cit.*, note 6, p. 651.

parcels, register buildings, register specific legal regimes on land and the manner of land use, create cadastral records for the real estate cadastre, and enable the renewal, establishment, or amendment of land registers. Since data about real estate must be collected and processed before the preparation of the geodetic report, and these are primarily obtained from the cadastre, certain problems occur in practice when cadastral sketches and cadastral data, due to the passage of time, are not clear enough to reconstruct the state on the ground or when they have been destroyed.

A cadastral survey is carried out with respect to cadastral parcels, which represent the smallest unit for the individual identification of each property.[44] The boundary line is its border, and the boundaries of cadastral parcels themselves are defined by break points, whose positions are determined by coordinates within a prescribed level of accuracy and are marked on the ground with visible permanent markers.[45]

Amendments to the ASSCRE from 2024[46] regulated the survey procedure in such a way that the survey is initiated by a public decision published in the Official Gazette, other public media, and on the website of the State Geodetic Administration. As part of the preparation of the geodetic report, all persons registered in the land cadastre records, those listed as owners in the land registers, land cards, document deposits, as well as all individuals who have a legal interest in the process of marking the boundaries of cadastral parcels, are invited to participate. The law thus aims to include a broader circle of individuals who may be affected by the boundary regulation procedure, allowing them to actively present their proposals and indicate, or physically show the break points of the land. Then a list of cadastral parcels is made for which individuals have shown breakpoints, and which the surveyor must mark and display on the survey sketch. The surveyor then compiles a record of the marking, and it is particularly important that they must state the facts about the land boundaries that are disputed, as legal protection in the form of non-contentious proceedings (boundary regulation procedure) is provided for such cadastral parcels.

3.1. USE OF CADASTRAL DATA IN SURVEY PROCEDURES

In cadastral survey procedures, data are primarily obtained from cadastre. Sometimes, there are cases where such data cannot be used, then alternative methods are

[44] Kontrec, D., *Parcelacija nekretnine i provedba prijavnog lista u zemljišnoj knjizi*, in: Jelčić, O. (eds.); Brežanski, J.; Jelčić, O.; Josipović, T.; Kontrec, D.; Perkušić, A.; Nekretnine kao objekti imovinskih prava - aktualnosti u stjecanju i raspolaganju pravima na nekretninama, Official Gazette, Zagreb, 2005. str. 153 - 173.

[45] Art. 25 of the ASSCRE, Official Gazette, No. 112/18, 39/22, 152/24.

[46] ASSCRE, Official Gazette, No. 152/24.

provided for marking the boundaries between neighboring parcels. Court practice shows that the objective possibility of using cadastral data is not always guaranteed. In a case before the Municipal Court in Zlatar, the reasoning of the decision stated following: The representative of the geodetic expert company, when asked by the court whether it was possible to determine and indicate the boundary on-site according to the cadastral plan - specifically between the respondent's parcels no. 1870 and 1869/1 and the applicant's parcel no. 1881/4, cadastral municipality S. - responded that the current possession status differentiates too much from the cadastral plan and that any attempt to fit the cadastral plan to the actual state on the ground would not provide a realistic depiction of the boundaries… The geodetic expert opinion concluded that it was not possible to regulate the boundary between the parties' properties because the actual state of the properties on the ground significantly deviates from the cadastral plan, meaning that any attempt to align the cadastral plan with the current state would not give an accurate representation of the boundaries.[47] Furthermore, the County Court in Varaždin, Permanent Service in Koprivnica, noted that according to the opinion of the geodetic expert, the position of the boundary markers deviates from the boundaries of the properties as shown in the cadastral plan, and the expert clearly and fully indicated this on the field sketches. From the reasoning of the decision, it follows that in this proceeding, it was not possible to regulate the boundary based on the cadastral records, as they substantially differ from the actual state of the properties, nor was there an agreement between the parties regarding the regulation of boundary…[48] Similarly, the County Court in Pula - Pola, in a case where the expert marked the boundary according to the cadastral records, found that such a boundary did not correspond to the state of possession. Consequently, the expert proceeded to mark the boundary according to the most recent peaceful possession.[49]

Analyzing the decisions rendered by courts in boundary regulation procedures, it can be concluded that the applicability of cadastral data - more precisely, their correspondence with the current state on the ground - is in many cases of limited significance. The reasoning of the decisions shows that courts were unable to decide based on the cadastral sketch, as the sketch does not provide a realistic representation of the boundary position in physical space. Due to the inconsistency between the actual state and state in cadastre, courts must not rely solely on those data, nor attempt to regulate boundaries exclusively on that basis. For this reason, an additional requirement for the boundary regulation procedure based on the sketch

47 Municipal Court in Zlatar, R1-22/2019-42, § 17, 21, Judgement of 25th January 2022.

48 County Court in Varaždinu, Permanent Service in Koprivnica, Gž-931/2021-3, § 7, 10, Judgement of 27th September 2022.

49 County Court in Pula - Pola, Gž-117/2023-2, § 5, Judgement of 7th February 2023.

is that the parties involved must express their consent to it.[50] In this context, the cumulative fulfillment of the following conditions is required for the implementation of the boundary regulation procedure: the possibility of arrangement with the sketch and the consent of the parties. The inability to align the boundary with the cadastral plan may arise due to inaccuracies that can occur due to the small scale of the plan, or due to the contraction and expansion of the material on which the plans were drawn (known as paper shrinkage), as well as the configuration of the land itself so the boundary of the parcel according to the cadastral plan is not determinable or cannot be faithfully transferred from the sketch to the property.[51] For this reason, some authors deny this method of boundary regulation procedure the status of a definitive means of regulation and consider it as one of the pieces of evidence in the boundary regulation procedure.[52] That is why the AOORR itself provides for the subsidiary application of boundary regulation procedure based on the agreement of neighboring owners, and if no agreement is reached, then based on the most recent peaceful possession. If the state of the most recent peaceful possession cannot be established, the court decides according to an equitable assessment.[53]

3.2. JUDICIAL PROTECTION OF THE RIGHT OF OWNERSHIP AFTER BOUNDARY MARKING

The authors previously addressed the non-contentious procedure for the correction and marking of boundary as provided by the AOORR, in which the court does not decide about the right of ownership. When the court issues a decision regulating the boundary, the boundary is simultaneously marked on-site with boundary markers, and from that moment onward, a rebuttable presumption arises that ownership exists up to the restored or corrected boundary.[54]

---

50 Case law has accepted the position that, when the court restores or corrects the boundary according to the cadastral sketch, the consent of the parties is deemed to exist even in situations where the court regulated the boundary by having a court expert, in the presence of the parties, place boundary markers - identified by metal pipes - according to the state recorded in the cadastral records, and where the parties had no objections to such regulation on-site. Furthermore, party consent is also considered to exist when the expert's report and opinion have been delivered to the parties for comment, and the applicant explicitly stated that they had no objections and fully accepted the expert's report and opinion, while the opposing party failed to respond. Municipal Court in Osijek, Permanent Service in Valpovo, 66 R1-129/2023-11, Judgement of 21st of February 2024.

51 Gavella, N., *et. al., op. cit.*, note 6, p. 651.

52 Šago, D., *Uređenje međa*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 51, No. 3, 2014, p. 611.

53 Art. 103 of AOORR, Official Gazette, No. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14, 81/15, 94/17.

54 Gavella, N., *et. al., op. cit.*, note 6, p. 653.

Proof of the right of ownership in civil proceedings, in a manner contrary to the decision reached in the non-contentious boundary regulation procedure, is allowed through the possibility of proving a stronger right (in which case the delivery of possession of the encroached portion of the land is requested). Persons who participated in the boundary regulation procedure may initiate a civil lawsuit only within six months from the date the decision in the procedure became final. Ownership of the disputed area, after the expiration of the deadline, may be proven only by someone who was the owner of the land before the boundary was marked and who did not participate in the procedure, or by someone who acquired ownership independently of a person who did participate in that procedure.[55]

Investors [56] sometimes, during construction, fail to respect the established boundaries of cadastral parcels and unlawfully encroach upon the private property of other individuals.[57] Owners whose rights have been violated by the crossing of a boundary or by encroachment on a portion of neighboring land adjacent to the boundary have the right to request the restoration of the previous state. However, the question arises as to how realistic the restoration of the previous state truly is, especially if a building is already in the final stages of construction? Until the previous state is restored, the landowner is entitled to compensation for the use of the land, in the amount equivalent to the rent for the encroached portion. This right exists as long as part of the building remains on the landowner's property and even after that, the landowner has the right to claim compensation for damages. However, by way of exception, a builder who was acting in good faith during construction (that is, who did not know and could not have reasonably known that construction was exceeding the boundary and encroaching on neighboring land) has, in cases where the landowner has requested the restoration of the previous

55 *Ibid.*

56 The authors refer equally to legal and natural persons. The issue becomes particularly contentious when construction is carried out in violation of established urban and spatial plans - especially when such actions are undertaken by the state.

57 An organized land cadastre and land register is both a prerequisite and a driving force for economic progress and societal development. The 1980s, including in the territory of the Republic of Croatia, were marked by the dominance of so-called social ownership. This period was also characterized by the construction of large residential blocks, the allocation of so-called solidarity apartments, and a boom in the housing market. In the templates of the then-used apartment sale contracts, the designated fields for cadastral parcel numbers and cadastral municipalities were often left blank. The negligence of investors who built apartments for the market but failed to register buildings in the land cadastre and land register led to a significant discrepancy between the factual situation on the ground and the official records. This disordered state was inherited by the social changes that began in the early 1990s. These societal developments, primarily the return to a market economy, required establishment of new relationships and the resolution of the inconsistencies between cadastral, land register, and factual property status. Ružička, B., *Zemljišna knjiga. Povezivanje zemljišne knjige i knjige položenih ugovora i upis vlasništva posebnog dijela nekretnine.*, Novi informator, 2010 pp. 9 – 93.

state but such restoration is not possible without significant damage to the rest of the building or disproportionately high costs, a *facultas alternativa*: the right to, instead of restoring the previous state, purchase at market value the entire portion of land encroached upon by part of the building.[58] The landowner may also request the purchase of the land at market value from the builder. It is widely held that, despite the particular nature of boundary encroachment through construction, the builder should not be granted legal protection if it is evident that they knew, or according to the circumstances could and should have known, that they were crossing the boundary, especially if the owner of the neighboring land objected to this in a timely manner.[59] Exceptionally, if the encroachment involves a truly minor and insignificant portion of land, or if only the airspace or underground space of the neighboring land is affected, and the circumstances indicate that the particular owner has no specific and legitimate interest in requesting removal, it should be considered an abuse of the right of ownership if the restoration of the previous state is sought by demanding the removal of the part of the building that extends onto another's property.[60]

The authors disagree with the expressed position, as the encroachment upon airspace without the consent of the neighboring property owner, essentially constitutes unlawful interference with the right of ownership. It cannot be considered insignificant, regardless of whether it concerns airspace, land, or any other part of the property.

The issue of encroachment into a property's airspace was also brought before the Supreme Court of the Republic of Croatia (hereinafter: SCRC). In a recent decision, the SCRC allowed a revision concerning the following legal question: *"Does the placement of an object by a third party - in this specific case, an air conditioning unit - in the airspace of a property owner constitute interference with that owner's right of ownership over the property?"* The SCRC granted the revision because the interpretation of the second-instance court, which had dismissed the claim, was contrary to the SCRC position, whose role is to ensure the consistent application of the law and equality of all participants in proceedings. In the case at hand, the defendant, on August 31, 2010, installed an air conditioning unit on the rear side of the eastern part of the building located on cadastral parcel no. 2359 (owned by the defendant), which extended into the airspace above parcel no. 2359 (owned by the plaintiff). The answer to the posed question is that the placement of an

58 Gavella, N., *et. al., op. cit*., note 6, pp. 542 – 543.

59 Prančić, V., *Prekoračenje međe građenjem*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 59, No. 4, 2009, pp. 763 – 764.

60 *Ibid.*, p. 764.

object by a third party, in this specific case, an air conditioning unit in the airspace of a property owner *does* constitute interference with that owner's right of ownership. This is because it was indisputably established that the defendant encroached upon the airspace above the plaintiff's property by installing the air conditioning unit and failed to prove that this was done with the consent or in agreement with plaintiff. Furthermore, this involves not only the physical volume of airspace objectively occupied by the external unit but also issues such as the discharge of condensate, which naturally occurs from such device, which objectively represents an encroachment upon another's possession and ownership sphere and thereby constitutes a limitation of the plaintiff's ownership rights.[61]

4. CONCLUSION

A thoroughly regulated procedure for cadastral surveying, and the real estate cadastre in general, is the most important prerequisite for ensuring the highest level of legal certainty regarding the institute of the right of ownership. Cadastral surveys not only provide a foundation that directly affects ownership but also influence the completeness of the land registers and the realization of their role in the legal transactions of real estate. Cadastral data are the foundation of the functioning of the land registry and the realization of the principle of trust in the land registers. This was precisely the fundamental goal pursued by the adoption of the new ASSCRE, with the aim of establishing legal certainty through the advanced use of technology in cadastral survey procedures, and at the same time paving the way for the renewal, amendments, and transformation of land registries across the Republic of Croatia. The new legal framework introduced by the ASSCRE will open a wide range of questions related to the procedure and technique of geodetic surveying, particularly those already emphasized in this paper - first and foremost, the transfer of technical methods used in cadastral parcel measurement and geodetic activities into legal institutes and legal standards. In addition to improving the procedure through legislative amendments, the participation of a broader group of individuals, especially owners of neighboring properties are now mandatory in the cadastral survey and boundary regulation or renewal procedure. A legal framework in which all stakeholders in the procedure can actively protect their private legal interests increases the legitimacy of the process and minimizes potential violations that may arise during the procedure. Individuals with a legal interest can present objections, proposals, and statements on-site, and in doing so, respond in a timely manner during the boundary regulation and cadastre survey

[61] Supreme Court of the Republic of Croatia, Rev-1092/2020-2, § 12, 13 Judgement of 4th October 2022.

procedure. The process of boundary regulation procedure should not be viewed solely through the lens of technical measurement, but rather as a procedure with a highly important legal dimension regulated by statutory provisions. One of the key issues highlighted by this paper is the terminological inconsistency between the AOORR and the ASSCRE, as well as the relevant rulebook. In this regard, the authors believe that *de lege ferenda*, a terminological harmonization of the AOORR should be carried out by replacing the term "cadastral sketch" with "cadastral plan." This alignment is not merely linguistic; it contributes to legal certainty. The regulation of the state survey procedure, along with other aspects of this reform of real law regulation in Croatia, will ultimately be tested in practice but, legal theory is here to offer plausible solutions. This refers primarily on questions regarding balancing public law and general interests, on the one hand, with private legal interests of ownership rights holders, on the other.

REFERENCES

BOOKS AND ARTICLES

1. Elijaš, D.; Marković, S.; Trgovac, S., *Povreda konvencijskog prava na mirno uživanje vlasništva*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 36, No. 2, 2015, pp. 239 – 258.
2. Gavella, N.; Josipović, T.; Gliha, I.; Belaj, V.; Stipković, Z., *Stvarno pravo*, Narodne novine, Zagreb, 2007.
3. Gavella, N.; Ernst H.; Belaj V.; Jug J.; Nikšić S.; Gliha I.; Josipović T.; Radionov N.; Marin J.; Baretić M., *Stvarno pravo – posebna pravna uređenja*, Narodne novine, Zagreb, 2011.
4. Gavella N.; Alinčić M.; Klarić P.; Sajko K.; Tumbri T.; Stipković Z.; Josipović T.; Gliha I.; Matanovac R.; Ernst H., *Teorijske osnove građanskog prava – Građansko pravo i pripadnost hrvatskog pravnog poretka kontinentalnoeuropskom pravnom krugu*, Zagreb, Pravni fakultet, 2005.
5. Gović Penić, I., *Izabrana praksa europskog suda Europskog suda za ljudska prava i građanski postupci pred hrvatskim sudovima*, Organizator, 2022.
6. Jelušić, M; Šarin D., *Ustavnopravni aspekti određivanja naknade za potpuno izvlaštenje*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 36, No. 2, 2015, p. 813 – 844.
7. Josipović, T., *Zaštita vlasništva u postupku izdavanja lokacijske i građevinske dozvole*, in: Galić, A., Novosti u upravnom pravu i upravnosudskoj praksi, Organizator, Zagreb, 2022, p. 87 – 113.
8. Jurin, Bakotić, V., *Građanskopravna zaštita prava vlasništava i njihovo ostvarivanje pred sudom*, Elektronički zbornik radova Veleučilišta u Šibeniku, Vol. 8., No. 1-2, 2014, p. 143 – 154.
9. Klarić, P.; Vedriš, M., *Građansko pravo*, Narodne novine, Zagreb, 2006.
10. Kontrec, D., *Parcelacija nekretnine i provedba prijavnog lista u zemljišnoj knjizi*, in: Jelčić, O., Brežanski, J., Jelčić, O., Josipović, T., Kontrec, D., Perkušić, A. (eds.), Nekretnine kao objekti imovinskih prava - aktualnosti u stjecanju i raspolaganju pravima na nekretninama, Official Gazette, Zagreb, 2005, pp. 153 – 173.

11. Mrak-Taritaš, A., Lokacijska dozvola od prostornog plana do upravnog akta, Četrnaesti forum poslovanja nekretnina, Zagreb, Hrvatska gospodarska komora, 2009.
12. Omejec, J., Ustavno i konvencijsko jamstvo prava vlasništva, *Liber amicorum in honorem* Jadranko Crnić, Zagreb, Novi informator, 2009. pp. 139 – 187.
13. Pichler, D., *Građanskopravni aspekti politike kontrole oružja*, Politička misao : časopis za politologiju, Vol. 61 No. 3, 2024, pp. 90 – 116.
14. Pichler, D., *Novo zemljišnoknjižno uređenje*, Pravni fakultet Osijek, Osijek, 2022.
15. Prančić, V., *Prekoračenje međe građenjem*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 59, No. 4, 2009, pp. 739 – 783.
16. Rajčić, D.; Nikšić, S., Uvod u građevinsko pravo, Hrvatska sveučilišna naklada, Zagora - Zagorje, 2008.
17. Ružička, B., *Zemljišna knjiga. Povezivanje zemljišne knjige i knjige položenih ugovora i upis vlasništva posebnog dijela nekretnine*. Novi informator, 2010. pp. 9 – 93.
18. Šago, D., *Uređenje međa*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 51, No. 3, 2014 pp. 601 – 623.
19. Šikić, M.; Held, M., Prostorni planovi i tržišna vrijednost nekretnine (pravni interes), in: Galić, A., Novosti u upravnom pravu i upravnosudskoj praksi, Organizator, Zagreb, 2022, pp. 69 – 86.
20. Žagar, A., Zaštita prava vlasništva u postupcima provedbe prostornih planova, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 39, br. 1, 2018, pp. 687 – 708.

ECHR

1. *Ališić and others v Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* (2014) European Court of Human Rights, Application No. 60642/08
2. *Gorraiz Lizarraga and others V. Spain* (2004) European Court of Human Rights, Application No. 62543/00
3. *James and others v UK* (1986) European Court of Human Rights, Application No.8793/79
4. *Schirmer v Poland*, (2004) European Court of Human Rights, Application No. 68880/01
5. The (European) Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette, International Treaties, No. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10, 3/17

LIST OF NATIONAL REGULATIONS, ACTS AND COURT DECISIONS

1. Act on Ownership and Other Real Rights, Official Gazette, No. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14, 81/15, 94/17
2. Act on the State Survey and Cadastre of Real Estates, Official Gazette, No. 112/18, 39/22, 152/24

3. Constitutional Court of the Republic of Croatia, U-III-5095/2017, Judgement of 3rd December 2019
4. County Court in Pula - Pola, Gž-117/2023-2, Judgement of 7th February 2023
5. County Court in Varaždinu, Permanent Service in Koprivnica, Gž-931/2021-3, Judgement of 27th September 2022
6. Decision on the Publication of the Universal Declaration of Human Rights, Official Gazette, No. 12/09
7. Multi - Year Program of the Cadastral Sruveys of Construction Areas for the Period 2021 - 2030, Official Gazette, No. 109/21
8. Municipal Court in Osijek, Permanent Service in Valpovo, 66 R1-129/2023-11, Judgement of 21st February 2024
9. Municipal Court in Zlatar, R1-22/2019-42, Judgement of 25th January 2022
10. Rulebook on the Land Cadastre, Official Gazette, No. 84/07, 148/09
11. Supreme Court of the Republic of Croatia, Rev-1092/2020-2, Judgement of 4th October 2022
12. The Constitution of the Republic of Croatia, Official Gazette, No. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14
13. The Constitutional Act on the Constitutional Court of the Republic of Croatia, Official Gazette, No. 99/99, 29/02, 49/02

WEBSITE REFERENCES

1. Proposal of the Act on Amendments to the Land Registration Act, 2017, available at: [https://vlada.gov.hr/UserDocsImages//2016/Sjednice/2017/06%20lipanj/44%20sjednica%20Vlade%20Republike%20Hrvatske//44%20-%202.pdf], Accessed 1 March 2025.

STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION – MEASURES OF PROTECTION AGAINST MANIFESTLY UNGROUNDED CLAIMS OR ABUSIVE LITIGATION. A POLISH PERSPECTIVE

Tadeusz Zembrzuski, PhD, Full Professor
University of Warsaw, Faculty of Law and Administration,
Krakowskie Przedmieście 26/28 00-927 Warszawa, Poland
zembrzuski@wpia.uw.edu.pl

ABSTRACT

Lawyers have been observing a growing number of SLAPPs (Strategic Lawsuits Against Public Participation) – lawsuits designed to trigger a freezing effect and intimidate individuals speaking out on socially essential topics – filed in Poland and multiple European countries. Individual states have been coming up against this negatively perceived phenomenon of corporations (businesses) with a strong market position bringing personal interest lawsuits against journalists, reporters, bloggers and/or activists. Cross-border cases are a particular challenge for defendant entities. Judicial proceedings are prolonged and costs aggregated, not to mention the forum shopping (beneficial jurisdiction choosing) practice. In all actuality, civil lawsuits (and, occasionally, indictments) are intended to prevent inconvenient witness accounts regarding assorted irregularities (including corruption) from reaching the public opinion.

Attempts at resolving the issue have been made under Directive (EU) 2024/1069 of the European Parliament and of the Council of April 11th 2024. The law obliges Member States to provide defendants with a catalogue of safeguards: security, motions to dismiss manifestly unfounded claims, reimbursement of the costs of proceedings (charged to the plaintiff), and sanctions against plaintiffs initiating SLAPPs. While the Directive specifies minimum requirements, a standard higher than that guaranteed by the Directive can be applied.

Poland is a European Union member state with a disquietingly high SLAPP count. It has been noted that SLAPPs are filed by business entities – a typically West European phenomenon – as well as by state administration authorities, with the use of the prosecution service and/or police force. Both civil and criminal law institutions are reached for.

While the deadline for the implementation of the Directive remains distant (May 7th 2026), rigorous efforts have been made already to address the problem. The purpose of the paper is to discuss aforesaid efforts in a measure hopefully assisting the international debate designed to develop optimum solutions for European Union member states.

Keywords: *abuse of the letter of law, Directive (EU) 2024/1069, intimidation, lawsuits, public opinion, SLAPP*

1. INTRODUCTION

A fundamental right and freedom of the individual and a significant rule of law implement, the right to fair trial is a universal principle. It is referred to as the right to justice, the right to legal protection, the right to judicial remedy or – last but not least – the right to be tried by a jury of one's peers, or right to protection before a court of law.[1] Aforementioned assumptions and values are realised in individual legal orders, allowing all citizens to assert any violated freedoms or rights. Fair hearing before an independent, impartial and autonomous court shall be guaranteed – as swiftly as reasonably possible.[2]

Procedural law ought to be moral, fair and reflective of a specific axiological system.[3] Judicial trial presupposes respect for due process (*honeste procedere*), i.e. honest and loyal behaviour both towards the opponent in court as well as the court itself.[4] This concept dictates that parties to the process primarily assume a positive obligation to act in accordance with values as duly indicated, behaviour in breach of said obligation to be investigated and analysed as a secondary measure only, with a view to prevent, restrict, and, if necessary, penalise.[5]

Both parties to the judicial process – the one asserting its right or legal relationship and the entity rejecting the demand conveyed – may make specific use of their procedural powers, ideally designed to achieve the goal as expressed by the letter of law. Each and every entity determines its actions through the desire to pursue individual interests, adopting a particular procedural strategy. That said, it is obvious that parties do occasionally take actions contrary to the procedural purpose of their powers, processual economics and/or good morals, in an attempt to achieve effects and goals not reflected in substantive law.

Lawyers have been observing a growing number of SLAPPs (Strategic Lawsuits Against Public Participation) – lawsuits designed to trigger a freezing effect and intimidate individuals and/or other entities speaking out on socially essential topics – filed in Poland and multiple European countries.[6] Measures taken before courts

---

1 Zembrzuski, T., *Skarga kasacyjna. Dostępność w postępowaniu cywilnym* (*Cassation Complaint Availability in Civil Proceedings*), Warsaw 2011, p. 72 *et seq.*

2 Pietrzkowski, H., *Prawo do sądu* (*Right to Fair Trial*), "Przegląd Sądowy" Nos. 11-12, 1999, p. 3 *et seq*.

3 Allerhand, M., *Podstęp w procesie* (*Subterfuge in Judicial Proceedings*), Lviv 1907, p. 3 *et seq.*

4 Zembrzuski, T., *Nadużycie prawa procesowego de lege lata* (*Abuse of Procedural Law de lege lata*), in: Kosonoga, J. (ed.) Przeciwdziałanie nadużyciu uprawnień procesowych w postępowaniach sądowych (Preventing Abuse of Procedural Rights in Judicial Proceedings), Warsaw 2022, p. 150 *et seq.*

5 Weitz, K., *Nadużycie "prawa" procesowego cywilnego* (*Abuuse of Procedural "Rights" in Civil Law Proceedings*), "Polski Proces Cywilny", No. 1, 2020, p.11.

6 The verb *"to slap"* conveys the purpose of the institution rather well.

of law are objectively unhelpful and as such unreliable, while acquiring mere appearance of lawful action. The only correct response thereto ought to extend beyond negative assessment into profound reflection designed to restrict and prevent them. This is a challenge individual states as well as organisations and institutions international in nature are coming up against, one which can and should be addressed by European Union law.

2. DESCRIPTION OF SLAPP SUITS

SLAPPs are a global phenomenon, first observed and diagnosed in the common law system. In the 1980s, the term was used in the United States to describe lawsuits brought against individuals who had used their right to petition arising from the First Amendment to the United States Constitution. These lawsuits were originally used to suppress statements political in nature[7], intentions including freedom of speech restrictions and silencing critics of authorities.[8] Thousands of citizens *"have been sued into silence*"[9] on such, later also broader grounds.

SLAPP (*Strategic Lawsuit Against Public Participation*) features include an imbalance of powers, plaintiffs organisationally, financially and/or politically stronger than defendants. Such lawsuits are most frequently brought by influential entities attempting to subdue public debate, remove certain content from the public domain, preclude the publication of such content, or – at the very least – divert attention therefrom. Plaintiff actions are intentional and deliberate, designed to restrict (whether directly or indirectly) statements made by other individuals, take non-legislative measures to chastise active opponents, or even intimidate entities potentially interested in participating in public interest-related cases.[10] The act of filing a lawsuit is in itself intended to discourage the exercising of freedom of expression, if not outright pushing for so-called self-censorship. Individual states have been coming up against this negatively perceived phenomenon of corporations (businesses), lobbying groups, politicians and/or state authorities raising doubtful and objectively unjustified claims against a diverse community of entities

---

7 Canan, P.; Pring, G.W., *Studying Strategic Lawsuits against Public Participation: Mixing Quantitative and Qualitative Approaches*, Law & Society Review, No. 2, 1988, p. 385 *et seq*.

8 Bodnar, A.; Gliszczyńska-Grabias A., *Strategic Lawsuits against Public Participation (SLAPPs), the Governance of Historical Memory in the Rule of Law Crisis, and the EU Anti-SLAPP Directive*, European Constitutional Law Review, No. 4, 2023, p. 642 *et seq*.

9 Pring, G.W., *SLAPPs: Strategic Lawsuits Against Public Participation*, Pace Environmental Law Review, No. 7, 1989, p. 506 *et seq*.

10 Tomczyk, E., *Regulacje prawne dotyczące strategicznego powództwa zmierzającego do stłumienia debaty publicznej (SLAPP) jako nowy instrument ochrony prawnej w postępowaniu cywilnym* (*Legal Regulations Regarding Strategic Lawsuits against Public Participation (SLAPPs) as a New Instrument of Legal Protection in Civil Law Proceedings*), Europejski Przegląd Sądowy, No. 12, 2025, p. 12 *et seq*.

– chiefly journalists (civic journalists included), reporters, bloggers, whistleblowers, social and other activists, or even scientists.[11] Some actions taken in judicial proceedings are incompatible with their intended purpose, and may thus be classified as violation of procedural law.

Civil lawsuits – and the occasional indictment – are actually brought with intent to prevent inconvenient witnesses' accounts regarding various irregularities (such as abuse of power, or corruption, for example) from reaching the public. Demands are most frequently filed on grounds of personal rights protection; the institution of offence under criminal law is resorted to as well. Alleged harm ostensibly caused by action taken by harassed and intimidated citizens is the factor pointed to most often.[12] Compensatory claims are sometimes exorbitant, beyond reason or market conditions, the European record sum having reached EUR 17.6 million. The average and median are currently over EUR 360,000 and EUR 15,100, respectively – there is no shortage of lawsuits for a symbolic one euro, costs of legal proceedings in themselves potentially sufficient to intimidate and silence an opponent.[13]

Claim validity assessment is primarily based on the subject matter of the lawsuit, i.e. the claim and facts as presented. Plaintiff SLAPP claims are superficial in nature, the circumstances invoked occasionally doubtful or difficult to verify *a priori*. It usually turns out after the fact that defendant statements – i.e. grounds for initiating proceedings recognised as grounds for initiating proceedings ending in judicial rulings – had been well within the scope of permissible criticism, and in no way defamatory or insulting.[14]

SLAPPs are best described as a type of particular penalty, psychological and financial in nature.[15] Manipulation of justice is what we are dealing with in this case. As pointed out before, such claims are not brought with intent to secure actual legal protection – they are designed to achieve non-legislative goals. Respondents are dragged into money, time, and energy-consuming court battles without legal ba-

---

11 Clark, M., Grech., A., *Journalists Under Pressure: Unwarranted interference, fear and self-censorship in Europe*, Brussels 2017, p. 20 *et seq*.

12 Canan, P.; Pring, G.W., *Strategic Lawsuits Against Public Participation*, Social Problems, No. 5, 1988, p. 506 *et seq*.

13 Cydzik, S., *Polska liderem Europy w SLAPP*, 2023, [https://legalis.pl/polska-liderem-europy-w-slapp/], Accessed 1 March 2025.

14 Sobczak, J., *Prawo do krytyki a kontratyp zniesławienia* (*Right to Criticise v. Lawful Excuse for Slander*), Studia Medioznawcze, No. 2, 2013, p. 45 *et seq*.

15 Farrington, F.; Zabrocka, M., *Punishment by Process: The Development of Anti-SLAPP Legislation in the European Union*, Era Forum, No. 4, 2023, p. 521 *et seq*.

sis[16], plaintiffs in all actuality focused on exposing defendants to the risk of covering high costs of legal proceedings. The perspective of covering said costs is in itself intended as a defendant pressuring mechanism. Judicial proceedings are intentionally prolonged, the expenses aggregated, not to mention the forum shopping (beneficial jurisdiction choosing) practice. Plaintiffs are frequently successful in reaching their intended objective. That said, the vantage point of final outcomes and comprehensive assessment of the phenomenon does prove that lawsuits are occasionally dismissed, settlements reached, actions withdrawn at later stages of judicial proceedings. All in all, SLAPPs merit vehement criticism as a pathological measure disrupting the proper functioning of pluralist societies in democratic states.[17]

3. THREATS TO AND PROTECTION OF ENTITIES ENGAGING IN THE PUBLIC DEBATE IN THE EUROPEAN UNION

Protecting freedom of expression and unfettered participation in public debate in contemporary Europe is of fundamental and unquestioned significance. Pursuant to Article 11 of the Charter of Fundamental Rights of the European Union[18], everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers (clause 1); the freedom and pluralism of the media shall be respected (clause 2). The Convention for the Protection of Human Rights[19] can be referenced as well as an act guaranteeing everyone the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers (Article 10 (1)).

The *Coalition Against SLAPPs in Europe – CASE*[20] focuses on monitoring negative phenomena and European trends colliding with aforesaid values and assumptions. Reports published from 2010 onwards have been revealing a regular and disquieting increase in the number of SLAPPs.[21] The *Daphne Caruana Galizia* case re-

---

16 Beder, S., *SLAPPs – Strategic Lawsuits Against Public Participation: Coming to a Controversy Near You*, Current Affairs Bulletin, No. 3, 1995, p. 25 *et seq*.

17 Nowicka, Z., *Instrumenty ochrony przeciwko SLAPP-om w polskim postępowaniu cywilnym (analiza zagadnienia na tle projektowanych regulacji UE)* (*Instruments of Protection against SLAPPs in Polish Civil Law Proceedings (Issue Analysis against the Backdrop of Planned EU Regulations)*), Państwo i Prawo, No. 1, 2024, p. 76 *et seq*.

18 Charter of Fundamental Rights of the European Union of December [2000] OJ C 364/1.

19 Convention for the Protection of Human Rights and Fundamental Freedoms [1950] ETS No. 005

20 *The Coalition Against Slapps in Europe (CASE)*, [https://www.the-case.eu/], Accessed 1 March 2025.

21 Five hundred and seventy and as many as 820 were identified in 2022 and 2023, for example.

mains most notorious as regards the use of SLAPPs in the European Union – the Maltese journalist had been repetitively raising the issue of corruption in the Maltese government.[22] Prior to her death close to home following the explosion of a bomb planted in her car, she had had as many as 47 SLAPP brought against her.[23]

The European Commission has been raising the alarm several years ago already, pointing to the increasing number of alerts related to attacks, aggression and harassment against journalists and other media professionals in EU Member States.[24] The European Parliament has also accentuated the need for strengthening freedom and pluralism of the media in the European Union, given the undue use of actions under civil and criminal law to silence journalists and other entities engaging in public debate.[25] It has been pointed out that physical threats and symptoms of intimidation had occasionally morphed into unlawful acts of crime and/or terrorism.[26] The rise in SLAPP volumes has been decried as well.

The manner and frequency of reaching for SLAPPs varies in individual European states. In Poland, notably, SLAPPs are filed by business entities – a typically West European phenomenon – as well as by state authorities, with prosecution service and/or police force interventions. Civil and criminal law institutions are put to use. Personal property protection lawsuits prevail, as do cases of private prosecution for crimes of offence or slander.[27] Insult to religious belief (blasphemy) provisions, and even Hunting Law regulations have been used (against game hunt-protesting activists).

The phenomenon has become particularly blatant in post-2015 Poland, tying closely in with the contemporaneous rule of law crisis swell.[28] Poland remains in

---

22 Issues she brought to light would result in pre-term elections in Malta in 2017.

23 Milewska, P., *SLAPPs, Daphne's Law, and the Future of Journalism*, 2023, [https://verfassungsblog.de/slapps-daphnes-law-and-the-future-of-journalism/], Accessed 1 March 2025.

24 See third motive of (EU) Commission Recommendation 2021.1534 of September 16th 2021 on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union [2021] C/2021/6650, OJ L 331/8.

25 European Parliament resolution of November 11th 2021 on strengthening democracy and media freedom and pluralism in the EU: the undue use of actions under civil and criminal law to silence journalists, NGOs and civil society [2021] 2021/2036(INI), OJ C 205/2.

26 Assassination of investigative journalist Daphne Caruana Galizia apart, the most notorious cases include the terrorist attack against the *Charlie Hebdo* weekly in France in 2015 (12 people were killed), and the assassination of journalist Ján Kuciak in Slovakia in 2018.

27 Poland is unique among European Union Member States in that seeking criminal prosecution for defamation is common. See Nowicka, *op. cit.*, note 18, p. 77.

28 Zembrzuski, T., *Remedying the Judiciary System in Poland – Restoring the Rule of Law*, in: Duić, D., Petrašević, T. (eds.), EU at the Crossroads – Ways to Preserve Democracy and Rule of Law, Vol. 8, 2024, p. 666 *et seq*.

the unfortunate lead in the infamous European Union member state ranking of SLAPP threats (*"SLAPP state of the year"*)[29] – Malta, France and Croatia with their considerable volume of SLAPPs are noteworthy listings as well.

4. STANDARDS OF PROTECTION LAID OUT IN DIRECTIVE 2024/1069

European Union legislation has been attempting to address contemporary threats to freedom of expression arising from the proliferation of SLAPP actions. Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings (*'Strategic lawsuits against public participation'*)[30] came into force as of May 6th 2024.[31] The act of introducing the Directive is an expression of the European Union's attempts to safeguard fundamental rights, such as freedom of expression, media pluralism, or the citizens' rights to participate in public life. The intent was to provide genuine protection to individuals engaging in public debate against claims brought by entities using the legal system to intimidate, silence criticism, and suppress freedom of speech.

The Directive applies to cross-border judicial proceedings considered abusive in that they are not brought to genuinely assert or exercise a right, but have as their main purpose the prevention, restriction or penalisation of public participation, frequently exploiting an imbalance of power between the parties, and pursuing objectively unfounded claims (Article 4(3) of the Directive). The purpose of the Directive is thus to eliminate obstacles to the correct course of civil proceedings. Entities engaging in public debate with a focus on issues coinciding with public interest deserve increased protection. The population of entities recognised as meriting protection includes journalists, publishing houses, media organisations, whistleblowers and human rights defenders, as well as civil society organisations, NGOs, trade unions and artists, as well as scientists and university teachers.

While Directive provisions in principle have no direct effect on horizontal relationships, the Directive does oblige European Union Member States to provide defendants with a catalogue of appropriate protection measures. Pursuant to Ar-

---

29 Cydzik, S., *Polska liderem Europy w SLAPP*, 2023, [https://legalis.pl/polska-liderem-europy-w-slapp/], Accessed 1 March 2025.

30 OJ L 2024/1069.

31 Proposal for a Directive of the European parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation") [2022] COM/2022/177 final, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52022PC0177], Accessed 1 March 2025.

ticle 6(1) of the Directive, these include: 1) the option of filing a motion for the claimant providing security for estimated costs of the proceedings (which may include the costs of legal representation incurred by the defendant), and (if provided for in national law), damages; 2) early dismissal of manifestly unfounded claims; 3) application of other measures, such as requiring the plaintiff (claimant) to cover all costs of legal proceedings. Article 7(1) of the Directive requires Member States to ensure that aforesaid measures be treated in an accelerated manner (in accordance with national law, taking into account the circumstances of the case, the right to an effective remedy and the right to a fair trial); furthermore, a decision granting early dismissal is subject to an appeal (Article 13 of the Directive).

The Directive sets minimum requirements – Member States are free to introduce standards above and beyond those safeguarded therein. This ought to encourage European Union Member States to undertake detailed analyses of their legal status, and engage in comprehensive reviews of domestic legislation with intent to ensure an optimum level of protection to entities engaging in public debate – in cross-border as well as non-cross-border cases.

The implementation deadline for Directive 2024/1069 remains rather distant, its provisions to be transposed into domestic law by May 7th 2026. Individual EU Member States have already been making intense efforts to develop optimum legal solutions, the group including Poland – as aforementioned, an EU Member State with alarmingly high SLAPP volumes.

5. SLAPP – THE POLISH PERSPECTIVE

Poland has taken dynamic action to implement Directive 2024/1069. Rather than expand processual law – the Code of Civil Procedure[32] - to include new solutions, a separate piece of legislation has been proposed: a draft law regarding the protection of persons engaging in public participation against manifestly unfounded claims and/or abusive judicial proceedings.[33] The law is to adopt a broad definition of the term(s) *"public participation / public debate"*, to conform with and reflect the definition ensconced in Article 4 (1) of Directive 2024/1069[34], while vis-

[32] Code of Civil Procedure Law of November 17th 1964, uniform text: Journal of Laws 2024, item 1568, as amended), hereinafter referred to as *"CPC"*.

[33] Draft law prepared by the Civil Law Codification Committee under the aegis of the Ministry of Justice of the Republic of Poland, as part of legislative works, hereinafter referred to as *"the draft law"*.

[34] The Directive defines *"public participation"* as the making of any statement or the carrying out of any activity by a natural or legal person in the exercise of the right to freedom of expression and information, freedom of the arts and sciences, or freedom of assembly and association, and any preparatory, supporting or assisting action directly linked thereto, and which concerns a matter of public interest.

ibly including all and any matters of major significance to public interest. Owing to the above, protection will not be limited to traditional forms of public debate, such as political or media statements, but extend to other forms of civic activity: freedom of arts and sciences, and freedom of assembly and association.

Of all proposals laid out by the Polish legislator, the early claim dismissal suggestion merits particular attention. This solution is to be backed by a modification (in the spirit of Directive 2024/1069) of the manifestly unfounded lawsuit measure already in use, having been made part of Polish civil law proceedings pursuant to the law of July 4th 2019[35], i.e. prior to European Union-level SLAPP-preventing efforts.

De lege lata, pursuant to Article 191[1] of the CPC, should a justice – having analysed the claim, attachments and facts of the case – decide to exercise the norm ensconced in the aforesaid provision, he/she may may dismiss the action in closed session, without serving the claim to the individual named as the defendant therein or considering the plaintiff's individual demands. Measures concerning lawsuit endorsement, including action to identify formal and/or fiscal defects of pleadings, review the valuation of the subject matter of the dispute, or examine the court's jurisdiction, may be omitted. The court shall draw up a respective justification of the decision *ex officio* in writing, listing reasons for finding the claim to be manifestly unfounded. The decision shall be served to the plaintiff (claimant) only, the appeal procedure identically simplified (Article 391[1] of the CPC), any cassation complaint inadmissible.

Polish case law defines manifestly unfounded lawsuits as circumstances beyond reasonable doubt of the plaintiff's claim meriting no legal protection to be extended, such conclusion reachable immediately upon the claim and its factual and legal basis having been revealed.[36] It is further presupposed that such unfoundedness should be indubitable not only to a representative of a legal profession, but to any reasonable participant of legal proceedings.[37] Introduced to the Polish legal system in 2019, the mechanism of preventing so-called apparent lawsuits was received with caution and restraint[38] as well as criticism, threats to the principle

---

35 Law of July 4th 2019 amending the Code of Civil Procedure Law and selected other laws, Journal of Laws 2019, item 1469, hereinafter referred to as *"CPC"*.

36 Judgement of the Court of Appeals in Białystok of October 19th 2021, Ref. No. I ACa 888/21, Lex No. 3262378.

37 Judgement of the Court of Appeals in Łódź of October 30th 2020, Ref. No. I ACa 1050/20, Lex No. 3108148.

38 Judgement of the Court of Appeals in Cracow of May 29th 2020, Ref. No. I ACa 231/20, *Legalis*.

of fair trial having been identified.[39] That said, European Union-level solutions ensconced in Directive 2024/1069 would suggest a review of previous doubts and concerns, as bestowing a new role and new significance to the procedural measure pondered herein.

It goes without saying that not every lawsuit dismissal as a manifestly unfounded claim ought to be automatically tied to abuse of procedural law, or associated with SLAPP measures. In each and every case, an examination of the facts behind the plaintiff's intentions ought to be recognised as essential to determining whether the plaintiff has brought action to secure reasonable and effective legal protection, or for different reasons altogether. It can be well assumed *a priori* that SLAPPs are a manifestly unfounded claim category, since their purpose is to initiate legal proceedings designed to prevent or restrict public debate rather than assert a right[40]. In case of SLAPPs, we are by definition dealing with claims completely unfounded, reflected in no facts or any substantive law provisions. Article 5 of the draft law assumes that CPC provisions already in force (Articles 191^1 and 391^1) will apply thereto, any applicable modifications duly recognised. Should, for example, the defendant file an out-of-court motion for dismissal of the claim as manifestly unfounded, the presiding judge will notify the plaintiff of a deadline by which a preparatory pleading shall be drafted for purposes of responding to said motion. Moreover, the court can also hear parties in closed session (Article 6 of the draft law). The plaintiff is thus provided with an option of proving that the lawsuit is not of the SLAPP category, and thus becoming eligible to protection against a wrongful and unjustified application of a statutory solution.

Regardless, the Polish draft law provides for an option of a SLAPP claim remaining judicially unexamined once classified by a court as a abuse of law pursuant to Article 4^1 of the CPC. In such case, a justice – having concluded that the lawsuit had been brought with sole intent of suppressing, restricting or interfering with public participation – may issue a ruling dismissing the claim, said ruling no more than a formal decision (Article 8 of the draft law). Prior to exercising the aforesaid

---

[39] Piaskowska, O.M., *Prawo do sądu a oddalenie oczywiście bezzasadnego powództwa w świetle projektu zmian z 27.11.2017 r. do Kodeksu postępowania cywilnego* (*The Right to Fair Trial v. Dismissal of Manifestly Unfounded Claim in View of the Draft Amendments of November 27^{h} 2017 to the Code of Civil Procedure*), "Studia Prawnicze", No. 1, 2018, p. 34 *et seq.*; Zembrzuski, T., *Powództwo oczywiście bezzasadne a dostęp do ochrony prawnej w postępowaniu cywilnym* (*Clearly Unfounded Claims in the Context of Access to Legal Protection in Civil Proceedings*), [in:] Flaga-Gieruszyńska, F., Flejszar, R., Marszałkowska-Krześ E., *Dostęp do ochrony prawnej w postępowaniu cywilnym* (*Access to Legal Protection in Judicial Civil Proceedings*), Warsaw 2019, p. 169 *et seq.*; Błaszczak, Ł., *Powództwo oczywiście bezzasadne (art. 191^1 k.p.c.)* (*Manifestly Unfounded Claims (Article 191^1 of the Code of Civil Procedure)*), Warsaw 2021, p. 133 *et seq*.

[40] Tomczyk, *op. cit.*, note 11, p. 20.

procedural measure, the court shall inform parties to the process of such intent, notifying them further of a deadline for preparatory pleadings to be filed, their positions concerning the ruling to be presented therein.

The modification to the early claim dismissal mechanism and claim dismissal mechanism apart, the Polish draft law provides i.a. for an option of requiring the plaintiff (upon the defendant's motion)[41] to pay a deposit to cover the cost of judicial proceedings (Article 3 of the draft law).[42] To that end, the defendant shall be obliged to present a *prima facie* case that the action has been chiefly brought with intent to suppress, restrict or interfere with public participation, or that the absence of a deposit will thwart or seriously impede any ruling concerning cost of proceedings payment. The draft law will provide for a right of appeal against the deposit-related ruling.

The draft law further allows the entity whose action has been classified as a SLAPP to be fined. Potentially reaching the equivalent of one hundred times the minimum wage, the maximum amount of such additional court-imposed penalty is intended to discourage SLAPP suits. Fine proceeds will be payable to the state budget (Article 11 of the draft law).

Since the majority of Polish SLAPPs are domestic in nature, implementation measures for Directive 2024/1069 have been expanded to include further protection, applicable to strictly domestic procedures. It is expected that mechanisms developed in Poland will help balance out the chances of parties to the process. Regulations have been designed to protect individuals, non-governmental organisations, journalists and activists as the most frequent targets (as shown in practice) of lawsuits designed to intimidate or silence them. On the other hand, sporadically voiced concerns have accentuated the need to make sure that none of the planned implements are distorted or applied in reverse, i.e. to suppress public debate, and/or protect individuals or entities suppressing public participation.[43] In view of the entirety of suggestions made, it seems unlikely that entities affected by genuine

---

41 The court shall examine the defendant's motion no later than within a term of two weeks as of its filing.

42 The deposit shall reflect the expected amount of the reimbursable cost of judicial proceedings. Should case examination prove the deposit to be insufficient as coverage for the cost of judicial proceedings, the defendant may demand that another deposit be posted.

43 Kunicki, I., *Kilka uwag na temat projektu Dyrektywy Parlamentu Europejskiego i Rady w sprawie ochrony osób, które angażują się w debatę publiczną, przed ewidentnie bezpodstawnymi lub stanowiącymi nadużycie postępowaniami sądowymi („strategiczne powództwa zmierzające do stłumienia debaty publicznej)* (*A handful of comments regarding the draft Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation'))*, Kultura Prawna, 2023 available at: [https://thelegalculture.com/legal/article/view/119/144], Accessed 1 March 2025.

violation of personal property rights or dissemination of false information would lose eligibility to seek any claims due to them. Keeping a close eye on anti-SLAPP action taken by other European Union Member States will be of considerable importance as well.

6. FINAL COMMENTS

Wrongful use of the right of access to justice stands in contradiction thereto, and may be interpreted as abuse of procedural rights. Arguably, critical perception of SLAPPs (Strategic Lawsuits Against Public Participation) centres less on the negative assessment of plaintiff intentions than on its ultimate outcome – destructive impact on the freedom of expression[44]. Taking legal action with intent to silence critics and suppress public debate, while nothing new, is increasingly common. Intimidating and harassing journalists and other entities, using threats and violence against them, and the impunity of perpetrators remain the most serious challenges faced by media freedom.

The introduction of Directive 2024/1069 and its transposition to domestic legal orders sends a clear signal that the use of judicial proceedings as tools of pressure or repression will not be acceptable by European Union Member States. This is hugely important in terms of efforts to preserve media pluralism in the digital age in light of ownership concentration, poor transparency of media proprietorship and funding, and social and political disputes weakening public broadcasters[45]. Strengthening protection measures extended to the freedom of speech and expression ought to improve the quality and openness of public debate alike.

Any attempts to prevent the phenomenon under analysis herein ought to be seen as positive and desirable. Just like in common law systems[46], taking co-ordinated action on the European Union level is conducive to developing harmonised solutions across European Union Member States. The resultant array of mechanisms can prove effective and efficient in the face of violation diversity and related circumstances. While procedural law regulations will never be completely unified across all European Union Member States – in view of the procedural autonomy principle, not to mention the varied traditions and specificity of individual legal orders – the implementation of Directive 2024/1069 may become a yet another

---

44 Shapiro, P., *SLAPPs: Intent or Content? Anti-SLAPP Legislation Goes International*, Review of European Community & International Environmental Law, No. 1, 2010, p. 14 *et seq*.

45 Clark, Grech, *op. cit.*, note 12, p. 61 *et seq*.

46 Saftsrom, J., *Time to SLAPP Back: Advocating Against the Adverse Civil Liberties Implications of Litigation that Undermines Public Participation*, LSU Law Journal for Social Justice & Policy, No. 3, 2023, p. 125 *et seq*.

stage proving the justifiability of and need for developing a legal order based on identical rules and values, without which Europe will be neither powerful nor secure.

REFERENCES

BOOKS AND ARTICLES

1. Allerhand, M., *Podstęp w procesie* (*Subterfuge in Judicial Proceedings*), Lviv 1907.
2. Beder, S., *SLAPPs – Strategic Lawsuits Against Public Participation: Coming to a Controversy Near You*, Current Affairs Bulletin, No. 3, 1995, pp. 22-29.
3. Błaszczak, Ł., *Powództwo oczywiście bezzasadne (art. 191[1] k.p.c.)* (*Manifestly Unfounded Claims (Article 191[1] of the Code of Civil Procedure*), Warsaw 2021.
4. Bodnar, A.; Gliszczyńska-Grabias A., *Strategic Lawsuits against Public Participation (SLAPPs), the Governance of Historical Memory in the Rule of Law Crisis, and the EU Anti-SLAPP Directive*, European Constitutional Law Review, No. 4, 2023, pp. 642-663.
5. Canan, P.; Pring, G.W., *Strategic Lawsuits Against Public Participation*, Social Problems, No. 5, 1988, pp. 506-519.
6. Canan, P.; Pring, G.W., *Studying Strategic Lawsuits against Public Participation: Mixing Quantitative and Qualitative Approaches*, Law & Society Review, No. 2, 1988, pp. 385-395.
7. Clark, M.; Grech., A., *Journalists Under Pressure: Unwarranted interference, fear and self-censorship in Europe*, Brussels 2017.
8. Farrington, F.; Zabrocka, M., *Punishment by Process: The Development of Anti-SLAPP Legislation in the European Union*, Era Forum, No. 4, 2023, pp. 519-534.
9. Nowicka, Z., *Instrumenty ochrony przeciwko SLAPP-om w polskim postępowaniu cywilnym (analiza zagadnienia na tle projektowanych regulacji UE)* (*Instruments of Protection against SLAPPs in Polish Civil Law Proceedings (Issue Analysis against the Backdrop of Planned EU Regulations*)), Państwo i Prawo, No. 1, 2024, pp. 76-92.
10. Piaskowska, O.M., *Prawo do sądu a oddalenie oczywiście bezzasadnego powództwa w świetle projektu zmian z 27.11.2017 r. do Kodeksu postępowania cywilnego* (*The Right to Fair Trial v. Dismissal of Manifestly Unfounded Claim in View of the Draft Amendments of November 27[th] 2017 to the Code of Civil Procedure*) , Studia Prawnicze, No., 1, 2018, pp. 29-46.
11. Pietrzkowski, H., *Prawo do sądu*, (*Right to Fair Trial*), Przegląd Sądowy, No.11-12, 1999, pp. 3-22.
12. Pring, G.W., *SLAPPs: Strategic Lawsuits Against Public Participation*, Pace Environmental Law Review, No. 7, 1989, pp. 3-29.
13. Saftsrom, J., *Time to SLAPP Back: Advocating Against the Adverse Civil Liberties Implications of Litigation that Undermines Public Participation*, LSU Law Journal for Social Justice & Policy, No. 3, 2023, pp. 125-175.
14. Shapiro, P., *SLAPPs: Intent or Content? Anti-SLAPP Legislation Goes International*, Review of European Community & International Environmental Law, No. 1, 2010, pp. 14-27.

15. Sobczak, J., *Prawo do krytyki a kontratyp zniesławienia* (*Right to Criticise v. Lawful Excuse for Slander*), Studia Medioznawcze, No. 2, 2013, pp. 45-75.
16. Tomczyk, E., *Regulacje prawne dotyczące strategicznego powództwa zmierzającego do stłumienia debaty publicznej (SLAPP) jako nowy instrument ochrony prawnej w postępowaniu cywilnym* (*Legal Regulations Regarding Strategic Lawsuits against Public Participation (SLAPPs) as a New Instrument of Legal Protection in Civil Law Proceedings)*, Europejski Przegląd Sądowy, No. 12, 2025, pp. 12-22.
17. Weitz, K., *Nadużycie "prawa" procesowego cywilnego* (*Abuse of Procedural "Rights" in Civil Law Proceedings*), Polski Proces Cywilny, No. 1, 2020, pp. 7-39.
18. Zembrzuski T., *Nadużycie prawa procesowego de lege lata* (*Abuse of Procedural Law de lege lata*), in: Kosonoga, J. (ed.) *Przeciwdziałanie nadużyciu uprawnień procesowych w postępowaniach sądowych* (*Preventing Absuse of Procedural Rights in Judicial Proceedings*), Warsaw 2022, pp. 155-184.
19. Zembrzuski, T., *Powództwo oczywiście bezzasadne a dostęp do ochrony prawnej w postępowaniu cywilnym* (*Clearly Unfounded Claims in the Context of Access to Legal Protection in Civil Proceedings*), in: Flaga-Gieruszyńska, F., Flejszar, R., Marszałkowska-Krześ E. (eds.), *Dostęp do ochrony prawnej w postępowaniu cywilnym* (*Access to Legal Protection in Judicial Civil Proceedings*), Warsaw 2019, pp. 169-188.
20. Zembrzuski, T., *Remedying the Judiciary System in Poland – Restoring the Rule of Law*, in: Duić, D., Petrašević, T. (eds.), *EU at the Crossroads – Ways to Preserve Democracy and Rule of Law*, Vol. 8. Osijek, 2024, pp. 666-685.
21. Zembrzuski, T., *Skarga kasacyjna. Dostępność w postępowaniu cywilnym* (*Cassation Complaint Availability in Civil Proceedings*), Warsaw 2011.

LIST OF NATIONAL NATIONAL REGULATIONS, ACTS AND COURT DECISIONS

1. Code of Civil Procedure Law of November 17th 1964, uniform text: Journal of Laws 2024, item 1568
2. Judgement of the Court of Appeals in Cracow of May 29th 2020, Ref. No. I ACa 231/20, Legalis
3. Judgement of the Court of Appeals in Łódź of October 30th 2020, Ref. No. I ACa 1050/20, Lex No. 3108148
4. Judgement of the Court of Appeals in Białystok of October 19th 2021, Ref. No. I ACa 888/21, Lex No. 3262378

WEBSITE REFERENCES

1. Cydzik, S., *Polska liderem Europy w SLAPP*, 2023, [https://legalis.pl/polska-liderem-europy-w-slapp/], Accessed 1 March 2025
2. Kunicki, I., *Kilka uwag na temat projektu Dyrektywy Parlamentu Europejskiego i Rady w sprawie ochrony osób, które angażują się w debatę publiczną, przed ewidentnie bezpodstawnymi lub stanowiącymi nadużycie postępowaniami sądowymi („strategiczne powództwa zmierzające*

do stłumienia debaty publicznej) (*A handful of comments regarding the draft Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation')),* Kultura Prawna 2023, [https://thelegalculture.com/legal/article/view/119/144], Accessed 1 March 2025.

3. Milewska, P., *SLAPPs, Daphne's Law, and the Future of Journalism*, 2023, [https://verfassungsblog.de/slapps-daphnes-law-and-the-future-of-journalism/] Accessed 1 March 2025
4. Proposal for a Directive of the European parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation") [2022] COM/2022/177 final [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52022PC0177], Accessed 1st March 2025
5. *The Coalition Against Slapps in Europe (CASE)*, [https://www.the-case.eu/], Accessed March 2025

THE APPLICATION OF THE LEGAL PRINCIPLES AND METHODS OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN CLIMATE CHANGE-RELATED CASES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Maja Proso, PhD, Associate Professor
University of Split, Faculty of Law
Domovinskog rata 8, 21000 Split, Croatia
maja.proso@pravst.hr

Vedran Zlatić, PhD, Assistant Professor
University of Split, Faculty of Law
Domovinskog rata 8, 21000 Split, Croatia
vedran.zlatic@pravst.hr

ABSTRACT

Climate change, a long-term shift in global, regional, and local weather patterns, is primarily driven by human activities, especially the burning of fossil fuels since the 1800s. This has led to a 1.2°C increase in Earth's average surface temperature since the pre-industrial era, a level unprecedented in 100,000 years. The consequences are widespread, including intensified droughts, water shortages, severe fires, rising sea levels, flooding, melting ice, extreme storms, and biodiversity loss. These impacts threaten our health, food production, housing, safety, and livelihoods. While the right to a healthy environment is recognized and protected by the European Court of Human Rights(ECtHR) through its jurisprudence, it isn't explicitly stated in the European Convention on Human Rights. However, the UN Human Rights Council and General Assembly have affirmed this right, recognizing a clean, healthy, and sustainable environment as a universal human right. Climate change, along with unsustainable resource management, pollution, and improper waste disposal, degrades the environment, hindering this right and negatively impacting all human rights. In 2024, the ECtHR made a landmark rulings, establishing that insufficient climate action constitutes a violation of human rights. The paper examines recent ECtHR decisions related to climate change and its impact on the right to a healthy environment (protected by Article 8 of the European Convention on Human Rights) The ECtHR has previously developed criteria for member states to adhere to, particularly regarding Article 8 of the Convention (right to respect for private and family life), in environmental pollution cases. The authors are particularly interested in examining how the Court has used established legal tools and approaches in climate change cases. This includes the principle

of effectiveness, which has been key in defining the positive duties of Convention signatories, and the doctrine of the margin of appreciation. This latter concept is vital for determining the extent of these positive duties under Article 8 of the Convention in the context of climate change. The aim of the present research is, therefore, to examine how the ECtHR's deployment of the doctrines and methods of interpretation- the method of causation and the doctrines of positive state obligations and the margin of appreciation are applied in recent climate change judgements, particularly in Klima Seniorinnen v. Switzerland case, and to answer the main research question- does the interpretation of applied doctrines and methods of interpretation by the ECtHR in cases concerning climate change differ from existing environmental case law?

***Keywords**: Article 8. of the European Convention on Human Rights, climate change-related cases, The European Court of Human Rights, the right to a healthy environment, the margin of appreciation doctrine*

1. INTRODUCTION

Long-term changes in global temperatures and weather, known as climate change, are driven by an enhanced greenhouse effect. Although natural phenomena can play a role, the primary driver since the Industrial Revolution is the release of greenhouse gases from human activities. Burning fossil fuels, like coal, oil, and natural gas, generates carbon dioxide and methane, which act as a thermal blanket, trapping solar heat. Land clearing and agricultural practices also contribute to these emissions, with energy, industry, transport, and building sectors being major sources.[1] The European Union has set a legally binding target for its member states to reach net-zero greenhouse gas emissions by 2050, effectively establishing a climate-neutral economy. This objective, was agreed upon by EU leaders in 2019 and detailed in the European Green Deal.[2] The European Climate Law[3] is the cornerstone of the Green Deal, as it legally mandates that all EU member states achieve climate neutrality by 2050. April 2024 saw the European Court of Human Rights (hereinafter: ECtHR) Grand Chamber deliver its verdicts on three much-awaited climate change lawsuits, a major development in international climate action. The court's decisions confirmed that the European Convention on Human Rights[4] (hereinaf-

---

1 United Nations, Climate Action, *What is Climate change?* Available at: [https://www.un.org/en/climatechange/what-is-climate-change], Accessed 8 March 2025.

2 The European Green Deal, *Striving to be the first climate neutral continent* Available at: [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en], Accessed 8 March 2025.

3 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 (EC) No 401/2009 and (EU) 2018/1999 (European Climate Law), OJ L 243, 9 July 2021.

4 European Convention on Human Rights, text available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:eu_human_rights_convention], Accessed 8 March 2025.

ter: ECHR) safeguards individuals from the harms of climate change, and mandates that states actively work to reduce those harms. Although the ECHR doesn't explicitly recognize a right to a clean environment, the ECtHR has addressed environmental issues by examining violations of existing human rights under ECHR by employing particular and adaptable method of interpreting the ECHR, known as the "living instrument" principle. This ensures that the rights within the Convention are interpreted in a dynamic way, which has, in effect, led to the "greening" of the Convention. By merging the idea of the Convention as a "living instrument" with the understanding that it safeguards rights that are real and impactful, not just abstract, the principle of effectiveness is applied. This principle proved particularly crucial in shaping the notion of positive duties for the signatoires of the ECHR and the doctrine of the margin of appreciation. The aim of the present research is, therefore, to examine how the ECtHR's deployment of the doctrines and methods of interpretation- the method of causation and the doctrines of positive state obligations and the margin of appreciation are applied in recent climate change judgements, particularly in Klima Seniorinnen v. Switzerland case[5] and to answer the main research question- does the interpretation of applied doctrines and methods of interpretation by the ECtHR in cases concerning climate change differ from existing environmental case law? Following the introduction, the second part of the paper explores the developement of the right to a healthy environment within the process called the greening of the ECHR, by employing the causation method and the doctrines of positive state obligations and the margin of appreciation as established in existing ECtHR environmental case law. The third section is dedicated to the analysis of the application of the existing legal principles and interpretative methods in Klima Seniorinnen v. Switzerland case. The authors will specifically analyse how the ECtHR has interpreted the question of causation and the doctrine of the State's positive obligation in the context of climate change threats to the human rights protected by ECHR's Article 8 in the Klima Seniorinnen v. Switzerland judgement. Since the doctrine of the margin of appreciation is indispensable for evaluating how well Member States fulfill their positive obligations, the authors will examine does the ECtHR assess the margin of appreciation differently compared to its earlier environmental case-law? In the concluding section of the paper, we will integrate the conclusions of all the discussed topics and synthesize the findings addressed in this research.

[5] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Application no. 53600/20, Judgement of 9 April 2024.

2. THE DEVELOPMENT OF LEGAL RECOGNITION OF THE RIGHT TO A HEALTHY ENVIRONMENT - THE GREENING OF THE ECHR (BY APPLYING THE METHOD OF CAUSATION AND THE DOCTRINES OF POSITIVE STATE'S OBLIGATIONS AND THE MARGIN OF APPRECIATION IN EXISTING ECTHR ENVIRONMENTAL CASE-LAW)

Emerging as a "third-generation" right, the right to a healthy environment saw its legal recognition surge in the 1970s, driven by the growing realization of the severe consequences of climate change. This awareness, highlighting the existential threat to human civilization, prompted international action, notably the 1972 Stockholm UN Conference. Its declaration established the principle that humans possess a fundamental right to a life of dignity and well-being within a quality environment, while also bearing a duty to safeguard it for future generations.[6] The Stockholm Conference represents a pivotal moment in the historical development of the relationship between human civilization and the natural environment. Since then, both at the international and national levels, the necessity of protecting the natural environment has been increasingly emphasized, as it has become more than clear that the survival of humanity itself depends on the protection of the natural environment. In this regard, increasing attention is being paid to the issue of environmental protection at the international level. In 1983, again under the auspices of the UN, the World Commission on Environment and Development (WCED) was established, with the primary goal of finding solutions to growing environmental problems such as global warming and damage to the ozone layer. The World Commission on Environment and Development's 1987 report, "Our Common Future," established the concept of sustainable development, defining it as development that balances current needs with future generations' capabilities.[7] This report further outlined methods for implementing this principle. Building upon this, the 1990s saw the United Nations Conference on Environment and Development (UNCED), or Earth Summit, which aimed to reinforce international environmental protection. Marking two decades since the Stockholm Conference, the Earth Summit resulted in the adoption of significant agreements, such as the Rio Declaration, Agenda 21, and conventions addressing

---

6 Declaration on the Human Environment, available at: [https://documents.un.org/doc/undoc/gen/nl7/300/05/pdf/nl730005.pdf] Accesssed 26 February 2025.

7 UN World Commission on Environment and Development, *Report of the World Commission on Environment and Development: Our Common Future,* [https://www.environmentandsociety.org/mml/un-world-commission-environment-and-development-ed-report-world-commission-environment-and], Accessed 21 February 2025.

climate change, biodiversity, and forest management.[8] These documents intended to build the initial structure for sustainable development across local, national, regional, and global scales for the 21st century. The right to a healthy environment today enjoys wider legal recognition, both in national and international frameworks, for example, the African Charter on Human and Peoples' Rights, the San Salvador Protocol, the Aarhus Convention, as well as the Arab Charter on Human Rights. In total, the mentioned regional documents have been ratified by 120 countries worldwide.[9] In October 2021, the UN Human Rights Council adopted Resolution 48/13 (hereinafter: the Resolution), recognizing a clean, healthy, and sustainable environment as a human right. The Resolution was further strengthened by the UN General Assembly in 2022, declaring access to a clean, healthy, and sustainable environment as a universal human right. The Resolution states that the right to a healthy environment is linked to existing international laws and affirms that its promotion requires the full implementation of multilateral environmental agreements. It also explicitly recognizes that the impact of climate change, unsustainable management and use of natural resources, air, soil, and water pollution, improper management of chemicals and waste, resulting in biodiversity loss, hinder the realization of the right to live in a healthy environment, and that environmental damage has direct and indirect negative implications for the effective enjoyment of all human rights. The Resolution, finally, reaffirms that the right to live in a healthy environment is 'a human right belonging to everyone, and not just a privilege for some.[10] When it comes to national legal systems, the right to a healthy environment and legal protection of the environment began to appear in constitutional documents only after the 1972 Stockholm Conference. According to D. R. Boyd, the first countries to include the right to a healthy environment as one of the fundamental rights in their constitutional documents were Portugal in 1976 and Spain in 1978.[11] According to the UN's "Environmental Rule of Law: First Global Report" from 2019, more than 150 countries include provisions on environmental protection or the right to a healthy environment as a

---

8 United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992, [https://www.un.org/en/conferences/environment/rio1992] Accessed 28 February 2025.

9 Boyd, R. D., *Evaluating 40 years of experience in implementing the right to a healthy environment* in: Knox, H. J.; Pejan, R., (eds.), Human right to a healthy environment, Cambridge University Press, 2018, p. 17.

10 Schoukens, H.; Bouquelle, F., *Introduction: the right to a healthy environment revisited as a necessary leverage point in times of climate crisis in Europe and beyond?* in*:* Schoukens, H.; Bouquelle, F., (eds), The Right to a Healthy Environment in and Beyond the Anthropocene, Edward Elgar Publishing, 2024, p. 2.

11 Boyd, R.D., *The Status of Constitutional Protection for the Environment in Other Nations*, David Suzuki Foundation, 2013, p.6., Available at: [https://davidsuzuki.org/science-learning-centre-article/status-constitutional-protection-environment-nations] Accessed 8 March 2025.

fundamental human right in their constitutions.[12] These are certainly encouraging figures, although it is concerning that some of the wealthiest and most developed countries still do not have provisions on environmental protection or the right to a healthy environment as a separate human right at the national constitutional level. The growing global trend towards constitutional environmental protection was joined by the Republic of Croatia with the adoption of its Constitution in 1990. This is most clearly seen in the provisions of Article 3 of the Constitution of the Republic of Croatia[13], which states that the principle of nature conservation and human environment protection represents one of the highest values of the Croatian constitutional order. Furthermore, Article 52 of the Constitution of the Republic of Croatia stipulates that "..the sea, the coastline and islands, waters, airspace, mineral resources, and other natural wealth, as well as land, forests, plant and animal life, other parts of nature, real estate, and objects of particular cultural, historical, economic, and ecological significance, which are designated by law as being of interest to the Republic of Croatia, are under its special protection." Moreover, the original text of the 1990 Constitution[14] explicitly stipulated the right to a healthy environment as one of the fundamental human rights in it's Article 69. However, this provision was altered by constitutional amendments in 2001. Article 70 of the Constitution stipulates that "the state ensures conditions for a healthy environment."[15] Nevertheless, it is important to note that this change did not eliminate the right to a healthy environment from the Croatian constitutional system, as confirmed by the Decision of the Constitutional Court of the Republic of Croatia on April 18, 2023.[16] This is also consistent with the expressed stance of the Constitutional Court that certain constitutional provisions cannot be interpreted mechanically and separately but only as part of the organically connected whole of the Constitution.[17] Therefore, it can be said that, through a

---

12 Environmental Rule of Law: First Global Report, (United Nations Environment Programme, 2019, Available at: [https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report], Accessed 28 February 2025.

13 The Constitution of the Republic of Croatia, Official Gazette, no. 85/10, 5/14.

14 Paragraph 2, Article 69 of the 1990 constitutional text reads: "The Republic ensures the right of citizens to a healthy environment. Citizens, state, public, and economic bodies, and associations are obliged, within the scope of their powers and activities, to pay special attention to the protection of human health, nature, and the human environment." See The Constitution of the Republic of Croatia, Official Gazette, no. 56/90.

15 Furthermore, paragraph 2, Article 70 reads: "The state ensures conditions for a healthy environment", and paragraph 3 of Article 70 of the Constitution reads: „Everyone is obliged, within the scope of their powers and activities, to pay special attention to the protection of human health, nature, and the human environment."

16 The Decision and the Ruling of the Constitutional Court No. U-II-845/2019 i U-II-2160/2019, 18. April 2023., paras. 20.2., 21.1., 21.9.

17 The Ruling of the Constitutional Court No. U-I-3789/2003, 8. December 2010., para. 8.2.

teleological and systematic interpretation of the Constitution as a whole, it can be concluded that there is a constitutional right to a healthy environment in the Croatian constitutional order, especially considering the provisions of Articles 3, 52, and 70 of the Constitution of the Republic of Croatia.

The ECtHR interprets conventional human rights in a way that the circle of legally protected goods under the Convention articles includes those violated by negative human impact on the environment. This process is theoretically called the "greening" of explicitly established human rights. Instead of recognizing an independent right to live in a healthy environment, the "greening" of human rights process emphasizes the ecological dimension of already existing rights and protects the environment as a prerequisite for the enjoyment of human rights such as, for example, the right to life, health, privacy of personal and family life, home, and correspondence. Over the past decades, UN bodies, national courts, and other human rights mechanisms have interpreted the human right to a healthy environment in a similar way, but authors argue that the ECtHR has been the most advanced in "greening" their rights.[18] In the Case Olujić v. Croatia[19], the ECtHR held that although the ECHR does not contain an explicit right to a clean and quiet environment, noise or other pollution that directly and seriously affects an individual may constitute a violation of the right to respect for private and family life, guaranteed by Article 8 of the ECHR. In other words, although the ECHR does not explicitly protect the right to a healthy environment, pollution that seriously impairs a person's quality of life may be the basis for a lawsuit before the Court. The ECtHR safeguards the right to a healthy environment by using specific interpretive, evolving methods for the ECHR which include; the "living instrument" principle - ensuring dinamic interpetation of the convention rights, which, in turn, facilitated the "greening" of the ECHR a limited scope for national governments to interpret and apply the ECHR („the margin of appreciation") and a focus on ensuring ECHR rights are practically enforceable („the principle of effectiveness"). The principle of evolutionary and dynamic interpretation of conventional principles is one of the foundations that enabled the 'greening' of the ECHR.[20] Drawing on the principle of the "living instrument" emerging in the 1970s in Strasbourg jurisprudence[21] — the idea that the ECHR should be interpreted dynamically in

---

18 Pedersen, W. O., *The Ties That Bind: The Environment, the European Convention on Human Rights and the Rule of Law,* Vol. 16 (4), European Public Law, 2010, p. 594.

19 Olujić v. Croatia, Application no. 22330/05, Judgement of 5. February, 2009, para. 45.

20 Müllerová, H., *Environment Playing Short-Handed: Margin of Appreciation in Environmental Jurisprudence of the European Court of Human Rights*, Review of European, Comparative & International Environmental Law, 24, 2014, p. 84.

21 van Dijk, P.; Godefridus J.H.; van Hoof, G. J.H., *Theory and Practice of the European Convention on Human Rights,* The Hague-Boston-London: Kluwer Law International, 1998, p. 74.

light of present-day conditions, meaning conventional rights evolve with societal progress. This principle, central to ECtHR environmental case-law, allows the ECtHR flexibility to ensure protected rights are adapted to social changes.[22] This approach, which involves an evolutive interpretation of ECHR rights, was notably applied by the ECtHR in its judgment in Marckx v. Belgium.[23] The principle of effectiveness is applied because rights guaranteed by ECHR require real, effective protection, not just teorethical. The ECtHR demands evidence of a causal connection to link environmental dangers with possible violations of human rights, and its emphasis on a State's role highlights this developing perspective.This, in turn, imposes positive duties on States, to address environmental pollution that harms individuals' private lives and homes. The margin of appreciation doctrine is a judicial tool giving States leeway in limiting rights. This assumes national bodies are best placed to judge necessary restrictions. Therefore, in the continuation of this research, we will analyze the use of aforementioned methodes and doctrines of interpretation in existing ECtHR environmental case-law.

2.1. Application of the method of causation and the doctrines of positive State's obligations and the margin of appreciation in existing ECtHR environmental case-law

The ECtHR began to acknowledge the connection between environmental conditions and human rights in the 1990s. According to the ECtHR, the ability to enjoy the majority of human rights is dependent upon the existence of an undamaged environment.[24] Through cases Powell and Rayner v. UK[25] and López Ostra v. Spain[26], ECtHR started to explore how detrimental environmental factors could affect individuals' quality of life. Even though the Powell and Rayner case didn't find a rights violation, it established the crucial point of balancing individual and community interests.[27] It's important to note that for a case to be valid, it must fall within the scope of Article 8 of the ECHR, which protects rights related to private life, family,

---

22 Mihelčić, G.; Marochini Zrinski, M., *Suživot negatorijske zaštite od imisija i prava na život u zdravoj životnoj sredini*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 39, No. 1, 2018, p. 250.

23 *Marckx v. Belgium*, Application no. 6833/74, judgment of 13 June 1979.

24 Braig, K. F.; Panov, S., *The Doctrine of Positive Obligations as a Starting Point for Climate Litigation in Strasbourg: The European Court of Human Rights as a Hilfssheriff in Combating Climate Change?* Journal of Environmental Law and Litigation, Vol. 35, 261, 2020, p. 270.

25 *Powell and Rayner v. the United Kingdom*, Application no. 9310/8121, Judgment of 21. February 1990.

26 *López Ostra v. Spain,* Aapplication no. 16798/90, Judgment of 9 December 1994.

27 Raisz, A.; Krajnyák, E., *Protection of the environment in the european human rights framework: a central euroepan perspective*, in: Constitutional Protection of the Environment and Future Generations. Studies of the Central European Professors' Network . Central European Academic Publishing, Miskolc, Budapest, 2022, p. 77.

home, and correspondence. For various environmental disturbances to be deemed a violation of Article 8 rights a ECHR causal link is needed to connect environmental harm to a breach of Convention rights and the state's actions or inactions. This determination, made on a case-by-case basis, rests on two key criteria. First, the environmental pollution must be severe enough to significantly impair an individual's enjoyment of their private and family life,[28] and second, the State must have either failed to implement necessary measures to mitigate the pollution or have taken inappropriate actions,[29] Essentially, the ECtHR assesses if the State's actions or inactions contributed to the environment pollution reaching a level that violates Article 8. The Fadeyeva v. Russia[30] case clearly underscores the necessary preconditions, specifying that for an environmental pollution complaint to fall under Article 8 of the ECHR, it must demonstrate an infringement on an individual's private and family life and home, reaching a certain threshold of seriousness. The minimum threshold of severity required for the application of Article 8 is „inherently relative"' and depends on the data set of the case, in particular the intensity and duration of the nuisances, their physical and psychological effects, as well as the determination of whether the damage caused in the specific case is comparable to that which could arise in connection with environmental risks.[31] What is key regarding the question of the causation, as interpreted by the ECtHR, is that the link and the category of protection of the right to life in a healthy environment are directly related to the State's responsibility for violation of individual rights through the State's failure to fulfill a specific positive obligation. For instance, in the Öneryildiz case ECtHR found the State breaching its positive duty to protect property due to officials' inaction, which directly led to the applicant's house being engulfed[32]. In aforementioned Lopez Ostra case, ECtHR found the State failed to protect the applicant from pollution, upsetting the fair balance and exceeding its discretion. Though the obligation type wasn't specified, and it was noted that distinguishing between the State's positive obligation to ensure a right and its negative obligation not to interfere is difficult, the ECtHR concluded that the applicable principles are very similar for both (para. 51). Later cases (Moreno Gomez[33], Cuenca Zarzoso[34]) explicitly deemed the State's failure to protect against environmental pollution a breach of its positive obligations

---

28 Jurić, A.; Mijatović, M., *Protection from Noise in the Context of Article 8 of the European Convention with Special Reference to Civil Law Protection*, Proceedings of the Conference Current Issues of Civil and Commercial Legislation and Legal Practice, no. 19, Mostar, 2022, p. 215.

29 *Ibid.*

30 *Fadeyeva v. Russia*, Application no. 55723/00, Judgment of 9. June 2005, paras. 68-70.

31 *Chiş v. Romania*, Application no. 36129/15, Judgment of April 27. 2017, paras. 31-32.

32 *Öneryıldız v. Turkey Application* no. 48939/99, Judgment of 30.11.2004.

33 *Moreno Gómez v. Spain*, Application no. 4143/02, Judgment of 16.11.2004.

34 *Cuenca Zarzoso v. Spain,* Application no. 23383/12, Judgment of 16.01.2018.

under Article 8 (Moreno Gomez para. 62; Cuenca Zarzoso, para. 54.) In Cordella and Others v. Italy,[35] the ECtHR found that the Italian government had failed to protect its citizens from the harmful effects of industrial pollution, emphasizing once again the State's positive obligation of effective protection from enviromental hazards. The ECtHR clarified that State needs to balance environmental protection with broader societal interests, a balance the Italian authorities, in this particular case, had failed to achieve, thus broadening the scope of State's positive obligations. The ECtHR determined that the government's lack of action, including the failure to provide information about cleanup efforts to mitigate harmful effect of the pollution, constituted a violation of Article 8. In Pavlov and Others v. Russia[36] case the ECtHR went further clarifiing that not only a State's inaction in the face of environmental threats, but also its inappropriate actions constitute a breach of the State's positive obligation and should be taken in consideration. The ECtHR, finding an Article 8 violation, notably stressed the ECHR aim to ensure rights are practical and effective, thereby applying the principle of effectiveness. The Taskin and others case[37] illustrates the variety of State's positive obligations, constituting domestic authorities' failure to implement court decisions a breach of the State's positive obligation. Existing environmental jurisprudence under the Convention shows that violations of ECHR rights are firmly based on States' actions or omissions under the doctrine of positive State's obligations. In the afforementioned Powell and Rayner case, it was also emphasized that States enjoy a wide margin of appreciation in achieving a fair balance between the economic interests of the community and individual interests. The Fadeyeva case[38] proved that the State had a positive duty to lessen environmental harm, potentially through enforcing its own rules or offering relocation. Despite the State's usual broad margin of appreciation, the ECtHR in this particular case found that the government failed to fairly balance community interests against the applicants' rights to private life and home.

In exisitng environmental based case-law, according to the legal doctrine, the ECtHR seemed to strike a balance by recognizing environmental concerns as important within existing human rights frameworks, thus aligning with current international agreement, without needing to create a new, potentially contentious, environmental right[39] because a healthy environment is indispensable for the full

---

35 *Cordella and Others v. Italy,* Aapplications nos. 54414/13 and 54264/15, Judgment of 24. January 2019.

36 *Pavlov and Others v. Russia*, Application no. 31612/09, Judgment of 11. October 2022.

37 *Taşkın and Others v. Turkey,* Application no. 46117/99, Judgment of 10 November 2004.

38 Fadeyeva v. Russia, Application no. 55723/00, judgment of 9 June 2005.

39 Morrow, K., *The ECHR, Environment-Based Human Rights Claims and the Search for Standards*, in: Turner, J. S., *et al*. (eds.), Environmental Rights, The Development of Standards, Cambridge University Press, 2019, p. 59.

enjoyment of a wide array of human rights.[40] The ECtHR has progressively engaged with this nexus, as evidenced by the growing body of its environmental jurisprudence.[41] Despite the ECtHR's increasing engagement, a central point of scholarly critique[42] revolves around the absence of an explicit right to a healthy environment within the ECHR. Also, some doctrinal views, which the authors of this research find convincing, voice concerns about this approach to environmental protection, considering it too instrumental and anthropocentric. If environmental protection is treated merely as a tool to achieve other aims, including protecting rights and freedoms, its practical effectiveness will suffer. This perspective doesn't seem to value the environment per se, but, rather, sees it, purely, as a mechanism for achieving other goals. According to some authors, this is an approach that treats nature protection merely as an "ancillary" right, which is typically tied to the protection of other fundamental individual rights and freedoms (such as the right to life, the right to health, the right to privacy, etc.), rather than as a value in itself.[43] As some argue[44], this view on environmental protection, which suggests its legal protection is always dependent on another right rather than having independent standing, fosters an individualistic approach to protecting environmental rights. The Unated Nations General Assembly recognized the human right to a healthy environment, and in 2021, the Parliamentary Assembly of the Council of Europe called upon the Council of Europe's Committee of Ministers to create a new addition to the European Convention of Human Rights.[45] The aim of this addition, known as an "additional protocol," would be to legally recognize and enforce the right to a healthy environment. Establishing a new human right to a

---

40 Human Rights Law and Climate Change, [https://climatehughes.org/law-and-climate-atlas/human-rights-law-and-climate-change/], Accessed 10 May 2025.

41 Stancin, V., *The Echr and the Iccpr: A Human Rights-Based Approach to the Protection of the Environment and the Climate System*, European Convention on human rights Law Review, 5, 2024, p. 192.

42 See: Kobylarz, N., *A World of Difference: Overcoming Normative Limits of the ECHR Framework through a Legally Binding Recognition of the Human Right to a Healthy Environment*, Journal of Environmental Law, Volume 37, Issue 1, 2025, pp. 23–43, [https://doi.org/10.1093/jel/eqae031] Accessed 10 May 2025.

43 Peters, B., *The European Court of Human Rights and the Environment*, in: Sobenes, E., Mead, S., Samson, B. (eds.) *The Environment Through the Lens of International Courts and Tribunals,* Springer, 2022, p. 192.

44 Francioni, F., *International Human Rights in an Environmental Horizon*, The European Journal of International Law, Volume 21, Issue 1, 2010. p 43-44.

45 The right to a healthy environment: PACE proposes draft of a new protocol to the European Convention on Human Rights, [https://pace.coe.int/en/news/8452/the-right-to-a-healthy-environment-pace-proposes-draft-of-a-new-protocol-to-the-european-convention-on-human-rights-], Accessed 17 May 2025.

healthy environment under ECHR would, as doctrine argue[46], make the existing collection of the ECtHR cases related to environmental issues more consistent and easier to understand. It would, also, create a fundamental requirement for signatoires legislators to not only think about how new laws might affect the environment but also to proactively create laws that support and align with this right. Ultimately, we can concur with the idea that the ECtHR existing environmental jurisprudence provides a favorable setting for the development and formal recognition of a specific human right to a healthy environment.[47] While environmental human rights could, as we have discussed in this section, evolve without a legally binding instrument, such a document would strengthen the ECHR framework, enabling more proactive environmental justice and resolving a wider array of human rights and environmental issues in the context of the threat of accelerating climate change, while also guiding judicial interpretation.

The ECtHR established environmental jurisprudence, or, as ECtHR calls them-classic environmental cases, generally deals with situations where environmental damage originates from a distinct source. In these instances, the people affected by the specific harm can be pinpointed with relative ease, and the link between the identified source and the resulting harm to groups of individuals is generally clear. Additionally, the actions taken or not taken to lessen the damage from that source, whether through regulations or practical steps, can also be clearly identified. Essentially, there's a direct connection between the origin of the harm and those impacted, and the necessary steps to reduce the harm can be identified and applied at its source. Unlike existing case law, focused on specific environment pollution sources, climate change involves broader, systemic issues. Consequently, the ECtHR has determined that existing environmental jurisprudence cannot be directly applied to climate change cases, necessitating the development of a new, tailored legal framework that will be analysed in the next section.

3. THE APPLICATION OF THE LEGAL PRINCIPLES AND METHODS OF INTERPRETATION OF ECHR IN CLIMATE CHANGE-RELATED CASES BEFORE THE ECTHR

The UN's landmark resolutions in 2021 and 2022 established a clean, healthy, and sustainable environment as a universal human right, reinforcing its connection

[46] Willman, S.; Balfour-Lynn, H., *The Right to a Healthy Environment: The Case for a New Protocol to the European Convention on Human Rights,* SSRN Working Paper Series. 2022, p. 4. [https://doi.org/dx.doi.org/10.2139], Accessed 17 May 2025.

[47] Omerović, E., *et al., The European Convention for the Protection of Human Rights and Fundamental Freedoms: A Fertile Ground for the Protection of the Environment?,* Zeitschrift für Europarechtliche Studien, Nomos, Baden Baden, 2024, p. 451.

to existing international law. This recognition directly addresses the reality that climate change, pollution, and the destruction of natural resources impede the exercise of this fundamental right. Climate change can negatively affect many rights protected by the ECHR.These include the prohibition of torture and inhuman or degrading treatment (Article 3),the prohibition of discrimination (Article 14), the rights to a fair trial and an effective remedy (Articles 6 and 13 ECHR), the right to life (Article 2) and the right to respect for private and family life, home and correspondence (Article 8 ECHR).The ECtHR has recently broadened its approach concerning the method of causation and the doctrines of State's positive obligations and the margin of appreciation, notably through the Grand Chamber's decision in aforementioned Klima Seniorinnen v. Switzerland. The ECtHR dismissed two of the claims Carême v. France[48], and Duarte Agostinho v. Portugal and 32 Others[49].[50] Further in the paper we will analyse the complexities of the principle of causation ECtHR has used interpreting the connection between climate change and it's adverse impact on ECHR based human rights, particularly the right to respect for private and family life, home and correspondence protected by Article 8 ECHR, as laid down in Klima Seniorinnen v. Switzerland.

3.1. The principle of causation in *Klima Seniorinnen v. Switzerland*

The ECtHR acknowledged that Klima Seniorinnen claim marks a new departure in its environmental case law, shifting from cases involving specific harm sources to the broader, diffuse issue of climate change. Nevertheless, as the ECtHR states

---

48 *Carême v. France*, Application no. 7189/21, Decision of 9 April 2024.

49 *Duarte Agostinho and Others v. Portugal and 32 Other States*, Application no. 39371/20, Decision of 9 April 2024.

50 In Duarte Agostinho and Others v. Portugal and 32 Other States six young Portuguese people in 2020 sued 33 countries at the ECtHR, arguing that their inadequate response to climate change violates their fundamental rights to life under Article 2 ECHR, privacy under Article 8 ECHR, and freedom from discrimination under Article 14 ECHR. The case centers on the applicants' claim that 33 nations are responsible for climate change through their greenhouse gas emissions, which in turn are causing heatwaves that threaten their health and living conditions. The ECtHR ruled the climate change application inadmissible. The court declined to recognize the requested extraterritorial jurisdiction, thus dismissing the case against most of the respondent countries. The case against Portugal was also dismissed, as the applicants had not utilized all available legal avenues within Portugal before bringing their case to the European Court. In Carême v. France A former French mayor, sued France for insufficient climate action, challenging the government's refusal to meet 2030 emissions targets. The applicant argued the Council of State wrongly dismissed his case, claiming he was directly affected by inadequate climate action, thus violating his right to privacy (Article 8 ECHR). The application was declared inadmissible by the European Court on April 9, 2024, because the applicant's change of residence meant they could no longer claim to be a victim as required by the Convention. See: Climate Change Litigation Databases,
[https://climatecasechart.com/], Accessed 28 February 2025.

in para. 455 "failure by the Court to maintain a dynamic and evolutive approach of interpretation would risk rendering it a bar to reform or improvement." Unlike the more predictable consequences of specific toxins, greenhouse gas emissions aren't confined to a few distinct, hazardous practices; they arise from numerous common activities. Climate change, according the ECtHR is a polycentric problem, meaning that effective solutions necessitate a broad, interconnected set of actions, rather than just localized or single-sector efforts (paras. 416-419). Climate change negative effects complicate the process of establishing direct causation between a nation's actions and specific harms due to the global nature of greenhouse gas emissions. Therefore, in Klima Seniorinnen case, the ECtHR has dedicated considerable attention to the concept of causation, which represents a departure from its previous approach in environmental cases. As the Court itself recognized in paragraph 422, it is "neither adequate nor appropriate" to simply transfer the principles from its established environmental case law to the context of climate change, a point that is highly relevant given the focus on causation in this new judgment. In Klima Seniorinnen ECtHR considered it appropriate to adopt an approach which both acknowledges and takes into account the particularities of climate change and is tailored to addressing its specific characteristics.[51] These complexities of causation in climate change disputes should, according the ECtHR, involve: establishing the scientific link between emissions and climate change[52], the legal link between climate impacts and human rights, the causal link between state actions and individual harm, and the attribution of responsibility among multiple emitters (para.425).[53] The ECtHR considered the impact of climate change effects on the enjoyment of Convention rights as the second part of the causation question (paras. 431-435). In short, the ECtHR expanded the concept of harm to include also the risk of harm in climate change cases. This required "sufficiently severe risks", as defined in paras. 487-488, by a high intensity of exposure or significant consequences and a pressing need for individual protec-

---

51 „In the present case, therefore, while drawing some inspiration from the principles set out in the Court's existing case-law, the Court will seek to develop a more appropriate and tailored approach as regards the various Convention issues which may arise in the context of climate change." *Klima Seniorinnen v. Switzerland*, para. 422.

52 But the proof linking greenhouse gas emissions to climate change phenomena in human rights law isn't solely a scientific matter. The ECtHR, in the process of assesing State's positive obligation (as explained in section 3.2.) has relied on domestic and international legal standards of Paris Agreement, Aarhus convention, Intergovernmental Panel on Climate Change etc. as substitutes for scientific proof, also: Stoyanova, V., *KlimaSeniorinnen and the Question(s) of Causation*, [https://verfassungsblog.de/klimaseniorinnen-and-the-questions-of-causation/], Accessed 10 May 2025.

53 ECtHR further explained that the fourth dimension of causation in climate change cases should concern attributing responsibility for climate change effects to a specific State, given the fact that multiple actors contribute to overall emissions.

tion, which determines victim status.[54] This second dimension, is not considered alone, but is linked to States' obligations and their scope, merging the questions of whether a positive obligation exists, its extent, and if it has been breached. Paras. 437-440 clarified three points about this third dimension: assessing sufficiently close risk to the applicant, applying a severity threshold for risks to lives, health, and well-being (para. 440)[55], and linking this risk to State obligations and their scope (which we discuss in the section 3.2). The Klima Seniorinnen judgment is notable for extensively addressing causation up front, marking the first time the ECtHR dedicated whole sections to it. However, we found the Court's reasoning on causation somewhat confusing and unclear, particularly regarding the application of the 'real prospect' test[56] for finding a breach due to State's omissions. To establish a direct link between the State's omissions in mitigating adverse effects of environmental pollution and it's harmful impact on personal life, the ECtHR uses the doctrine of the margin of appreciation, which allows the ECtHR to navigate between deferring to national governments and exercising its judicial oversight. In response to the effects of climate change on rights protected by the ECHR, the ECtHR has evolved this doctrine, used in environmental case-law, only to create a differentiated margin of appreciation, appropriate to assess the State's positive obligations related to climate change, as explained in section bellow.

3.2. Specificities in the application of the doctrines of State's positive obligations and the margin of appreciation in Klima Seniorinnen v. Switzerland

In KlimaSeniorinnen v. Switzerland, the ECtHR stressed States' duty to establish effective environmental protections, especially risk-specific regulations, drawing on its existing environmental law.[57] The ECtHR held that although climate change is a global issue, the significance of different emission sources and the appropriate mitigation and adaptation strategies can differ between countries, influenced by factors like economic structure, geography, demographics, and societal condi-

---

54 Comparatively, in *Carême v. France* the ECtHR explained the application of Article 8, requiring a "direct and immediate link" between the issue and the applicant's home/private/family life. Environmental damage only triggers Article 8 if it has a direct impact or repercussions on these aspects, not just a general environmental decline (paras. 83-87).

55 Further guidance on the severity threshold is provided in paras. 513 and 519, where the ECtHR defines the scope of Articles 2 and 8 respectively. Under Article 8, the severity threshold is defined as "serious adverse effects of climate change" on the applicants' "life, health, well-being and quality of life."

56 This test for breaching a positive obligation requires demonstrating that the measure the State should have taken had „a real prospect of altering the outcome or mitigating the harm."(para. 444)

57 *Klima Seniorinnen v. Switzerland*, para. 538.

tions.[58] The ECHR requires states to actively uphold its rights and, as it has been discussed above, in section 2.1. the ECtHR has often found states responsible for failing these positive obligations. In Klima Seniorinnen ECtHR for the first time, found a state (Switzerland) in violation of Articles 8 for failing to adequately address climate change because no specific limits for national greenhouse gas emissions were established or calculated. The ECtHR held that the State's positive obligations were not met because the Swiss government did not act in a timely, appropriate, and consistent manner in creating and implementing the necessary legal and administrative framework.[59] Countries are obligated to establish plans for greenhouse gas reduction and to define their path towards achieving climate neutrality within thirty years.[60]

Regarding the margin of appreciation, in contrast to previously analyzed environmental cases, the ECtHR used a somewhat nuanced approach to the question of margin of appreciation.[61] The Court, building from existing environmental case law, emphasized, once again, the principle of effectiveness, meaning that states have a primary duty to enact and effectively implement regulations and measures to mitigate climate change's present and potential irreversible future effects, ensuring Convention rights are practical, not just theoretical. This requires States to implement necessary actions to limit increases in atmospheric greenhouse gas concentrations and global temperature rises, to prevent serious harm to human rights, particularly the right to private and family life and home under Article 8. In other words, the ECtHR in Klima Seniorinnen granted State a wide margin of appreciation in selecting climate policy and implementation. As to the content of climate-related obligations under Article 8, ECHR the ECtHR outlined the specific criteria used to review how countries set their climate change mitigation goals.[62] Concerning what states are required to do, the ECtHR emphesized that

---

58 *Ibid.*, para. 421.

59 *Ibid.*, para. 573.

60 Wiśniewski, A., *The European Court of Human Rights and Climate Change*, Law & Social bonds no. 6 (53), 2021, p. 1373.

61 While states have a margin of appreciation, their commitment to climate action is separate from the means they select. para. 543

62 Klima Seniorinnen v. Switzerland, para. 550: „When assessing whether a State has remained within its margin of appreciation the Court will examine whether the competent domestic authorities, be it at the legislative, executive or judicial level, have had due regard to the need to:(a) adopt general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future GHG emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments; (b) set out intermediate GHG emissions reduction targets and pathways (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies; (c) provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction targets;(d) keep the relevant GHG reduction targets updated with due diligence, and based on the

States must implement effective regulations to mitigate climate change's current and future impacts, ensuring practical human rights protections, not merely theoretical ones. In doing so, the ECtHR stressed the importance of State's duty to cut gass emissions significantly and reach net neutrality within 30 years to uphold Article 8 rights, acting, even more importantly- promptly and consistently.[63] To ensure states properly use their discretion in climate policy, the ECtHR considered public access to relevant studies and meaningful participation in decision-making as essential procedural safeguards.[64] The ECtHR in Klima Seniorinnen v. Switzerland, we can conclude, gently balances state discretion against the imperative of effective climate action for human rights protection, emphasizing that states must act effectively within their capabilities and international commitments, notably The Paris Agreement[65] and UNFCCC[66] as guided by the doctrine of the margin of appreciation. The ECtHR also particularly noted the neccessity to consider international pollution standards and the need to rely on international reports, particularly from the Intergovernmental Panel on Climate Change (IPCC)[67], for scientific guidance on climate change impacts on individuals when assessing affected rights in the context of climate change. In the context of climate change, the Klima Seniorinnen v. Switzerland judgment, therefore, signifies a considerable extension of what Article 8 require national governments to actively do.

4. CONCLUSION

Human activities, particularly the widespread combustion of fossil fuels, are understood by climate scientists to cause atmospheric alterations that trap more heat,

---

best available evidence; and (e) act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures."

63 *Klima Seniorinnen v. Switzerland*, paras. 547-548.

64 *Ibid*., para. 554.

65 The Paris Agreement, a legally binding climate treaty adopted by 196 nations in 2015 and effective since 2016, aims to limit global temperature rise. Originally targeting "well below 2°C," recent scientific consensus, particularly from the IPCC, has emphasized the critical need to cap warming at 1.5°C to avoid catastrophic climate impacts. This necessitates peaking greenhouse gas emissions before 2025 and achieving a 43% reduction by 2030.
[https://unfccc.int/process-and-meetings/the-paris-agreement], Accessed 11 May 2025.

66 Established in 1992 and operational since 1994, the United Nations Framework Convention on Climate Change (UNFCCC) aims to stabilize greenhouse gas concentrations in the atmosphere, thereby mitigating human-induced climate change. As one of the key outcomes of the 1992 Rio Earth Summit, it has achieved almost global participation, with 198 member countries. More at:
[https://www.eesc.europa.eu/pt/initiatives/un-framework-convention-climate-change], Accessed 7 March 2025.

67 The United Nations body for assessing the science related to climate change, more at:
[https://www.ipcc.ch/], Accessed 12 May 2025.

ultimately warming the Earth's surface significantly.[68] Since a specific "right to a healthy environment" is still not universally recognized, legal efforts to mitigate climate change's damage must rely on established human rights. This research aimed, therefore, to analyze how and to what extent the ECtHR applies its existing doctrines and interpretative methods developed in earlier environmental case-law in recent climate change rulings, specifically in the KlimaSeniorinnen v. Switzerland case. The authors wanted to answer the question of whether judicial methods and principles of interpretation in cases regarding climate change differ from earlier judicial practice. The research's key conclusion is that the ECtHR's approach to legal principles and interpretation methods regarding climate change diverges from its established environmental case law. Current environmental case law typically addresses specific pollution sources, whereas climate change involves wider, systemic problems. Consequently, the ECtHR in KlimaSeniorinnen v. Switzerland has determined that existing environmental jurisprudence cannot and should not be directly applied to climate change cases, necessitating the development of a new, tailored legal framework[69], as we have discussed in the paper. The KlimaSeniorinnen v. Switzerland case was the first instance where the ECtHR directly linked a State's climate policy to its positive duties under the ECHR. The ECtHR in interpreting the doctrine of the state's positive obligations established a State's duty to protect citizens from climate change under ECHR's Article 8 and limited State discretion in setting ambitious climate policies, requiring carbon budget consideration. Our research proved that the most significant shift from prior environmental case-law, is the narrowing of the margin of appreciation afforded to States, which was typically wide in environmental cases. One of the judgment's crucial points is the ECtHR's requirement for signatories States to implement significant and continuous reductions in their GHG emissions to achieve net neutrality within roughly the next thirty years, outlining a five-step test to evaluate State discretion. In our research, we also found that the KlimaSeniorinnen judgment stands out for its extensive examination of causation, a first for the ECtHR in dedicating entire sections to this issue and broadening the definition of harm to encompass the risk of harm, unlike previous case law in environmental cases.

Assessing the significance of the judgment, doctrine highlights that the ECtHR faced the difficult task of balancing a critical social issue with the need to maintain a controlled interpretation of the Convention, thus, making Klima Seniorinnen v. Switzerland judgement a major legal advancement, prompting questions about

---

[68] Mayer, B., *The International Law on Climate Change,* Cambridge University Press*, 2*018*,* p.5.

[69] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC] 53600/20, Résumé juridique, 09/04/2024, [https://hudoc.echr.coe.int/fre?i=002-14304], Accessed 28 February 2025.

its future impact.[70] While the ECtHR's decision was grounded in its existing environmental jurisprudence, as we have discussed previously in the paper, we have concluded that it has also broadened its scope to encompass climate change. The judgement fits the ever changing understanding of the ECHR, chanelling the living instrument doctrine, international climate agreements, and the science. This consistency reflects how legal advice is likely to develop, strengthening the connection between laws, human rights issues, and scientific needs when tackling climate change.[71]

As legal scholarship has adequately pointed out, the ruling is expected to have a broad impact on European and potentially international law with climate litigators and other stakeholders likely to use its findings on causality and state responsibility as a precedent.[72] It is, therefore, expected that more disputes related to climate change will appear before the ECtHr and that climate change issues will be considered in the context of violations of Articles 2 and 8, which do not directly address climate change, but from whose content this right is derived and in the Court's practice is created as a novelty.[73] The instrumental perspective on a right to a healthy environment (which we have analysed in section 2.1.), even after the first climate judgments, is still prevalent. Environmental protection is, thus, often relegated to being just a means to secure other fundamental ECHR rights and freedoms protected most often by Article 8. While protecting the environment to support these other rights is not undesirable, it is vital to understand that environmental protection is a truly worthy goal intrinsically, which we should strive to achieve directly. Although environmental human rights can develop without a binding document, we believe such an instrument would fortify the ECHR, address more environmental concerns amid accelerating climate change, and guide judicial interpretation.

---

70 Žatková, S.; Paľuchová, P., *ECtHR: Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (Application No. 53600/20, 9 April 2024): Insufficient Measures to Combat Climate Change Resulting in Violation of Human Rights,* Bratislava Law Review, 8 (1), 2024, p. 239. [https://doi.org/10.46282/blr.2024.8.1.874]

71 Bönnemann, M.; Tigre, M.A., *The Transformation of European Climate Change Litigation: Introduction to the Blog Symposium*, VerfBlog, 2024/4/09, [https://verfassungsblog.de/the-transformation-of-european-climate-change-litigation/], DOI: 10.59704/6e82d5aac53531fb. Accessed 16 May 2025.

72 Hösli, A.; Rehmann, M., *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland: the European Court of Human Rights' Answer to Climate Change*, Climate Law 14 (3-4), 2024, p. 284. [DOI:10.1163/18786561-bja10055].

73 Maganić, A., *Sporovi o klimatskim promjenama pred Europskim sudom za ljudska prava,* Zbornik radova s X. međunarodnog savjetovanja „Aktualnosti građanskog procesnog prava- nacionalna i usporedna pravno teorijska i praktična dostignuća", Split, 2024, p. 81.

REFERENCES

BOOKS AND ARTICLES

1. Boyd, R. D., *Evaluating 40 years of experience in implementing the right to a healthy environment* in: Knox, H. J.; Pejan, R., (eds.), Human right to a healthy environment, Cambridge University Press, 2018
2. Boyd, R.D., *The Status of Constitutional Protection for the Environment in Other Nations*, David Suzuki Foundation, 2013, pp. 6-39, Available at: [https://davidsuzuki.org/science-learning-centre-article/status-constitutional-protection-environment-nations], Accessed 8 March 2025
3. Braig, K. F.; Panov, S., *The Doctrine of Positive Obligations as a Starting Point for Climate Litigation in Strasbourg: The European Court of Human Rights as a Hilfssheriff in Combating Climate Change?,* Journal of Environmental Law and Litigation, Vol. 35, 261, 2020, pp. 262-296
4. Francioni, F., *International Human Rights in an Environmental Horizon*, The European Journal of International Law, Volume 21, Issue 1, 2010. pp. 41-55
5. Hösli, A; Rehmann,M., *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland: the European Court of Human Rights' Answer to Climate Change*, Climate Law 14 (3-4), 2024, pp.1-22
6. Jurić, A.; Mijatović, M., *Protection from Noise in the Context of Article 8 of the European Convention with Special Reference to Civil Law Protection*, Proceedings of the Conference Current Issues of Civil and Commercial Legislation and Legal Practice, no. 19, Mostar, 2022, pp. 208-227
7. Kobylarz, N., *A World of Difference: Overcoming Normative Limits of the ECHR Framework through a Legally Binding Recognition of the Human Right to a Healthy Environment*, Journal of Environmental Law, Vol. 37, Issue 1, 2025, pp. 23–43, [https://doi.org/10.1093/jel/eqae031]
8. Maganić, A., *Sporovi o klimatskim promjenama pred Europskim sudom za ljudska prav*a, Zbornik radova s X. međunarodnog savjetovanja „Aktualnosti građanskog procesnog prava-nacionalna i usporedna pravno teorijska i praktična dostignuća", Split, 2024, p. 61-84
9. Mayer, B., *The International Law on Climate Change*, Cambridge University Press, 2018
10. Mihelčić, G.; Marochini Zrinski, M., *Suživot negatorijske zaštite od imisija i prava na život u zdravoj životnoj sredini*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 39, No. 1, 2018, pp. 253-261
11. Morrow, K., *The ECHR, Environment-Based Human Rights Claims and the Search for Standards*, in: Turner, J. S. *et al.* (eds.), Environmental Rights, The Development of Standards, Cambridge University Press, 2019, pp. 41-59
12. Omerović, E., *et al.*, *The European Convention for the Protection of Human Rights and Fundamental Freedoms: A Fertile Ground for the Protection of the Environment?,* Zeitschrift für Europarechtliche Studien, Nomos, Baden Baden, 2024, pp. 430–457
13. Pedersen,W. O., *The Ties That Bind: The Environment, the European Convention on Human Rights and the Rule of Law*, Vol. 16 (4), European Public Law, 2010, p. 571-595

14. Peters, B., *The European Court of Human Rights and the Environment* in: Sobenes, E.; Mead, S.; Samson, B., (eds.), *The Environment Through the Lens of International Courts and Tribunals*, T.M.C. Asser Press, 2022
15. Raisz, A.; Krajnyák, E., *Protection of the environment in the european human rights framework: a central euroepan perspective*, in: Constitutional Protection of the Environment and Future Generations. Studies of the Central European Professors' Network, Central European Academic Publishing, Miskolc, Budapest, 2022, pp. 73-125
16. Schoukens, H.; Bouquelle, F., *Introduction: the right to a healthy environment revisited as a necessary leverage point in times of climate crisis in Europe and beyond?* in: Schoukens, H.; Bouquelle, F., (eds), The Right to a Healthy Environment in and Beyond the Anthropocene, Edward Elgar Publishing, 2024
17. Stancin, V., *The Echr and the Iccpr: A Human Rights-Based Approach to the Protection of the Environment and the Climate System*, European Convention on human rights Law Review, 5, 2024, pp. 190–197
18. Stoyanova, V., *KlimaSeniorinnen and the Question(s) of Causation*, [https://verfassungsblog.de/klimaseniorinnen-and-the-questions-of-causation/]
19. van Dijk, P.; Godefridus J.H.; van Hoof, G. J.H., *Theory and Practice of the European Convention on Human Rights*, The Hague-Boston-London: Kluwer Law International, 1998
20. Willman, S.; Balfour-Lynn, H., *The Right to a Healthy Environment: The Case for a New Protocol to the European Convention on Human Rights*, SSRN Working Paper Series, 2022, https://doi.org/dx.doi.org/10.2139
21. Wiśniewski, A., *The European Court of Human Rights and Climate Change*, Law & Social bonds no. 6 (53), 2021, pp.1356-1374
22. Žatková, S.; Paľuchová, P., *ECtHR: Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (Application No. 53600/20, 9 April 2024): Insufficient Measures to Combat Climate Change Resulting in Violation of Human Rights,* Bratislava Law Review, 8 (1), 2024, pp. 227-244

EU LAW

1. European Convention on Human Rights, Text available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:eu_human_rights_convention], Accessed 8 March 2025
2. 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 (EC) No 401/2009 and (EU) 2018/1999 (European Climate Law), OJ L 243, 9.7.2021
3. The European Green Deal, Striving to be the first climate neutral continent, available at: [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en], Accessed 8 March 2025

LIST OF NATIONAL REGULATIONS

1. The Constitution of the Republic of Croatia, Official Gazette no. 85/10, 5/14
2. The Decision and the Ruling of the Constitutional Court No. U-II-845/2019 i U-II-2160/2019, 18 April 2023

3. The Ruling of the Constitutional Court No. U-I-3789/2003, 8 December 2010

THE EUROPEAN COURT OF HUMAN RIGHTS

1. *Cordella and Others v. Italy*, Aapplications nos. 54414/13 and 54264/15, Judgment of 24. January 2019
2. *Cuenca Zarzoso v. Spain,* Application no. 23383/12, Judgment of 16.01.2018
3. *Duarte Agostinho and Others v. Portugal and 32 Other States*, Application no. 39371/20, Decision of 9. April 2024
4. *López Ostra v. Spain*, Aapplication no. 16798/90, Judgment of 9. December 1994
5. *Pavlov and Others v. Russia*, Application no. 31612/09, Judgment of 11. October 2022
6. *Powell and Rayner v. the United Kingdom*, Application no. 9310/8121, Judgment of 21. February 1990
7. *Taşkın and Others v. Turkey*, Application no. 46117/99, Judgment of 10 November 2004
8. *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland,* Application no. 53600/20, Judgement of 9. April 2024
9. *Marckx v. Belgium*, application no. 6833/74, judgment of 13 June 1979
10. *Carême v. France*, Application no. 7189/21, Decision of 9. April 2024
11. *Moreno Gómez v. Spain*, Application no. 4143/02, Judgment of 16.11.2004
12. *Olujić v. Croatia*, Application no. 22330/05, Judgement of 5. February, 2009
13. *Chiş v. Romania*, Application no. 36129/15, Judgment of 27. April 2017
14. *Fadeyeva v. Russia*, Application no. 55723/00, Judgment of 9. June 2005

WEB REFERENCES

1. Bönnemann, M.; Tigre, M.A., *The Transformation of European Climate Change Litigation: Introduction to the Blog Symposium*, VerfBlog, 2024/4/09, [https://verfassungsblog.de/the-transformation-of-european-climate-change-litigation/], Accessed 16 May 2025
2. Climate Change Litigation Databases, [https://climatecasechart.com/], Accessed: 28 February 2025
3. Declaration on the Human Environment, available at: [https://documents.un.org/doc/undoc/gen/nl7/300/05/pdf/nl730005.pdf], Accesssed 26 February 2025
4. Environmental Rule of Law: First Global Report, (United Nations Environment Programme 2019), available at: [https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report], Accessed 28 February 2025
5. Human Rights Law and Climate Change, [https://climatehughes.org/law-and-climate-atlas/human-rights-law-and-climate-change/], Accessed 10 May 2025
6. The Paris Agreement, [https://unfccc.int/process-and-meetings/the-paris-agreement], Accessed 11 May 2025

7. The United Nations Framework Convention on Climate Change (UNFCCC), [https://www.eesc.europa.eu/pt/initiatives/un-framework-convention-climate-change], Accessed 7 March 2025
8. UN World Commission on Environment and Development, ed., Report of the World Commission on Environment and Development: Our Common Future, [https://www.environmentandsociety.org/mml/un-world-commission-environment-and-development-ed-report-world-commission-environment-and], Accessed 21 February 2025
9. United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992, [https://www.un.org/en/conferences/environment/rio1992], Accessed 28 February 2025
10. Verein KlimaSeniorinnen Schweiz and Others v. Switzerland [GC] 53600/20, Résumé juridique, 09/04/2024, [https://hudoc.echr.coe.int/fre?i=002-14304], Accessed 28 February 2025

THE IMPACT OF EU NATURE RESTORATION LAW ON PRIVATE PROPERTY RIGHTS – BETWEEN THE ENVIRONMENTAL PROTECTION AND THE (IN)COMPATIBILITY WITH THE ROMAN LEGAL TRADITION

Nikol Žiha, PhD, Associate Professor
Josip Juraj Strossmayer University of Osijek, Faculty of Law
Stjepana Radića 13, 31000 Osijek, Croatia
nikolz@pravos.hr

Marko Sukačić, PhD, Assistant Professor
Josip Juraj Strossmayer University of Osijek, Faculty of Law
Stjepana Radića 13, 31000 Osijek, Croatia
msukacic@pravos.hr

ABSTRACT

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 (EU Nature Restoration Law) is the first continent - wide comprehensive law aimed at restoring ecosystems, habitats, and species in the EU. Entering into force on 18 August 2024, the Regulation obliges all Member States to adopt effective restoration measures without delay, with the objective of covering at least 20% of the EU's land and sea areas by 2030, and ensuring that all ecosystems in need of restoration are addressed by 2050. Given that over 80% of Europe's natural habitats are currently in poor condition, the EU Nature Restoration Law introduces legally binding targets that aim to reverse biodiversity loss and improve the ecological integrity of the Union's territory. In order to reach the goals, it is unavoidable that the restoration measures will affect property rights and create a need to supplement existing legal remedies for subjects whose rights will be affected by the restoration measures. As the regulation of property rights—particularly ownership—falls within the exclusive competence of each Member State, the legal and constitutional traditions regarding property vary significantly across the Union. In Croatia, building up on Roman legal tradition, ownership represents a most comprehensive right over an object. As the Nature Restoration Law intervenes in how property may be used, questions arise as to whether the required measures are compatible with the traditional understanding of ownership.

This paper examines the implications of the EU Nature Restoration Law on private property rights, using Croatia as an example. It begins by outlining the definition and core attributes of dominium in Roman law and its reception in Croatian legal doctrine. The analysis then turns

to the key provisions of the EU Nature Restoration Law, highlighting the absence of explicit mechanisms for reconciling ecological objectives with property rights as fundamental rights. Finally, the paper offers conclusions on the significance of nature restoration efforts, thereby underlining the necessity of harmonising environmental goals with the inviolability of private ownership as a cornerstone of modern legal systems.

***Keywords**: EU Nature restoration law, European private law, legal environmental, ownership, protection, Roman law*

1. INTRODUCTION

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 (hereafter: EU Nature Restoration Law) is the first continent-wide comprehensive law aimed at restoring ecosystems, habitats, and species in the EU. Even before entering into force on 18 August 2024, the public debate on its positive and negative impacts was heated. For instance, in Finland and Sweden, the public had objectively justified concerns about its impact on legal certainty for landowners.[1] Criticism was also voiced in Croatia. Fearing that it will directly jeopardize the already fragile agricultural production and fisheries, the Croatian Chamber of Agriculture advocated to vote against the proposed regulation.[2] On the other hand, nature protection organizations, various NGOs and nature enthusiasts welcomed the EU Nature Restoration Law with a strong emphasis on its positive environmental influence.[3] Lastly, certain authors called for the rational, middle approach to the problem.[4]

---

1 Teivainen, A., *Finland will insist on revisions to nature restoration law, rules committee*, web page Helsinki Times, 02 December 2022, [https://www.helsinkitimes.fi/finland/finland-news/politics/22609-finland-will-insist-on-revisions-to-nature-restoration-law-rules-committee.html], Accessed 04 February 2025; Christiansen, C., *Nature Restoration law: Legal certainty for land owners need to be respected,* web page of North Sweden European Office, 12 July 2023, [https://www.northsweden.eu/english/news/2023/nature-restoration-law-legal-certainty-for-land-owners-need-to-be-respected/], Accessed 04 February 2025.

2 The reasoning put forward was that its implementation in Croatia would further reduce the already low level of agricultural productivity and increase the country's dependence on imported agricultural products. This, in turn, could lead to a counterproductive effect by increasing CO_2 emissions due to transport-related pollution, highlighting the issue of insufficient self-sufficiency. *Cf. Agriculture Chamber urges Croatian MEPs to vote against nature restoration bill*, N1, 12 July 2023 [https://n1info.hr/english/news/agriculture-chamber-urges-croatian-meps-to-vote-against-nature-restoration-bill/], Accessed 28 March 2025.

3 *Serious concerns about the Swedish Presidency proposal for the Nature Restoration Law*, Open letter published on the web page of FERN organization, 27 March 2023 [https://www.fern.org/publications-insight/serious-concerns-about-the-swedish-presidency-proposal-for-the-nature-restoration-law/], Accessed 04 February 2025; Erg, B.; Schnell, A.A., *IUCN statement on the EU Nature Restoration Law,* web page International Union for Conservation of Nature, 04 July 2023, [https://iucn.org/iucn-statement/202307/iucn-statement-eu-nature-restoration-law], Accessed 04 February 2025.

4 Leino-Sandberg, P., *Nature Restoration and Fundamental Rights*, web page Verfassungsblog, 17 November 2022, [https://verfassungsblog.de/nature-restoration-and-fundamental-rights/], Accessed 04 February 2025; Kurmayer, N., *Brussels wrestles with potential impacts of EU nature restoration law,* web

As there is no unified or comprehensively regulated concept of property at the European level—nor is one currently foreseen[5]—the effectiveness of implementing the EU Nature Restoration Law will depend largely on the legal frameworks and approaches adopted by individual Member States, which may, in turn, jeopardize the achievement of its objectives. Focusing on the case of Croatia, this article explores the potential impact of the EU Nature Restoration Law on private property rights and assesses its (in)compatibility with the notion of ownership as shaped by the Roman legal tradition.

Methodologically, this paper is grounded in historical-comparative and doctrinal legal research. It opens with an exposition of the nature and essential attributes of the institute of *dominium* in Roman law, examining the intersection between private ownership and the public interest. This is followed by an analysis of the core characteristics and challenges of the Croatian property law system. The second part presents the general framework for the protection of private property within EU law. The third part offers a critical analysis of the practical implications of the relevant provisions of the EU Nature Restoration Law and discusses the (perceived) tensions between these measures and property rights from the perspective of EU law. Lastly, the paper concludes by reflecting on the importance of ecosystem restoration and underscores the necessity of achieving a synergy between environmental objectives and ownership as a fundamental real right.

2. *DOMINIUM*

2.1. Nature and limitations of ownership in Roman Law

The Roman institute of *dominium*, which forms the foundation of ownership in legal systems rooted in the Roman legal tradition, was an abstract and universal concept of property—an absolute, though not unlimited, right of a person over an object. In the early development of Roman law, particularly in the context of its procedural enforcement (*via legis actio sacramento in rem*), ownership did not necessarily signify an absolute right of dominion. Instead, it was generally understood as a superior right in relation to a specific litigation rival.[6] Since *rei vindicatio* un-

page EURACTIV, 20 February 2023, [https://www.euractiv.com/section/climate-environment/news/brussels-wrestles-with-potential-impacts-of-eu-nature-restoration-law/], Accessed 04 February 2025.

5 Michaels, R., *Property*, in: Basedow, J.; Hopt, K. J.; Zimmermann, R. (eds.), The Max Planck Encyclopaedia of European Private Law, vol. 2, Oxford University Press, Oxford, 2012, p. 1371.

6 *Cf.* Kaser, M., *The Concept of Roman Ownership*, Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law), Vol 27, No. 1, 1964, p. 8; Kaser, M., *Über 'relatives Eigentum' im altrömischen Recht*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung, vol. 102, no. 1, 1985, pp. 24; Giglio, F., *The concept of ownership in Roman law*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung, vol. 135, no. 1, 2018, pp. 84;

derwent a fundamental transformation within the formulary procedure during the Middle Republic—where only the plaintiff was required to prove ownership, and failure to do so resulted in the dismissal of the action regardless of the defendant's legal position—it can be inferred that ownership was conceived as an absolute right.[7] In the Late Republic, the terms *dominium*[8] and *proprietas* were used synonymously[9] to signify the comprehensive dominion in relation to objects, unless restricted by additional terms.[10] Due to the Roman aversion to abstract definitions,[11] no clear description of the institute has been preserved. However, ownership can be understood as full private-law sovereignty, allowing both legal and actual disposal of a thing within the limits set by the legal order and private autonomy.[12]

Indeterminacy and elasticity are considered two key characteristics of Roman property law. Indeterminacy implies that the content of ownership cannot be precisely defined, as it encompasses an unlimited set of rights over things. Elasticity, on the other hand, means that any restriction on ownership does not alter the right itself; rather, it reverts to its full scope once the limitation is removed.[13] The concept of elasticity suggests that ownership is a right with flexible boundaries, while indeterminacy requires that it includes all conceivable powers. Giglio directs our attention to the fact that the very existence of variable boundaries indicates that an owner's powers are not always absolute—otherwise, there would be no boundaries at all.[14]

Following Birks's observation that "absolute is not a word which admits of degrees"[15] it becomes clear that ownership is an absolute right only in theory. Although it was the most extensive real right, including the right to possess, enjoy, utilize, and

---

Klinck, F., *Eigentumsbegriffe*, in: Babusiaux, U., *et al.* (eds.), Handbuch des römischen Privatrechts, Vol 1, Mohr Siebeck, Tübingen, 2023, pp. 1058-1059.

7 Gai. *Inst.* 4,92-93; Alf. D. 6,1,57; Kaser, M., *Das römische Privatrecht, I, Das altrömische, das vorklassische und klassische Recht*, C. H. Beck, München, 1971, p. 400.

8 The earliest reference of the term *dominium* is found in Paul's Epitomes of the Digest of Alfenus Varus D. 8,3,30.

9 *E.g.* Ner. D. 41,1,13 pr.

10 However, a certain difference in terminology becomes clear in cases where legal dominion is limited, for example, by the right of a third party or by common use; then it is generally referred to as *proprietas*, not *dominium. E.g.* Gai. D. 1,8,5 pr; Ulp. D. 4,3,7,4; Paul. D. 6,1,33; Gai. D. 7,1,3,2; Iav. D. 7,1,54; Flor. D. 13,7,35,1; Ulp. D. 29,5,1,1.

11 *Cf.* Paul. D. 50,17,1; Iav. D. 50,17,202.

12 Kaser, *op. cit.,* note 7, p. 400.

13 Bonfante, P., *Corso di diritto romano*, vol. II: La Proprietà, vol. I, Attilio Sampaolesi, Roma 1926, p. 241.

14 Giglio, *op. cit.,* note 4, p. 95.

15 Birks, P., *The Roman law concept of* dominium *and the idea of absolute ownership*, Acta Juridica, vol. 1, 1985, p. 1. Scott acknowledges that the theory of absolute title does not align with the realities of Roman legal practice. See Scott, H., *Absolute Ownership and Legal Pluralism in Roman Law: Two Arguments*, Acta Juridica, Vol 1, 2011, p. 23.

dispose of, it could have been restricted in favour of public law, neighbouring rights,[16] or by voluntary renunciation of certain rights by the owners themselves. These constraints allowed for a balance between individual property rights and collective interests, establishing a framework within which owners had to consider the overarching public good. However, in early Roman law, the expropriation of private property for the common good was still a nascent legal institution.[17] The closest equivalent was the state-mandated sale of private property, which was employed only in exceptional cases, such as the construction of aqueducts to ensure a reliable water supply.[18] Over time, various restrictions were imposed on land use to safeguard the safety,[19] health,[20] and well-being of city inhabitants.[21] Following the same principle, landowners adjacent to public roads were prohibited from obstructing the right of way,[22] riparian owners could not prevent reasonable use of riverbanks by those navigating the river,[23] and planting or erecting trees within a specified distance of an aqueduct was strictly forbidden.[24]

Although the legislator never explicitly formulated a *modus procedendi* for expropriation, by at least the Middle Republic a customary procedure had become established for individual interferences with private property, which included appropriate compensation for the affected party.[25] Whenever the value of the

16 *E.g.* Alf. D. 8,5,8,5–7; Ulp. D. 39,3,1 pr; Ulp. D. 39,2,7 pr; Ulp. D. 43,27-28.

17 Kaser, *op. cit.,* note 7, p. 405; Jones, J. W., *Expropriation in Roman Law*, Law Quarterly Review, vol. 45, no. 4, 1929, p. 514.

18 Frontinus, *De aquaeductu urbis Romae* 128: "Its fairness is all the more apparent in light of the fact that our forefathers, with remarkable equity, did not seize from private parties even those lands which were of necessary interest to the state; but when they were bringing in waters, if a landholder was recalcitrant about selling a part of his property, they paid for the whole, and then after fixing boundaries for the land that was needed they sold the property in their turn, it having been clearly established that the state as well as private parties, each within respective boundaries, should have full and absolute right." The owners of the land through which public water supply canals passed were obligated to clean and maintain them in exchange for exemption from extraordinary fees (*ab extraordinariis oneribus volumus esse immunes*). Failure to maintain the canal in good condition, thereby obstructing the aqueduct's flow, resulted in the forfeiture of the land to the state. This confiscation was likely intended not only as a punishment and deterrent but also as a means to cover repair costs that would otherwise have been borne by the state treasury. *Cf.* C. Theo. 15,2,1 = C. 11,43,1.

19 C. Theo. 15,1,4.

20 As early as the Code of the Twelve Tables, burial and cremation within city walls were prohibited to prevent the spread of infection. Ulpian (D. 47,12,3,5) cites the wording of Hadrian's rescript, which stated that anyone who buried a deceased person within the city was required to pay forty aurei to the state treasury, and the burial site would be confiscated. See also: C. Theo. 14,6,5; Ulp. D. 1,18,7.

21 C. 8,10,2-3; C. 3,34,14,1.

22 Ulp. D. 43,8,2,27.

23 Inst. 2,1,4; Paul. D. 43,12,3.

24 Frontinus, *De aquaeductu urbis Romae* 127; C. 11,43,1; C. 11,43,6,1; C. Theo. 15,2,1.

25 Pennitz, M., *Der "Enteignungsfall" im römischen Recht der Republik und des Prinzipats: eine funktional-rechtsvergleichende Problemstellung*, Bohlau, Wien, 1991, pp. 203sqq.

property to be taken was not known in advance, an assessment procedure was initiated, led by an executive official, to determine the property's value and to ensure adequate compensation to the individual concerned. There is evidence to suggest that efforts were made to provide just compensation for expropriation.[26] Although Roman law did not develop a comprehensive theory of expropriation, it clearly reflects an awareness of the importance of collective public interest over individual claims. At the same time, its deep respect for private ownership laid the groundwork for later legal doctrines aimed at balancing proprietary rights with the demands of the common good.

2.2. Contemporary Croatian property right

In the legal systems rooted in European legal tradition, ownership is a cornerstone institution, and accordingly, any changes to the legal concept of ownership necessarily affect nearly all legal relations within the system.[27] By abandoning the individualistic concept of private ownership during its inclusion in the socialist legal circle in favour of a collectivist model with pluralism of ownership forms, the very essence of the legal institution was transformed, leading to significant upheavals, including the disruption of the land registry system and increased legal uncertainty, the consequences of which are still felt today.[28] With its return to the Romano-Germanic legal family, Croatia demonstrated that a change in regime does not necessarily entail a radical break with former traditions, as even during its time within the socialist legal framework, the system did not entirely exclude the presence of Romanist substrata within its very core.[29]

The individualistic conception of ownership inherited from Roman law[30] and absolute private control over property do not exclude the fact that individuals are

---

[26] For instance, Frontinus (*De aquaeductu urbis Romae* 125) refers to a *Senatus consultum* from 11 BC, which prescribed that the value of construction materials forcibly taken from a person's land for the purpose of building or repairing aqueducts should be assessed according to the judgment of *viri boni* acting as arbiters.

[27] Gavella, N., *et al., Stvarno pravo* (Property Law), Vol 1, Official Gazette, Zagreb, 2007, p. 344.

[28] Josipović, T., *Private Law Codification in The Republic of Croatia*, in: Wang, W. (ed.), Codification in International Perspective: Selected Papers from the 2nd IACL Thematic Conference, Heidelberg, New York, Dordrecht, London, Springer, 2014, p. 189.

[29] Žiha, N., *Croatian Property Law between Tradition and Transition: A Revival of the Roman Principle Superficies Solo Cedit*, in: Primorac, Z; Bussoli, C; Recker, N. (eds.), Economic and Social Development. 16th International Scientific Conference on Economic and Social Development "The Legal Challenges of Modern World", Book of Proceedings, Split, Varaždin, 2016, pp. 73–83.

[30] The right of ownership is defined by the Article 30 of the *Croatian Act on Ownership and Other Real Rights* as a real right over a specific object, granting the holder the authority to use it and enjoy any benefits it generates as they see fit, while also excluding others from interfering—except where this would infringe upon the rights of others or violate legal restrictions. Croatian Act on Ownership and Other Real Rights

not isolated but operate within a community. As such, they are obligated to act responsibly, considering the general interests of society as a whole. This concept is embodied in Article 48(2) of *The Constitution of the Republic of Croatia* (hereinafter: Constitution),[31] as well as Article 32(1) of *Croatian Act on Ownership and Other Real Rights* (hereinafter: OA), which state that ownership carries obligations. Consequently, owners and beneficiaries of property rights are required to contribute to the common good. Although the concept's content is not explicitly defined, it should be understood as the owner's duty toward society, depending on the social function of the property they own.[32] In other words, it restricts ownership rights based on the needs of the society in which the owner resides. The imposition of restrictions does not alter the substance of ownership, as it continues to entitle the owner to freely dispose of their property and its benefits and to exclude others from interfering with it. What changes under the effect of such restrictions is the ability to exercise ownership rights—that is, the scope of the owner's legal authority.[33]

Due to the social nature of ownership, public authorities will, in many cases, have the ability to seize, encumber, and restrict an individual's proprietary rights. The guarantee of ownership granted by Article 48 of the Constitution does not exclude this possibility, but rather sets boundaries for such actions by public authorities, establishing constitutional norms that determine the conditions under which interference with property rights is allowed. Article 50 of the Constitution stipulates that this can only occur exceptionally when prescribed by law, for the protection of the interests and security of the Republic of Croatia, nature, the human environment, and public health, and with compensation based on the market value. In accordance with the constitutional principle of proportionality, as set out in Article 16(2), restrictions of rights and freedoms must be proportionate to the nature of the need for such restriction in each individual case.

(Zakon o vlasništvu i drugim stvarnim pravima), Official Gazette 91/96, 68/98, 137/99, 22/00, 73/00, 114/01,79/06, 141/06, 146/08, 153/09, 90/10, 143/12, 152/14, 81/15, 94/17. Provisional translation of the outdated text is available on the website of the Croatian Judicial Academy: [https://pak.hr/cke/propisi,%20zakoni/en/OwnershipandOtherRealRights/EN.pdf], Accessed 28 February 2025.

31 *The Constitution of the Republic of Croatia* (consolidated text) [Ustav Republike Hrvatske] (Official Gazette 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14). The manifestation of the concept can be also found in other constitutions of European countries belonging to the same circle. Compare for instance Article 14 (2) *Grundgesetz für die Bundesrepublik Deutschland* in der im Bundesgesetzblatt Teil III, Gliederungsnummer 100-1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 1 des Gesetzes vom 20. Dezember 2024 (BGBl. 2024 I Nr. 439) geändert worden is. (Basic Law for the Federal Republic of Germany]

32 Gavella, N., *Ograničenja prava vlasništva* [Restrictions of Ownership), Zbornik Pravnog fakulteta Sveučilišta u Rijeci (Collected Papers of the Faculty of Law of the University of Rijeka), Vol 19, No. 2, 1998, p. 356.

33 Gavella, *et al., op. cit.,* note 27, p. 414.

Legal restrictions imposed for the reasons outlined in Article 50(2) of the Constitution should be distinguished, in particular, from those limiting the use and exploitation of properties designated as assets of special interest to the Republic of Croatia. These resources are subject to a special legal regime under Article 52 of the Constitution and include the sea, seashore, islands, waters, airspace, mineral resources, and other natural resources, as well as land, forests, flora and fauna, other components of the natural environment,[34] and real estate and objects of particular cultural, historical, economic, or ecological significance.

Despite the fact that it may appear to be a simple and fair solution, the process of expropriating immovable property due to its acquisition of a special legal status has already led to significant issues in recent Croatian legal history. Since Croatia, owing to its indented coastline and rich natural resources, frequently faces conflicts between private property rights and nature protection interests, a comprehensive treatment of all such instances falls beyond the scope of this paper. Accordingly, one representative instance will be outlined. A prominent example concerns the seashore, which, in accordance with Roman legal tradition, is classified under Croatian law as *res communes omnium*—a common good accessible to all under equal conditions.[35] As such, the seashore cannot be subject to private ownership, a principle enshrined in the Constitution, the OA and the *Maritime Domain and Seaports Act* (hereinafter: MDSA).[36] Nevertheless, over the past century—including during the Communist era—certain coastal parcels were legally recognized as the subject of private rights, and as a result, some individuals have held, and continue to hold, ownership over parts of what is now designated maritime domain. The previous version of the MDSA imposed on these owners the burden of proving lawful acquisition, under penalty of automatic loss of ownership *ex lege*.[37] A critical perspective on this issue was articulated in the dissenting opinion of Judge Brkić in a ruling by the Croatian Constitutional Court. He highlighted

---

[34] Furthermore, Article 168 of the Nature Protection Act (Official Gazette 80/13, 15/18, 14/19, 127/19, 155/23) establishes a specific legal framework that entitles property owners within designated protected areas to request, within two years from the entry into force of the act introducing restrictions or prohibitions on the property, either the purchase of the affected real estate at market value by the state or local authority, or the provision of a replacement property. *Cf.* also Gavella, N., *et al., op. cit.,* note 27, p. 417.

[35] For the detailed elaboration of the dubious legal status of maritime domain, see: Žiha, N.; Sukačić, M., *Troubled waters - Croatian seashore as res extra commercium in commercio*, Pravni Vjesnik, (Journal of Law), Vol 39, no. 2, 2023, pp. 7-28.

[36] Zakon o pomorskom dobru i morskim lukama (Maritime Domain and Seaports Act), Official Gazette 83/23. Currently there is no official or informal publicly available English translation of this legal text.

[37] According to Article 118 of the former Maritime Domain and Seaports Act (MDSA) (Official Gazette 158/03, 100/04,141/06, 38/09, 123/11, 56/16, 98/19), registrations of ownership or other real rights over land and buildings within the maritime domain are deemed legally invalid if a lawful method of acquisition cannot be proven. Consequently, each owner is required to demonstrate a valid basis for

the absence of any legal obligation for the state to notify property owners when their land is reclassified as maritime domain, or to offer compensation reflecting fair market value.[38] Under the current text of the MDSA, all prior registrations of maritime domain are rendered null and void.[39]

Given the unresolved challenges stemming from Croatia's complex legal and historical legacy, there is legitimate concern as to whether future exclusions of private ownership for the purpose of nature protection can be carried out in a just and equitable manner.

3. PROPERTY RIGHTS IN THE EU

3.1. Overview of EU competences

Right to property is a general principle of EU law, recognized in the case law of the Court of Justice back in 1979, and subsequently mentioned and considered in its case law as a well-established fundamental right.[40] However, it is differently defined and protected throughout different legal systems of Member States. For instance, in most civil law systems, property rights are regulated and established in the written constitutions, thus having a higher status of ordinary law that nullifies or in other ways breaches the right.[41]

The main legal source that directly mentions the right to property in the EU legislation can be seen quite late in the EU legal history, in the Charter of Fundamental Rights (hereafter Charter),[42] a legally binding catalogue of fundamental rights, principles, values, and ideas with a strong symbolic importance.[43] It was drafted

---

acquisition, regardless of whether they—or their legal predecessor—were already in possession of such rights at the time of registration.

38 Constitutional Court decision U-I-6256/2014 from 9th October 2019.

39 It remains debatable whether such a solution aligns with the principle of vested rights, given that the current owner acquired the immovable property on valid legal grounds from a predecessor who had lawfully obtained the right at a time when such acquisition was permissible. *Cf.* Vezmar Barlek, I., *Primjena načela legitimnih očekivanja u praksi Upravnog suda Republike Hrvatske* [*Application of the Principle of Legitimate Expectations in the Case Law of the Administrative Court of the Republic of Croatia*], Zbornik Pravnog fakulteta Sveučilišta u Rijeci (Collected Papers of the Faculty of Law of the University of Rijeka), Vol 32, no. 1, 2011, p. 571.

40 Case 44/79, *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727. *Cf.* Case 59/83 *SA Biovilac NV v European Economic Community* [1984] ECR 4057, par. 21; Case C-347/03 *Regione autonoma Friuli-Venezia Giulia and ERSA* [2005] ECR I-3785, par. 119.

41 Winter, G., *Property and Environmental Protection,* in: Winter, G. (ed.), Property and Environmental Protection in Europe, Europa Law Publishing, Groningen, 2016, p. 7.

42 Charter of Fundamental Right of the European Union, OJ C 326, 26 Oct 2012.

43 Bernhard, N., *A 'New Governance' Approach to Economic, Social and Cultural Rights in the EU,* in: Harvey, T.; Kenner, J. (eds.), Economic and Social Rights Under the EU Charter of Fundamental Rights:

up in 1999-2000, but eventually came into full legal power in December 2009,[44] together with the Lisbon Treaty.[45] By Article 6(1) of the Treaty on the European Union, the Union recognizes the rights, freedoms and principles set out in the Charter, and therefore the Charter is a part of the primary law of the EU.[46] An important consequence of this regulation is the fact that the Charter represents a major subject to the jurisdiction of the Court of Justice of the European Union (hereafter CJEU). Since the Charter has a binding nature, it also guarantees the respect of fundamental rights in both the elaboration and the implementation of EU law.[47] In addition, it is worth noting that Article 345 of the Treaty of the Functioning of the EU (hereafter TFEU) states that the Treaties shall in no way prejudice the rules of Member States concerning the system of property ownership. Therefore, such rights are in the competencies of Member States.

In the context of property rights, the Charter's Article 17(1) states that everyone has the right to own, use, dispose of, and bequeath his or her lawfully acquired possessions. In addition, no one may be deprived of his possession, except in the public interest, and under the conditions provided for by law. If such an event occurs, the owner is entitled to fair compensation in good time. Lastly, the article states that the use of property may be regulated by law in so far as is necessary for the general interest.

The formulation of Article 17 of the Charter is modelled on Article 1 of Protocol No. 1 to the European Convention on Human Rights (ECHR),[48] and therefore it confers the same meaning and affords an equivalent scope of protection.[49] In this regard, Article 52(3) of the Charter is particularly relevant, as it provides that, insofar as rights enshrined in the Charter correspond to those guaranteed by the

---

A Legal Perspective, Hart Publishing, Oxford, 2003, p. 247; Kerikmäe, T., *EU Charter: Its Nature, Innovative Character, and Horizontal Effect*, in: Kerikmäe, T.(ed.), Protecting Human Rights in the EU, Controversies and Challenges of the Charter of Fundamental Rights, Springer, Heidelberg, 2014, p. 8.

44 Craig, P.; de Búrca, G., *EU Law: Text, Cases, and Materials,* Oxford University Press, Oxford, 2011, p. 94.

45 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 83, 30 March 2010.

46 Zetterquist, O., *Charter of Fundamental Rights and the European Res Publica*, in: Di Federico, G. (ed.), The EU Charter of Fundamental Rights: From Declaration to Binding Instrument, Springer, Heidelberg, 2011, p. 3.

47 Di Federico, G., *Fundamental Rights in the EU: Legal Pluralism and Multi-Level Protection After the Lisbon Treat*, in: Di Federico, G. (ed.), The EU Charter of Fundamental Rights: From Declaration to Binding Instrument, Springer, Heidelberg, 2011, p. 53.

48 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

49 Lock, T., *Articles 6 - 19,* in: Kellerbauer M. *et al.* (eds.), The EU Treaties and the Charter of Fundamental Rights, A Commentary, Oxford University Press, Oxford, 2019, p. 2149.; Becker, F., *Market Regulation and the 'Right to Property' in the European Economic Constitution*, Yearbook of European Law, Vol 26, No. 1, 2007, p. 268.

Convention for the Protection of Human Rights and Fundamental Freedoms, their interpretation shall be in line with the interpretation given by the European Court of Human Rights (ECtHR). This makes the extensive jurisprudence of the ECtHR directly applicable to the interpretation and application of Article 17 of the Charter. Article 17 guarantees every individual the right to own, use, dispose of, and bequeath lawfully acquired possessions. The provision not only imposes a negative obligation on the European Union and its Member States to refrain from unjustified interference with the right to property, but also entails positive obligations to ensure the effective enjoyment of that right. Accordingly, States must take appropriate measures to secure the conditions under which property rights can be exercised meaningfully and without disproportionate restriction.[50]

Article 17 of the Charter, when read in conjunction with Article 52(5), establishes that the right to property must be respected not only by the institutions, bodies, offices, and agencies of the European Union, but also by the Member States.[51] However, Member States are bound by the Charter solely when acting within the scope of EU law.

Additional dimensions of the protection of property rights are reflected in Article 52(4), which stipulates that the Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, and that such rights shall be interpreted in harmony with those traditions. Although the provision does not specify which Charter rights fall within this category, legal scholarship generally agrees that it refers to those rights for which a common constitutional foundation exists across Member States. Notable examples include Article 14(1) (right to education), Article 17(1) (right to property), and Article 49(3) (the principle of proportionality of criminal offences and penalties). Thus, the right to property as enshrined in Article 17(1) is encompassed by this interpretive principle.

Accordingly, the interpretation of the right to property under the Charter should be informed by the constitutional traditions of the Member State from which the case arises. While this approach promotes respect for national legal specificities, it also permits divergent interpretations and outcomes in comparable cases across different jurisdictions, potentially affecting legal certainty and uniformity within the EU legal order.

The CJEU's definition of property rights was given in the *Sky Österreich* case, *as rights with an asset value creating an established legal position under the legal system,*

---

50 Lock, *Ibid.,* p. 2150. *Cf. Öneryıldız v Turkey* (2004) ECHR 2004-XII, especially par. 134.

51 Wollenschläger, F., *Article 17(1) – Right to Property,* in: Peers, S., *et al* (eds.), The EU Charter of Fundamental Rights, A Commentary*,* Hart, Oxford, 2021, p. 491.

enabling the holder to exercise those rights autonomously and for his benefit.[52] In this case, the CJEU ruled that exclusive broadcasting rights fall outside the scope of Article 17(1), thereby granting Member States' legislators a crucial role in defining what constitutes property. The decision faced criticism, primarily for allowing excessive legislative discretion. However, it aligns with the previously mentioned principle of respecting Member States' legal traditions regarding property rights.

In theory, the right to property can be understood from both negative and positive dimensions. From a negative perspective, it serves to protect individuals from state interference with their possessions, effectively prohibiting certain actions. Conversely, from a positive perspective, administrative procedures and legal protections related to property rights must be implemented to a degree that ensures individuals can fully enjoy their property.[53] Thus, the state is obligated to take all necessary measures to safeguard property rights—not only against its own actions but also against infringements by private individuals and natural threats.

3.2. Limitations and derogations

Besides the protection of the property, Article 17(1) of the Charter enables two limitations concerning deprivation and the modality of use. The Charter uses phrases *no one may be deprived of his or her possession* and *the regulating the use of property*. The second term, "regulation of the use of property," encompasses all measures that define or restrict the exercise of property rights. Property use can be influenced by both legislative norms and individual measures enacted by Member States. Deprivation of possession constitutes formal expropriation, whether it stems directly from legislation or from measures implementing such legislation.[54] The ECHR uses the term *transfer of ownership*, as seen in the case of *Sporrong and Lönnroth* from 1985.[55] In this case, Sweden issued expropriation permits that created a long-term planning blight on the property, thereby lowering its selling price below the usual market value. However, the ECHR ultimately ruled that this

---

[52] Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* [2013] ECLI:EU:C:2013:28, par. 34. Such definition was repeatedly confirmed in latter cases, for instance in: Case C-398/13 P *Inuit Tapiriit Kanatami and Others v Commission* [2015] EU:C:2015:535, par. 60 or Case C-235/17 *European Commission v Hungary* [2019] ECLI:EU:C:2019:432, par. 69.

[53] Wollenschläger, *op. cit.,* note 51, p. 502. *Cf. Abukauskai v Lithuania* (2020) EHRR 72065/17, par. 54 or Case T-318/01 *Othman v Council and Commission* [2009] ECR II-01627, par. 91.

[54] Wollenschläger, I*bid.,* p. 505. *Cf.* Frenz, W., *Handbuch Europarecht*, vol. 4, Springer, Berlin, 2009, p. 853.

[55] *Sporrong and Lönnroth v Sweden* (1985) EHRR 7151/75, par. 63. *Cf.* Schaffer, J.K., *et al.*, *An Unlikely Rights Revolution: Legal Mobilization in Scandinavia Since the 1970s*, Nordic Journal of Human Rights, vol. 42, issue 1, 2024, p 17.

impact on the property did not constitute deprivation.[56] Therefore, for a measure to be considered deprivation, it must completely and permanently strip the owner of their property rights.

Advocate General Wathelet provided a pertinent definition of direct expropriation, describing it as *measures of nationalization or dispossession by formal transfer of title or physical seizure*.[57] According to this interpretation, an interference with property qualifies as expropriation only where ownership is transferred—either to a public authority or a private entity—or where the property is physically confiscated. However, this concept has been extended to include *de facto* expropriations or deprivations—measures which, although not formally designated as expropriations, produce equivalent or substantially similar legal and economic consequences for the property holder. Such indirect or constructive takings are equally subject to legal scrutiny and protection under both EU and international human rights standards. A notable illustration of *de facto* deprivation is provided in the judgment of the ECHR in *Hentrich v. France*, in which the Court examined the substance of the measure rather than its formal classification, emphasising the importance of the practical effect on the property holder's rights.[58]

Another example closely related to the topic of this research is the 2008 ECHR case Köktepe v. Turkey.[59] The case concerns a Turkish national residing in Çanakkale, Turkey, who in 1993 acquired a parcel of forest land with a valid title issued by the General Directorate of Land Registration. However, the same land had already been officially designated as part of the public forest by the Forestry Commission in 1990—three years prior to the issuance of the title. Mr. Köktepe challenged this designation by filing a request for judicial review with the Çanakkale District Court. In the course of the proceedings, an expert report from 1998 stated that the disputed land was not part of the public forest. However, a subsequent expert report from 2000 reached the opposite conclusion, asserting that the land did fall within public forest boundaries. That same year, the court dismissed Mr. Köktepe's claim, a decision later upheld by the appellate court. In addition to losing the legal battle, Mr. Köktepe was sentenced to one year and three months in prison for clearing a portion of the land without the required authorization. Finally, in 2007, the Ministry of Forestry initiated legal proceedings to annul Mr. Köktepe's land title in the Land Registry, a measure that would formally strip him of ownership.[60]

---

56 Jacobs, F. *et al.*, *The European Convention on Human rights,* Oxford University Press, Oxford, 2014, p. 503

57 Case C-284/16 *Achmea BV* [2018] ECLI:EU:C:2017:699, Opinion of AG Wathelet, par. 221 and n. 177.

58 *Hentrich v France* (1994) 18 EHRR 440. See more in Jacobs *et al., op. cit.,* note 56, p. 505.

59 *Köktepe v Turkey* (2008) EHRR App. No. 35785/03.

60 *Köktepe v. Turkey*, Human Rights Case Digest, Vol 18, issue 11-12, 2007-2008, p. 1166.

The ECHR upheld the decisions of the Turkish courts, confirming that the disputed land constituted public forest and affirming that the aim of depriving the applicant of his possession was legitimate in light of nature protection. The Court further noted that certain fundamental rights should not automatically be prioritized over environmental protection. However, it also emphasized a crucial point: the applicant had acquired the land in good faith and was subsequently unable to make any use of it. Despite holding a valid title, he was barred from harvesting, cultivating, or even selling the land. This placed a disproportionate burden on him, amounting to a *de facto* expropriation—particularly given that the forest delimitation was permanent, no effective domestic remedy was available, and no compensation was provided. The case illustrates that even when pursuing unquestionably important goals such as environmental protection, these efforts must not disregard other fundamental rights. Instead, they should be pursued in a manner that respects and aligns with those rights.

Property rights may be restricted to the extent that an individual is deprived of possession, but such interference requires strong justification. Article 17(1), second sentence of the Charter, outlines three key conditions for lawful deprivation. First, the measure must be provided for by law, ensuring a clear, foreseeable, and accessible legal framework.[61] Second, the deprivation must pursue a legitimate objective in the public interest. Third, fair compensation must be paid within a reasonable timeframe.[62] In addition, the CJEU has confirmed that Article 52(1) of the Charter also applies,[63] meaning that any limitation on property rights must pass the proportionality test. Furthermore, an additional procedural safeguard requires *that the applicable procedures must also afford the person concerned a reasonable opportunity of putting his case to the competent authorities*.[64] Therefore, while deprivation of possession is permissible under EU law, Member States must take care not to exceed the strict conditions and procedural guarantees that protect the fundamental right to property.

The second limitation on the right to property concerns the regulation of its use. Such regulation must be established by law and pursue an objective of general interest. The notion of general interest is not left to arbitrary interpretation but

---

61 Case T-786/14 *Bourdouvali* [2018] ECLI:EU:T:2018:487, par. 268. See more in: Frenz, *op. cit.,* note 54, p. 858.

62 Such a requirement was applied in the jurisprudence of ECHR, even though it was not directly mentioned in the Additional Protocol to European Convention on Human rights. *Cf.* Wollenschläger, *op. cit.,* note 51, p. 508.

63 Case C-235/17 *Commission v Hungary*, note 52.

64 Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351, par. 368.

must be construed in light of relevant case law.[65] Furthermore, any such limitation must comply with the requirements of Article 52(1) of the Charter, which imposes conditions of legality, necessity, and proportionality.

While compensation is typically associated with expropriation, in the context of regulatory restrictions it is not required as a general rule. The *Booker Aquaculture* case illustrates this point, where the Court held that the absence of compensation did not, in itself, constitute a violation of the right to property, provided the interference was proportionate and pursued a legitimate aim.[66]

The proportionality test, in this context, serves as a safeguard mechanism, ensuring that a fair balance is struck between the general interest of the community and the protection of individual rights. It seeks to ensure that fundamental rights, including property rights, are restricted only to the extent necessary to achieve a legitimate public objective.[67] In essence, it prevents the excessive or arbitrary sacrifice of individual rights for collective goals, preserving the core of the right while allowing for necessary societal limitations.

4. EU NATURE RESTORATION LAW

The legislative process leading to the adoption of the EU Nature Restoration Law was neither swift nor straightforward. The European Commission presented the Proposal for a Nature Restoration Regulation[68] in June 2022. Subsequently, the text underwent amendments by the European Parliament, and a provisional agreement on the final version was reached in February 2023. The Council of the European Union formally adopted the Regulation on 17 June 2024, and the EU Nature Restoration Law entered into force on 18 August 2024.

The Regulation sets forth ambitious objectives, as outlined in Article 1(1), notably the restoration of at least 20% of the Union's land and sea areas by 2030, and the restoration of all ecosystems in need of recovery by 2050. Importantly, the term "restoration," as used in both the title and the substantive provisions of the

---

65 For instance, see Case C-200/96 Metronome Musik [1998] ECR I-1953, para. 21: […] *the exercise of the right to property and the freedom to pursue a trade or profession may be restricted, provided that any restrictions in fact correspond to objectives of general interest pursued by the European Community and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed* […].

66 Joined Cases C-20/00 and C-64/00 *Booker Aquaculture* [2003] ECR I-7411, par. 79 and 93.

67 Becker, *op. cit.*, note 49, p. 283. *Cf. Sporrong and Lönnroth v Sweden* (1985), note 55, par. 69 or Case C-280/93, Germany v Council [1994] ECR I-4973, par. 77, 78, 88 *et seq.*

68 Proposal for a Regulation of the European Parliament and of the Council on nature restoration COM/2022/304 final.

Regulation, should not be conflated with mere protection or conservation. Rather, restoration implies active intervention to improve the current state of nature, with the aim of re-establishing degraded ecosystems and enhancing biodiversity beyond their present condition.[69]

Such a goal is in line with the United Nation's decision to proclaim the 2021-2030 as a Decade on Ecosystem Restoration, with the aim to support efforts to prevent the degradation of ecosystems worldwide, but also to raise awareness of the significance of ecosystem restoration.[70] EU Nature restoration law acknowledges its relevance and refers to the UN resolution in paragraph 6. In addition, the concept of restoration also means that the obligations and responsibility on the Member States seeks for more engagement.

EU Nature restoration law creates obligations for Member States, in relation to natural sites enumerated in Annex I for land areas and in Annex II for marine areas. Both sites (land and marine) must be restored to a good condition, as prescribed by Articles 5 and 6 of the legal text. Good condition was defined in Article 3(4) as a *state in which the key characteristics of an ecosystem reflect the high level of ecological integrity, stability and resilience*. In order to reach defined goals, Member States have an obligation to prepare National Restoration Plans, that will be approved by the Commission later on, as prescribed by Article 13. Within their national restoration plans, Member States are required to quantify the areas in need of restoration, based on a strict set of criteria prescribed by the Regulation. Moreover, Member States must define what constitutes a "satisfactory level of restoration."[71] However, the Regulation does not provide a clear definition of this concept, which raises concerns regarding legal certainty—both for Member States in the implementation process and for landowners whose property may be subject to restoration measures. The ambiguity surrounding the term "satisfactory" raises a fundamental question: to whom must the restoration efforts be satisfactory? The absence of a precise benchmark may result in divergent interpretations and inconsistent application across Member States. Article 11 of the Regulation provides that Member States shall prepare restoration plans and conduct monitoring and research taking into account the latest scientific evidence. While this reflects a commendable commitment to science-based policymaking, its broad and open-

---

69 Hoek, N., *Nature Restoration put to EU Law: Tensions and Synergies between Private Property Rights and Environmental Protection*, in: Hoek, N. *et al* (eds.), Spanningen tussen duurzaamheid en Europees recht, Kluwer, 2024., p. 132.

70 United Nations Decade on Ecosystem Restoration (2021-2030): resolution / adopted by the General Assembly, 2019, A/RES/73/284 .

71 Hoek, N., *A Critical Analysis of the Regulation on Nature Restoration: Have the problems been resolved?,* European Energy and Environmental Law Review, Vol 31, Issue 5, 2022, p. 326.

ended formulation may complicate the practical implementation and measurability of restoration objectives. Furthermore, Annex VII of the Regulation contains an indicative list of potential measures that Member States may incorporate into their national restoration plans. However, the discretion left to Member States regarding which measures to apply leaves significant uncertainty as to the Regulation's uniformity in practice. The effectiveness and coherence of its implementation will depend heavily on how each Member State interprets and applies these provisions within their respective legal and ecological contexts.

One of the foreseeable challenges associated with the implementation of the EU Nature Restoration Law lies in the financial burden it may impose on Member States. The costs of restoration vary significantly depending on the type of ecosystem in question, which in turn differs across Member States due to their distinct geographic and ecological characteristics.[72] For example, Croatia, with its unique combination of an indented Adriatic coastline and expansive lowland plains, will likely be required to adopt a wide array of restoration measures—some of which will entail substantial financial outlays, while others may involve comparatively lower costs.

Paragraph 78 of the preamble to the Regulation acknowledges this issue by stating that, in order to meet the targets and obligations laid down therein, it is essential that adequate private and public investment be mobilised. It further suggests that Member States should integrate expenditure related to biodiversity objectives into their national budgets. However, beyond these general proclamations, the Regulation provides little concrete guidance on funding mechanisms, and it is clear from the preamble that the primary responsibility for financing the implementation will lie with the national budgets of Member States.

Given the potentially significant costs involved, the absence of a dedicated and clearly defined EU-level financial support framework raises concerns. It remains to be seen what concrete measures Member States will adopt to fulfil their obligations under the Regulation, and to what extent the financial burden might influence the scope, pace, and ultimately the success of restoration efforts. A more pressing concern may therefore be whether such an arrangement—placing the majority of financial responsibility on national authorities—could undermine the effectiveness and uniformity of nature restoration across the Union.

Taking into account the vast territorial scope of areas designated for restoration across the European Union, the measures envisaged under the EU Nature Resto-

---

[72] European Commission: Directorate-General for Environment, *Impact assessment study to support the development of legally binding EU nature restoration targets – Final report*, Publications Office of the European Union, 2023 available at:
[https://data.europa.eu/doi/10.2779/275295], Accessed 28 February 2025.

ration Law will inevitably affect land owned by private individuals. Certain measures may impose restrictions on the exercise of property rights, while others may establish positive obligations for landowners, such as the duty to implement or tolerate specific restoration activities on their land. The Regulation delegates substantial discretion to Member States through the mechanism of National Restoration Plans, thereby effectively shifting the anticipated tensions between private property rights and restoration objectives from the EU to the national level.[73] This legislative design is consistent with Article 345 of the TFEU, which affirms that the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership. In essence, Article 345 ensures that the EU lacks competence to interfere with national rules on property regimes, allowing Member States to determine the scope and limitations of property rights within their jurisdictions.[74] However, this same provision may also represent a structural limitation to deeper integration in the field of environmental protection. By preserving national autonomy over property regimes, Article 345 TFEU could hinder the uniform application of restoration measures across the EU, potentially resulting in fragmented and uneven environmental outcomes.

CJEU has already dealt with cases situated at the intersection of environmental regulation and the right to property as a fundamental right protected under the Charter. A notable example is the *Siragusa* case decided in 2014.[75] In this case, Mr. Siragusa owned land located within a designated landscape conservation area in Italy. He carried out certain alterations to his land without first obtaining the necessary landscape compatibility clearance from the competent public authority, as required under national law. While Italian legislation permits the possibility of subsequent regularisation of such works, the administrative authority in this instance ordered the restoration of the land to its original state. Mr. Siragusa challenged the decision, and the referring Italian court raised the question of whether Article 17 of the Charter—guaranteeing the right to property—had been infringed. However, the CJEU held that it lacked jurisdiction to adjudicate the matter, finding that the national provisions at issue did not constitute an implementation of EU law, as required under Article 51(1) of the Charter. The Court emphasized that the mere fact that the matter fell within a broader context of environmental protection was not, in and of itself, sufficient to bring it within the scope of EU law.[76] This judgment,

---

73 Hoek, *op. cit.*, note 69, p. 137 .

74 See more *supra,* subchapter 3.1. Overview of EU competences.

75 Case C-206/13 *Siragusa* [2014] ECLI:EU:C:2014:126.

76 Jans, H.J.; Outhuijse, A., *Property and Environmental Protection in the Jurisprudence of the Court of Justice of the European Union,* in: Winter, G. (ed.), Property and Environmental Protection in Europe, Europa Law Publishing, Groningen, 2016, p. 47.

however, predates the adoption and entry into force of the EU Nature Restoration Law. Had a similar case arisen after the Regulation became binding, the outcome could very well have been different. If the contested national measures were adopted in implementation of obligations derived from the EU Nature Restoration Law, the CJEU would likely have jurisdiction to assess compliance with the Charter, including Article 17. This illustrates how the increasing integration of environmental objectives into EU legal obligations may trigger the full applicability of Charter rights, particularly where private property is directly affected by measures adopted in furtherance of EU environmental law.

However, the opposite solution was given in the *Azienda* case,[77] dealing with the ban of the installation of wind turbines not intended for the home provisions, in a connection with Wild Birds and Habitats directives.[78] Here CJEU decided that the protection given by these two directives does not prohibit all human activity in nature protection areas created by the provisions of quoted directives (Natura 2000 network). However, the Member States' regulation must be in line with the objective of the Habitats Directive, meaning they possibly could limit ownership rights in order to reach prescribed objectives.[79] Such a ruling possibly indirectly circumvents the lack of competence of the EU in the regard the ownership, as prescribed by Article 345 of TFEU. In addition, the national legislation prohibiting the construction of new wind turbines in Nature 2000 network areas because of the protection of bird populations, as seen in this case, provides stricter system of protection then required by Habitats Directive.[80] Therefore, the protection of bird and other species could affect the property rights in Member States and it is up to Member States to adopt additional rules regarding the exercise of ownership rights. As can be seen in both cases, delegating decision-making to a national level could lead to uneven practice and consequently to legal uncertainty.

Considering all the potential issues outlined, the foreseeable challenges can be examined through the lens of the legislative changes required in Croatia concerning the legal status of land associated with water bodies. Under Croatian law, such land is classified as water estate, as defined by the Water Act (hereinafter: WA).

---

77 Case C-2/10 *Azienda Agro-Zootecnica Franchini sarl* [2011] ECLI:EU:C:2011:502.

78 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (Codified version), OJ L 20, 26.1.2010 and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, Official Journal L 206, 22 July 1992.

79 Garcia-Ureta, A., *The ECJ Jurisprudence on Nature Protection and Ownership Rights,* in: Winter, G. (ed.), Property and Environmental Protection in Europe*,* Europa Law Publishing, Groningen, 2016, p. 73.

80 Such a solution is in line with the Article 193 TFEU, providing Member States to maintain or introduce more stringent protective measures.

This category includes land encompassing aquifers, abandoned surface waterbeds, both regulated and unregulated inundation areas, zones necessary for the physical protection of water sources, and islands that have formed—or may form—within an aquifer.[81] Water estates clearly represent a significant category of land parcels subject to the EU Nature Restoration Law, making it essential that their legal status and regulation be clearly and precisely defined.

Under the current WA, certain categories of water estates may remain in private ownership, whereas others—classified as public water estates—are excluded from private ownership, as they constitute public goods not subject to individual property rights.[82] In specific circumstances, privately owned water estates may be reclassified as public, thereby triggering an expropriation process.

Croatian legal practice since the 1990s has revealed a range of issues and legal uncertainties for previous owners of such land. The 1995 WA contained several inconsistencies and illogical provisions that interfered with the protection of individual property rights.[83] The 2019 WA, currently in force, has undergone multiple amendments, including a significant 2021 revision, in which the legislator introduced a rule mandating market-value compensation for landowners whose property was *ex lege* designated as a public water estate.[84] This legislative change suggests that, prior to the amendment, some landowners were not automatically entitled to compensation under the law and were compelled to initiate legal proceedings to secure their property rights. This is exemplified by a case brought before the Varaždin County Court, which highlights the necessity of judicial intervention in the absence of effective administrative remedies.[85]

Bearing in mind all the previously stated concerns, the implementation of the EU Nature Restoration Law within the Croatian legal system remains highly uncertain. Given the system's sluggishness, the inherited issues stemming from Croatia's socialist legal past, and the complexities of privatization, it is questionable whether

---

81 Article 8 of Water Act (Zakon o vodama), Official Gazette No. 66/19, 84/21, 47/23). Provisional translation of the outdated text is available on the website of the Croatian Ministry of Foreign and European Affair: [https://mvep.gov.hr/UserDocsImages/files/file/dokumenti/prevodenje/zakoni/zakon-o-vodama-nn-153-09-eng.pdf], Accessed 28 February 2025.

82 Article 11 of WA in connection with Article 3 of OA .

83 See the detailed elaboration in: Jug, J., *Raspolaganje vodnim dobrom* (*Disposing of water resources*), Zbornik Pravnog fakulteta Sveučilišta u Rijeci [Collected Papers of the Faculty of Law of the University of Rijeka], vol. 37, no. 1, 2016, pp. 371-372.

84 Legislator explanation could be found in the Consultation with the interested public for the WA Amendment on the Croatian Ministry of Justice, Public Administration and Digital Transformation website: [https://esavjetovanja.gov.hr/ECon/MainScreen?entityId=16007], Accessed 28 February 2025 .

85 Judgment of the Varaždin's County Court Gž Zk 841/2021-2.

the legal framework will be sufficiently prepared to enforce ownership restrictions in pursuit of broader EU objectives. It is reasonable to expect that significant challenges will only begin to emerge during the implementation phase.

5. CONCLUSION

Considering that the degradation of biodiversity represents a serious threat to society and requires a systematic reassessment of our relationship with nature, the European Commission has proposed a very ambitious restoration law, which aims to fill existing gaps in EU legislation on nature protection by introducing legally binding restoration targets (implying not just protection but an active improvement of nature), that could potentially create challenges between the desire for nature restoration on the one hand and private ownership on the other.

As one of the hallmarks of the civil law tradition prevalent in the legal systems of continental Europe that were schooled by the Roman spirit, the institution of ownership (*dominium*) grants the owner the broadest possible powers over their property, including the right to destroy it. Any imposition of restrictions did not modify the essence, but affected the exercise of ownership—that is, the practical extent of the owner's legal authority over the property. However, since Roman times, such absolute powers have not been without limits; they were frequently constrained by social and public considerations, as well as the obligation to serve the common good. Regardless of this common concept deeply rooted in the shared Roman legal tradition, we anticipate that specific national procedures governing expropriation and compensation will, in practice, lead to unequal implementation of nature restoration across Member States. As a result, the EU Nature Restoration Law may inadvertently generate more legal ambiguity than clarity, ultimately undermining its core objective of restoring nature.

Contrary to the existing criticism, the EU Nature Restoration Law does not violate fundamental rights, as it does not directly regulate ownership rights—something explicitly precluded by Article 345 TFEU. However, it strategically shifts potential breaches to the national level, where property rights may be restricted under certain conditions. Such restrictions are not without exceptions, as recognized in the Charter, which allows for limitations and derogations under specific circumstances. To be legally valid, any restriction on property must serve an objectively justified general interest and be proportionate to the goal pursued. While compensation may be required, this is not always the case, as demonstrated in CJEU case law. Finally, expropriation must be prescribed by law, serve a public interest, comply with the principle of proportionality, and entitle the affected owner to fair compensation.

Furthermore, the Regulation requires Member States to prepare National Restoration Plans, quantify areas needing restoration, and define what constitutes a "satisfactory level of restoration." However, the lack of a clear definition for "satisfactory" creates legal uncertainty for both Member States and landowners. Although the plans must be based on scientific evidence, their broad nature complicates practical implementation. The discretion given to Member States in choosing restoration measures, as listed in Annex VII, further contributes to this uncertainty.

A major challenge lies likewise in the financial burden that the restoration efforts will impose on Member States. Costs will vary significantly depending on the type of ecosystem. Countries like Croatia, with its diverse natural conditions—including the unique combination of an indented Adriatic coastline and expansive lowland plains—will likely need to implement a wide range of restoration measures. While the Regulation calls for public and private investment, the primary financial responsibility falls on national budgets, with little guidance from the EU. This lack of a dedicated EU financial framework raises concerns about the effectiveness and uniformity of implementation.

The measures outlined in the Regulation will inevitably affect private property rights, imposing restrictions or obligations on landowners. Since the management of property rights is left to Member States, perseving national autonomy over property regimes, this could create inconsistencies in the application of restoration measures across the EU, potentially leading to fragmented environmental protection. Without intending to be pessimistic, we consider the expectation that 100% restoration will be achieved by 2050 to be unrealistic, as this would require greater integration and the transfer of competencies to the EU level.

Even in the absence of EU intervention, the situation in Croatia was already complex and fraught with issues due to legal uncertainties surrounding property rights, inconsistent application of laws, and complications in expropriation and land ownership disputes. Given these challenges, it remains uncertain whether Croatia's legal system is equipped to effectively enforce the restoration measures mandated by the EU. Given that more than 38% of Croatia's territory falls within Natura 2000 areas, this article serves merely as a general introduction to a complex topic which, while ultimately aimed at supporting ecosystem restoration as a key tool in addressing climate change and biodiversity loss, will inevitably raise numerous legal questions and open space for further academic debate.

REFERENCES

BOOKS AND ARTICLES

1. Becker, F., *Market Regulation and the 'Right to Property' in the European Economic Constitution*, Yearbook of European Law, Vol 26, No. 1, 2007, pp. 255–296
2. Bernhard, N., *A 'New Governance' Approach to Economic, Social and Cultural Rights in the EU*, in: Harvey, T.; Kenner, J. (eds.), Economic and Social Rights Under the EU Charter of Fundamental Rights: A Legal Perspective, Hart Publishing, Oxford, 2003, pp. 247–268
3. Birks, P., *The Roman law concept of dominium and the idea of absolute ownership,* Acta Juridica, Vol 1, 1985, pp. 1–38
4. Bonfante, P., *Corso di diritto romano, vol. II: La Proprietà, vol. I*, Attilio Sampaolesi, Roma 1926
5. Craig, P.; de Búrca, G., *EU Law: Text, Cases, and Materials,* Oxford University Press, Oxford, 2011
6. Di Federico, G., *Fundamental Rights in the EU: Legal Pluralism and Multi-Level Protection After the Lisbon Treat*, in: Di Federico, G. (ed.), The EU Charter of Fundamental Rights: From Declaration to Binding Instrument, Springer, Heidelberg, 2011, pp. 15–54
7. Frenz, W., *Handbuch Europarecht*, vol. 4, Springer, Berlin, 2009
8. Garcia-Ureta, A., *The ECJ Jurisprudence on Nature Protection and Ownership Rights,* in: Winter, G. (ed.), Property and Environmental Protection in Europe*,* Europa Law Publishing, Groningen, 2016, pp. 56–74
9. Gavella, N., *et al., Stvarno pravo* (Property Law), Vol 1, Official Gazette, Zagreb, 2007
10. Gavella, N., *Ograničenja prava vlasništva* [Restrictions of Ownership], Zbornik Pravnog fakulteta Sveučilišta u Rijeci (Collected Papers of the Faculty of Law of the University of Rijeka), Vol 19, No. 2, 1998, pp. 351–362
11. Giglio, F., *The concept of ownership in Roman law*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung, Vol 135, No. 1, 2018, pp. 76–107
12. Hoek, N., *A Critical Analysis of the Regulation on Nature Restoration: Have the problems been resolved?,* European Energy and Environmental Law Review*,* Vol 31, No. 5, 2022, pp. 320–333
13. Hoek, N., *Nature Restoration put to EU Law: Tensions and Synergies between Private Property Rights and Environmental Protection*, in: Hoek, N. *et al* (eds.), Spanningen tussen duurzaamheid en Europees recht*,* Kluwer, 2024, pp. 129–148
14. Jacobs, F. *et al. The European Convention on Human rights,* Oxford University Press, Oxford, 2014
15. Jans, H.J.; Outhuijse, A., *Property and Environmental Protection in the Jurisprudence of the Court of Justice of the European Union,* in: Winter, G. (ed.), Property and Environmental Protection in Europe, Europa Law Publishing, Groningen, 2016, pp. 42–55
16. Jones, J. W., *Expropriation in Roman Law*, Law Quarterly Review, Vol 45, No. 4, 1929, pp. 512-527
17. Josipović, T., *Private Law Codification in The Republic of Croatia*, in: Wang, W. (ed.), Codification in International Perspective: Selected Papers from the 2nd IACL Thematic Conference, Heidelberg, New York, Dordrecht, London, Springer, 2014, pp. 171–203

18. Jug, J., *Raspolaganje vodnim dobrom* [*Disposing of water resources*), Zbornik Pravnog fakulteta Sveučilišta u Rijeci (Collected Papers of the Faculty of Law of the University of Rijeka), Vol 37, No. 1, 2016, pp. 367–384
19. Kaser, M., *The Concept of Roman Ownership*, Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law), Vol 27, No. 1, 1964, pp. 5–19
20. Kaser, M., *Das römische Privatrecht, I, Das altrömische, das vorklassische und klassische Recht*, C. H. Beck, München, 1971
21. Kaser, M., *Über 'relatives Eigentum' im altrömischen Recht*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung, Vol 102, No. 1, 1985, pp. 1–39
22. Kerikmäe, T., *EU Charter: Its Nature, Innovative Character, and Horizontal Effect*, in: Kerikmäe, T.(ed.), Protecting Human Rights in the EU, Controversies and Challenges of the Charter of Fundamental Rights, Springer, Heidelberg, 2014, pp. 5–19
23. Klinck, F., *Eigentumsbegriffe*, in: Babusiaux, U., *et al.* (eds.), Handbuch des römischen Privatrechts, Vol 1, Mohr Siebeck, Tübingen, 2023, pp. 1058-1063
24. *Köktepe v. Turkey*, Human Rights Case Digest, Vol 18, Issue 11-12, 2007-2008, pp. 1165–1167
25. Lock, T., *Articles 6 - 19,* in: Kellerbauer M. *et al.* (eds.), The EU Treaties and the Charter of Fundamental Rights, A Commentary, Oxford University Press, Oxford, 2019, pp. 2110-2158
26. Michaels, R., *Property*, in: Basedow, J., Hopt, K. J., Zimmermann, R. (eds.), The Max Planck Encyclopedia of European Private Law, Vol 2, Oxford University Press, Oxford, 2012, p. 1371–1374
27. Peers, S.; Prechal, S., *Art 52 – Scope and Interpretation of Rights and Principles*, in: Peers, S., *et al* (eds.), The EU Charter of Fundamental Rights, A Commentary, Hart, Oxford, 2021, pp. 1611-1674
28. Pennitz, M., *Der "Enteignungsfall" im römischen Recht der Republik und des Prinzipats: eine funktional-rechtsvergleichende Problemstellung,* Bohlau, Wien, 1991
29. Scott, H., *Absolute Ownership and Legal Pluralism in Roman Law: Two Arguments*, Acta Juridica, Vol. 1, 2011, pp. 23–34
30. Schaffer, J.K., *et al.*, *An Unlikely Rights Revolution: Legal Mobilization in Scandinavia Since the 1970s*, Nordic Journal of Human Rights, Vol 42, No. 1, 2024, pp. 11–31
31. Vezmar Barlek, I., *Primjena načela legitimnih očekivanja u praksi Upravnog suda Republike Hrvatske* (*Application of the Principle of Legitimate Expectations in the Case Law of the Administrative Court of the Republic of Croatia*), Zbornik Pravnog fakulteta Sveučilišta u Rijeci (Collected Papers of the Faculty of Law of the University of Rijeka), Vol 32, No. 1, 2011, p. 569–581
32. Winter, G., *Property and Environmental Protection,* in: Winter, G. (ed.), *Property and Environmental Protection in Europe,* Europa Law Publishing, Groningen, 2016, pp. 2–40
33. Wollenschläger, F., *Article 17(1) – Right to Property,* in: Peers, S., *et al* (eds.), The EU Charter of Fundamental Rights, A Commentary, Hart, Oxford, 2021, pp. 489–518
34. Zetterquist, O., *Charter of Fundamental Rights and the European Res Publica*, in: Di Federico, G. (ed.), The EU Charter of Fundamental Rights: From Declaration to Binding Instrument, Springer, Heidelberg, 2011, pp. 3–14

35. Žiha, N., *Croatian Property Law Between Tradition and Transition: A Revival of the Roman Principle Superficies Solo Cedit*, in: Primorac, Z; Bussoli, C; Recker, N. (eds.), Economic and Social Development. 16th International Scientific Conference on Economic and Social Development "The Legal Challenges of Modern World", Book of Proceedings, Split, Varaždin, 2016, pp. 73–83
36. Žiha, N., Sukačić, M., *Troubled waters - Croatian seashore as res extra commercium in commercio*, Pravni Vjesnik (Journal of Law), Vol 39, No. 2, 2023, 7-28

INTERNATIONAL LAW

1. United Nations Decade on Ecosystem Restoration (2021-2030): resolution / adopted by the General Assembly, 2019, A/RES/73/284

EU LAW

1. Charter of Fundamental Right of the European Union, [2012] OJ C 326
2. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, [2010] OJ C 83
3. Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, Official Journal L 206, 22.07.1992
4. Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (Codified version), OJ L 20, 26.1.2010
5. Proposal for a Regulation of the European Parliament and of the Council on nature restoration COM/2022/304 final
6. 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 OJ L, 2024/1991, 29.7.2024

COURT OF JUSTICE OF THE EUROPEAN UNION

1. Case 44/79, *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727
2. Case 59/83 *SA Biovilac NV v European Economic Community* [1984] ECR 4057
3. Case C-2/10 *Azienda Agro-Zootecnica Franchini sarl* [2011] ECLI:EU:C:2011:502
4. Case C-200/96 *Metronome Musik* [1998] ECR I-1953
5. Case C-206/13 *Siragusa* [2014] ECLI:EU:C:2014:126
6. Case C-235/17 *European Commission v Hungary* [2019] ECLI:EU:C:2019:432
7. Case C-280/93, *Germany v Council* [1994] ECR I-4973
8. Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* [2013] ECLI:EU:C:2013:28
9. Case C-284/16 *Achmea BV* [2018] ECLI:EU:C:2017:699, Opinion of AG Wathelet
10. Case C-347/03 *Regione autonoma Friuli-Venezia Giulia and ERSA* [2005] ECR I-3785
11. Case C-398/13 *P Inuit Tapiriit Kanatami and Others v Commission* [2015] EU:C:2015:535
12. Case T-318/01 *Othman v Council and Commission* [2009] ECR II-01627

13. Case T-786/14 *Bourdouvali* [2018] ECLI:EU:T:2018:487
14. Joined Cases C-20/00 and C-64/00 *Booker Aquaculture* [2003] ECR I-7411
15. Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351

EUROPEAN COURT OF HUMAN RIGHTS

1. European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5
2. *Abukauskai v Lithuania* (2020) EHRR 72065/17
3. *Hentrich v France* (1994) 18 EHRR 440
4. *Köktepe v Turkey* (2008) EHRR App. No. 35785/03
5. *Öneryıldız v Turkey* (2004) ECHR 2004-XII
6. *Sporrong and Lönnroth v Sweden* (1985) EHRR 7151/75

LIST OF NATIONAL REGULATIONS, ACTS AND COURT DECISIONS

1. Constitutional Court decision U-I-6256/2014 from 9th October 2019
2. Croatian Act on Ownership and Other Real Rights (Zakon o vlasništvu i drugim stvarnim pravima), Official Gazette 91/96, 68/98, 137/99, 22/00, 73/00, 114/01,79/06, 141/06, 146/08, 153/09, 90/10, 143/12, 152/14, 81/15, 94/17. Provisional translation of the outdated text is available on the website of the Croatian Judicial Academy: [https://pak.hr/cke/propisi,%20zakoni/en/OwnershipandOtherRealRights/EN.pdf], Accessed 28 February 2025
3. Former Maritime Domain and Seaports Act (Official Gazette, 158/03, 100/04,141/06, 38/09, 123/11, 56/16, 98/19)
4. Grundgesetz für die Bundesrepublik Deutschland in der im Bundesgesetzblatt Teil III, Gliederungsnummer 100-1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 1 des Gesetzes vom 20. Dezember 2024 (BGBl. 2024 I Nr. 439) geändert worden is (Basic Law for the Federal Republic of Germany)
5. Judgment of the Varaždin's County Court Gž Zk 841/2021-2
6. Maritime Domain and Seaports Act (Zakon o pomorskom dobru i morskim lukama), Official Gazette 83/23
7. Nature Protection Act (Zakon o zaštiti prirode) (Official Gazette 80/13, 15/18, 14/19, 127/19, 155/23)
8. The Constitution of the Republic of Croatia (consolidated text), (Ustav Republike Hrvatske) (Official Gazette 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14)
9. Water Act (Zakon o vodama) (Official Gazette No. 66/19, 84/21, 47/23). Provisional translation of the outdated text is available on the website of the Croatian Ministry of Foreign and European Affair: [https://mvep.gov.hr/UserDocsImages/files/file/dokumenti/prevodenje/zakoni/zakon-o-vodama-nn-153-09-eng.pdf], Accessed 28 February 2025

WEBSITE REFERENCES

1. *Agriculture Chamber urges Croatian MEPs to vote against nature restoration bill*, N1, 12 July 2023 [https://n1info.hr/english/news/agriculture-chamber-urges-croatian-meps-to-vote-against-nature-restoration-bill/], Accessed 28 March 2025
2. Christiansen, C., *Nature Restoration law: Legal certainty for land owners need to be respected,* web page of North Sweden European Office, 12 July 2023, [https://www.northsweden.eu/english/news/2023/nature-restoration-law-legal-certainty-for-land-owners-need-to-be-respected/], Accessed 04 February 2025
3. Consultation with the interested public for the Water Act Amendment on the Croatian Ministry of Justice, Public Administration and Digital Transformation website: [https://esavjetovanja.gov.hr/ECon/MainScreen?entityId=16007] accessed 28 February 2025
4. Erg, B.; Schnell, A.A., *IUCN statement on the EU Nature Restoration Law,* web page International Union for Conservation of Nature, 04 July 2023, [https://iucn.org/iucn-statement/202307/iucn-statement-eu-nature-restoration-law], Accessed 04 February 2025
5. European Commission: Directorate-General for Environment, *Impact assessment study to support the development of legally binding EU nature restoration targets – Final report*, Publications Office of the European Union, 2023 available at: [https://data.europa.eu/doi/10.2779/275295], Accessed 28 February 2025
6. Kurmayer, N., *Brussels wrestles with potential impacts of EU nature restoration law,* web page EURACTIV, 20 February 2023, [https://www.euractiv.com/section/climate-environment/news/brussels-wrestles-with-potential-impacts-of-eu-nature-restoration-law/], Accessed 04 February 2025
7. Leino-Sandberg, P., *Nature Restoration and Fundamental Rights*, web page Verfassungsblog, 17 November 2022, [https://verfassungsblog.de/nature-restoration-and-fundamental-rights/], Accessed 04 February 2025
8. *Serious concerns about the Swedish Presidency proposal for the Nature Restoration Law*, Open letter published on the web page of FERN organization, 27 March 2023 [https://www.fern.org/publications-insight/serious-concerns-about-the-swedish-presidency-proposal-for-the-nature-restoration-law/], Accessed 04 February 2025
9. Teivainen, A., *Finland will insist on revisions to nature restoration law, rules committee*, web page Helsinki Times, 02 December 2022, [https://www.helsinkitimes.fi/finland/finland-news/politics/22609-finland-will-insist-on-revisions-to-nature-restoration-law-rules-committee.html], Accessed 04 February 2025

Chapter 3

Review article

SAFEGUARDING INTERESTS AND HUMAN RIGHTS OF UNACCOMPANIED MINORS SEEKING ASYLUM IN POLAND THROUGH CIVIL PROCEEDINGS

Magdalena Skibińska, PhD, Assistant Professor
University of Zielona Góra, Faculty of Legal and Economic Sciences
Pl. Słowiański 9, A-41, Zielona Góra, Poland
m.skibinska@uz.zgora.pl

ABSTRACT

This paper addresses the role of civil proceedings in safeguarding interests and human rights of unaccompanied minors seeking asylum in Poland. The first part of the paper describes which human rights, including procedural rights, need to be taken into consideration during aforementioned civil proceedings in order to secure the protection of the children in question, considering their special status, both as children and asylum seekers. In the second part of the research the provisions regulating procedures for appointing a guardian (called a curator) and for placing a minor in foster care as well as their application have been discussed. This provides an answer to questions whether it is possible to respect these rights within the current legal framework and if they are respected at present. To answer these questions selected provisions of the UN Convention of the Rights of the Child, the European Convention on the Exercise of Children's Rights, the Charter of Fundamental Rights of the European Union, two directives of the European Parliament and of the Council (the directive 2013/33/EU of 26 June 2013, which is still in force, and the directive 2024/1346 of 14 May 2024, which needs to be transposed by 12 June 2026 and will replace the directive 2013/33/EU) laying down standards for the reception of applicants for international protection and the Polish Code of Civil Procedure have been analyzed using legal-dogmatic and hermeneutical methods. The research shows that the best interests and rights of unaccompanied children seeking asylum in Poland can be effectively safeguarded in civil proceedings involving them and that Polish guardianship courts have sufficient legal means to provide protection to an unaccompanied minor by ruling in matters of custody or guardianship. On the other hand, in the area of praxis there is significant room for improvement.

Keywords: *asylum, child rights, foster care, guardianship, legal representation, unaccompanied minors*

1. INTRODUCTION

The migration crisis is a source of security challenges for the EU. Therefore, one of the strategic objectives of its migration policy has been to establish common

standards of migration security in the area of asylum and return policy. These standards primarily focus on the security of receiving countries and their societies (national security), while also addressing, though to a lesser extent, the security of migrants seeking international protection (individual security).[1] Among the latter ones unaccompanied children represent the most vulnerable subgroup.[2] According to Article 1 of the UN Convention of the Rights of the Child[3], a "child" is defined as every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.[4] Whereas the "unaccompanied children" (also referred to as unaccompanied minors) are children, as defined in article 1 of the CRC, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.[5] In contrast, EU law provides a definition of "unaccompanied minor" in Article 2 (e) of the Directive 2013/33/EU[6] and Article 2 (5) of the Directive 2024/1346[7]. According to the former, an "unaccompanied minor"

---

1 On the international level this issue is addressed by the Convention relating to the Status of Refugees, opened for signature on 28 July 1951, 189 UNTS 137 (entered into force on 22 April 1954).

2 See e.g. Thorburn Stern, R., *Unaccompanied and separated asylum-seeking minors: implementing a rights-based approach in the asylum process*, in: Mahmoudi, S.*, et al* (eds.), Child-Friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child, Brill Academic Publishers, Leiden 2015, p. 242 *et seq*.

3 Adopted by the UN General Assembly on November 20, 1989, 1577 U.N.T.S. 3 (1989), hereinafter: CRC.

4 According to Polish law, a "child" is defined as a person from birth until reaching the age of majority, which occurs either upon turning 18 or, in the case of a woman, by entering into marriage for important reasons with court consent after turning 16 (Article 10 of the Act of 23 April 1964 - Civil Code, consolidated text: Journal of Laws 2024, item 1061, as amended).

5 See the Committee on the Rights of the Child, General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, U.N. Doc. CRC/GC/2005/6, 1 September 2005, para. 7, [https://www.refworld.org/legal/general/crc/2005/en/38046], Accessed 10 March 2025, hereinafter: General comment No. 6 (2005). This definition is analogous to the definition of an unaccompanied minor provided in Article 2 Point 9a of the Act of 13 June 2003 on granting protection to foreigners on the territory of the Republic of Poland (consolidated text: Journal of Laws 2025, item 223, hereinafter: Act of 13 June 2003). Pursuant to this regulation, an unaccompanied minor is a minor foreigner who arrives on the territory of the Republic of Poland or stays on that territory without the care of adults responsible for him in accordance with the law in force in the Republic of Poland. Unaccompanied children should be distinguished from so-called "separated children", i.e. children, as defined in article 1 of the Convention, who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives – see General comment No. 6 (2005), para. 8; Thorburn Stern, *op. cit.*, note 2, p. 243.

6 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L 180/96, hereinafter: Directive 2013/33/EU.

7 Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection [2024] OJ L 2024/1346, hereinafter: Directive 2024/1346.

is a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States. Similarly, the latter directive defines an "unaccompanied minor" as a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her, whether by the law or practice of the Member State concerned, and for as long as that minor is not effectively taken into the care of such an adult, including a minor who is left unaccompanied after he or she has entered the territory of the Member States. The slight differences between the definitions provided in the CRC and EU law do not affect the interpretation or application of these regulations in similar cases. Statistics indicate that the number of these children (71% of whom are minors under the age of 13) seeking asylum[8] through administrative procedure in Poland has increased in recent years.[9]

It is commonly accepted that children seeking asylum should not be treated as "adults in miniature".[10] Therefore, they should receive special protection compared to adults seeking asylum.[11] This applies to unaccompanied minors as well. Moreover, their more vulnerable status[12], in comparison to other children seeking asylum, demands even more nuanced and specialized forms of care and treatment. This is due to the fact that an unaccompanied minor faces triple jeopardy: as child, as refugee and as someone with no protector.[13] Consequently, the receiving state must ensure ongoing care and proper representation for such minors. Both these

---

8 This term is used in the paper in the broad sense, i.e. encompassing all individuals seeking international protection under EU law (see Article 2 (a) of the Directive 2013/33/EU and Article 2 (a) of the Directive 2024/1346). See also General comment No. 6 (2005), para. 12.

9 Łachacz, O.; Markiewicz-Stanny, J.; Tymińska, A., *Małoletni cudzoziemcy poszukujący ochrony międzynarodowej w Polsce oraz ich prawa w standardach międzynarodowych, prawie krajowym i praktyce polskich władz (2018-2023)*, Wolters Kluwer, Warszawa, 2024, pp. 42, 48, 117. This tendency is also observed in other EU Member States (see Szuniewicz-Stępień, M., *Zasady postępowania* z *dziećmi pozbawionymi opieki* w *procedurach azylowych – kilka uwag na tle zalecanego standardu międzynarodowego*, Themis Polska Nova, No. 2, 2016, p. 187), as well as in other countries (see Seugling, C.J., *Toward a Comprehensive Response to Transnational Migration of Unaccompanied Minors in the United States*, Vanderbilt Journal of Transnational Law, Vol. 37, No. 3, 2004, pp. 861, 863-864). According to data provided by the Office for Foreigners, unaccompanied children constituted 11.68% of all children seeking asylum in Poland between 2018 and 2023 – Łachacz; Markiewicz-Stanny; Tymińska, *op. cit.*, note 7, p. 41.

10 Bhabha, J.; Young, W., *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, International Journal of Refugee Law, Vol. 11, Issue 1, 1999, p. 84.

11 See e.g. Mikołajczyk, B., *Prawa dziecka w sytuacji ubiegania się o status uchodźcy*, Państwo i Prawo, No. 7, 2004, p. 89.

12 They are prone to prostitution, child trafficking and other forms of abuse – see e.g. *Ibid.,* p. 95.

13 Seugling, *op. cit.*, note 7, p. 888.

needs are met through civil proceedings: one to appoint a guardian and another to place the minor in foster care. Although these proceedings play a complementary role to asylum procedure, they are crucial in safeguarding the rights and interests of these minors.

This study aims to assess whether the Polish legal framework governing these proceedings, as well as its practical application, meets the child protection standards[14] established by international and EU law.[15] The time-frame of this analysis aligns with the transposition date of the Directive 2024/1346 of 14 May 2024 which needs to be transposed by 12 June 2026 and will replace the Directive 2013/33/EU (Articles 35 and 36 of the Directive 2024/1346). The result of this research may lead to proposals for aligning Polish regulations and judicial practices with the updated standards, ensuring the security and protection of these minors. This comes timely, as any necessary changes in this area should be implemented before the transposition deadline of Directive 2024/1346.

The research does not include minors receiving temporary protection in connection with the Russo-Ukrainian war due to the special status of Polish regulations governing this matter.[16] It also does not address administrative asylum proceedings or the fulfillment of international and European standards within them.[17]

2. DETERMINING HUMAN RIGHTS AND PROCEDURAL STANDARDS IN CIVIL PROCEEDINGS INVOLVING UNACCOMPANIED MINORS SEEKING ASYLUM

2.1. Opening remarks

In order to determine which human rights, including procedural rights, need to be taken into consideration during civil proceedings concerning unaccompanied

---

[14] This standard should be understood as an "abstract model and point of reference for detailed legal regulation of various spheres of social life". It serves as both a model to strive for and a tool for verifying the correctness of the adopted solutions – Białocerkiewicz, J., *Organizacje europejskie i ich standardy prawne*, WSHE, Włocławek, 2003, s. 24-26.

[15] Under the principles of public international law, it is indisputable that national legislation cannot limit the scope of a state's international obligations. On the contrary, the provisions of international law take precedence over those of domestic law. Furthermore, the state has an obligation to align its internal law with its international legal commitments – see more Brownlie, I., *Principles of public international law*, Oxford University Press, New York, 2008, pp. 34-35.

[16] See e.g. Tymińska, A., *Dzieci z pieczy zastępczej oraz małoletni bez opieki z Ukrainy: ocena ex-post regulacji i praktyki stosowania specustawy ukraińskiej*, Warszawa 2022, [https://hfhr.pl/upload/2022/11/hfpc_raport_dzieci_z_pieczy_zastepczej_oraz_maloletni_bez_opieki_z_ukrainy.pdf], Accessed 10 March 2025.

[17] See Chlebny, J., *Postępowanie w sprawie o nadanie statusu uchodźcy*, C. H. Beck, Warszawa, 2011, pp. 333-350.

minors seeking asylum provisions of the CRC[18], the European Convention on the Exercise of Children's Rights[19], the Charter of Fundamental Rights of the European Union[20], the Directive 2013/33/EU and the Directive 2024/1346 need to be discussed. The necessity to consider both international and EU law stems from the participation of Member States, including Poland, in the international framework for the protection of unaccompanied minors seeking asylum. Given the distinct nature of these legal systems, they will be examined separately. Finally, common standards derived from both systems will be presented.

2.2. International law

Among these acts the CRC plays a crucial role due to its general and fundamental status. It also sets a basic assessment pattern of national regulations. The CRC consists of two types of provisions relevant to the topic at hand. The first are general provisions, as the norms established within them apply to all children. The second are supplementary provisions, which support the general rights of children and the obligations of the state, specifically applying to children seeking refugee status.[21]

Regarding general rules, the principle of non-discrimination (Article 2)[22], the principle of best interests of the child in all actions concerning children (Article 3)[23] and the principle of participation (Article 12) are particularly significant in the discussed matter.[24] Adherence to these general principles forms the founda-

---

18 The CRC entered into force on September 2, 1990. Poland ratified the CRC on July 7, 1991 (Journal of Laws 1991 No.120, item 526, as amended).

19 ETS No. 160, 25 January 1996, hereinafter: ECECR.

20 Charter of Fundamental Rights of the European Union, OJ C 326/391, (hereinafter: CFR).

21 Hence, the CRC's emphasised axiom is the idea that refugee children are, first and foremost, children, and secondly, refugees – see e.g. Szuniewicz-Stępień, *op. cit.*, note 7, p. 191.

22 In order to comply with this principle, both passive and active approaches are required – see more Rehman, J., *International Human Rights Law*, Pearson, Harlow, 2010, pp. 561-564.

23 The Committee on the Rights of the Child underlined that the child's best interests is a threefold concept: a substantive right, a fundamental interpretative legal principle and a rule of procedure – see the Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), U.N.Doc. CRC/C/GC/14, 29 May 2013, para. 6, [https://www.refworld.org/legal/general/crc/2013/en/95780], Accessed 10 March 2025, hereinafter: General comment No. 14 (2013). Therefore, the best interests of the child is not a universal, rigid concept with some abstractly defined content (see Łachacz; Markiewicz-Stanny; Tymińska, *op. cit.*, note 7, p. 16), but rather a dynamic concept that encompasses various issues which are continuously evolving - General comment No. 14 (2013), para. 11. It is accepted that the provisions of Article 3 of the CPC cannot be the subject of any reservations – see Goodwin-Gill, G.S., McAdam, J., *The Refugee in International Law*, Oxford University Press, New York, 2007, p. 323.

24 The fourth general principle of survival and development (Article 6) will not be discussed, as its importance to the subject matter of this paper is minimal.

tion for respecting all other provisions of the CRC.[25] The latter principle consists of essential procedural rights - the right of a child to be involved and heard in decision-making processes.[26] Pursuant to Article 12(1) of the CRC, States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. Article 12(2) further emphasizes the importance of a child's opportunity to be heard in judicial and administrative proceedings, either directly, through a representative, or through an appropriate body, in a manner consistent with national legal procedures. The Article 12 of the CRC not only affirms the right to be heard but also underscores the obligation for the court to take the child's opinion into consideration.[27] These rights are not dependent on the child reaching any specific age. They remain valid regardless of whether the child is fully matured, has a certain level of understanding, or can communicate their views.[28] Furthermore, according to the Article 20 of the CRC, a child temporarily or permanently deprived of their family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. States Parties shall, in accordance with their national laws, ensure alternative care for such a child. Such care could include, *inter alia*, foster placement or, when necessary, placement in suitable institutions for children.

Regarding special rules related to children seeking asylum, the provisions of the Article 22 need to be discussed. According to this Article, States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by their parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of their family environment for any reason, as set forth in the CRC. This provision is the first, universal, legally binding regulation *expressis verbis* recognizing the specific needs of unaccompanied minors as a special sub-group of refugee-children, and therefore plays a critical role in safeguarding

---

25 Rehman, *op. cit.*, note 23, p. 559.

26 *Ibid.*, p. 569.

27 The Committee on the Rights of the Child, General comment No. 12 (2009) The right of the child to be heard, U.N.Doc. CRC/C/GC/12, 20 July 2009, paras 15, 28 *et seq*., [https://www.refworld.org/legal/general/crc/2009/en/70207], Accessed 10 March 2025, (hereinafter: General comment No. 12 (2009).

28 Rehman, *op. cit.*, note 23, p. 569.

their protection.[29] The rights and obligations derived from this article are complementary[30] to the general rights and obligations resulting from the CRC.

The CRC entered into force in Poland on July 7, 1991.[31] All the above mentioned rights are indivisible and interdependent.[32] The absolute nature of the obligations deriving from the CRC and their *lex specialis* character[33] require Poland to adjust its domestic legislation to the standards set forth therein and to apply the provisions of the CRC directly when national law does not reflect them.

At the European level the provisions of the CRC have been supplemented by the provisions of the ECECR. Pursuant to its provisions, children are to be informed and allowed to participate in proceedings affecting them, either directly or through other persons or bodies, before a judicial authority (Article 1). The ECECR requires the courts to observe the principle of the best interests of the child, to provide the child with all relevant information, to allow the child to express their views and to give due weight to those views (Article 6). Article 3 of the ECECR states that "a child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting them, shall be granted, and shall be entitled to request, the following rights: a) to receive all relevant information; b) to be consulted and express his or her views; c) to be informed of the possible consequences of compliance with these views and the possible consequences of any decision". Children's views may be determined and presented to the court in various ways and by a number of different persons, either directly by the child or by a representative[34]. It is for internal law to decide whether a child should be formally represented or formally participate, and whether they are a party to the proceedings.[35] States can grant children additional procedural rights, for example, to apply themselves, or through other persons or bodies, for the appointment of a separate representative, in appropriate cases a lawyer (Article 5). The term "representative" in this regulation refers to a person, such as a lawyer, or a body appointed to act before a judicial authority on behalf of a child (Article 2)[36]. In proceedings before

---

29 Nykänen, E., *Protecting children? The European Convention on Human Rights and Child Asylum Seekers*, European Journal of Migration and Law, Vol. 3, Issue 3-4, 2001, p. 323.

30 General comment No. 6 (2005), para. 65.

31 Journal of Laws 1991 No. 120, item 526.

32 General comment No. 6 (2005), para. 6.

33 *Ibid*., para. 16.

34 See Articles 2 and 10 of the ECECR; the Council of Europe Explanatory Report to the European Convention on the Exercise of Children's Rights, ETS No. 160, Strasbourg, 25.I.1996, p. 5-6, https://rm.coe.int/16800cb, Accessed 10 March 2025, hereinafter: Explanatory Report.

35 *Ibid*., p. 3, para. 14.

36 Such as a child welfare authority or the holders of parental responsibilities if they have been specifically appointed to act on his or her behalf before the judicial authority - *Ibid*., p. 5, paras 25, 26.

a judicial authority affecting a child, the representative shall, unless this would be manifestly contrary to the best interests of the child: a) provide all relevant information to the child, if the child is considered by internal law as having sufficient understanding; b) provide explanations to the child if the child is considered by internal law as having sufficient understanding, concerning the possible consequences of compliance with their views and the possible consequences of any action by the representative; c) determine the views of the child and present these views to the judicial authority (Article 10).

In the European law, the general right to protection and care necessary for the well-being of a child has been outlined in Article 24(1) of the CFR. Additionally, the principles of non-discrimination (Article 12 of the CFR), the best interests of the child (Article 24(2) of the CFR), and the right of the child to express their views freely, similar to the provisions of the CRC, are also emphasized. The latter mater is particularly highlighted in Article 24(1) of the CFR. Pursuant to this regulation, children may not only express their views freely, but such views must be taken into consideration on matters which concern them in accordance with their age and maturity.

2.3. EU law

Similar rights of children and obligations of the Member States have been expressed in the Directive 2013/33/EU and the Directive 2024/1346[37]. This directives lay down minimum standards for the reception of applicants for international protection in EU Member States. The first one, still in force, ensured that all asylum seekers are treated with dignity and have access to basic services while their applications are being processed. Building on this framework, Directive 2024/1346/EU introduces updated and more harmonized reception conditions across the EU. It was adopted in response to ongoing migration challenges and to prevent disparities between Member States that could lead to unequal treatment or encourage secondary movements within EU Member States. This directive places even greater emphasis on the protection of vulnerable applicants, including children[38]. Since this directive is not yet in force and there is still uncertainty about whether it will come into force at all, both directives will be discussed side by side.

---

[37] Provisions of these directives should be interpreted in light of the treaties, including the CFR, in accordance with international law binding the European Union, and in line with the general principles of EU law – see Szpunar, M., *Wybrane problemy stosowania prawa Unii Europejskiej przed sądami państw członkowskich*, Palestra, No. 5, 2020, p. 64.

[38] See more Markiewicz-Stanny, J., *Nowy Pakt o migracji i azylu – pomiędzy spójnością a fragmentacją prawa*, Europejski Przegląd Sądowy, No. 2, 2025, pp. 4-12.

In applying these directives Member States should ensure full compliance with the principle of the best interests of the child in accordance with the CFR, the CRC and the ECHR (see preamble Point 9 and Article 23 of the Directive 2013/33/EU and preamble Point 38 and Article 26 of the Directive 2024/1346). Under both directives unaccompanied minors require special treatment because they are accounted to the group of vulnerable persons (according to Article 21 of the Directive 2013/33/EU) or a group of applicants with special reception needs (according to Article 24(b) of the Directive 2024/1346). Unaccompanied minors should, as a general rule, not be detained. Instead, they should be provided with suitable accommodation that includes special provisions for minors (see Article 11(2 and 3) of the Directive 2013/33/EU and preamble Point 40 and Article 13(2 and 3) of the Directive 2024/1346).

A representative should be appointed for such minors as soon as possible (Article 24(1) of the Directive 2013/33/EU and Article 27(1)(b) of the Directive 2024/1346). Moreover, Directive 2024/1346 Member States to appoint a representative no later than 15 working days from the date on which the application is made. It also requires Member States to designate a person suitable to provisionally act as a representative until a representative has been appointed (Article 27 (1)(a and b) of the Directive 2024/1346). The definitions of a "representative" differ slightly in both directives, but it generally refers to a person or an organization appointed by the competent authorities to represent, assist, and act on behalf of an unaccompanied minor, safeguarding the best interests of that minor.[39] A minor shall be informed immediately of the appointment of the representative (Article 24 (1) of the Directive 2013/33/EU and Article 27 (5)(a) of the Directive 2024/1346).

From the moment unaccompanied minors are admitted to the territory of a Member State until they are required to leave, they should be placed: a) with adult relatives; b) with a foster family; c) in accommodation centers with special provisions for minors; d) in other accommodation suitable for minors. Siblings should, where possible, be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors should be limited to a minimum (Article 24 (2) of the Directive 2013/33/EU and Article 27 (9) of the Directive 2024/1346). The Directive 2024/1346 further emphasizes the need to place a child, where appropriate, in non-custodial, community-based placements rather than institutions.

[39] See and compare Article 2(j) of the Directive 2013/33/EU and Article 2(13) of the Directive 2024/1346.

Both directives impose an obligation on Member States to ensure that those working with unaccompanied minors receive appropriate training concerning their needs and are bound by confidentiality rules provided for in national law regarding any information obtained during their work (Article 24 (4) of the Directive 2013/33/EU and Article 33 of the Directive 2024/1346).

Providing free legal assistance and representation in civil proceedings related to the cases discussed is not required by either directive. However, both directives require Member States to take due account of the views of the minor, in accordance with their age and maturity (see Article 23 (2)(d) of the Directive 2013/33/EU and Article 26 (2)(d) of the Directive 2024/1346).

2.4. Common Standards under International and EU Law

In conclusion, the following procedural standards, derived from the aforementioned regulations, should be adhered to in civil proceedings involving unaccompanied minors seeking asylum:

1. The primary objective of all proceedings is to ensure the effective implementation of the principle of the best interests of the child.
2. The principle of non-discrimination must be upheld in every case
3. The child should be heard in all cases, either directly or indirectly, and the court is obliged to give due weight to the child's views
4. The appointment of a guardian and a legal representative for the unaccompanied minor must be prioritized.
5. States are obligated to provide an alternative form of care for the child.

These legal instruments establish a minimum standard that states must respect, while also allowing them the possibility to take further measures to enhance the protection of children's rights.

3. IMPLEMENTATION OF SET STANDARDS IN PROCEEDINGS FOR APPOINTING A GUARDIAN AND FOR PLACING A MINOR IN FOSTER CARE

The obligation to ensure the protection of unaccompanied minors in Poland is generally fulfilled through two civil proceedings:[40] one for the appointment of a

[40] Furthermore, proceedings for securing claims may also be initiated. In such cases, a distinction should be made between the following situations: a) an unaccompanied minor foreigner over the age of 15, b) an unaccompanied minor foreigner under the age of 15, and c) a separated minor. When an unaccompanied minor is found in Poland, the police are required to immediately transfer the minor to the

guardian (called a curator) and another for the placement of the minor in foster care. These proceedings allow the court to provide a child with both a legal representative and a guardian.[41] The roles of the guardian and the legal representative differ in terms of their obligations. A guardian should be familiar with the child's background and be competent and able to represent their best interests.[42] In Poland, this role is fulfilled by the foster family (Article 112[1] of the Act of 25 February 1964 – the Family and Guardianship Code[43]). On the other hand, a legal representative ensures proper legal representation throughout the proceedings.[44] According to Polish regulations, this function is provided by a curator. The research on the implementation of these regulations between January 1, 2018, and December 31, 2023, indicates that the appointment of both a guardian and a legal representative is a common practice. Hence, in this regard, Poland is adhering to international and the EU requirements.[45]

Both procedures are regulated under the Polish Code of Civil Procedure[46] as non-contentious proceedings and may be initiated either upon the request of the Border Guard or *ex officio* (Article 570 of the CPC).[47] Pursuant to Article 61 Section 1 Point 3 of the Act of 13 June 2003, if an unaccompanied minor has declared to the Border Guard authority the intention to submit an application for interna-

---

custody of the Border Guard authority. The Border Guard, in turn, must apply to the court for the placement of the child either in a care and upbringing facility or in a guarded center (Article 397 Section 1 of the Act of 12 December 2013 on Foreigners, consolidated text: Journal of Laws of 2024, item 769, as amended). The latter option, which allows for the placement of a minor in a detention center and can only be applied to minors over the age of 15 (Article 397 § 3 of the aforementioned Act), raises significant legal concerns (see e.g. Białas, J., *Detencja cudoziemców w Polsce a standard EKPC*, in: Pudzianowska D. (ed.), Status cudzoziemca w Polsce wobec współczesnych wyzwań międzynarodowych, Wolters Kluwer, Warszawa, 2016, pp. 204-206; Liszewska, A., in: Chlebny, J. (ed.), Prawo o cudzoziemcach. Komentarz, Warszawa, 2020, p. 764; Łachacz; Markiewicz-Stanny; Tymińska, *op. cit.*, note 7, pp. 98-100). Consequently, unaccompanied minors under the age of 15 can only be placed in a care and upbringing facility within the framework of these proceedings. For this proceedings, a curator should appointed *ex officio* (Articles 144 and 510 § 2 of the CPC). Finally, in the case of separated children, the Border Guard authority may submit an application for securing claims under Article 755 § 1 Point 4 of the CPC, in the form of custody by a relative, as referred to in paragraph 1a, for the duration of the proceedings concerning the placement of the unaccompanied minor in foster care (Article 26 § 1b of the Act of 12 December 2013 on Foreigners).

41 See General comment No. 6 (2005), paras 21, 69.

42 *Ibid*., para. 69.

43 Consolidated text: Journal of Laws of 2023, item 2809, as amended, hereinafter: the FGC.

44 Szuniewicz-Stępień, *op. cit.*, note 7, p. 208.

45 Łachacz; Markiewicz-Stanny; Tymińska, *op. cit.*, note 7, pp. 83.

46 Act of 17 November 1964 – Civil Procedure Code, consolidated text: Journal of Laws 2023, item 1550, as amended, hereinafter: CCP.

47 The court may initiate these proceedings *ex officio* upon receiving notification of a minor residing in the territory of the Republic of Poland, e.g. from organizations providing assistance to refugees.

tional protection[48], the authority receiving the declaration shall immediately apply to the guardianship court for the appointment of a guardian to represent them in the proceedings concerning granting international protection[49] and placing him/her in foster care. This regulation fulfills the principle of the best interests of the child, as it requires the state to provide care and protection before any other proceedings involving the child are commenced. It also aligns with the constitutional framework established in the Constitution of the Republic of Poland of 2 April 1997.[50] Moreover, an unaccompanied minor found on Polish territory should be placed in a professional foster family acting as an emergency family service or in an emergency care and educational facility until the guardianship court issues a ruling (Article 63 Section 2 of the Act of 13 June 2003). This arrangement ensures temporary care for the child until the proceedings are concluded. The costs of such care are covered by the state treasury (Article 63 of this Act). In such cases, the role of the court is typically not to designate a specific foster family or facility, but rather to confirm the child's placement in a particular facility, as determined by another authority (Article 579[1] of the CPC).[51]

The jurisdiction of Polish courts in these matters will most likely be based on Article 11 of 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[52]. According to Article 11 (1) where the habitual residence of a child cannot be established and jurisdiction cannot be determined on the basis of Article 10, the courts of the Member State where the child is present shall have jurisdiction. Furthermore, under Article 11 (2), this jurisdiction also applies to refugee children or children internationally displaced

---

48 The same rules apply when an application on behalf of an unaccompanied minor was submitted by a representative of an international or non-governmental organization providing assistance, including legal assistance, to foreigners or when another Member State transferred an unaccompanied minor under Regulation (EU) No 604/2013 for whom a guardian has not been previously appointed, or who has not previously been placed in foster care (Article 61 Section 3 of the Act of 13 June 2003).

49 The same provision applies in cases where an unaccompanied minor is transferred to another Member State pursuant to Regulation (EU) No 604/2013, as well as in cases involving the provision of social assistance or assistance in voluntary return to the country of origin.

50 Journal of Laws No. 78, item 483, as amended, hereinafter: Constitution. Pursuant to Article 72 of the Constitution, the Republic of Poland shall ensure the protection of the rights of the child. (…). Specifically, it stipulates that a child deprived of parental care has the right to receive care and assistance from public authorities. Furthermore, public authorities and individuals responsible for the welfare of children are required, when determining the rights of the child, to consider and, whenever possible, prioritize the views of the child.

51 Łachacz; Markiewicz-Stanny; Tymińska, *op. cit.*, note 7, p. 113.

52 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, OJ L 178, pp. 1–115.

because of disturbances occurring in their Member State of habitual residence. Such cases generally fall within the jurisdiction of the guardianship court (Article 568 of the Polish Code of Civil Procedure), determined by the minor's place of stay in accordance with Article 569. The court is required to appoint a curator *ex officio* for absent parents or guardians when their place of residence is unknown (Article 510 Section 2 Sentence 2 of the CPC), a scenario commonly encountered in such cases. Both proceedings can be conducted jointly (Article 219 in conjunction with the Article 13 § 2 of the CPC[53]) or separately.[54] Polish courts apply Polish law in these cases (Article 15 of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children[55] and Articles 56 Section 1 and 60 Section 2 of the Act of 4 February 2011 on Private International Law[56]). Decisions issued by the guardianship court are effective and enforceable immediately upon their announcement, or if no announcement is made, from the moment they are issued (Article 578 § 1 of the CPC).

The procedure for appointing a curator, regulated in Articles 599-605 of the CPC[57], serves as a key procedural safeguard to ensure the protection of the best interests of an unaccompanied minor. As previously noted, these proceedings should precede the asylum procedure[58] and guarantee the proper representation of the unaccompanied minor, both in the asylum process and in the procedure for placing the minor in foster care. The role of the curator is strictly procedural, as the primary function of this curatorship is to represent the minor in legal proceedings.[59] *In casu*, a curator is empowered to file a motion on behalf of the unac-

---

53 See Decision of the Supreme Court (7) of 1 December 2011, I CSK 83/11, OSNC-ZD 2012, No. 3, item 60.

54 Statistics from 2018 to 2022 indicate that these proceedings are primarily conducted separately, with only a few cases where they were held jointly - Łachacz; Markiewicz-Stanny; Tymińska, *op. cit.*, note 7, p. 63.

55 The Convention entered into force with respect to Poland on November 1st, 2010. Journal of Laws 2010, No. 172, item 1158.

56 Consolidated text: Journal of Laws 2023, item 503.

57 In instances where the provisions governing the appointment of a curator do not provide specific guidance, the provisions on guardianship apply accordingly to curatorship (Article 179 Section 2 of the FGC). The same applies to the procedural provisions (see Article 605 of the CPC).

58 General comment No. 6 (2005), para. 33. Although it is worth noting that a child can apply for asylum independently, even before the appointment of a guardian – see e.g. Nykänen, *op. cit.*, note 30, p. 318; Chlebny, *op. cit.*, note 17, pp. 346-347.

59 Therefore, this curator should be treated as guardian or legal assistant in proceedings only and not as a guardian in sense of a person, who is taking care of all child's affairs and who looks after the child's best interests and general well-being – see UNHCR, Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A) 2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees", 22 December 2009, HCR/GIP/06/07, p. 26, footnote 135, [https://hrcak.

companied child for international protection (Article 26 Section 2 of the Act of 13 June 2003).[60] The curator cannot withdraw the child's application for asylum if the child has applied for asylum independently beforehand. However, they are authorized to take actions such as appointing an attorney[61] or filing an appeal.[62]

The guardianship court is required to appoint a curator immediately, but no later than three days from the date of receiving the motion (Article 61 Section 2 of the Act of 13 June 2003). This regulation fully aligns with the time frame for appointing a guardian established by both directives. Due to its importance the appointment of a competent guardian should take place as expeditiously as possible.[63] Legal scholars have pointed out that the obligation to apply "immediately" to the court for appointing a curator, along with the court's requirement to appoint a curator within a maximum of three days, is insufficient, because the effectiveness of this of this protective measure depends not only on the court's but rather on speed with which the Polish Border Guard initiates the proceedings. Consequently, it has been suggested that a maximum time limit for filing the motion should be formally regulated.[64] However, in practice, this issue is of minor significance, as the Border Guard takes prompt action in such cases.

In praxis, curators are appointed mostly from the Polish Border Guard officers, attorneys, judicial curators and court employees.[65] Before assuming their role, the

srce.hr/ojs/index.php/eclic/issue/view/1327/405], Accessed 10 March 2025, (hereinafter: UNHCR, Guidelines on International Protection No. 8).

60 According to the same regulation an application for international protection can be filed by a representative of an international or non-governmental organization providing assistance to foreigners, including legal assistance, if, based on an individual assessment of the situation of an unaccompanied minor, the organization considers that he or she may need such protection.

61 There is no doubt that legal aid is crucial in providing an unaccompanied minor seeking asylum with a proper protection, because he or she does usually know neither the law nor the language - see e.g. Mikołajczyk, B., *Pomoc prawna w sprawach uchodźczych. Nowe wyzwania w związku z przystąpieniem Polski do UE*, Palestra, No.1-2, 2004, p. 20. The provisions of the CPC allow for the appointment of an attorney free of charge when a party or participant in the proceedings is fully or partially exempted from court fees by the court (Article 117 of the CPC). In both of the discussed proceedings, no fees are charged for filing the motion (Article 95 Section 1 Points 2 and 4 of the Act of 28 July 2005 on court costs in civil cases, Consolidated text, Journal of Laws 2024, item 959, as amended). This enables the guardian to file a motion for the appointment of an attorney. Therefore, the court cannot appoint a legal representative ex officio without such a motion. These provisions align with the requirements of both directives (Articles 9(6) and 26(2) of Directive 2013/33/EU and Preamble Point 26, Articles 11(6) and 29(2) of Directive 2024/1346), as they obligate states to provide free legal assistance in the second instance of asylum proceedings, rather than in the accompanying civil proceedings.

62 Chlebny, *op. cit.*, note 17, p. 348.

63 See also UNHCR, Guidelines on International Protection No. 8, p. 25, para. 66 and p. 26, para. 69.

64 Dańczak, P., in: Chlebny, J. (ed.), Prawo o cudzoziemcach. Komentarz, Warszawa, 2020, p. 1125.

65 See Łachacz; Markiewicz-Stanny; Tymińska, *op. cit.*, note 7, pp. 83-85.

curator must take an oath to act on behalf of the minor with due consideration for the child's welfare (Article 590 and 591 in conjunction with Article 605 of the CPC). The court issues a certificate to the curator, specifying the scope of powers granted to a curator (Article 604 of the CPC).

Once a guardian has been appointed the court should ensure alternative care for children in question, as required by Article 22 of the CRC. The guardianship court places the child in foster care immediately, but no later than 10 days from the date of receipt of the application (Article 61 Section 7 of the Act of 13 June 2003). This statutory deadline (similarly to the 3-day deadline for appointing a curator) is of prescribed nature. That means that exceeding it does not have legal effects. Nevertheless, in light of the best interests of the child and the need to provide proper care, this deadline should not be exceeded. On the contrary, such cases should be resolved as soon as possible.[66] This regulation fully complies with the time frame for providing an alternative care to the child set by both directives.

Foster care can be established in two forms, depending on the minor's situation. The guardianship court chooses one of the foster families listed in Article 39 of the Act of 9 June 2011 on family support and the foster care system[67] or institutional foster care facilities stated in Article 93 of this Act[68], including orphanages.[69] The latter option is commonly chosen by Polish courts, as there are few foster families available, and they are often not capable of dealing with the needs of foreign minors. This practice is contrary to the recommendations outlined in aforementioned directives.

The foster family or a worker from the institutional foster care facility acts on behalf of the child. In this sense, they are legal representatives understood as people looking after the child's best interests and general well-being.[70] They should strive to maintain continuity in the child's upbringing.[71] It is obvious that replicating the exact conditions the child previously had is not possible, but the best possible conditions, according to the circumstances, that allow for the physical, mental, spiri-

66 Dańczak, *op. cit.*, note 61, p. 1126.

67 Consolidated text: Journal of Laws of 2025, item 49.

68 According to Article 61 Section 1a of the Act of 13 June 2003, if the children in question are accompanied by an adult relative in the direct line of the second degree (such as a grandmother or grandfather) or a collateral line of the second or third degree (such as a sister or brother of the mother or father, or an adult nephew/niece), the Border Guard may designate such a person as a foster family, with their consent. This provision, while not directly introducing the concept into Polish law, acknowledges the existence of a group of separated minors.

69 Łachacz; Markiewicz-Stanny; Tymińska, *op. cit.*, note 7, p. 112.

70 See UNHCR, Guidelines on International Protection No. 8, p. 26, footnote 135.

71 See General comment No. 6 (2005), para. 39.

tual, and moral development of the child should be provided. This also includes ensuring that siblings are kept together and that care is permanent, minimizing changes in the child's residence. Therefore, interim care must be also provided for the shortest time appropriate for unaccompanied children.[72] In this regard, the principle of non-discrimination is fully respected, and Polish regulations align with established standards.

The court has several other measures to secure the best interests of the child in these proceedings. Firstly, unaccompanied children are considered as participants in these proceedings (Article 510 of the CPC).[73] Secondly, the child possesses full procedural capacity unless they lack legal capacity (Article 573 § 1 of the CPC). Thirdly, the court may limit or exclude the minor's personal participation in proceedings if upbringing reasons justify such a measure (Article 573 § 2 of the CPC). Fourthly, the guardianship court may also order the minor's personal appearance if deemed necessary (Article 574 § 1 of the CPC). Fifthly, in urgent cases, the guardianship court is empowered to issue all necessary decisions *ex officio*, even if the court lacks local competence (Article 569 § 2 of the CPC). Lastly, the court is obligated to conduct the proceedings, either in whole or in part behind closed doors if the minor's welfare requires the case to be heard in private (Article 575^1 of the CPC).

Additionally, according to Article 576 § 2 of the CPC, in cases concerning the person or property of a child, the court is required to hear the child, provided that the child's mental development, health condition, and degree of maturity allow it, while considering the child's reasonable wishes to the extent possible. The hearing takes place outside the courtroom. This regulation is more conducive to the realization of the child's rights provided in Article 12 of the CRC or Articles 3 and 6 of the ECECR, because it mandates the court to hear the child directly.

The right to be heard, as expressed in international, European, and Polish law, is not absolute. Therefore, conducting a hearing is not mandatory in every case involving a child. A court is required to conduct a hearing only when certain criteria are met.[74] Moreover, each state has the right to define the criteria to assess whether children are capable of forming and expressing their own views.[75] Furthermore, the CRC does not impose an age limit on the child's right to be heard, and the Committee on the Rights of the Child advises States parties against introducing

---

72 *Ibid*., para. 40.

73 See Bodio, J., *Status dziecka jako uczestnika postępowania nieprocesowego*, Wolters Kluwer, Warszawa, 2019, pp. 123 *et seq*., 341 *et seq*.

74 *Ibid*., pp. 416-417.

75 Explanatory Report, p. 6, para. 30.

age limits, either in law or in practice.[76] The Polish legislator adheres to these recommendations. According to Polish law, no age limit has been established; however, children must possess a certain level of understanding to be considered capable of forming and expressing their own views. The admissibility of the child's hearing is assessed *ex ante*, without their participation.[77] For the same reasons, the exercise of the right to be heard should not depend on having legal capacity, procedural capacity or being legally incapacitated.[78]

Article 576 § 3 of the CPC states that a hearing should be conducted in accordance with the provisions of Article 216^1 § 3 and 4 and Article 216^2 of the CPC. As a general rule, the child may be heard only once during the proceedings unless the child's best interests necessitate a second hearing or the child requests it. If a repeated hearing is required, it should be conducted by the same court, unless this is impossible or would not be in the child's best interests (Article 216^1 § 3 of the CPC). On the other hand, if the court decides not to hear the child, it must record the reasons for this decision in the minutes of the session or hearing, and these reasons must be provided no later than before the conclusion of the proceedings (Article 216^1 § 4 of the CPC). According to Article 216^2 of the CPC, the hearing of the child shall be conducted in camera. The hearing must take place in a room suitably adapted for such purposes, or, if necessary for the child's welfare, outside the courtroom. In addition to the judge, an expert psychologist may participate in the hearing if it is deemed necessary due to the child's health, mental development, or age, or if it is essential for assisting the judge in understanding the child's needs. The course of the hearing will be recorded in an official note, but no sound or video recordings may be made.[79]

The provisions regarding the location of the hearing and the specific individuals involved in the hearing ensure, on the one hand, an accurate interpretation of the child's reactions and, on the other hand, allow the child the opportunity to express themselves freely[80]. It is therefore widely recognized that such provisions guarantee the child's freedom of expression in a safe environment, appropriately adapted to

---

76 General comment No. 12 (2009), para. 21.

77 Sutova, M.; Zembrzuski, T., *Hearing a Minor as an Instrument of Protecting a Child's Best Interests in Polish and Macedonian Procedural Law,* Balkan Social Science Review, Vol. 24, 2024, p. 117.

78 Bodio, *op. cit.*, note 70, pp. 417-418.

79 The specifics of conducting the hearing are regulated by the Minister of Justice's Regulation of October 21, 2024, which outlines the methodology for preparing and conducting a child's hearing and the conditions for rooms where such hearings must take place, Journal of Laws, item 1579.

80 In this respect, vital changes came into force on 15 February 2024. They implemented recommendations made by the Committee on the Rights of the Child in Concluding observations on the combined fifth and sixth periodic reports of Poland, CRC/C/POL/CO/5-6, 6 December 2021, p. 5, para. 21 [https://docs.un.org/en/CRC/C/POL/CO/5-6], Accessed 10 March 2025.

the child's psychological needs.[81] In that respect, these provisions meet standards set in international and European law. Furthermore, the provisions of the CPC, similarly to international and constitutional laws, offer two-tier protection within the right to be heard. This entails not only hearing the child but also taking their opinion into account.[82] The right to be heard is therefore not merely a formal procedural step but must have a tangible impact on the child's situation.[83] While the court is not required to base its decision solely on the child's opinion, it must give that opinion due consideration in accordance with the best interests of the child.

However, despite the aforementioned advantages of provisions regulating the child's hearing, in most cases, unaccompanied children are not directly heard by the guardianship court. This practice does not infringe international or European law regarding the right to be heard, as these legal frameworks permit states to hear a child either directly or through a representative. Rather, this practice violates Article 576 § 2 of the CPC, which mandates a direct hearing of the child. It also constitutes a violation of the child's right to non-discrimination, as Polish children in similar circumstances are generally heard directly. The differentiation in practice is based solely on the language barrier, as the children in question typically do not speak Polish.[84] This should not be viewed as an insurmountable obstacle to the child's right to be heard, particularly given that interpreters may be used.[85] In practice, however, this can present difficulties, as finding interpreters specializing in languages such as Afghan, Syrian or others may prove challenging.[86]

Moreover, this practice is supported by Article 576 § 1 of the Code of Civil Procedure (CPC), which mandates that before issuing a decision on the merits, the guardianship court must hear the legal representative of the person concerned. It is important to note that this provision does not preclude the child's direct hearing. Rather, it provides a separate procedural act for hearing the legal representative or another close person. Therefore, the child's right to be heard directly should not be

---

81 Pietruszewska, A., Zaruczyńska, A., *Wysłuchanie małoletniego w postępowaniu cywilnym. Refleksje de lege lata i de lege ferenda*, Ars Iuridica, No. 2, 2023, pp. 148-149.

82 General comment No. 12 (2009), para. 19.

83 Bodio, *op. cit.*, note 70, p. 412.

84 Children seeking asylum in Poland between 2018 and 2023 came from 53 different countries – see Łachacz; Markiewicz-Stanny; Tymińska, *op. cit.*, note 7, pp. 28-30. Almost half of them were citizens of the Russian Federation - Łachacz; Markiewicz-Stanny; Tymińska, *op. cit.*, note 7, p. 40. Among the group of unaccompanied minors, 37.33% were citizens of the Russian Federation - Łachacz; Markiewicz-Stanny; Tymińska, *op. cit.*, note 7, p. 45.

85 Which complies with the means of application of the CRC - see General comment No. 6 (2005), para. 71.

86 On top of that, these interpreters should be trained to work with children and possess a fundamental understanding of migration and refugee issues - Łachacz; Markiewicz-Stanny; Tymińska, *op. cit.*, note 7, p. 87.

generally substituted by hearing a legal guardian[87], particularly given that the child is often the only source of critical information in the case.[88]

4. CONCLUSION

The general tendency of failure to respect rights of those seeking asylum in compliance with ever more restricting immigration policy has been observed worldwide[89]. This also applies to Poland, which has been hindering the asylum application process for years. On the other hand, an analysis of the provisions of the CPC has shown that they are well-suited for providing protection to unaccompanied children seeking asylum in Poland according to standards established in the international and European law. Thus, no amendments to the CPC should be made before the transposition deadline of Directive 2024/1346. Both discussed procedures put emphasis on ensuring the implementation of the principle of the best interests of the child. They allow the court to appoint a curator to act as a legal representative and place the child in foster care, securing guardianship within a short period of time. The research also highlights significant progress in ensuring the children's right to be heard, as all requirements set forth in international and EU law are met. Furthermore, Article 576 § 2 of the CPC establishes higher standards for the right to be heard, as it mandates to hear a child directly. However, in practice, this obligation is often not fulfilled, as courts typically hear only the legal representative, rather than the child. In this regard, the principle of non-discrimination is not upheld, as Polish children in similar circumstances are heard directly. Therefore, the state should ensure the availability of more interpreters to address this issue. Additionally, more foster families should be trained and prepared to care for the children in question, as they should not be placed in institutions, which is a common practice in Poland. Moreover, an individual approach catering to the special needs of a particular child should be applied. This would require a special training for judges handling these cases. It is worth noting that such measures were already undertaken[90], demonstrating Poland's efforts to improve its practices in applying international and EU standards.

---

87 Only when the court decides not to hear the child directly due to the child's incapacity to be heard pursuant to the requirements set in Article 576 § 2 of the CPC a representatives are entrusted with the responsibility of reliably determining and presenting the child's position in the proceedings – see Borkowska, K., *Prawo dziecka do wypowiedzi w prawie międzynarodowym i krajowym*, Rodzina i Prawo, No. 19, 2011, p. 33.

88 See UNHCR, Guidelines on International Protection No. 8, p. 26, para. 70.

89 See e.g. Mikołajczyk, *op. cit.*, note 9, p. 89.

90 See *Pierwszych 160 sędziów zostało przeszkolonych w temacie ochrony małoletnich przed detencją z przyczyn migracyjnych*, available at: [https://www.unicef.org/eca/pl/press_release/pierwszych-160-s%C4%99dzi%C3%B3w-zosta%C5%82o--przeszkolonych-w-temacie-ochrony-ma%C5%82oletnich-przed], Accessed 10 March 2025.

REFERENCES

BOOKS AND ARTICLES

1. Bhabha, J.; Young, W., *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, International Journal of Refugee Law, Vol. 11, Issue 1, 1999, pp. 84-125.
2. Białas, J., *Detencja cudoziemców w Polsce a standard EKPC*, in: Pudzianowska D. (ed.), Status cudzoziemca w Polsce wobec współczesnych wyzwań międzynarodowych, Wolters Kluwer, Warszawa, 2016.
3. Białocerkiewicz, J., *Organizacje europejskie i ich standardy prawne*, WSHE, Włocławek, 2003.
4. Bodio, J., *Status dziecka jako uczestnika postępowania nieprocesowego*, Wolters Kluwer, Warszawa, 2019.
5. Borkowska, K., *Prawo dziecka do wypowiedzi w prawie międzynarodowym i krajowym*, Rodzina i Prawo, No. 19, 2011, pp. 27-34.
6. Brownlie, I., *Principles of public international law*, Oxford University Press, New York, 2008.
7. Chlebny, J., *Postępowanie w sprawie o nadanie statusu uchodźcy*, C. H. Beck, Warszawa, 2011.
8. Chlebny, J. (ed.), Prawo o cudzoziemcach. Komentarz, Warszawa, 2020.
9. Goodwin-Gill, G.S., McAdam, J., *The Refugee in International Law*, Oxford University Press, New York, 2007.
10. Markiewicz-Stanny, J., *Nowy Pakt o migracji i azylu – pomiędzy spójnością a fragmentacją prawa*, Europejski Przegląd Sądowy, No. 2, 2025, pp. 4-12.
11. Mikołajczyk, B., *Pomoc prawna w sprawach uchodźczych. Nowe wyzwania w związku z przystąpieniem Polski do UE*, Palestra, No.1-2, 2004, pp.19-29.
12. Mikołajczyk, B., *Prawa dziecka w sytuacji ubiegania się o status uchodźcy*, Państwo i Prawo, No. 7, 2004, pp. 88-99.
13. Nykänen, E., *Protecting children? The European Convention on Human Rights and Child Asylum Seekers*, European Journal of Migration and Law, Vol. 3, Issue 3-4, 2001, pp. 315-345.
14. Łachacz, O.; Markiewicz-Stanny, J.; Tymińska, A., *Małoletni cudzoziemcy poszukujący ochrony międzynarodowej w Polsce oraz ich prawa w standardach międzynarodowych, prawie krajowym i praktyce polskich władz (2018-2023)*, Wolters Kluwer, Warszawa, 2024.
15. Pietruszewska, A.; Zaruczyńska, A., *Wysłuchanie małoletniego w postępowaniu cywilnym. Refleksje de lege lata i de lege ferenda*, Ars Iuridica, No. 2, 2023, pp. 141-150.
16. Rehman, J., *International Human Rights Law*, Pearson, Harlow, 2010.
17. Seugling, C.J., *Toward a Comprehensive Response to Transnational Migration of Unaccompanied Minors in the United States*, Vanderbilt Journal of Transnational Law, Vol. 37, No. 3, 2004, pp. 861-895.
18. Sutova, M.; Zembrzuski, T., *Hearing a Minor as an Instrument of Protecting a Child's Best Interests in Polish and Macedonian Procedural Law,* Balkan Social Science Review, Vol. 24, 2024, pp. 111-132.
19. Thorburn Stern, R., *Unaccompanied and separated asylum-seeking minors: implementing a rights-based approach in the asylum process*, in: Mahmoudi, S.; Kaldal, A.; Lainpelto, K.; Leviner P. (eds.), Child-Friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child, Brill Academic Publishers, Leiden 2015, pp. 242-255.

20. Szpunar, M., *Wybrane problemy stosowania prawa Unii Europejskiej przed sądami państw członkowskich*, Palestra, No. 5, 2020, pp. 60-73.
21. Szuniewicz-Stępień, M., *Zasady postępowania z dziećmi pozbawionymi opieki w procedurach azylowych – kilka uwag na tle zalecanego standardu międzynarodowego*, Themis Polska Nova, No. 2, 2016, pp. 186-218.

INTERNATIONAL LAW

1. The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Journal of Laws 2010, No. 172, item 1158
2. The Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 005
3. The UN Convention of the Rights of the Child adopted by the UN General Assembly on November 20nd 1989, 1577 U.N.T.S. 3 (1989)

EU LAW

1. Charter of Fundamental Rights of the European Union, [2012] OJ C 326/391
2. 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, OJ L 178, pp. 1–115
3. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, [2013] OJ L 180/96
4. Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection, [2024] OJ L 2024/1346

LIST OF NATIONAL REGULATIONS, ACTS AND COURT DECISIONS

1. Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483, as amended
2. Act of 23 April 1964 – Civil Code, consolidated text: Journal of Laws 2024, item 1061, as amended
3. Act of 17 November 1964 – Civil Procedure Code, consolidated text: Journal of Laws 2023, item 1550, as amended
4. Act of 28 July 2005 on court costs in civil cases, consolidated text Journal of Laws 2024, item 959, as amended
5. Act of 13 June 2003 on granting protection to foreigners on the territory of the Republic of Poland (consolidated text: Journal of Laws 2025, item 223
6. Act of 9 June 2011 on family support and the foster care system, consolidated text: Journal of Laws of 2025, item 49

7. Act of 12 December 2013 on Foreigners, consolidated text: Journal of Laws of 2024, item 769, as amended
8. Act of 4 February 2011 on Private International Law, consolidated text: Journal of Laws 2023, item 503
9. Decision of the Supreme Court (7) of 1 December 2011, I CSK 83/11, OSNC-ZD 2012, No. 3, item 60
10. Minister of Justice's Regulation of October 21, 2024, which outlines the methodology for preparing and conducting a child's hearing and the conditions for rooms where such hearings must take place, Journal of Laws, item 1579

WEBSITE REFERENCES

1. *Pierwszych 160 sędziów zostało przeszkolonych w temacie ochrony małoletnich przed detencją z przyczyn migracyjnych*, available at: [https://www.unicef.org/eca/pl/press_release/pierwszych-160-s%C4%99dzi%C3%B3w-zosta%C5%82o-przeszkolonych-w-temacie-ochrony-ma%C5%82oletnich-przed], Accessed 10 March 2025
2. The Committee on the Rights of the Child, Concluding observations on the combined fifth and sixth periodic reports of Poland, CRC/C/POL/CO/5-6, 6 December 2021, available at: [https://docs.un.org/en/CRC/C/POL/CO/5-6], Accessed 10 March 2025
3. The Committee on the Rights of the Child, General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, U.N. Doc. CRC/GC/2005/6, 1 September 2005, available at: [https://www.refworld.org/legal/general/crc/2005/en/38046], Accessed 10 March 2025
4. The Committee on the Rights of the Child, General comment No. 12 (2009) The right of the child to be heard, U.N.Doc. CRC/C/GC/12, 20 July 2009, available at: [https://www.refworld.org/legal/general/crc/2009/en/70207], Accessed 10 March 2025
5. The Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), U.N.Doc. CRC/C/GC/14, 29 May 2013, available at: [https://www.refworld.org/legal/general/crc/2013/en/95780], Accessed 10 March 2025
6. The Council of Europe Explanatory Report to the European Convention on the Exercise of Children's Rights, ETS No. 160, Strasbourg, 25.I.1996, available at: [https://rm.coe.int/16800cb], Accessed 10 March 2025
7. Tymińska, A., *Dzieci z pieczy zastępczej oraz małoletni bez opieki z Ukrainy: ocena ex-post regulacji i praktyki stosowania specustawy ukraińskiej*, Warszawa 2022, available at: [https://hfhr.pl/upload/2022/11/hfpc_raport_dzieci_z_pieczy_zastepczej_oraz_maloletni_bez_opieki_z_ukrainy.pdf], Accessed 10 March 2025
8. UNHCR, Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A) 2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees", 22 December 2009, HCR/GIP/06/07, available at: [https://hrcak.srce.hr/ojs/index.php/eclic/issue/view/1327/405], Accessed 10 March 2025

Original scientific paper

BEST INTERESTS OF UNACCOMPANIED CHILDREN IN RETURN PROCEEDINGS

Ines Medić, PhD, Full Professor
University of Split, Faculty of Law
Domovinskog rata 8, 21000 Split, Croatia
ines.medic@pravst.hr

ABSTRACT

Ever since the adoption of the UN Convention on the Rights of the Child in 1989, the best interests of the child principle has become main tool for the protection of children in all proceedings. The centrality of this principle has been particularly emphasised in asylum and migration proceedings, however, after the CJEU judgment in 2021 it remains more of a wishfull thinking than the actual practice.

In the meantime, parts of the 2018 Proposal for a recast of the Return Directive have been incorporated in other EU Acts (mainly Regulations, proposed by the Pact on Asylum and Migration). In the same vein, in March 2025 Proposal for the Directive has been replaced with the Proposal for a Return Regulation, establishing a Common European System for Returns.

Many novelties are introduced, not all of them are welcomed. The new transfer procedure, despite more or less explicit statement on the protection of human rights, threatens to reduce procedural as well as human rights compared to the Return Directive. Combined asylum and return procedure, as already confirmed by the CJEU case law, manifests serious deficiences. Even the European Parliament recognised the risks, like „the risk of refoulment which is not systematically assessed by the authorities on their own initiative when contemplating the issuing of a return decision", limitation of the rights of defence, broad detention grounds, etc. Also, the short deadline for the completion of the return border procedure is a risk in itself.

Thus, the aim of this article is to explore the content and scope of protection of the best interests of the child in the new return procedure, as well as to articulate arguments either in favour or against the new regime.

Keywords: *best interests of the child, human rights, Proposal for a recast of the Return Directive, Proposal for a Return Regulation, Return Directive, unaccompanied children*

1. INTRODUCTION

According to the available statistics, a significant number of children arrives every year in EU Member States. Many of them unaccompanied. In 2022, EU Member States received 881.200 first-time applications for international protection, of which 39.250 were made by unaccompanied minors, making a 45% increase

compared to those made in 2021.[1] Based on the available data, in 2023 there were 254.900 minors as first-time asylum applicants in the EU,[2] of which 42.940 were made by unaccompanied minors. The share of unaccompanied minors aged less than 18 was on average 16,1% over the period from 2013 to 2023, with a maximum value of 25,5% recorded during the migration crisis.[3] While the COVID-19 pandemic slowed it down to 7,3 %, already in 2022 the number raised up to 19,2%.[4] In terms of age, 7% of all applicants were aged 16-17 years old, 23% were aged 14-15 years old, and 7% were younger that 14 years old.[5] Although the acceptance rates in case of children are 1.4 times higher than for adults there are still many of them who are rejected and ordered to return to their country of origin.[6]

Some of these children are coming from economically underdeveloped countries, in search of better life,[7] while the rest are children who may have suffered a lot in their countries of origin, either because of the „child labour, early marriage, female genital mutilation, underage recruitment, trafficking for prostitution and sexual exploitation,"[8] etc. Their circumstances may vary significantly. They may have left the country of origin alone or they may be separated from their parents or guardians while traveling.[9] Their journey may be more or less traumatic. Therefore, it is very important to acknowledge their life circumstances and the need for their specific and appropriate protection.

The UN Convention on the Rights of the Child (hereinafter: CRC),[10] together with the General Comment No. 6[11] and the EU Charter of Fundamental Rights

---

1 „Happines, Love and Understanding": The Protection of Unaccompanied Minors in the 27 EU Member States, 18 May 2023, p. 8. Available at: [https://euromedmonitor.org/en/article/5642/%E2%80%9CHappiness,-Love-and-Understanding%E2%80%9D:-The-Protection-of-Unaccompanied-Minors-in-the-27-EU-Member-States], Accessed 3 April 2025.

2 Children in migration – asylum applicants – statistics explained, April 2024. Available at: [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Children_in_migration_-_asylum_applicants&oldid=636360], Accessed 3 April 2025.

3 *Ibid.*, Figure 10.

4 *Loc. cit.*

5 „Happines, Love and Understanding", *op. cit*., note 1.

6 Children in migration – asylum applicants – statistics explained (See: Figure 12.), *op. cit.,* note 2.

7 Gornik, B.; Sedmak, M.; Sauer, B., Introduction – *Unaccompanied minor migrants in Europe:: between compassion and repression*, in: Gornik, B.; Sedmak, M.; Sauer, B. (eds.), Unaccompanied Children in European Migration and Asylum Practices. In Whose Best Interests?, New York, 2017, p. 3.

8 „Happines, Love and Understanding", *op. cit.,* note 1.

9 Bhabha, J.: *Arendt's children: Do today's migrant children have right to have rights?*, Human Rights Quarterly, 2009, p. 413.

10 Available at: [https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child], Accessed 3 April 2025.

11 Committee on the Rights of the Child: General Comment No. 6 (2005): Treatment of Unaccompanied Children and Separated Children Outside their Country of Origin, CRC/GC/2005/6, 1 September 2005.

(hereinafter: EU Charter)[12] serves as a cornerstone for the protection of children's rights also in the Common European Asylum System (hereinafter: CEAS),[13] i.e. within the framework of Asylum and Migration Management Regulation,[14] Asylum Procedures Regulation,[15] Return Border Procedure Regulation,[16] Crisis and Force Majeure Regulation,[17] Eurodac Regulation,[18] Screening Regulation,[19] Qualification Regulation,[20] Reception Conditions Directive[21] and the Union Resettlement and Humanitarian Admission Framework.[22]

---

12 Charter of Fundamental Rights of the European Union, OJ C 326, 26. 10. 2012. (art. 24(2) and (3)).

13 Smyth, C., *European Asylum Law and Rights of the Child*, New York, 2014, p. 34.

14 Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013, OJ; L, 2024/1351, 22 May 2024. (recs. 46-48 and 53, arts. 2(11), 23 and 25).

15 Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, OJ L, 2024/1348, 22. 5. 2024. (recs. 35 and 36, arts. 3(7) and 23).

16 Regulation (EU) 2024/1349 of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148, OJ L 2024/1349, 22 May 2024. (rec. 9).

17 Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, OJ L, 2024/1359, 22 May 2024. (rec. 8).

18 Regulation (EU) 2024/1358 of the European Parliament and of the Council of 14 May 2024 on the establishment of „Eurodac" for the comparison of biometric data in order to effectively apply Regulations (EU) 2024/1351 and (EU) 2024/1350 of the European Parliament and of the Council and Council Directive 2001/55/EC and to identify illegally staying third-country nationals and stateless persons and on requests for the comparison with Eurodac dana by member States' law enforcement authorities and Europol for law enforcement purposes, amending Regulations (EU) 2018/1240 and (EU) 2019/818 of the European Parliament and of the Council and repealing Regulation (EU) No 603/2013 of the European Parliament and of the Council, OJ L; 2024/1358, 22 May 2024. (rec 47, art. 14).

19 Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, OJ L, 2024/1356, 22 May 2024. (recs. 25, 33, 38; arts. 2(11) and 13).

20 Regulation (EU) 2024/1347 of the European Parliament and of the Council of 14 May 2024 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European parliament and of the Council „Qualification Regulation", OJ L, 2024/1347, 22 May 2024. (recs. 15 and 16, arts. 1 (11) and 33).

21 Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection (recast), OJ L, 2024/1346, 22 May 2024. (recs. 35, 38-45, arts. 2(5), 13, 26 and 27).

22 Regulation (EU) 2024/1350 of the European Parliament and of the Council of 14 May 2024 establishing a Union Resettlement and Humanitarian Admission Framework, and amending Regulation (EU) 2021/1147, OJ L; 2024/1350, 22 May 2024., note 46.

However, the aim of these documents is dealing with the irregular migration within the EU which is, first and foremost, aimed at adults. It is not so surprising since, historically, children were treated as a „property" of their parents.[23] They were considered objects of law and, consequently, depended on their parents or guardians to protect their interests. This reflected also in immigration law where they had no recognized rights on their own,[24] which particularly affected unaccompanied children who remained largely invisible. Only with the adoption of the CRC, and the change of paradigm in relation to children's status within the law, legislations began to develop material and procedural safeguards in relation to children.

The CRC contains four general principles which are (to a greater or lesser extent) explicitly incorporated in EU legislation in the field of asylum and migration: the principle of non-discrimination (art. 2); the principle of the best interests of the child (art. 3.); the right of the child to life, survival and development (art. 6) and the child's right to express his/her views freely (art. 12). However, even with the implementation of the CRC principles to unaccompanied children in migration cases, there are many challenges, especially in connection to the return proceedings.

For a long time, the EU's return policy was framed by the so-called Return Directive,[25] minimum standards Directive whose aim is "to establish an effective removal and repatriation policy, based on common standards and common legal safeguards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity".[26] However, already in the midst of the refugee crisis in 2015, it was clear that the migratory pressure has increased, on the Member States and the EU as a whole, and that Member States encounter difficulties in the implementation of the Directive. In 2018 Commission went on with the Proposal for a recast Return Directive[27] which was later withdrawn, only to give a way to the proposed Return Regulation, establishing a Common European System for Returns (hereinafter: the Proposal for a Return Regulation).[28] Despite

---

23 Dalrymple, J. K., *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, Boston College Third World Law Journal, Vol. 26, No. 1, 2006, p. 142.

24 *Ibid.*, p. 137.

25 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegaly staying third-country nationals, OJ L 348, 24. 12. 2008.

26 C-146/14 PPU *Mahdi,* ECLI:EU:C:2014:1320 (para. 38); C-554/13 *Zh. and O.*, ECLI:EU:C:2015:377 (para. 47).

27 Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegaly staying third-country nationals (recast), COM (2018) 634 final, 12 September 2018.

28 Proposal for a Regulation of the European Parliament and of the Council establishing a common system for the return of third-country nationals staying illegaly in the Union, and repealing Direc-

explicit advocacy for the protection of human rights, both of these Proposals have met with numerous criticisms.

Thus, the aim of this article is to explore the content and scope of the protection of the best interests of unaccompanied minors within the Return Directive Framework and within the Proposal for a Return Regulation. Also, we will look into the current jurisprudence of the European Courts. Finally, in the conclusion, we will try to articulate arguments either in favour or against the new regime.

2. THE RETURN DIRECTIVE FRAMEWORK

Some decades ago, European rules referring (explicitly) to unaccompanied minors were rare.[29] Only the EU Council Resolution 97/C 221/03,[30] which was not even a binding instrument focused exclusively on the treatment of unaccompanied minors in cases of migratory flux. The aim of the Resolution was „to establish guidelines for the treatment for unaccompanied minors, with regard to matters such as the conditions for their reception, stay and return and, in the case of asylum seekers, the handling of applicable procedures".[31] Standards set out in a Resolution can be recognised in the subsequent EU legislation in asylum and migration cases.

Although according to the UN Committee on the Rights of the Child, there is a difference between an „unaccompanied children" - those „who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or by custom, is responsible for doing so"; and „separated children" - those „who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives",[32] in most of the documents they are covered by the same set of rules. The same is the case with the Return Directive.[33]

The main feature of the Return Directive is emphasis on voluntary return and the least coercive measures in cases of forced return. The transition from voluntary return to forced return is nuanced in a way that voluntary return within the 7 -30 days comes as a first option following the return decision (art. 7). If it doesn't work

---

tive 2008/115/EC of the European Parliament and the Council, Council Directive 2001/40/EC and Council decision 2004/191/EC, COM (2025) 101 final, 11 March 2025.

29 Senovilla, D.; Lagrange, F., *The legal status of unaccompanied children within international, European and national frameworks, Protective standards v. restrictive implementation*, PUCAFREU Project, 2011, p. 21.

30 Council Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries (97/C 221/03), OJ C 221, 19. 7. 1997.

31 *Ibid.*, art. 1. para. 3.

32 General Comment No. 6 (2005), *op. cit.*, note 11 (paras. 7-8).

33 Directive 2008/115/EC, *op. cit.*, note 25.

out, than comes an entry ban (art. 11) and, „unless other sufficient but less coercive measures can be applied effectively in a specific case", detention (art. 15). It is up to Member States to decide to combine decisions ending legal stay (e.g. rejected asylum application or visa withdrawal) with return decisions (art. 6 para.6). The same is with the measures to prevent absconding, which may be imposed for the duration of the period for voluntary departure (art. 7 paras. 3 and 4). There are also some procedural safeguards regarding the form of the return decision and right to information (art. 11), available legal remedies (art. 13) and safeguards pending return (art. 14).

In relation to children, the recitals of the Directive make explicit reference to the ECHR, the Geneva Convention and the EU Charter. According to art. 5., „when implementing the Directive, Member States shall take due account of: (a) the best interests of the child; … and respect the principle of non-refoulment", e.g. „extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as .. the existence of children attending school .." (art. 7 para. 2). „When considering a return or removal of unaccompanied minors, an independent authority must be involved in assesment of the best interests of the child. Also, before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State must be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return" (art. 10). With regard to detention, „the best interests of the child shall be a primary consideration in the context of the detention of minors pending removal" (art. 17 para. 5). Consequently, „unaccompanied minors … shall only be detained as a measure of last resort and for the shortest appropriate period of time" (art. 17 para. 2). Also, they shall be (as far as possible) provided with an accomodation in a child-friendly institutions - with the personnel and facilities which take into account the needs of persons of their age, which give them possibility to engage in leisure activities and education (paras. 3-4). Thus, the Directive allows for the pre-removal immigration detention of minors, but only as a measure of last resort and after consideration of all other alternatives.

There is no dispute that the text of the Return Directive leaves enough space for the protection of the best interests of unaccompanied minors. However, there are some *lacunas* which are particularly undesirable in case of unaccompanied minors, e.g. complete absence of the right to be heard, or the consequences of an infringement.[34] In *Mukarubega*[35] and *Boudjlida* case,[36] the CJEU stressed the importance

[34] Progin-Theuerkauf, S.: *The EU Return Directive – Retour à la „case départ"?*, sui-generis, 2019, p. 41.

[35] C-166/13 *Mukarubega*, ECLI:EU:C:2014:2336.

[36] C-249/13 *Boudjlida*, ECLI:EU:C:2014:2431.

of the right ot be heard at all stages of the return procedure, including the stage of voluntary departure, where the person should be able to express his or her point of view on detailed return arrangements, such as the period allowed for departure and whether the return is to be voluntary or coerced.

Also, the case law shows that majority of EU Member States make regular use of the pre-removal immigration detention of minors.[37] To this day, the harmful consequences of immigration detention of children are well documented.[38] It may lead to post-traumatic stres disorder (PTSD), depression and anxiety, behavioral difficulties and self-harm.[39] Numbers of studies accross continents show that children held in detention experience significantly more psycho-social and emotional difficulties than children living in a community, in particular younger ones.[40]

Despite its deficiences, „the Directive had positively influenced the situation regarding voluntary departure and effective forced return monitoring, and contributed to more convergence of detention practices, including the reduction of pre-removal detention periods and a wider implementation of alternatives to detention." Still, being a minimum harmonization Directive proved to be extremely challenging during the 2015 refugee crisis. Successfully stearing the unprecedented migration influx required coordinated action which the Return Directive, with its lenient implementation requirements, was not able to achieve. Number of weaknesses were identified: the different transposition in national legislation of EU Member States resulted in different sets of national rules and procedures (whith the consequence of „high risk of absconding"); inefficient national procedures in relation to subsequent asylum applications during return proceedings, (resulting in low rates of returns); long waiting between the completition of the asylum proceedings and the start of the return proceedings; the absence of interoperability and duplication of proceedings; non-cooperation of the applicants and the non-EU authorities, etc.[41]

---

37 International Organization on Migration (IOM); UN Children's Fund (UNICEF), UN Refugee Agency (UNHCR): Safety and Dignity for refugee and migrant children: Recommendations for alternatives to detention and appropriate care arrangements in Europe, May 2022, p. 7.

38 See: Zwi, K. *et al., The impact of detention on the social well-being of children seeking asylum: a comparison with community-based children*, European Child Adolescent Psychiatry, Vol. 27, No. 4, 2018, pp. 411-422.

39 Karatzas, A., *Bringing child immigration detention to an end: The case of EU return procedures,* European Policy Centre, 18 November 2022, p. 4.

40 Triggs, G., *The impact of detention on the health, wellbeing and development of children: findings from the second National Inquiry into Children in Immigration Detention (Chapter 20)*, in: Crock, M.; Bension, L.B. (eds.), Protection of Migrant Children. In Search of Best Practice, Edward Elgar Publishing Limited, UK, 2018, pp. 407-410.

41 Lutz, F., Prologue: *The Genesis of the EU's Return Policy*, in: Moraru, M.; Cornelisse, G.; de Bruycker (eds.), Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union,

3. THE FAIL OF THE 2018 PROPOSAL AND THE PROPOSED REGULATION FRAMEWORK

3.1. The rise and fall of the 2018 Proposal for a recast Return Directive

Ever since the 2015 and the refugee crisis, irregular immigration has been at the core of the European immigration policy discussions. The current system was perceived as too complex and too fragmented to successfully deal with considerably changed EU migration policy. Also, a lack of cooperation of many returnees and also some States of origin was considered frustrating and in need of improvement. However, the Proposal for a recast Return Directive,[42] from 2018, was eventualy withdrawn. It was faced with heavy criticism which can be summarized in a conclusion that, with regard to international standards of protection, it has been moving backwards.

Compared to the existing Return Directive, the Proposal for a recast Return Directive introduced a number of measures showing that it departs from the proportionality principle and clearly favours a coercive approach. It introduced the new non-exahustive list of factors to help the States asses the risk of absconding.[43] On top of that, the Council was proposing to extend the number of criteria[44] which, together with the additional objective criteria envisaged in national legislation, would have made it easier for the Member States to use detention and entry bans, instead of voluntary return.

One of the criteria for establishing a risk of absconding was an obligation of the third-country nationals to cooperate in all stages of return proceedings.[45] The duty of cooperation was imposed rather unilateraly, laying mainly on the migrant. The authority had only the duty to inform the migrant of the consequences of a non-compliance, although it may be better placed to gain access to certain types of information/documents.[46]

Issuing a return decision immediately after the adoption of a decision ending a legal stay of third-country national, including a decision not-granting a refugee status or subsidiary protection status was obligatory (art. 8 para. 6).

Oxford: Hart, 2020, pp. 1-16.

42 The Proposal for a recast Return Directive, *op. cit.*, note 27.

43 *Ibid.,* art. 6 para. 1.

44 Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) – Partial general approach, 2018/0329 (COD), 13. 6. 2019. Available at: [https://data.consilium.europa.eu/doc/document/ST-10144-2019-INIT/en/pdf]

45 The Proposal for a recast Return Directive, *op. cit.*, note 27, art. 7.

46 Majcher, I., *Legislating without evidence: The Recast of the EU Return Directive*, European Journal of Migration and Law, Vol. 23, 2021, p. 116.

With regard to voluntary return the minimum period for voluntary departure (7 days) was erased while the maximum was set at 30 days. In practice, leaving a very short period for voluntary return could easily turn into justification for detention. Also, the permission to refrain from granting a period for voluntary return was changed to obligation, in case of: risk of absconding, manifestly unfounded or fraudulent application and a risk to public policy, public security or national security;[47] thus, excluding the Member States discretion entirely if these circumstances were met.

Imposition of an entry ban was expanded, also to cases of „illegal stay detected in connection with border checks carried out at exit".[48]

With regard to legal remedies, the Proposal for a recast Return Directive limited the opportunity to appeal return decision outside the asylum proceedings to one; which had to be lodged within 5 days following the return decision.[49] Suspensive effect of an appeal was restricted, which is not in line with the CJEU jurisprudence.[50]

Detention was solidified, prohibiting a national maximum period of detention of less than 3 months, despite the lack of evidence that the shorter period of detention hinders removals.[51] On the other hand, the Proposal explicitly stated that the aim is to use detention more effectively to „support the enforcement of returns", which was understood that detention as a measure of last resort still remained as the preferred option.[52]

Finally, border procedure was proposed, introducing stricter rules than for the regular procedure (Chapter V).

In relation to children, recitals 43 and 45 of the Proposal, and other articles dealing with the unaccompanied children, remained the same as in the Return Directive. However, such a strong focus on increasing return rates and using detention as a supporting tool caused a fear that it may spill over the children as well,[53] which is particularly questionable in relation to unaccompanied minors. The Proposal retained the detention of minors, followed by an expansion of the grounds of detention which was certainly not the move in the right direction. Instead of

---

47 The Proposal for a recast Return Directive, *op. cit*., note 27, art. 9 para. 4.

48 *Ibid.*, art. 13 para. 2.

49 *Ibid.*, art. 16 paras. 1 and 4.

50 Majcher, *op. cit*, note 46, p. 111.

51 Kilpatrick, J., *The revised returns Directive: a dangerous attempt to step up deportations by restricting rights*, September 2019, p. 3. Avalaible at: [https://www.statewatch.org/analyses/2019/eu-the-revised-returns-directive-a-dangerous-attempt-to-step-up-deportations-by-restricting-rights/#_ftn26], Accessed 3 April 2025.

52 Proposal for a recast Return Directive (note 27), p. 2. Karatzas, *op. cit.*, note 39, p. 4.

53 *Ibid.*, p. 7.

being accompanied with the alternatives to detention and additional safeguards with regard to children, the Proposal moved further away from the international standards and consensus developed on the issue.

Despite being eventualy withdrawn, the Proposal for a recast Return Directive set the trajectory for the future developments.

3.2. And through the back door…

In May 2024 the EU adopted an Asylum and Migration Pact with a view to strenghtening European response to irregular migration, i.e. better balancing responsibility for the EU's external borders control with the first-entry States, through the use of introduced „solidarity mechanism" and introduced pre-screening checks on the external EU borders. Some of the novelties impacting return were: mandatory inclusion of asylum rejection and the return decision in one act;[54] unified return border proccedings allowing for extended detention[55] and introduction of the new transfer procedure.[56]

This massive asylum and migration reform did not include a recast of the Return Directive.

However, after a years of disagreement about the Proposal for a recast Return Directive,[57] on March 11, 2025 European Commisson released the Proposal for a Return Regulation).[58] This Proposal consists of 9 chapters,[59] and it is considered „a key peace to complement the Pact on Migration and Asylum ... setting out a comprehensive approach on migration".[60]

At the legislative level, the Proposal aims „at increasing the efficiency of the return process"[61] through „establishment of common procedure for return, which simpli-

---

54 Asylum Procedure Regulation, *op. cit.*, note 15.

55 Return Border Procedure Regulation, *op. cit.*, note 16.

56 Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/339 on a Union Code on the rules governing the movement of persons across borders, OJ L , 2024/1717, 20 June 2024.

57 The Proposal for a recast Return Directive*, op. cit.*, note 27.

58 The Proposal for the Return Regulation*, op. cit.*, note 28.

59 I. General provisions; II. Return procedure; III. Obligations of third-country nationals; IV. Safeguards and remedies; V. Prevention and absconding and detention; VI. Readmission; VII. Sharing and transfer of personal data; VIII. Common system for returns; IX. Final provisions, including measures to be implemented in times of emergency.

60 See: [https://ec.europa.eu/commission/presscorner/detail/en/ip_25_724], Accessed 3 April 2025.

61 The Proposal for the Return Regulation, *op. cit.*, note 28, p. 3.

fies, facilitates and speeds up return procedures".[62] It picks up where the Proposal for the recast Return Directive has left. Novelties introduced by the Proposal for the Return Regulation are: common/unified procedural rules for the issuance of return-related decisions, ensuring the same treatment of third-country nationals throughout the EU; stronger accent on voluntary returns (through the reinforced right to information and return counceling and reintegration); strenghtened procedural safeguards throughout the entire return proceedings, in particular with respect to vulnerable persons; introduction of explicit obligation of the returnees to cooperate with national authorities (and the list of possible consequences); stricter rules for managing and preventing absconding and unauthorized movements between Member States (exhaustive list to assess the risk of absconding and an exhaustive list of detention grounds); strict rules for people posing security risks; introduction of European Return Order; direct enforceability of decisions issued by another Member State (now only a possibility, with the aim to become mandatory); return hubs (based on agreements or arrangements with third countries where international human rights standards and principles, including the principe of non-refoulment are respected) and readmission as an integral part of a return process. All steps under the return procedure must be carried out under the framework of the EU Charter of Fundamental Rights.

At operational level, the Proposal for the Return Regulation envisages a number of support systems, including counselling and (potentially) reintegration support. In line with the CRC and the EU Charter, the principle of the best interests of the child is of primary consideration when returning minors. Member States need to pay particular attention to unaccompanied minors. The Proposal for the Return Regulation aligns with key novelties of the Pact rules. Thus, the age assessments of minors follows the same rules as in the area of asylum and, in doubt, a representative must be appointed to see to the interests of the minor (art. 19). Standard is even higher in case of return of unaccompanied minors. Unaccompanied minors shall automatically be provided with free legal assistance and representation (art. 25 para. 2). A representative must be appointed to represent, assist and act on behalf of an unaccompanied minor from the beginning till the end of the return process, and appropriately trained in child-friendly and age-appropriate communication and speak a language that the minor understands (art. 20 para. 2). The unaccompanied minor shall be heard, either directly or through the representative or trained person .. including in the context of the determination of the best interests of the child, and the authorities of a Member State must be satisfied that the minor will be returned to a member of his or her family, a nominate guardian or adequate reception facilities in the country of return (art. 20. para. 3).

[62] *Ibid.* note 8.

Unfortunatelly, the Proposal did not give up on detention for unaccompanied children (and families with minors). It says that the unaccompanied minors shall only be detained as a measure of last resort and for the shortest appropriate period of time and taking into account the best interests of the child (art. 35 para. 1). However, despite providing for strong safeguards on detention conditions in case minors are detained, which in any case remains a measure of last resort, the provision of art. 35 of the Proposal compared with the provision of art. 17 of the Return Directive seems to be lowering the level of protection of unaccompanied children with regard to detention, since it moved from „the best interests of the child shall be a primary consideration" to „taking into account the best interests of the child". Although it may seem just a subtle departure, moving from the „primary consideration" to the „taking into account" significantly lowers the standard of the protection of the child. The wording of the provision certainly raises some quiestions regarding the operationalization of the principle within the Proposal, especially compared to art. 18 (Section 5, Return of minors) which explicitly states that „the best interests of the child shall be a primary consideration when applying the provisions in accordance with the Regulation". Thus, either the wording of the art. 35 para. 1 is unfortunate, or the legislator envisages different scrutiny of the principle within the Proposal, depending on the subject matter/ stage of proceedings.

Anyhow, based on the children's response to detention, particularly prolongued detention,[63] combined with the restrictions of movement,[64] it can be said that the detention is never in the best interests of the child and that it should be prohibited, even as a measure of last resort.[65] The continued use of child detention in the European region is at odds with the commitments made internationally and regionally.[66] Instead, less restrictive measures should be used, which may restrict

[63] WHO, Regional Office for Europe: Addressing the health challenges in immigration detention, and alternatives to detention: a country implementation guide, 2022. Triggs, *op. cit.*, note 40, pp. 407-410. Dudely, M.; Steel, Z.; Mares, S.; Newman, L.: *Children and young people in immigration detention*, Current Opinion in Psychiatry, Vol. 25, No. 4, p. 228.

[64] According to the ECtHR jurisprudence, prolongued detention combined with the restriction of movement may be a violation of art. 3 of the ECHR (Application No 11593/12 *AB and Others v. France*, 12. 7. 2016.; Application No 68264/14 *RK and Others v. France*, 17. 10. 2014.). Smyth, C.: *Towards a Complete Prohibition on the Immigration Detention of Children,* Human Rights Law Review, 2019, Vol 19, No 1, p. 29.

[65] Parliamentary Assembly of the Council of Europe: Missing refugee and migrant children in Europe, Strasburg, Resolution 2324 (2020).

[66] WHO: Immigration detention is harmful to health – alternatives to detention should be used, May 2022; UNICEF: Alternatives to Immigration Detention of Children, February 2019; UNHCR's position regarding the detention of refugee and migrant children in the migration context, January 2017, etc.

the person's freedom of movement without deprivation of liberty.[67] Therefore, any of the „alternatives to detention" listed in art. 31 of the Proposal for Regulation should be mandatory,[68] especially in case of unaccompanied children. Preference should be given to those alternative measures which are community-based and include independent living, foster and family based care and supervision and case management.[69]

4. THE CJEU AND THE BEST INTERESTS OF THE CHILD IN THE RETURN PROCEEDINGS

The principle of the best interests of the child is no longer new. It was introduced into the legal system in 1989, by the CRC,[70] whose article 3 introduces the concept that the child, in accordance with his or her evolving capacities, age and maturity, has the right to express his or her own views. In other words, the child becomes an active participant in his or her own life.[71]

However, consideration of the interests of the child in asylum and migration cases did not appear in the Court of Justice of the EU (further on: CJEU) jurisprudence

---

67 ECtHR, Application no 8687/08 *Rahimi v. Greece*, 5. 4. 2011. - in cases concerning children, „searching for alternatives to detention is obligatory in order to eradicate arbitrariness of the detention on children". A landmark judgment concerning the detention of an unaccompanied migrant child in a closed centre for adults with poor hygiene and infrastructure conditions, in which the ECtHR found out that the national authorities, when ordering the detention of the child, did not at any stage gave consideration to the best interests of the child. The Court reiterated its earlier findings in Neulinger and Shuruk that in all decisions concerning children their best interests must be paramount. ECtHR, Application no 13178/03 *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12. 10. 2006., regarding a detention of a five-years old unaccompanied migrant child at the Brussels Airport because she did not have the necessary documents to enter the State's teritorry, the ECtHR took an explicit stand that the authorities should have considered alternatives to detention, which would have aligned more with the best interests of the child. The Court acknowledged the State's sovereign right to control the entry and stay within its territory but it emphasised the fact that they are still bound by the obligations under international law (i.e. ECHR and CRC). Also, the fact that the Belgium authorities returning the unaccompanied child to the Democratic Republic of Congo, her state of nationality, where there was no reception arrangements in place to ensure her safe arrival and care; was considered a violation of article 3 ECHR. ECtHR, Application no 14165/16 *Sh. D. and Others v. Greece, Austria, Croatia, Hungary, Northern Macedonia, Serbia and Slovenia*, 13. 6. 2019.; Application no 19951/16 *H.A. and Others v. Greece*, 28 February 2019.

68 See: Karatzas, *op. cit.*, note 39, p. 8.

69 PICUM: Implementing Case Management Based Alternatives to Detention in Europe, March 2020, p. 2.

70 Available at: [https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child], Accessed 3 April 2025, *Op. cit*, note 10.

71 See: Medić, I., *Najbolji interes djeteta u europskim prekograničnim predmetima*, in: Župan, M. (ed.), Prekogranično kretanje djece u Europskoj uniji, Osijek, 2019, p. 11.

until 2006,[72] when European Parliament[73] challenged some provisions of the Directive 2003/86[74] (further on: Family Reunification Directive) as incompatible with fundamental rights, i.e. the 1950 European Convention for the protection of Human Rights and Fundamental Freedoms (further on: ECHR)[75] and other various instruments of public international law dealing with children's rights.[76] In its judgment, the CJEU found that the dedication for the respect of fundamental rights (child's rights included) is clearly stated already in recitals, since recital 2 of the Directive explicitly refers to the EU Charter of Fundamental Rights[77] which, at a time, was not yet a legally binding instrument.[78] Further on, the Family Reunification Directive also refers to "the best interests of minor children" (art. 5 para. 5) and therefore, requires the Member States to "examine the application in the interests of the child and with a view to promoting family life".[79]

Since then, the importance of the EU Charter evolved,[80] and the CJEU keeps referring to the Charter, in particular it's article 24, as well as to the CRC and the General Comment No 14 of the CRC.[81] In the last few years the CJEU has given over 20 preliminary rulings in asylum and migration cases, most of them containing explicit reference to article 24 para. 2 of the EU Charter.[82] On top of that the

---

72 For the other reasons and some other cases connected to migration but not to return, see: *Gromek-Broc, K.: Vicissitudes of Unaccompanied Minors in the EU. In the best interests of a child: one step forward two steps back*, Ordines, Vol. 1, 2018. Available at: [http://www.ordines.it/wp-content/uploads/2018/08/KATARZYNA.pdf], Accessed 3 April 2025.

73 See: C-540/03 *Parliament v. Council*, ECLI:EU:C:2006:429.

74 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3. 101. 2003.

75 Available at: [https://www.echr.coe.int/documents/d/echr/convention_ENG], Accessed 3 April 2025.

76 The International Covenant on Civil and Political Rights (1966), The Convention on the Rights of the Child (1989), The International Convention on the protection of the Rights of all Migrant Workers and Members of their Families (1990), The Declaration on the Rights of the Child (1959), etc. (para. 33 of the Judgment).

77 *Op. cit.*, note 12.

78 C-540/03 *Parliament v. Council*, ECLI:EU:C:2006:429, para. 38.

79 *Ibid.*, para. 88.

80 Frasca, E; Carlier, J.-Y., *The best interests of the child in ECJ asylum and migration case law: Towards a safeguard principle for the genuine enjoyment of the substance of children's rights?*, Common Market Law, Review, Vol. 60, no. 2, 2023, p. 351.

81 Committee on the Rights of the Child: General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, 29 May 2013.

82 Frasca, E.; Carlier, J.-Y., *op. cit,* note 80, p. 345. Takács, N., *The treefold concept of the best interests of the child in immigration case law of the ECtHR*, Hungarian Journal of Legal studies, Vol. 62, No. 1., 2021, pp. 96-114.

CJEU continues to base its judgments on relevant recitals,[83] like the recital 22 of the Return Directive.[84] Compared to its early jurisprudence in asylum and migration cases in which the accent was on "balancing all the interests in play, taking particular account of the interests of the children concerned"[85], recent case law requires "general and in-depth assessment of the situation" in order to determine the best interests of the child.[86] Change of paradigm is additionally strengthened with the duty to take the best interests of a child as a "primary consideration" in all asylum and migration cases, in particular with respect to unaccompanied children since they are considered "extremely vulnerable" persons.[87]

So far, the CJEU has been asked to interpret the best interests of the child in the context of the Return Directive on three ocasions.[88] Two of these cases concerned the return of family members of a child who is an EU citizen.[89] The last one is the first case ever in which the CJEU ruled on return decision against third country national unaccompanied minor.[90] The case concerns an unaccompanied minor whose claim for international protection has been rejected.

In June 2017, an unaccompanied minor (TQ) aged 15 years and 4 months, applied in the Netherlands for a fixed-term residence permit on grounds of asylum. He stated to be born in Guinea but living with his late aunt in Siera Leone, after whose death he came to Europe/Amsterdam. There he claimed to have been the victim of human trafficking and sexual exploitation. In March 2018, the State Secretary *ex officio* rejected his application due to ineligibility to fixed-term residence permit. Also, in accordance with national law that decision constituted a return decision. In April 2018, TQ brought an appeal against that decision claiming *inter alia* that he doesn't know where his parents live or whether he has any other family members.

---

83 See: C-233/18 *Haqbin*, ECLI:EU:C:2019:256 (para. 54); Joined cases C-273/20 and 355/20 *Bundesrepublik Deutschland*, ECLI:EU:C:2022:617 (para. 39); C-19/21 *Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2022:605 (para, 34).

84 C-441/19 *Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2021:9 (para. 6); C-112/20 *M.A. v. État Belge*, ECLI:EU:C:2021:197 (para. 4).

85 Joined cases C-356/11 and 357/11 *O. and S.*, ECLI:EU:C:2012:776 (para. 81).

86 C-441/19 *Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2021:9 (para. 46).

87 Frasca; Carlier, *op. cit.*, note 80, p. 367.

88 C-82/16 *K.A. and Others*, ECLI:EU:C:2018:308; C-441/19 *Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2021:9; C-112/20 *M.A. v. État Belge*, ECLI:EU:C:2021:197.

89 C-82/16 *K.A. and Others*, ECLI:EU:C:2018:308 and C-112/20 *M.A. v. État Belge*, ECLI:EU:C:2021:197.

90 C-441/19 *Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2021:9.

The referring court explained that the Netherlands legislation, with respect to unaccompanied minors, envisages dual approach. If the child is under 15 years old on the date of the application an investigation will be carried out and if the adequate facilities are not available in the State of return the child will be granted a residence permit. On the contrary, in relation to unaccompanied children over 15 years of age, the Netherlands legislation allows for automatic imposition of return in case of rejection of asylum application, without examination of the availability of adequate reception conditions in the country of return. The referring court also explained that, in such cases, the authorities responsible for the return periodically check whether the child and his guardian prepared for his return but they do not execute the return until the child in question reaches 18. In the meantime the child's status in Netherlands is irregular but tolerated.

Thus, the referring court wanted to know: 1) whether, under the EU law, in the case of unaccompanied minor the imposition of the obligation to return depends on an investigation whether an adequate reception facilities exist and are available in the country of origin; 2) is it permitted, under the EU law, to make distinctions on the basis of age when granting lawful residence on a teritorry if it is established that an unaccompanied minor does not qualify for refugee status or subsidiary protection; 3) is it permitted under the EU law to impose an obligation to return but not to undertake any concrete actions to proceed with removal until the unaccompanied child reaches 18 or it implies suspension of obligation to return and granting a lawful residence.

With regard to the first question, the Duch authorities were of the opinion that art. 10 para. 2 of the Return Directive may be interpreted in a way that the authorities may adopt a return decision even without examination in to „whether the unaccompanied minor will be returned to a family member, a nominated guardian or adequate reception facilities". The CJEU rejected such interpretation and took a clear stand that the best interests principle must be applied at all stages of the procedure and to all children regardless of their age (paras. 43 and 45). It means that the State before deciding to issue a return decision in respect of an the unaccompanied minor must carry out an investigation in order to verify specifically that adequate reception facilities are available for the unaccompanied minor in the State of return (paras. 49, 55, 58-60). Failing to do so places the minor in an intolerable situation, since „he would be a subject of return decision but could not be removed in the absence of adequate reception facilities"(para. 52), „he would be placed in a situation of great uncertainty as to his legal status" (para. 53) and „it is contrary to the requirement to protect the best interests of the child at all stages of the procedure" (para. 54).

With regard to the second question, the CJEU answered that „the criterion of age cannot be the only factor to be taken into account in order to ascertain whether there are adquate reception facilities in the State of return". Instead of automatic decision making the State should carry out an assessment on a case-by-case basis (para. 66).

Finally, in relation to the third question, the CJEU basically reiterated the answer to the first question, i.e. a return decision should only be adopted if there is a real possibility of implementing the decision in a way that fulfils the best interests of the child (para. 81).

The interpretations in this judgment must be considered not only in relation to the Return Directive but also in relation to the current and the future architecture of the European migration legislation. The CJEU emphasised couple of points. First, individual assessment is at the core of the unaccompanied child best interest determination. Any decision taken with respect to the child should lead to the regularization of the child's status, either in the State providing adequate reception facilities or in the Member States of refuge. Second, there are number of factors which must be taken into into account before deciding whether to adopt a return decision or not.[91] Only by carrying out a general and in-depth assessment of the situation of the unaccompanied minor in question, it is possible to determine the „best interests of the child" and to issue a decision which comlies with the requirements under Return Directive.[92] Since, under the new CEAS „construction", there is a „streamlined" approach to asylum and return and dual approach to return (border return proceedings and return proceedings), Member State authorities must carefully balance between fundamental rights and obligations arising from cross-referencing. Third, in any proceedings, an unaccompanied minor is entitled to the right to be heard, to the independent guardian and legal assistance.

The judgments of the CJEU, with an *erga omnes* binding force, should have a substantial impact on the interpretation of EU legislation and, implicitly, national legislation transposing EU legislation. Based on the facts of this case, it is safe to say that the Dutch legislator failed to implement the CJEU judgment, as well as the CRC and the ECHR, in more than one way. Unaccompanied children are by definition „vulnerable persons"[93] and the standards of protection applied to their

---

91 *Inter alia*, the age, seks, particular vulnerability, state of physical and mental health, the placing in a foster family, the level of school education and the social environment of that minor (para. 47 of the *TQ* Judgment).

92 Para. 46 of the *TQ* Judgment.

93 Art. 3. para. 9. of the Return Directive, *op. cit.*, note 25.

situation should be highest. According to the General Comment No. 14,[94] the best interests of the child is a treefold concept: a substantive right; a fundamental, interpretative legal principle and a rule of procedure.[95] As such, it is self-executing, provides a framework for interpretation, and requires to be applied in all actions concerning children (either individually or as a specific group). „The best interests of the child shall be primary consideration in the adoption of all measures of implementation".[96] As a primary consideration, the decision-maker must not „treat any other consideration as inherently more significant than the best interests of the child".[97] The best interests of the child also require „appropriate proactive measures taken by the State to ensure effective equal opportunities for all children to enjoy the rights under the Convention".[98]

What is worrying in relation to this case is that even after the CJEU's judgment, and its clear guidance (in line with the CRC, EU Charter and the ECHR), the Dutch legislation remained (practicaly) the same. Justifying direct discrimination with respect to unaccompanied minors with policy considerations (which the reference to the lenght of the procedure implicitly is, since it only serves to advance the return rates) is far from the rule of law. More so, according to the Resolution of the Committee of Ministers adopted in May 2004,[99] this could qualify as a systemic deficiency,[100] which requires serious improvement of the current system.

5. CONCLUSION

As already explained, the reform of the CEAS did not go straightforward, mainly due to a lack of consensus among the Member States on the implementation of the principle of solidarity. When it finally happened it did not encompas the Return Directive, since there was no consensus with regard to the Proposal for a recast Return Directive. Placing the returns at the center of European migration policy, enlarging the scope of application of return border procedure and increasing the

94 *Op. cit*, note 81.

95 *Ibid.*, para. 6, p. 4.

96 *Ibid.*, para. 36, p. 10.

97 Collinson, J., *Making the best interests of the child a substantive human right at the centre of national level expulsion decisions,* Netherlands Quarterly of Human Rights, Vol. 38, No. 3, 2020, p. 187.

98 General Comment No. 14, *op. cit.*, note 81, para. 1, p. 11.

99 Resolution (Res(2004)3) on judgments revealing and underlying systemic problem, 12 May 2004.

100 *Ibid.* In this Resolution, the Committee of Ministers, having emphasised the need to help the states concerned to identify underlying problems, and to implement necessary measures, invited the ECtHR „to identify in its judgments finding a violation of the Convention what it considers to be an underlying systemis problem and the source of that problem, in particular when it is likely to give rise to numerous applications, so as to assist States in finding the appropriate solution and the Committee of Ministers in supervising the executioon of judgments". – para. I of the Resoultion.

link between return policies and asylum was not acceptable to many civil societies. Many interests groups have voiced their concerns, stating that the proposed Regulation: „turns forced returns into the default option for people in irregular situations", „massively expands the use and duration of immigration detention", „lays grounds for States to send people to countries to which they have no connection", etc.[101] However, new European migration policies have found their way through the backdoor, i.e. Pact on Asylum and Migration (May 2024) and the Proposal for a Return Regulation (March 2025). According to the Commission's press relase, main incentive for the proposed changes was the reasoning that the EU must „give protection to those in need" whilst removing „those who have no right to stay".[102] In order to achive that aim, double objective has been followed - effective returns and compliance with fundamental rights. However, looking into the new regime brings some concerns in relation to human rights, particularly of the most vulnerable migrants.

When it comes to return politics, the adoption of the Pact for Asylum and Migration already changed the „playing field" significantly. One of the biggest novelties introduced by the Pact is the creation of a „seamlesss link" between asylum and return policies.[103] To that end, there are numerous new provisions, scattered accross different legislative acts and cooperation agreements with third countries, which must be applied together with the existing global, regional and national legislation.[104] Thus, looking only into the Proposal for Return Regulation is far from enough to draw a final conclusions with regard to the respect for the best interests of the unaccomanied children within new return proceedings.

Namely, the Pact influences return in three different ways: the return decision must be a part of the asylum rejection decision; appeal procedure for asylum and return decisions within the border procedure are merged into one single procedure; the detention of asylum seekers is linked to the pre-removal detention during border procedures;[105] thus it should be evaluated as a whole.

In many aspects the Pact is more respectful of human rights that the Proposal for a recast Return Directive. Some standard safeguarding provisions are included with

---

101 Available at: [https://emnbelgium.be/news/new-proposal-regulation-establishing-common-return-system-has-been-released], Accessed 3 April 2025.

102 European Commission press release: European Agenda on Migration: Commission presents new measures for an efficient and credible EU return policy, 2. 3. 2017. Available at: [https://europe.eu/rapid/press-release_IP-17-350_en.htm], Accessed 3 April 2025.

103 Moraru, M.: *The new design of the EU's return system under the Pact on Asylum and Migration*, p. 3. Available at: [https://eumigrationlawblog.eu/the-new-design-of-the-eus-return-system-under-the-pact-on-asylum-and-migration/], Accessed 3 April 2025.

104 *Loc. cit.*

105 *Loc. cit.*

regard to children and in particular unaccompanied minors (Respect for the CRC, Geneva Convention and EU Charter). They are not so „invisible" any more. There are also procedural guarantees, absent from the Return Directive, eg. right of the minor to be heard, child-friendly assistance, child-friendly interviews, etc.

However, compared to the Return Directive there are some points of concern, like the limitation of the right to defence, broad detention grounds, rather short deadline to complete the return border procedure, etc. Also, the detention remains one of the biggest issues. According to the Global detention project, at least 20 out of 27 EU Member States have held children in immigration detention during the last 5 years. Detention has been used a s „structural method at EU borders" and the last resort principle has rarely been observed.[106] Thus, it can also bi viewed as „expanding and extending the detention of people subject to return decisions based on vague and punitive grounds, new sanctions for failing to „cooperate" sufficiently with return proceedings, an increased use of entry bans, limited options for voluntary departure, and expansive derogations for people deemed a security risk".

On the other hand, the current return system, determined by the Return Directive (coloquially called the „Directive of shame"),[107] is from the very beginning labeled as unsatisfactory, exactly because of „inexcusably low" standards of protection of the fundamental rights.[108] Not even the two succesive Commission's „Return Handbooks"[109] helped to improve the quality of implementation.

According to statistics, children under 18 make up almost half of the world's refugee population. Also, according to the official reports, between 2014 and 2018, one registered migrant child was reported dead or missing every day worldwide.[110] Thus, the consideration that is given to the CRC, EU Charter and the ECHR is particularly relevant for unaccompanied minors. International human rights standards included in the Pact and the Proposal for a Return Regulation, if applied properly (assesing the best interests of the unaccompanied minor as the primary consideration in return proceedings), have the potential to change this saddening statistics.

---

106 Karatzas, *op. cit.*, note 39, p. 7.

107 Lutz, F.: *The Negotiations on the Return Directive: comments and materials*, Wolf Legal Publishers, 2010. Baldaccini, A.: *The EU Directive on Return: Principles and Protest*, Refugee Survey Quarterly, Vol. 28, No. 4, 2009, pp. 114-138.

108 Progin-Theuerkauf, S.: *The EU Return Directive – Retour à la „case départ"?*, sui-generis, 2019, p. 35.

109 Commission Recommendation C(2015) 6250 of 1 October 2015 establishing a common „Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks, Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common „Return Handbok" to be used by Member States' competent authorities when carrying out return related tasks, OJ L 339, 19 December 2017.

110 Parliamentary Assembly of the Council of Europe: Missing refugee and migrant children in Europe, Strasburg, Resolution 2324 (2020).

REFERENCES

BOOKS AND ARTICLES

1. Baldaccini, A., *The EU Directive on Return: Principles and Protest*, Refugee Survey Quarterly, Vol. 28, No. 4, 2009, pp. 114-138
2. Bhabha, J., *Arendt's children: Do today's migrant children have right to have rights?*, Human Rights Quarterly, 2009, pp. 410-451
3. Collinson, J., *Making the best interests of the child a substantive human right at the centre of national level expulsion decisions,* Netherlands Quarterly of Human Rights, Vol. 38, No. 3, 2020, pp. 169-190
4. Dalrymple, J. K., *Seeking Asylum Alone: Using the Best Interests of the Child pricnciple to Protect Unaccompanied Minors,* Boston College Third World Law Journal, Vol. 26, No. 1, 2006, pp. 131-168
5. Dudely, M.; Steel, Z.; Mares, S.; Newman, L., *Children and young people in immigration detention*, Current Opinion in Psychiatry, Vol. 25, No. 4, pp. 285-292
6. Frasca, E.; Carlier, J.-Y., *The best interests of the child in ECJ asylum and migration case law: Towards a safeguard principle for the genuine enjoyment of the substance of children's rights?,* Common Market Law, Review, Vol. 60, no. 2, 2023, pp. 345-390
7. Gornik, B.; Sedmak, M.; Sauer, B., *Introduction – Unaccompanied minor migrants in Europe: between compassion and repression*, in: Gornik, B.; Sedmak, M.; Sauer, B. (eds.), Unaccompanied Children in European Migration and Asylum Practices. In Whose Best Interests?, New York, 2017, pp. 1-16
8. Gromek-Broc, K., *Vicissitudes of Unaccompanied Minors in the EU. In the best interests of a child: one step forward two steps back,* Ordines, Vol. 1, 2018. Available at: [http://www.ordines.it/wp-content/uploads/2018/08/KATARZYNA.pdf], Accessed 3 April 2025
9. Karatzas, A., *Bringing child immigration detention to an end: The case of EU return procedures*, European Policy Centre, 18 November 2022
10. Kilpatrick, J.: *The revised returns Directive: a dangerous attempt to step up deportations by restricting rights*, September 2019. Avalaible at: [https://www.statewatch.org/analyses/2019/eu-the-revised-returns-directive-a-dangerous-attempt-to-step-up-deportations-by-restricting-rights/#_ftn26], Accessed 3 April 2025
11. Lutz, F., *The Negotiations on the Return Directive: comments and materials*, Wolf Legal Publishers, 2010
12. Lutz, F., *Prologue: The Genesis of the EU's Return Policy*, in: Moraru, M.; Cornelisse, G.; de Bruycker (eds.), Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union, Oxford: Hart, 2020, pp. 1-16
13. Majcher, I., *Legislating without evidence: The Recast of the EU Return Directive*, European Journal of Migration and Law, Vol. 23, 2021, pp. 103-126
14. Medić, I., *Najbolji interes djeteta u europskim prekograničnim predmetima*, in: Župan, M. (ed.), Prekogranično kretanje djece u Europskoj uniji, Osijek, 2019, pp. 9-59
15. Moraru, M., *The new design of the EU's return system under the Pact on Asylum and Migration*, p. 3. Available at: https://eumigrationlawblog.eu/the-new-design-of-the-eus-return-system-under-the-pact-on-asylum-and-migration/], Accessed 3 April 2025

16. Progin-Theuerkauf, S., *The EU Return Directive – Retour à la „case départ"?,* sui-generis, 2019, pp. 32.48.
17. Senovilla, D.; Lagrange, F., *The legal status of unaccompanied children within international, European and national frameworks, Protective standards v. restrictive implementation*, PUCAFREU Project, 2011
18. Smyth, C., *European Asylum Law and Rights of the Child*, New York, 2014
19. Smyth, C., *Towards a Complete Prohibition on the Immigration Detention of Children*, Human Rights Law Review, 2019, Vol 19, No. 1, pp. 1-36
20. Takács, N., *The treefold concept of the best interests of the child in immigration case law of the ECtHR*, Hungarian Journal of Legal studies, Vol. 62, No. 1., 2021, pp. 96-114
21. Triggs, G., *The impact of detention on the health, wellbeing and development of children: findings from the second National Inquiry into Children in Immigration Detention (Chapter 20)*, in: Crock, M.; Bension, L.B. (eds.), *Protection of Migrant Children. In Search of Best Practice*, Edward Elgar Publishing Limited, UK, 2018, pp. 407-410
22. Zwi, K., *et al., The impact of detention on the social well-being of children seeking asylum: a comparison with community-based children*, European Child Adolescent Psychiatry, Vol. 27, No. 4, 2018, pp. 411-422

COURT OF JUSTICE OF THE EUROPEAN UNION

1. C-540/03 *Parliament v. Council*, ECLI:EU:C:2006:429
2. Joined cases C-356/11 and 357/11 *O. and S.*, ECLI:EU:C:2012:776
3. C-166/13 *Mukarubega*, ECLI:EU:C:2014:2336
4. C-249/13 *Boudjlida*, ECLI:EU:C:2014:2431, 11. 12. 2014
5. C- 554/13 *Zh. and O.*, ECLI:EU:C:2015:377
6. C-146/14 PPU *Mahdi,* ECLI:EU:C:2014:1320
7. C-82/16 *K.A. and Others*, ECLI:EU:C:2018:308
8. C-233/18 *Haqbin*, ECLI:EU:C:2019:256
9. C-441/19 *Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2021:9.
10. C-112/20 *M.A. v. État Belge*, ECLI:EU:C:2021:197
11. Joined cases C-273/20 & 355/20 *Bundesrepublik Deutschland*, ECLI:EU:C:2022:617
12. C-19/21 *Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2022:605

EUROPEAN COURT OF HUMAN RIGHTS

1. *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application no 13178/03, 12. 10. 2006
2. *Rahimi v. Greece*, Application no 8687/08, 5. 4. 2001
3. *AB and Others v. France*, Application no 11593/12, 12. 7. 2016
4. *RK and Others v. France*, Application no 68264/14, 17. 10. 2014
5. *Sh. D. and Others v. Greece, Austria, Croatia, Hungary, Northern Macedonia, Serbia and Slovenia,* Application no 14165/16, 13. 6. 201
6. *H.A. and Others v. Greece,* Application no 19951/16, 28. 2. 2019

EU LAW

1. Council Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries (97/C 221/03), OJ C 221, 19 July 1997
2. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3. 101. 2003
3. Resolution (Res(2004)3) on judgments revealing and underlying systemic problem, 12 May 2004
4. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegaly staying thrid-country nationals, OJ L 348, 24 December 2008
5. Commission Recommendation C(2015) 6250 of 1 October 2015 establishing a common „Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks
6. Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common „Return Handbok" to be used by Member States' competent authorities when carrying out return related tasks, OJ L 339, 19 December 2017
7. Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegaly staying third-country nationals (recast), COM (2018) 634 final, 12 September 2018
8. Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) – Partial general approach, 2018/0329 (COD), 13 June 2019
9. Parliamentary Assembly of the Council of Europe: Missing refugee and migrant children in Europe, Strasburg, Resolution 2324 (2020)
10. Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection (recast), OJ L, 2024/1346, 22 May 2024
11. Regulation (EU) 2024/1347 of the European Parliament and of the Council of 14 May 2024 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European parliament and of the Council „Qualification Regulation", OJ L, 2024/1347, 22 May 2024
12. Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, OJ L, 2024/1348, 22 May 2024
13. Regulation (EU) 2024/1349 of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148, OJ L 2024/1349, 22 May 2024
14. Regulation (EU) 2024/1350 of the European parliament and of the Council of 14 May 2024 establishing a Union Resettlement and Humanitarian Admission Framework, and amending Regulation (EU) 2021/1147, OJ L; 2024/1350, 22 May 2024

15. Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013, OJ; L, 2024/1351, 22 May 2024
16. Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, OJ L, 2024/1356, 22 May 2024
17. Regulation (EU) 2024/1358 of the European Parliament and of the Council of 14 May 2024 on the establishment of „Eurodac" for the comparison of biometric data in order to effectively apply Regulations (EU) 2024/1351 and (EU) 2024/1350 of the European Parliament and of the Council and Council Directive 2001/55/EC and to identify illegally staying third-country nationals and stateless persons and on requests for the comparison with Eurodac dana by Member States' law enforcement authorities and Europol for law enforcement purposes, amending Regulations (EU) 2018/1240 and (EU) 2019/818 of the European Parliament and of the Council and repealing Regulation (EU) No 603/2013 of the European Parliament and of the Council, OJ L; 2024/1358, 22 May 2024
18. Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, OJ L, 2024/1359, 22 May 2024
19. Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/339 on a Union Code on the rules governing the movement of persons across borders, OJ L , 2024/1717, 20 June 2024
20. Proposal for a Regulation of the European Parliament and of the Council establishing a common system for the return of Third-country nationals staying illegaly in the Union, and repealing Directive 2008/115/EC of the European Parliament and the Council, Council Directive 2001/40/EC and Council decision 2004/191/EC, COM (2025) 101 final, 11 March 2025

INTERNATIONAL LAW

1. The Declaration on the Rights of the Child (1959). Available at: [https://digitallibrary.un.org/record/195831?v=pdf/], Accessed 3 April 2025
2. The International Covenant on Civil and Political Rights (1966), Available at: [https://treaties.un.org/doc/treaties/1976/03/19760323%2006-17%20am/ch_iv_04.pdf/], Accessed 3 April 2025
3. The International Convention on the protection of the Rights of all Migrant Workers and Members of their Families (1990). Available at: [https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-13&chapter=4&clang=_en/], Accessed 3 April 2025
4. UN Convention on the Rights of the Child (1989). Available at: [https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child/], Accessed 3 April 2025
5. General Comment No. 6 (2005): Treatment of Unaccompanied children and Separated Children Outside their Country of Origin, CRC/GC/2005/6 1 September 2005
6. Charter of Fundamental Rights of the European Union, OJ C 326, 26. 10. 2012

7. General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, 29 May 2013

WEBSITE REFERENCES

1. UNHCR's position regarding the detention of refugee and migrant children in the migration context, January 2017. Available at: [https://www.refworld.org/policy/legalguidance/unhcr/2017/en/115250/], Accessed 3 April 2025
2. European Commission press release: European Agenda on Migration: Commission presents new measures for an efficient and credible EU return policy, 2. 3. 2017. Available at: [https://europe.eu/rapid/press-release_IP-17-350_en.htm], Accessed 3 April 2025
3. UNICEF: Alternatives to Immigration Detention of Children, February 2019. Available at: [https://www.unicef.org/media/58351/file/Alternatives%20to%20Immigration%20Detention%20of%20Children%20(ENG).pdf], Accessed 3 April 2025
4. PICUM: Implementing Case Management Based Alternatives to Detention in Europe, March 2020. Available at: [https://picum.org/wp-content/uploads/2020/04/Concept-Paper-on-Case-Management_EN.pdf], Accessed 3 April 2025
5. International Organization on Migration (IOM); UN Children's Fund (UNICEF), UN Refugee Agency (UNHCR): Safety and Dignity for refugee and migrant children: Recommendations for alternatives to detention and appropriate care arrangements in Europe, May 2022. Available at: [https://www.unicef.org/eca/sites/unicef.org.eca/files/2022-07/Advocacy%20Brief%20Alternatives%20to%20detention%20appropriate%20care%20arrangements%20fo%20refugee%20and%20migrant%20children%20Europe.pdf], Accessed 3 April 2025
6. WHO: Immigration detention is harmful to health – alternatives to detention should be used, May 2022. Available at: [https://www.who.int/europe/news/item/04-05-2022-immigration-detention-is-harmful-to-health---alternatives-to-detention-should-be-used], Accessed 3 April 2025
7. WHO, Regional Office for Europe: Addressing the health challenges in immigration detention, and alternatives to detention: a country implementation guide, 2022. Available at: [https://iris.who.int/bitstream/handle/10665/353569/9789289057929-eng.pdf?sequence=2&isAllowed=y], Accessed 3 April 2025
8. „Happines, Love and Understanding": The Protection of Unaccompanied Minors in the 27 EU Member States, 18 May 2023, p. 11. Available at: [https://euromedmonitor.org/en/article/5642/%E2%80%9CHappiness,-Love-and-Understanding%E2%80%9D:-The-Protection-of-Unaccompanied-Minors-in-the-27-EU-Member-States], Accessed 3 April 2025
9. Children in migration – asylum applicants – statistics explained, April 2024. Available at: [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Children_in_migration_-_asylum_applicants&oldid=636360], Accessed 3 April 2025

Original scientific paper

ROLE OF THE PARENTS IN THE EXERCISE OF THE CHILD'S RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

Ivan Šimović, PhD, Assistant Professor
University of Zagreb, Faculty of law
Trg Republike Hrvatske 3, 10000 Zagreb, Croatia
isimovic@pravo.hr

Josipa Kokić, LLM, PhD Candidate
PhD candidate at the Deák Ferenc Doctoral School of Law, Miskolc
Junior researcher at the Central European Academy, Budapest
3515 Miskolc-Egyetemváros, Egyetem út 1., Hungary
josipa.kokic@centraleuropeanacademy.hu

ABSTRACT

The right of the child to freedom of thought, conscience and religion is one of the four participation rights of the child, protected under Article 14, paragraph 1 of the UNCRC. As such, it enables the child to be an active member of society. However, due to child's vulnerability, immaturity and dependency on adults, the role of parents in exercising this (and other) right(s) is of a great importance. As the child's legal representatives, parents are entitled to provide direction and guidance in the exercise of this child's right (Article 14, paragraph 2 of the UNCRC). Nevertheless, according to Family law theory, such direction and guidance must be subject to certain limitations. Additionally, parents are entitled to decide about child's religious upbringing, which can result in conflict between their right to determine child's religion and child's rights, such as right to education, right to life, survival and development, and rights to physical integrity, self-determination and health. Conflicts are also likely to arise in case of divorce of parents in regarding the determination of child's religious upbringing. While discussing the right to determine child's religion, the role and rights of adoptive parents shall not be overlooked. Finally, the limitations of the right of the child to manifest religion are also examined.

Keywords: *Article 14 of the UNCRC, Best interests of the child, conscience and religion, ECtHR, Parental direction and guidance, Right of the child to freedom of thought, Role of parents*

1. INTRODUCTION

Historically, children were regarded as passive objects of law, *"legally incompetent, and thus unable to act or exercise rights on their own behalf."*[1] In the 1950s, this approach started to change as there was a growing awareness that children's legal position should be redefined. These changes started occurring primarily within the United Nations, which, in the 1959, adopted the UN Declaration on Children's Rights, proclaiming the rights and freedoms of children in only ten principles. However, due to its non-binding nature, its impact was primarily symbolic.[2] On the other hand, general human rights treaties adopted in this period – either within UN or Council of Europe – granted rights to *everyone*, but did not explicitly recognize children as holders of these rights.[3] The reason for that lay in the fact that children were still considered as emotionally, spiritually and materially dependent on adults.[4]

It was in 1989, when the UN Convention on the Rights of the Child (hereinafter: UNCRC)[5] – *"the clearest and fullest statement of children's rights"*[6] – was adopted, that their legal position changed. Thus, from passive objects of law, on whose behalf others (parents or legal representatives) made decisions, children became active subjects who independently enjoy different rights in all areas of their life: personal, societal, educational, health, social, economic, cultural, and judicial-protective.[7] These rights are commonly categorized into three groups, known as the '3P': protection, provision and participation.[8] Some legal scholars also add prevention as a fourth category, thus referring to it as '4P'.[9]

Among these rights, special attention is given to the right of child to freedom of thought, conscience and religion, a right that child enjoys as member of

---

1 Benyusz, M.; Raisz, A., Introduction, in: Benyuz, M.; Raisz, A. (eds.) *International Children's Rights,* CEA Publishing, Miskolc-Budapest, 2024, p. 13.

2 Hrabar, D., *Special Protection of Human Rights of Children I: History of Children's Rights*, in: Benyuz, M.; Raisz, A. (eds.) International Children's Rights, CEA Publishing, Miskolc-Budapest, 2024, p. 36.

3 Hlača, N.; Popović, P., *The Child's Right to Freedom of Conscience and Religion***,** Bogoslovska smotra, Vol. 79, Issue 2, 2009, p. 278.

4 *Ibid.*

5 UN Convention on the Rights of the Child, Official Gazette of the SFRY, No. 15/1990, Official Gazette of the Republic of Croatia – International Treaties, Nos. 12/93, 20/97.

6 Freeman, M., *A Magna Carta for Children? Rethinking Children's Rights*, Cambridge, United Kingdom, New York: Cambridge University Press, 2020, p. 6.

7 Hrabar, D. *et al*, *Family Law*, Official Gazette, Zagreb, 2021, pp. 199-203; Hrabar, D. *Introduction to children's rights*, in: Hrabar, D (ed.), Rights of the child. Multidisciplinary approach, Biblioteka Udžbenici, Faculty of Law University of Zagreb, pp. 11-37, pp. 28-29.

8 Freeman, *op. cit.*, note 6, p. 131.

9 Hrabar, *op. cit.*, note 2, p. 27; Hrabar, D. *et al.*, *op. cit.*, note 7, pp. 199-200.

society.[10] The need to discuss this right is becoming increasingly important, especially in the context of changes occurring within EU (such as migration and arrival of workers from third-world countries), which pose challenges to the integration of the children of different culture, religion and tradition into European societies. Considering that, in exercising of all child's rights – including the right to freedom of thought, conscience and religion – the assistance and guidance of parents is not only necessary, but rather welcomed, this paper will focus on their pivotal role in its realization.

Questions such as – How do parents fulfil that role in the society where the integration of their children of different culture, religion and tradition might be challenging? Should their role be subject to certain limitations? How should conflicts between parental right to determine child's religious conviction and child's rights be resolved? Can parental religious conviction be used as a justified reason for keeping their child out of public education/ for refusing necessary medical treatment/ for subjecting their child to medical procedures that are not medically indicated? Is the role of adoptive parents equal to the role of biological ones in determining the child's religion? Is the parent, with whom the child lives after the divorce, entitled to solely decide on religious upbringing of the child? – will be discussed.

2. THE RIGHT OF THE CHILD TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

Before the adoption of the UNCRC, the right of the child to freedom of thought, conscience and religion *"appeared in international treaties adopted within the framework of the United Nations only indirectly*, *establishing a right whose subjects are exclusively parents."*[11] However, Family law scholars argue that the child was guaranteed this right even before the adoption of the UNCRC- albeit implicitly – as the International Covenant on Civil and Political Rights (ICCR)[12] and European Convention on Human Rights (ECHR)[13] guaranteed the right to freedom of thought, conscience and religion to *everyone*. [14]

---

[10] *Ibid.*, p. 201; Jakovac-Lozić, D., *The child as the holder of the right to freedom of conscience, religion, or other beliefs*, Collected Papers of the Faculty of Law in Split, Vol. 39, 2002, p. 45.

[11] Hlača; Popović, *op. cit.*, note 3. See also: Jakovac-Lozić, D., *op. cit.*, note 10.

[12] International Covenant on Civil and Political Rights (ICCPR), UN General Assembly resolution 2200A (XXI), 1966.

[13] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

[14] Langlaude Doné, S.; Tobin J., *Article 14. The Right to Freedom of Thought, Conscience, and Religion*, in: Tobin, J. (ed.), The UN Convention on the Rights of the Child – A Commentary, Oxford University Press, Oxford, 2019, pp. 477 and 487; Samardžić, S., *Legislative history of the UN Convention on the*

With the adoption of the UNCR, the right of the child to freedom of thought, conscience and religion was explicitly acknowledged and protected. Article 14, paragraph 1 of the UNCRC states that State Parties shall respect the right of the child to freedom of thought, conscience and religion. As fundamental civil and political human right, it encompasses, on the one hand, the right of the child to manifest his or her beliefs, and on the other, the obligation of State Parties to respect, protect and promote this right within their jurisdiction without discrimination of any kind (Article 14, paragraph 1 in connection with Article 9, paragraph 1).[15] Alongside the right of the child to freely express views in all matters concerning him or her (Article 12 of the UNCRC), the right to freedom of expression (Article 13 of the UNCRC), and the right to free association and peaceful assembly (Article 15 of the UNCRC), the right to freedom of thought, conscience and religion, is one of the four participation rights of the child.[16] *These rights regulate children's relationships with family members and, more broadly, with all individuals and institutions with whom they come into contact.*[17] Moreover, they ensure that the child is not only visible,[18] but also recognized as an active subject of law.

Given its significance, the right of the child to freedom of thought, conscience and religion has been the subject of analysis of both legal scholars and European Court of Human Rights (hereinafter: ECtHR). While Schanda depicts it as *"inseparable and prominent fundamental right, that according to the ECHR, is one of the pillars of 'democratic society,'"*[19] Freeman argues that *"there is no right which illustrates better the inherent dignity of man."*[20] The ECtHR echoes these views, describing this right as *"one of the most vital elements that go to make up the identity of believers and their conception of life, but… also a precious asset for atheists, agnostics, sceptics and the unconcerned"*. [21]

In addition to its protection under the UNCRC, the right of the child to freedom of thought, conscience and religion also found its protection under general human right treaties, such as the International Covenant on Civil and Political (1966),

---

Rights of the Child, in: Benyusz, M.; Raisz, A. (eds.), International Children's Rights, CEA Publishing, Miskolc-Budapest, 2024, pp. 41-61, p. 51.

15 See: Hlača; Popović, *op. cit.*, note 3, p. 281.

16 See more about these rights: Šimović, I., *UN Convention on the Rights of the Child: Participation*, in: Benyuz, M.; Raisz, A. (eds.) International Children's Rights, CEA Publishing, Miskolc-Budapest, 2024, pp. 137-159.

17 *Ibid.*, p. 138.

18 The term "visible" firstly refers to the child's active role in his or everyday life, as well as in his or her society and community, and secondly, to his or her visibility in judicial and administrative proceedings.

19 Schanda, B., *The freedom of religion of children*, European Integration Studies, Miskolc, Vol. 19, Issue 1, 2023, p. 248. [https://doi.org/10.46941/2023.e1.11].

20 Freeman, *op. cit.*, note 6, p. 186.

21 Judgment *Bayatyan v. Armenia* (2011), 54 EHRR 15, para. 118.

the European Convention on Human Rights and Fundamental Freedoms (1950), and the European Charter of Fundamental Rights (2000),[22] all of which guarantee the right to freedom of thought, conscience and religion to *everyone*.[23] [24] Both Article 9, paragraph 1 of the ECHR and Article 10, paragraph 1 of the Charter state that *"everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance"*. The same wording is provided in the Article 18, paragraph 1 of the ICCPR, with only few subtle differences.

Evidently, there is one difference between these Articles and the Article 14, paragraph 1 of the UNCRC. Specifically, Article 18, paragraph 1 of the ICCPR, Article 9, paragraph 1 of the ECHR and the Article 10, paragraph 1 of the Charter elaborate on the content of the right to freedom of thought, conscience and religion, that is, they specify what it includes. In contrast, Article 14, paragraph 1 of the UNCRC does not determine the content of this right.[25] The reason for this lies in the persistent resistance to acknowledge that children have the right to change their religion.[26] Due to this omission, some legal scholars have been questioning whether the UNCRC grants children the right to change their religion. While Freeman argues that the UNCRC does not grant the child a right to change or choose his or her religion,[27] other legal scholars claim that the Convention can be interpreted as establishing a presumption in favour of the child's right to choose or change religion.[28]

Even though Article 14 of the UNCRC does not elaborate on the content of the right of the child to freedom of thought, conscience and religion, more states have expressed reservations to this Article than any other in the UNCRC [29]– the con-

---

22 Charter of Fundamental Rights of the European Union (Charter), Official Journal of the European Communities, 2000/C 364/01.

23 For more on the application of the ECHR on children see: Hlača; Popović, *op. cit.*, note 3, pp. 287-288.

24 In this regard, Vlašković argues that *"the child's equal entitlement is the outcome of the interpretation of the ECHR provisions that the rights and freedoms will be guaranteed to 'everyone' combined with the prohibition of discrimination"*. Vlašković, V., *Children's Rights in the Council of Europe – Framework*, in: Children's Rights in Regional Human Rights Systems, Raisz, A. (ed.), CEA Publishing, Miskolc-Budapest, 2024, p. 48.

25 Šimović, *op. cit.*, note 16, p. 151; Langlaude Doné, S.; Tobin J., *op. cit.,* note 14, pp. 488 and 489.

26 *Ibid.*, p. 488.

27 Freeman, *op. cit.*, note 6, p. 186.

28 See: Schanda, *op. cit.*, note 19, p. 247; Langlaude Doné; Tobin, *op. cit,* note 14, p. 478; Jakovac-Lozić, *op. cit.*, note 10, pp. 38-39; Hrabar *et al.*, *op. cit.*, note 7; Čolaković, M., *Religious commitment of parents vs. the BIC in exercising his rights to physical integrity*, Faculty of Law, University of Mostar, IBU Repository, p. 69, available at:
[https://omeka.ibu.edu.ba/items/show/1181], Accessed 3 March 2025.

29 When the UNCRC entered into force, in 1990, 21 States expressed reservations to this Article. Varadan, S., *The principle of evolving capacities under the UN Convention on the Rights of the Child*,

cession to the Islamic states was made.[30] These reservations blur the line between children as rights-holders under the UNCRC and parents as their legal representatives, who have the right and duty to provide direction and guidance in the exercise of these rights but do not themselves hold the rights granted by the UNCRC.

Accordingly, Family law theory argues that such concessions are contrary to the Article 51, paragraph 2 of the UNCRC, which states: *"A reservation incompatible with the object and purpose of the present Convention shall not be permitted"*. [31] A similar stance was taken by the UN Committee on the Rights of the Child, which, in the General comment No. 5 (2003),[32] paragraph 15, expressed deep concern that *"some States have made reservations which plainly breach Article 51 (2)"* and in the General Comment No. 20 (2016), [33]paragraph 43, *"urges States parties to withdraw any reservations to Article 14 of the Convention"*. However, reservations were not made solely by the states, but also by the Holy See, which *"underlines in its reservation to the Convention the 'primary and inalienable rights of parents'."* [34]

3. PARENTAL DIRECTION AND GUIDANCE IN THE EXERCISE OF THE CHILD'S RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

A child's parents, as holders of parental responsibility over the child, have the rights and duties to make decisions concerning the child, including those con-

International Journal of Children's Rights, Vol. 27, p. 312., available at: [https://brill.com/view/journals/chil/27/2/article-p306_306.xml?ebody=pdf-130820], Accessed 3 March 2025.

30 During the drafting of the Convention, representatives of certain countries considered the exercise of child's freedom of religion to be a threat to parental rights, and potentially, to the best interests of the child. In particular, representatives of Islamic countries expressed certain objections, arguing that the proposed solutions contradict to their national legal systems and tradition, according to which children follow the religion of their parents. Radina, A., *The right of the child to freedom of religion*, 2018., doctoral thesis, p. 28.; Samardžić, S., *op. cit.*, note 14. See also: Hlača, N., *Religious Upbringing, Children's Rights, and Child Circumcision*, Collected Papers, Second International Scientific Conference, Law Faculty of the University "Džemal Bijedić" Mostar, 2014, p. 59; Freeman, *op. cit.*, note 6, p. 186; Langlaude Doné; Tobin, *op. cit.*, note 14, pp. 477, 479 and 489.

31 *Ibid.*

32 UN Committee on the Rights of the Child (2003). General Comment No. 5 (2003) – General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5, 27 November 2003.

33 UN Committee on the Rights of the Child (2016). General Comment No. 20 (2016) – The Implementation of the Rights of the Child during Adolescence, CRC/C/GC/20, 6 December 2016.

34 Schanda, *op. cit.*, note 19, p. 252; Hlača; Popović, *op. cit.*, note 3, p. 292.; Varadan, *op. cit.*, note 29, p. 312.

cerning child's religious upbringing.[35] These rights and duties have their roots in the law of nature, as parents are the ones who gave birth to the child and therefore should be the first ones to take care of him or her. Accordingly, human rights treaties acknowledge that responsibility and do not prohibit them to upbring their children according to their religious or philosophical beliefs. On the contrary, *"it is widely accepted that parents' right to freedom of religion and respect for family life includes a right to bring up their children in accordance with their own religion and beliefs."*[36]

Among these treaties, the UNCRC holds foremost position. It not only acknowledges the indispensable role of parents in providing direction and guidance to the child in the exercise of this right but gives them primacy regarding the transmission of the religion, beyond which, any state intervention must cease.[37] Specifically, paragraph 2 of Article 14 of the UNCRC prescribes that the State Parties must respect the rights of the child's parents, or, when applicable, legal guardians, to provide direction in the exercise of this right, in a manner consistent with the child's evolving capacities. This standpoint was confirmed by the ECtHR in the case of *Bayev and Others v. Russia,*[38] in which it concluded that *"nothing in the applicants' actions diminished the right of parents to enlighten and advise their children, to exercise with regard to their children the natural parental functions as educators, or to guide their children on a path in line with the parents' own religious or philosophical convictions."*

In light of this, the question arises as to how parents provide such direction. First, as legal representatives of the child in realizing or exercising child's right to freedom of religion, parents can determine the religious affiliation of the child at his or her earliest age.[39] Second, they can influence development of his or her religious identity or affiliation through everyday family life – namely, parents will decide whether the child will take part in religious ceremonies (e.g., participation in pilgrimage), about his or her religious education, about the way the child will dress,

---

35 In this regard Hlača and Popović argue that *"no form of upbringing… can be exempt from transmitting, teaching, or assisting children in discovering certain values"*. Hlača; Popović, *op. cit.*, note 3, p. 284.

36 Langlaude Doné; Tobin, *op. cit.*, note 14, p. 494.

37 Šimović, *op. cit.*, note 16, p. 151; Hlača; Popović, *op. cit.*, note 3, p. 282.

38 Judgment *Bayev and Others v. Russia* (2017), App. No. 67667/09, 44092/12 and 56717/12 (ECtHR, 20 June 2017), para. 82.

39 Čolaković, *op. cit.*, note 28, p. 68; Novaković, U., *Religion in family relations – right of the child to choose religion and/or right of parents to raise the child according to their own religious beliefs*, Politics and religion, Vol. 12, Issue 1, p. 159; Lucić, N., *Representation in relation to Essential Personal Rights of the Child*, Collected Papers of the Faculty of Law, in Split, Vol. 58, Issue 3, p. 829.

whether he or she will eat pork or practice fasting, etc.[40] In making these decisions, parents have a wide discretion, limited only by law and child's well-being.[41] In this regard, Jakovac-Lozić points out that *"it then becomes clear that parents will pass on their belief, whether theistic or atheistic, as well as certain philosophical convictions to their children, teaching and raising them in such an environment"*.[42]

An understanding that parents of child's religious identity was not introduced by the UNCRC – it was already existent within the UN legal framework.[43] The UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, from 1981, prescribed that a child's parents, or, when applicable, legal guardians, *"have the right to organize the life within the family according to their religion or belief, and bearing in mind the moral education in which they believe the child should be brought up"*. In line with this, in case of *Abdi Ibrahim v. Norway*,[44] the ECtHR stated that *"it is clear when the child lives with his or her biological parent, the latter may exercise Article 9 rights in everyday life through the manner of enjoyment of his or her Article 8 rights."*

3.1. LIMITATIONS OF PARENTAL DIRECTION AND GUIDANCE

Despite the fact that parents have a pivotal role in relation to the child's right to freedom of thought, conscience and religion, they do not have the right to indoctrinate or coerce the child to accept a particular belief or religion.[45] Therefore, Family law theory considers that the influence of parents in shaping their child's religious values and beliefs should be limited and will only be legitimate if three preconditions prescribed by the UNCRC are met.[46]

First, parental direction and guidance needs to be conducted in a manner consistent with the child's evolving capacities (Article 14, paragraph 2 in connection with Article 5). This means that, as the child grows and becomes more mature, his or her opinion should be given more weight, and the role of parents dimin-

---

40 *Ibid.*; Čolaković, *op. cit.*, note 28, p. 69; Langlaude Doné; Tobin, *op. cit.*, note 14, p. 495; Taylor, R., *Parental Responsibility and Religion*, in: Probert, R.; Gilmore, S.; Herring, J. (eds.), Responsible Parents and Parental Responsibility Probert, Oxford and Portland, Oregon, p. 128.

41 *Ibid.*; Čolaković, *op. cit.*, note 28, p. 69; Jakovac-Lozić, *op. cit.*, note 10, p. 44.

42 Jakovac-Lozić, *op. cit.*, note 10, p. 38.

43 Hlača, Popović, *op. cit.*, note 3, p. 279.

44 Judgment *Abdi Ibrahim v. Norway* (2021), European Court of Human Rights [GC] Application No. 15379/16 para. 140.

45 Langlaude Doné; Tobin, *op. cit.*, note 14, p. 495.

46 Šimović, *op. cit.*, note 16, p. 149.

ishes.[47] [48] This standpoint was upheld by the UN Committee on the Rights of the Child in its General Comment No. 20 on the implementation of the rights of the child during adolescence (2016),[49] paragraph 43, in which it emphasized that *"it is the child who exercises the right to freedom of religion, not the parent, and the parental role necessarily diminishes as the child acquires an increasingly active role in exercising choice throughout adolescence"*.

Second, parental direction and guidance must be appropriate (Article 5 of the UNCRC), meaning that *"it is forbidden to raise and educate a child in a religion that encourages discrimination against others or to practice religious beliefs that would be detrimental to the child's physical, health or development."*[50] It must also be in line with the best interests of the child (hereinafter: BIC), meaning that the role of parents can be limited by the principle of the primary protection of the BIC.[51] As a matter of fact, this principle can 'overrule' the position of the parents. For example, if the religious beliefs of the parents and the child would endanger the BIC – such as when both the child and the parents refuse medical treatment (e.g. blood transfusion), thereby putting the child's life at risk– the protection of the BIC should prevail.[52] Thus, in case of *Jehovah's Witnesses of Moscow and Others v. Russia,*[53] the ECtHR stated that parental refusal of the medical treatment may be overruled through judicial intervention in the interest of the child.[54]

Lastly, the direction and guidance of parents will be legitimate if parents have respected the views of the child in all matters concerning the child (Article 14,

---

47 Hlača; Popović, *op. cit.*, note 3, p. 283 and 286; Langlaude Doné; Tobin, *op. cit.*, note 14, pp. 494-495; Čolaković, *op. cit.,* note 28, p. 69; Majstorović, I., *The realization of the right of the child to express his/her views – How »visible« are children in Croatian family judicial proceedings?*, Annual of social work, Vol. 24, Issue 1, 2017, p. 57; Lundy, L.; Tobin, J.; Parkes, A., *Article 12. The Right to Respect the Views of the* Child, in: Tobin, J. (ed.), The UN Convention on the Rights of the Child – A Commentary, Oxford University Press, Oxford, pp. 411-412.

48 In this regard Novaković states: *"The Convention on the Rights of the Child makes a balance between the right of the child to choose the religion and the capacities of the child."* Novaković, U., *op. cit.*, note 39, p. 156.

49 UN Committee on the Rights of the Child, General Comment No. 20, 2016.

50 Radina, *op. cit.*, note 30, pp. 67-68.

51 Langlaude Doné; Tobin, *op. cit.*, note 14, pp. 477, 479, 486 and 492; Freeman, M., *op. cit.*, note 6, pp. 8, 241-242 and 390; Khazova, O. A.; Dawit Mezmur, B., *UN Committee on the Rights of the Child, Reflections on Family Law Issues in the Jurisprudence of the CRC Committee: The Convention on the Rights of the Child @ 30,* in: Brinig M. (ed.), International Survey of Family Law, Intersentia, Cambridge – Antwerp – Chicago, 2019, pp. 305-328, p. 315; Vučković-Šahović, N. et *al.*, *The rights of the Child in International Law – Rights of the Child in a Nutshell and in Context: all about Children's Rights*, Stämpfli Publisher, Bern, 2012, p. 488.

52 Čolaković, *op. cit.*, note 28, p. 74.

53 Judgment *Jehovah's Witnesses of Moscow and Others v. Russia* (2010) European Court of Human Rights, Application No. 302/02.

54 *Ibid*., paras. 131-144.

paragraph 2 in connection with Article 12).[55] In other words, parents must understand what this right means for their child and the way the child wishes to express his or her thought, conscience and religion, while also considering child's evolving capacities.[56] However, it is not clear what should be done in the case of a conflict between parents and the BIC, as the UNCRC does not provide a solution.[57]

Therefore, each State Party needs to find and prescribe an appropriate solution that would resolve such situations. For example, in Croatia, in the case of a conflict between the parents and the child, the child (represented by a special guardian *ad litem*) or the parents could initiate a non-contentious judicial proceeding in which a Court would make a decision in line with the best interests of the child. Before this judicial proceeding, the child and the parents would have to attend mandatory counselling before the Croatian Institute for Social Work, where they would be provided with assistance in reaching consensual solution.[58] In these proceedings, competent authorities should respect the role of the child in protecting and promoting his or her right to freedom of religion – in accordance with the child's age and maturity and, of course, the child's best interests.

4. PARENTAL RIGHT TO DETERMINE CHILD' S RELIGIOUS AFFILIATION VS. CHILD'S RIGHTS

4.1. PARENTAL RIGHT TO ENSURE CHILD'S EDUCATION IN ACCORDANCE WITH RELIGIOUS BELIEFS AND THE CHILD'S RIGHT TO EDUCATION

Apart from acquiring religious knowledge through family life, a child receives such knowledge through education as well.[59] However, even then, the role of parents is strongly appreciated, [60]and the need to achieve harmony between the religious education of the child and the personal beliefs of the parents, is required by several

---

55 Šimović, *op. cit.*, note 16, p. 149; Langlaude Doné; Tobin, *op. cit.*, note 14, p. 493.

56 *Ibid.*, p. 493.

57 In this regard, Langlaude Doné and Tobin J. state that "*in the event of a conflict between parent's and a child's view in this contex, the views of the child must be determinative where the child is of sufficient maturity". Ibid.*, p. 496.

58 Article 94, paragraph 6 and Article109 of the Croatian Family Act, Official Gazette No. 103/15, 98/19, 47/20, 49/23, 156/23.

59 Lucić, *op. cit.*, note 39, p. 830.

60 In this regard Hrabar states: *"Education, both as a process and as content, must be aligned with parental upbringing; otherwise, it creates confusion for the child and undermines the parents' responsibility for the harmonious development of the child's personality."* Hrabar, D., *The Impact of Parental Religious and Philosophical Beliefs on the Upbringing and Education of Children in Croatian Legislation*, Collected Papers of Zagreb Law Faculty, Vol. 68, Issue 3-4, 2018, p. 322.

international legal documents.[61] The most important among them is Protocol No. 1 to the ECHR, which can be said to strongly appreciate the role of the parents in the sphere of children's education, including religious education.[62] Its Article 2 prescribes that *"no person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."*

The importance of this provision has been recognized in the jurisprudence of the ECtHR, which in the case *A.R. and L.R. v. Switzerland*,[63] concluded that *"the parent's right to provide for their children's education is mainly protected by Article 2 of Protocol No. 1 to the Convention, which is in principle the lex specialis in relation to Article 9 of the Convention."*[64]

In essence, the Court explained that when public education provided by the State, does not align with the religious or philosophical convictions of the parents, Article 2 of the Protocol No. 1 will apply as *lex specialis*, rather than Article 9 of the ECHR.[65]

The pivotal role of parents – besides being acknowledged by the Protocol 1 to the Convention, is also acknowledged by the Charter of Fundamental Rights of EU, which is the only legal document that mentions parental pedagogical beliefs aside to religious or philosophical ones.[66] Its Article 14, paragraph 3 states that *"the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national law governing the exercise of such freedom and right"*.

However, such acknowledgment of the (pivotal) role of parents does not mean that in cases of a conflict between parental right to ensure the child's education in accordance with their religious beliefs and the child's right to education, the parental right will prevail. On the contrary, the right of the child to education takes precedence and parents' religious conviction cannot be used as a justified reason

---

61 Lucić, *op. cit.,* note 39, p. 830.

62 Schanda, *op. cit.*, note 19, p. 248; Jakovac-Lozić, D., *op. cit.*, note 10, p. 43.

63 Judgment *A.R. and L.R. v. Switzerland* (2017), European Court of Human Rights, Application No. 22338/15.

64 See also: Judgment *Folgerø and Others v. Norway* (2007) European Court of Human Rights [GC] Application No 15472/02, para. 84; Judgment *Lautsi and Others v. Italy* (2011) European Court of Human Rights, Application No. 30214/06, para. 9.

65 See: Hrabar, *op. cit.*, note 60, p. 330.

66 Novaković, *op. cit.*, note 39, p. 189.

for keeping their child out of public education.[67] This standpoint was upheld by the ECtHR in case *Martins Casimiro and Cerveira Ferreira v. Luxembourg,* [68] where the Court stated: *"Where the parents' right to respect for their religious convictions, rather than enhancing the child's right to education, came into conflict with it, the interests of the child prevail."* A similar conclusion was reached in case *Osmanoğlu and Kocabaş v. Switzerland,* where it concluded that *"the children's interest in a full education… prevailed over the wish to have their daughters exempted from mixed swimming lessons…*[69] Finally, in the case of *A.R. and L.R. v. Switzerland*, [70] the Court emphasized that religious norms which are woven into parental education do not grant exemption from obligation to observe state law but rather prevent State from indoctrinating children through such teaching.[71]

4.2. PARENTAL RIGHT TO DETERMINE A CHILD'S RELIGION AND THE RIGHT OF THE CHILD TO LIFE, SURVIVAL AND DEVELOPMENT

As legal representatives of the child, parents have both rights and duties to represent the child in all matters concerning him or her, including in deciding on medical treatments and interventions. Accordingly, Article 6, paragraph 2 of the Convention on Human Rights and Biomedicine,[72] or the so-called Oviedo Convention, prescribes that *"when a minor does not have a capacity to consent to an intervention, the intervention may only be carried out with the authorisation of his or her representative or an authority of a person or body provided for by law. The opinion of the minor shall be taken into consideration as an increasingly determining factor in proportion to his or her age and degree of maturity."*

In order to consent, the parents need to be capable of doing so, aware of the situation, and informed about the procedure by the child's doctor. Even though in most

---

67 In this regard, Schanda states that the *"States are given a wide power of discretion in connection with the organization of public education, as the objective of public education is to transfer knowledge in objective, critical, and pluralist way; however, an exemption may not be requested from compulsory education even for religious reasons."* Schada, *op. cit.*, note 19, p. 250.

68 Judgment *Casimiro and Cerveira Ferreira v. Luxembourg* (1999) European Court of Human Rights, Application No. 44888/98.

69 Judgment *Osmanoğlu and Kocabaş v. Switzerland* (2017), Judgment *Lautsi and Others v. Italy*, European Court for Human Rights, Application No. 29086/12, paras. 91-92 & 95-106.

70 Judgment *A.R. and L.R. v. Switzerland* (2017), European Court of Human Rights, Application No. 22338/15.

71 *Ibid.*, paras. 40-41, and 49.

72 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Council of Europe, European Treaty Series – No. 164.

cases, parents accept doctor's opinion and consent to necessary medical interventions (such as blood transfusion or surgery) without hesitation, it can also occur that they refuse to do so – due to their religious or other beliefs.[73] In doing so, the parents may potentially endanger child's right to life, survival and development (Article 6 of the UNCRC). Such *"opposition to the application of a medical procedure solely on the basis of their religious or cultural affiliation is unacceptable…and cannot be upheld if such an intervention does not protect the best interests of the child"*.[74]

Thus, in order to prevent that *"the child is put in jeopardy as it does not have the same level of medical protection as other children do…",* the State should intervene and *"ensure medical protection to the child."*[75] [76] In cases of conflict over a medical intervention between the child and the parent(s), and the matter should be resolved through court mediation and/or with the participation of other state bodies responsible for protecting the rights and interests of the child.[77] In Croatia, in such cases, the medical staff has an obligation to inform the Croatian Institute for Social Work (hereinafter: CISW) about it. Employees of the CISW need to assess the whole situation and if necessary, appoint the child a special guardian *ad litem* with the goal of assuring him/her objective and impartial representation of his or her rights and interests.[78] In resolving this conflict, the principle of BIC should be a guiding principle, because the religious conviction and rights of the parents should not be exercised at the expense of the rights of the child, especially of the right to life, survival and development, nor should they endanger the BIC. [79]

---

73 Bubić, S., *The Best Interest of the Child Standard and Its Application in the Context of Exercising Parental Care*, Collected Papers, Second International Scientific Conference, Law Faculty of the University "Džemal Bijedić" Mostar, 2014, pp. 11-32, pp. 20-21.

74 *Ibid.*, p. 21. See also: Čolaković, *op. cit.*, note 28, p. 81.

75 Novaković, *op. cit.*, note 39, p. 167. See also: Čolaković, *op. cit.*, note 28, p. 81.

76 This standpoint was affirmed by ECtHR in case of *Jehovah's Witnesses of Moscow and Others v. Russia*, where the Court's reasoning suggests that, while *"adult persons obviously have to be provided with the opportunity of making truly free decisions, and courts must be able to overrule the decisions made by parents in respect of the minor members of the group in the interest of the children."* Schanda, *op. cit.*, note 19, p. 251.

77 Čolaković, *op. cit.*, note 28, p. 76.

78 Article 17 of the Croatian Act on the Protection of Patients' Rights, Official Gazette of the Republic of Croatia No. 169/04; Article 240, para. 1, pt. 5 of the Croatian Family Act; This won't apply in every case, as under the Article 88 of the Croatian Family Act, a sixteen-year-old child can independently give consent for a preventive, diagnostic or therapeutic medical procedure if that procedure is not related to the risk of serious consequences to the physical or mental health of the patient child. Otherwise, the general presumption is that the child is always represented by his/her parents as legal representatives.

79 Čolaković, *op. cit.,* note 28, p. 81.; In this regard, Cohan states: *"Parents can make martyrs out of themselves, but they must not do that out of their own child."* Cohan, J. A., *Judical Enforcement of Lifesaving Treatment for Unwilling Patient*, Creighton Law Review, Vol. 39, 2006, p. 863.

4.3. PARENTAL RIGHT TO DETERMINE A CHILD'S RELIGION AND THE RIGHTS OF THE CHILD TO PHYSICAL INTEGRITY, SELF-DETERMINATION, AND THE ENJOYMENT OF THE HIGHEST-ATTAINABLE STANDARD OF HEALTH

The right of parents – as legal representatives of the child – to decide on medical interventions related to the child also encompasses medical procedures carried out for religious purposes, such as male circumcision.[80] By consenting to male circumcision, parents aim to *"promote a child's best interests by allowing his full acceptance into the community."* [81] At the same time, they also subject a child to a medical procedure that is not medically necessary, and that results in permanent bodily changes.[82] *"In resolving such conflicts, the best interests of the child, as the primary criterion enshrined in the Convention on the Rights of the Child, must be the guiding principle, as the religious beliefs and interests of the parents must not prevail over the well-being of their child."*[83]

Unlike in situations involving refusal of blood transfusion, chemotherapy or certain surgical procedures – where the child's right to life is jeopardized – consenting to the circumcision of the child does not jeopardize his or her right to life but nevertheless encroaches upon child's right to physical integrity, self-determination, and health.[84] These rights are protected under Article 24 of the UNCRC, which, in paragraph 3, prescribes that *"States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children".*

This formulation raises several questions: Does the term "children", within the context of this provision, refer only to female or also to male children? Do "traditional practices prejudicial to the health of children" refer only to female genital mutilation? Can male circumcision – which encroaches upon child's right to physical integrity, self-determination and health – be considered as a "traditional practice prejudicial to the health of children" as well? According to Čolaković, when the Convention was being drafted, the term "traditional practice" primarily referred to female genital mutilation, but instead of using the term "female children", a more generalized term, "children" was used.[85]

---

80 Čolaković, *op. cit.*, note 28, p. 70.

81 Taylor, *op. cit.,* note 40, p. 130.

82 *Ibid.*

83 Čolaković, *op. cit.*, note 27, p. 67.

84 *Ibid.*, p. 72.

85 *Ibid.*, p. 70.

The distinction between these two procedures is clearly drawn in soft-law instrument adopted by Parliamentary Assembly of the Council of Europe in 2013 – The Resolution 1952 (2013). While in case of male circumcision, the Assembly calls on Member States to *"clearly define the medical, sanitary and other conditions to be ensured for practices which are today widely carried out in certain religious communities,"*[86] in relation to female mutilation, it calls on them to *"publicly condemn the most harmful practices, such as female genital mutilation, and pass legislation banning these."*[87] Why is it so and is it in accordance with the principle of non-discrimination contained in Article 2 of the UNCRC? The answer can be found in Hlača's conclusion that *"biological diversity of genders inevitably leads to discrimination: in the case of interfering with the bodily integrity of girls, a 'stronger' terminology should indeed be used, and it should be referred to as mutilation, which is punishable due to significantly different and much more severe consequences of interfering with a person's bodily integrity."*[88]

Today, most Member States to the UNCRC and the Council of Europe do not consider the complete prohibition of circumcision of young boys to be "effective" *or* "appropriate measure", in contrast to the prohibition of female mutilation. Namely, "*the circumcision of male children is hardly even considered a 'medical procedure,' but rather an act of exercising the parents' religious freedom."*[89] [90]In 2012, following strong reactions from Jewish and Muslim communities after the decision of the District Court in Keln, which *"concluded that circumcision of boys for religious reasons, if they are unable to give consent themselves, is not justified by the consent of their parents – meaning it constitutes a criminal act of bodily harm"* – the German legislator amended Civil Code.[91] Finally, the right of parents to consent to the medically unnecessary circumcision of a child who is unable to reason or form a judgment was legally regulated.[92]

---

86 Resolution 1952 (2013), pt. 7.5.1.

87 *Ibid.*, pt. 7.5.2.

88 Hlača, *op. cit.*, note 30, p. 65.

89 *Ibid.*, p. 54.

90 In this regard Talyor concludes: "*Whether or not circumcision can be justified as being in the best interests of the child, it is clear that the law protects the interests of parents. It allows parents to fulfil their own religious obligations by permanently marking the child with the symbol of their religion at an age where he is not capable of accepting that religion for himself."* Taylor, R., *op. cit.,* note 40, p. 131.

91 Čolaković, *op. cit.*, note 28, pp. 76-77.

92 *Ibid.*, p. 77.
Section 1613d of the German Civil Code now reads as follows: *1) The care for the person of the child includes the right to give consent to the medically unnecessary circumcision of a male child who is not capable of reasoning and forming a judgment, if this is to be carried out in accordance with the rules of medical practice. This does not apply if circumcision, even considering its purpose, jeopardizes the best interests of the child. 2) In the first six months after the child is born, circumcision also may be performed pursuant to*

5. THE ROLE OF ADOPTIVE PARENTS

As previously discussed, Article 14, paragraph 2 of the UNCRC – which prescribes that parents, or when applicable, legal guardians, have rights and duties to provide direction and guidance in the exercise of the child's right to freedom of thought, conscience and religion - acknowledges the indispensable role of parents in this regard. However, questions arise as to whether it also acknowledges the indispensable role of adoptive parents and whether their position in this regard is equal to that of biological parents.

According to the ECtHR, the relationship between biological and adoptive parents is quite comparable. In *Kurochkin v. Ukraine*, the ECtHR pointed out that *"the relations between an adoptive parent and an adopted child are as a rule of the same nature as the family relations protected by Article 8 of the Convention and such a relationship, arising from a lawful and genuine adoption, may be deemed sufficient to attract such respect as may be due for family life under Article 8 of the Convention*." [93] A similar standpoint was expressed in *Ageyevy v. Russia*,[94] and even more explicitly in *Taganrog Lro and Others v. Russia*, in which the Court concluded that "*as long as there is no evidence of abuse, violence or unlawful coercion, decisions about whether to give a child a religious or non-religious education… are to be made exclusively by the child's parents or the custodial parent…"*[95]

In support of the view that the position of adoptive parents is equal to the position of biological ones in this regard, is the fact that, by adopting a child, adoptive parents become the holders of parental responsibility and therefore, should have the same rights, duties and responsibilities as biological parents. In this context, two situations can be distinguished. The first situation involves biological parents being divested of parental responsibility, and the child being adopted. The adoptive parents become holders of parental rights, duties and responsibilities arising from parental responsibility and biological parents have no influence regarding child's religion. The second situation involves child being compulsorily taken into public care, but the biological parents still have parental responsibilities or contact rights aimed at facilitating their reunion with their child. In such cases, biological

subsection (1) by persons designated by a religious group to perform this procedure if these persons are specially trained to do so and, without being a physician, are comparably qualified to perform circumcisions.

93 Judgment *Kurockhin v. Ukraine* (2010) European Court of Human Rights, Application No. 42276/08, para. 37.

94 Judgment *Ageyevy v. Russia* (2013) European Court of Human Rights, Application. No. 7075/10, para. 120.

95 Judgment *Taganrog Lro and Others v. Russia* (2022), European Court of Human Rights, Application No. 32401/10, paras. 172. & 175.

parents retain influence regarding the child's religious upbringing, even though it is limited.

This standpoint was affirmed by the Grand Chamber judgment passed in the case of *Abdi Ibrahim v. Norway*. The Court noted: *"To some degree he or she (biological parents) may also be able to continue doing so (exercise Article 9 rights) where the child has been compulsorily taken into public care, for example through the manner of assuming parental responsibilities or contact rights aimed at facilitating reunion. The compulsory taking into care of a child inevitably entails limitations on the freedom of the biological parent to manifest his or her religious or other philosophical convictions in his or her own upbringing of the child."*[96] A similar standpoint was taken in *Kilic v. Austria*, in which the Court stated that "*compulsory taking into care of a child inevitably entails limitations on the freedom of the biological parents to manifest their religious or other philosophical convictions in their own upbringing of the child"*.[97]

When discussing the role of adoptive parents regarding the child's religious upbringing and whether they have the right to determine child's religious affiliation, the child's cultural and religious identity and background should not be overlooked. This raises an important issue - Should the right of adoptive parents to change the religion of the child prevail over the child's right to preserve his or her religious and cultural identity? For example, if Catholic parents adopt a two-year-old Muslim child, can they raise him or her as a Catholic, or are they obligated to respect and preserve the child's religious identity?

Article 14, paragraph 2 (parental guidance in exercise of the child's right to freedom of thought, conscience and religion) in connection with Article 5 (parental guidance and a child's evolving capacities) and Article 18 (parental responsibilities and state assistance) of the UNCRC, as well as Article 8 (right to respect for private and family life) and Article 9 (freedom of thought, conscience and religion) of the ECHR, suggest that parents are entitled to raise a child in their religious denomination. On the other hand, Article 8, paragraph 1 of the UNCRC, which states that *"States Parties undertake to respect the right of the child to preserve his or her identity…"* and Article 20, paragraph 3 of the UNCRC, which addresses the care for children temporarily or permanently deprived of parental responsibility, and prescribes that *"while considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural*

[96] Judgment *Abdi Ibrahim v. Norway* (2021) European Court of Human Rights [GC], Application No. 15379/16 paras. 140-141.

[97] Judgment *Kilic v. Austria* (2023), European Court of Human Rights, Application No. 27700/15, paras. 106 & 145.

and linguistic background," suggest that adoptive parents are bound by the child's religious identity.

The decisive factor for reaching a decision in each case will be the principle of the primary protection of the BIC. This means that the interests of the child's biological or adoptive parents shall not override the BIC, as prescribed by Article 3 of the UNCRC. This standpoint was confirmed in the most recent Grand Chamber decisions of the ECtHR, such as in *Kilic v. Austria*, *Abdi Ibrahim v. Norway*, and *Strand Lobben and Others v. Norway.* [98]

6. RELIGIOUS UPBRINGING OF CHILDREN AFTER DIVORCE OF PARENTS

While deciding on divorce of marriage involving a minor child, the court must, among other matters, determine the exercise of parental responsibility and decide with which parent the child will live. As that parent, with whom the child will live, will make everyday decisions about the child and his or her upbringing, the question arises whether he or she can solely decide on the religious upbringing of the child. Under Article 18, paragraph 1 of the UNCRC "*States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child*", meaning that the UNCRC emphasizes the importance of joint exercise of both parents and that both parents should be involved in the (religious) upbringing of the child. So, the question is: How should this be done?

In Croatia, the Family Act includes a general provision that parents have the right, duty, and responsibility to exercise parental responsibility equally, jointly, and consensually (Article 104).[99] However, regarding the specific issue of religious upbringing, the Family Act introduces a more detailed provision (Article 100), which addresses parental representation in relation to essential personal rights of the child - child's name, place of residence, and the choice or change of the child's religion.[100] [101]For legal representation and decisions on child's essential personal rights, written

---

98 Judgment *Strand Lobben and Others v. Norway* (2019), European Court of Human Rights [GC], Application No. 37283/13, paras. 204-206.

99 See more about Croatian legal framework on parental responsibility after divorce: Korać Graovac, A. *Parental care following divorce in the Republic of Croatia*, Law, identity and values, Vol. 2, Issue 2, pp. 45-63. [https://doi.org/10.55073/2022.2.45-63].

100 Lucić, *op. cit.*, note 39, p. 818.

101 In cases where a child is without appropriate parental care, the Croatian Social Welfare Center issues a decision placing the child under guardianship and appointing a guardian to represent the child. See: *Ibid.* pp. 833-835.

consent of the other parent will be needed (Article 100, paragraph 2).[102] If the parent refuses to consent, the child (represented by a special guardian *ad litem*) or the parent(s) can institute a non-contentious judicial proceeding in which the court will make a decision in line with the BIC. The court will decide which parent will represent the child in respect of the religious upbringing of the child.[103]

While deciding with which parent the child will live and how parental responsibility shall be exercised, the court shall not consider religious conviction of one parent as a disadvantageous factor.[104] This standpoint was upheld in *Hoffman v. Austria*, [105] and later in *Palau-Martines v. France*,[106] in which the ECtHR concluded: *"Such a difference in treatment is discriminatory ... if it is not justified by a 'legitimate aim' and if there is no 'reasonable relationship' of proportionality between the means employed and the aim sought to be realized."* Furthermore, the court shall not put one parent in a less favourable position, based on a fear that his or her religious beliefs might potentially jeopardize a child's rights or interests. [107]This standpoint was affirmed in case of *Vojnity v. Hungary*,[108] in which the ECtHR concluded that as there is *"no reasonable relationship of proportionality between a total ban on the applicant's access rights and the aim pursued, namely the protection of the best interest of the child..."*

7. LIMITATIONS TO THE RIGHT OF THE CHILD TO MANIFEST HIS OR HER RELIGION OR BELIEFS

In contrast to the child's right to freedom of religion – which is considered an absolute right, the right to manifest one's religion is regarded as relative, meaning

---

[102] In this regard Lucić observes that Family Act does not mention anything about the proving the authenticity of the written consent, that is, there is no obligation to have it certified by the competent authority. *Ibid.*

[103] Before this judicial proceeding, the child and the parent(s) need to attend mandatory counselling before the Croatian Institute for Social Work, where they would be provided with assistance in reaching a consensual solution (Art. 329, para. 1, pt. 5 CFA).

[104] In this regard, Schanda states: *"Although the membership in a church may not be taken into consideration in child custody disputes, the court may assess its consequences."* Schanda, B., *op. cit.*, note 19, p. 253. See also: Lucić, *op. cit.*, note 39, p. 831; Jakovac-Lozić, *op. cit.*, note 10, p. 40; Bubić, *op. cit*, note 73, p. 26.

[105] Judgment *Hoffman v. Austria* (1994), 17 EHHR 293, paras. 33 & 36. See more about this case: Lucić, N., *op. cit.,* note 39, p. 831.

[106] See also: Judgment *Palau-Martinez v. France* (2003) European Court of Human Rights, Application No. 64927/01. See more about this case: Bubić, *op. cit.*, note 73, p. 26.

[107] In this regard, Novaković states: *"In order to decide to assign the child to another parent, it is necessary that this parent proves that religious views and practice had harmful effects for the child, taking into account, before all, education and medical protection of the child."* Novaković, *op. cit.*, note 39, p. 170.

[108] Judgment *Vojnity v. Hungary* (2013) European Court of Human Rights, Application No. 29617/07.

it may be subject to certain limitations.[109] Under Article 14, paragraph 3, those limitations will be justified only if three requirements are fulfilled: they must be provided by law, they must pursue to achieve a legitimate aim (e.g. to protect public safety, order, health or morals, or the fundamental rights or freedom of others) and they must be necessary in a democratic society.[110] This means that if a State intervenes in this right, the intervention must comply with the principle of proportionality and pass a classic "proportionality test" to avoid violating that right.[111]

In *Dogru v. France* [112] and *Kervanci v. France*,[113] the Court concluded stated that *"the interference in question was justified as a matter of principle and proportionate to the aim pursued" a*nd that *"the purpose of that restriction on manifesting a religious conviction was to adhere to the requirements of secularism in state schools".* [114] However, in *Grzelak v. Poland*, the Court was *"not satisfied that the difference in treatment between non-believers who wished to follow ethics classes and pupils who followed religion classes was objectively and reasonably justified and that there existed a reasonable relationship of proportionality between the means used and the aim pursued ".*[115]

8. CONCLUSION

The right of the child to freedom of thought, conscience, and religion is a right of great importance for the child's spiritual and emotional development. A child enjoys it as a member of society, firstly within relationships with family members, and then, within society. It found its protection under Article 14 of the UNCRC, which in paragraph 1 states that State parties shall respect the right of the child to freedom of thought conscience and religion. However, this provision does not elaborate on the content of the right, leaving open questions for legal scholars as to whether the UNCRC grants the right to the child to change his or her religion.

---

109 Schanda*, op. cit.*, note 19, p. 247; Radina, *op. cit.*, note 30, pp. 39-40; Jakovac-Lozić, *op. cit.*, note 10, p. 43; Langlaude Doné; Tobin, *op. cit.*, note 14, p. 507.

110 See more about these requirements: Langlaude Doné; Tobin, *op. cit.*, note 14, pp. 508-509.

111 *Ibid.*, pp. 507-509.; In this regard Langlaude Doné and Tobin state: *"Children may not have an absolute right to manifest their religion or beliefs, but it is clear that if a state wishes to limit this right, it carries the heavy burden of explaining why the limitation is necessary to achieve the aims prescribed under Article 14(3)." Ibid.* pp. 508-509, p. 507 and 514.

112 Judgment *Dogru v. France* (2008) European Court of Human Rights, Application No. 27058/05.

113 Judgment *Kervanci v. France* (2008) European Court of Human Rights, Application No. 31645/04.

114 *Ibid.*, paras. 69 & 77. See more on this cases: Langlaude Doné, Tobin, *op. cit.*, note 14, p. 512; Schanda, *op. cit.*, note 19, p. 249.; *Grzelak v. Poland*, App. No. 7710/02 (ECtHR, 22 November 2010), para. 100. See more about this case: Lucić, *op. cit.*, note 39, pp. 830-831.

115 *Grzelak v. Poland*, App. No. 7710/02 (ECtHR, 22 November 2010), para. 100. See more about this case: Lucić, *op. cit.*, note 39, pp. 830-831.

Besides being protected by the UNCRC, the right of the child to freedom of thought, conscience and religion is also protected under some human rights treaties, such as the International Covenant on Civil and Political Rights (1966), the European Convention on the Protection on Human Rights (1950) and the European Charter of Fundamental Rights, which guarantee the right to freedom of thought, conscience and religion to everyone. Because of the term "everyone" and the principle of non-discrimination, it is a commonly held opinion in Family law theory that the child was guaranteed this right even before the adoption of the UNCRC. Unlike the UNCRC, these treaties elaborate on the content of this right.

Even though a child is the sole and independent holder of this (and other) right(s), in realizing it, the child's parents, as holders of parental responsibility, shall not be omitted. The UNCRC acknowledges the indispensable role of parents in the exercise of this child's right (*Bayev and Others v. Russia*). Under Article 14, paragraph 2, the child's parents are both entitled and obliged to provide direction and guidance in the exercise of the child's right in a manner consistent with child's evolving capacities. Parents provide that direction and guidance in two ways: 1. After the child is born, parents determine his or her religion, 2. They influence the child's opinion and upbringing throughout everyday life. However, that direction and guidance need to be limited, as parents are not allowed to indoctrinate their child, or coerce him or her to accept certain beliefs. To be legitimate, it must be appropriate, in line with the child's evolving capacities and the principle of the BIC and must respect the child's views. This standpoint was confirmed by the Committee on the Rights of the Child, which stated that it is the child who is the holder of this right, not the parents, and that their role diminishes as the child's autonomy increases during adolescence.

As holders of parental responsibility over the child, the child's parents are entitled to determine the child's religion and decide about his or her religious upbringing. This can result in conflicts with the child's rights, such as the right to education, the right to life, survival and development, and the rights to physical integrity, self-determination and health. Even though the child's parents should be involved in the child's education and the state shall respect their right to ensure the child's education in accordance with their religious or philosophical beliefs (Article 2 of the Protocol 1 to the ECHR), their religious conviction cannot be used as a justified reason for the exemption of the child from school (*Martins Casimiro and Cerveira Ferreira v. Luxembourg, Osmanoğlu and Kocabaş v. Switzerland* and *A.R. and L.R. v. Switzerland*).

Referring to the medical interventions performed on the child, two situations can be distinguished: 1. Parents, as the child's representatives, refuse necessary medical

intervention due to their religious beliefs and 2. Parents, the as child's legal representatives, submit the child to medical intervention that is not necessary, but is in line with religious beliefs (e.g. male circumcision). While in the first situation, by refusing necessary medical intervention, parents endanger the child's right to life, survival and development, in the second situation, the child's right to physical integrity and self-determination, and right to health are jeopardized. In case there is a conflict between the child's right to life, survival and development, and the parent's right to determine the child's religion, parental refusal of the medical intervention can be overruled by the principle of BIC (*Jehovah's Witnesses of Moscow and Others v. Russia).*

In the case of a medical intervention that is not medically necessary and is carried out based on the parents' beliefs - such as male circumcision - the question arises whether, like female genital mutilation, it falls under "traditional practices prejudicial to the health of children". Since today the majority of member states to the UNCRC and the Council of Europe hardly even consider it a "medical procedure," but rather an act of exercising the parents' religious freedom, and do not view its prohibition as an "effective" or "appropriate measure" - in contrast to female genital mutilation - it can be said that this represents a case of positive discrimination, inevitably resulting from the difference between the sexes.

Adoptive parents of the child, even though not explicitly mentioned in Article 14, paragraph 2, just like biological parents have the right to provide direction and guidance to the child. Therefore, their position is quite comparable to the position of the biological parents (*Kurochkin v. Ukraine, Taganrog Lro and Others v. Russia* and *Ageyevy v. Russia*). In case of changing or choosing the child's religion, the question arises as to whether they are entitled to change or choose the child's religion, or are they bound by child's religious identity. While several arguments go in favour of their right to raise the child in accordance with their religious conviction, there are also arguments that go in favour of preserving the child's religious identity. The answer should be found by approaching each case individually, guided by the principle of BIC.

After the divorce of parents, the parent with whom the child lives shall not be entitled to decide about child's religious upbringing on his or her own. As the UNCRC advocates the principle of common and shared responsibilities, both of the parents should be involved. In Croatia, the parent who is representing the child regarding essential rights of the child, among which is the choice or change of religion, shall have the written consent of the other parent. While deciding about the exercise of parental responsibility, and with which parent the child will live, religious conviction of the one parent shall not be taken as a disadvantageous

factor (*Hoffman v. Austria* and *Palau-Martines v. France*) nor one shall one parent be put in a less favourable position due to the fear that his or her religious practice might harm the child (*Vojnity v. Hungary*).

Finally, unlike the right of the child to the freedom of thought, conscience and religion, the right of the child to manifest his or her religious beliefs is a relative right, meaning it can be subject to certain limitations. According to Article 14, paragraph 3, to be justified, those limitations/ interferences need to be provided by law, pursue a legitimate aim (for the protection of public safety, order, health, or morals, or the fundamental rights and freedoms of others) and be necessary in democratic society. In cases *Dogru v. France* and *Kervanci v. France,* the Court found them to be justified, whereas in *Grzelak v. Poland,* it did not.

REFERENCES

BOOKS AND ARTICLES

1. Benyusz, M.; Raisz, A., Introduction, in: Benyuz, M., Raisz, A. (eds.), *International Children's Rights*, CEA Publishing, Miskolc-Budapest, 2024, pp. 13-18.
2. Bubić, S., *The Best Interest of the Child Standard and Its Application in the Context of Exercising Parental Care*, Collected Papers, Second International Scientific Conference, Law Faculty of the University "Džemal Bijedić" Mostar, 2014, pp. 11-32.
3. Cohan, J. A., *Judical Enforcement of Lifesaving Treatment for Unwilling Patient*, Creighton Law Review, Vol. 39, 2006.
4. Čolaković, M., *Religious commitment of parents vs. the BIC in exercising his rights to physical integrity*, Collected Papers, Second International Scientific Conference, Law Faculty of the University "Džemal Bijedić" Mostar, 2014, pp. 67-82.
5. European Union Agency for Fundamental Rights and Council of Europe. *Handbook on European Law Relating to the Rights of the Child,* Publications Office of the European Union, Luxembourg, 2022.
6. Hrabar, D., *Special Protection of Human Rights of Children I: History of Children's Rights*, in: Benyuz, M., Raisz, A. (eds.), International Children's Rights, CEA Publishing, Miskolc-Budapest, 2024, pp. 21-39.
7. Freeman, M., *A Magna Carta for Children? Rethinking Children's Rights*, Cambridge, United Kingdom; Cambridge University Press, New York, 2020.
8. Hlača, N.; Popović, P., *The Child's Right to Freedom of Conscience and Religion***,** Bogoslovska smotra, Vol. 79, Issue 2, 2009, pp. 275-303.
9. Hlača, N., *Religious Upbringing, Children's Rights, and Child Circumcision*, Collected Papers, Second International Scientific Conference, Law Faculty of the University "Džemal Bijedić" Mostar, 2014, pp. 50-67.
10. Hrabar, D., *The Impact of Parental Religious and Philosophical Beliefs on the Upbringing and Education of Children in Croatian Legislation*, Collected Papers of Zagreb Law Faculty, Vol. 68, Issue 3-4, 2018, pp. 319-336.

11. Hrabar, D.; Hlača, N.; Jakovac-Lozić, D.; Korać Graovac, A.; Majstorović, I.; Čulo
12. Margaletić, A.; Šimović, I., *Family Law*, Official Gazette, Zagreb, 2021.
13. Hrabar, D., *Introduction to children's rights*, in: Hrabar, D (ed.), Rights of the child. Multidisciplinary approach, Biblioteka Udžbenici, Faculty of Law University of Zagreb, pp. 11-37.
14. Jakovac-Lozić, D., *The child as the holder of the right to freedom of conscience, religion, or other beliefs*, Collected Papers of the Faculty of Law in Split, Vol. 39, 2002, pp. 33-48.
15. Khazova, O. A.; Dawit Mezmur, B., *UN Committee on the Rights of the Child, Reflections on Family Law Issues in the Jurisprudence of the CRC Committee: The Convention on the Rights of the Child @ 30,* in: Brinig M. (ed.), International Survey of Family Law, Intersentia, Cambridge – Antwerp – Chicago, 2019, pp. 305-328.
16. Korać Graovac, A. *Parental care following divorce in the Republic of Croatia*, Law, identity and values, Vol. 2, Issue 2, pp. 45.-63. [https://doi.org/10.55073/2022.2.45-63]
17. Langlaude Doné, S ; Tobin J., *Article 14. The Right to Freedom of Thought, Conscience, and Religion*, in: Tobin, J. (ed.), The UN Convention on the Rights of the Child – A Commentary, Oxford University Press, Oxford, 2019, pp. 475-516.
18. Lucić, N., *Representation in relation to Essential Personal Rights of the Child*, Collected Papers of the Faculty of Law in Split, Vol. 58, Issue 3, 2021, pp. 815-840.
19. Lundy, L.; Tobin, J.; Parkes, A., *Article 12. The Right to Respect the Views of the* Child, in: Tobin, J. (ed.), The UN Convention on the Rights of the Child – A Commentary, Oxford University Press, Oxford, pp. 397-434.
20. Majstorović, I., *The Realisation of the right of the child to express his/her views – How »visible« are children in Croatian family judicial proceedings?*, Annual of social work, Vol. 24, Issue, pp. 55-71.
21. Novaković, U., *Religion in family relations – right of the child to choose religion and/or right of parents to raise the child according to their own religious beliefs*, The Politics and Regional Journal, Vol. 12, Issue 1, 2018, pp. 151-184.
22. Radina, A., *The right of the child to freedom of religion*, 2018, doctoral thesis
23. Samardžić, S.*, Legislative history of the UN Convention on the Rights of the Child*, in: Benyusz, M., Raisz, A. (eds.), International Children's Rights, CEA Publishing, Miskolc-Budapest, 2024, pp. 41-61.
24. Schanda, B., *The freedom of religion of children*, European Integration Studies, Miskolc, Vol. 19, Issue 1, 2023, pp. 245-259. [https://doi.org/10.46941/2023.e1.11]
25. Šimović, I., *UN Convention on the Rights of the Child: Participation*, in: Benyuz, M.; Raisz, A. (eds.) International Children's Rights, CEA Publishing, Miskolc-Budapest, 2024, pp. 137-159.
26. Taylor, R.*, Parental Responsibility and Religion, in:* Probert, R., Gilmore, S., Herring, J. (eds.), *Responsible Parents and Parental Responsibility*, Oxford and Portland, Oregon, pp. 123-142.
27. Varadan, S., *The principle of evolving capacities under the UN Convention on the Rights of the Child*, International Journal of Children's Rights, Vol. 27, pp. 306-338. available at:
28. [https://brill.com/view/journals/chil/27/2/article-p306_306.xml?ebody=pdf-130820]

29. Vučković-Šahović, N.; Doek, Jaap E.; Zermatten, J., The rights of the Child in International Law – Rights of the Child in a Nutshell and in Context: all about Children's Rights, Stämpfli Publisher, Bern: 2012.
30. Vlašković, V., *Children's Rights in the Council of Europe – Framework*, in: Children's Rights in Regional Human Rights Systems, Raisz, A. (ed.), CEA Publishing, Miskolc-Budapest, 2024, pp. 41-65.

LEGAL SOURCES

1. Charter of Fundamental Rights of the European Union (Charter), Official Journal of the European Communities, 2000/C 364/01
2. Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Council of Europe, European Treaty Series – No. 164
3. Croatian Act on the Protection of Patients' Rights, Official Gazette of the Republic of Croatia Official Gazette, No. 169/04
4. Croatian Family Act, Official Gazette No. 103/15, 98/19, 47/20, 49/23, 156/23
5. European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.
6. International Covenant on Civil and Political Rights (ICCPR), UN General Assembly resolution 2200A (XXI), 1966
7. Parliamentary Assembly, Resolution 1952 (2013)
8. UN Convention on the Rights of the Child, Official Gazette of the SFRY, No. 15/1990, Official Gazette of the Republic of Croatia – International Treaties, Nos. 12/93, 20/97

ECtHR CASE LAW

1. *Abdi Ibrahim v. Norway* (2021) European Court of Human Rights [GC] Application No. 15379/16
2. *Ageyevy v. Russia* (2013) European Court of Human Rights, Application No. 7075/10
3. *A.R. and L.R. v. Switzerland* (2017) European Court of Human Rights, Application No. 22338/15
4. *Bayatyan v. Armenia* (2011), 54 EHRR 15
5. *Bayev and Others v. Russia* (2017) European Court of Human Rights, Application Nos. 67667/09, 44092/12 and 56717/12
6. *Dogru v. France* (2008), European Court of Human Rights, Application No. 27058/05
7. *Folgerø and Others v. Norway* (2007) European Court of Human Rights [GC], Application No. 15472/02
8. *Grzelak v. Poland* (2010) European Court of Human Rights, Application No. 7710/02
9. *Hoffman v. Austria* (1994), 17 EHHR 293.
10. *Jehovah's Witnesses of Moscow and Others v. Russia* (2010) European Court of Human Rights, Application No. 302/02

11. *Kervanci v. France* (2008) European Court of Human Rights, Application No. 31645/04
12. *Kilic v. Austria* (2023) European Court of Human Rights, Application No. 27700/15
13. *Kurockhin v. Ukraine* (2010) European Court of Human Rights, Application No. 42276/08
14. *Lautsi and Others v. Italy* (2011) European Court of Human Rights, Application No. 30214/06
15. *Martins Casimiro and Cerveira Ferreira v. Luxembourg* (1999) European Court of Human Rights, Application No. 44888/98
16. *Osmanoğlu and Kocabaş v. Switzerland* (2017) European Court of Human Rights, Application No. 29086/12
17. *Palau-Martinez v. France* (2003) European Court of Human Rights, Application No. 64927/01
18. *Strand Lobben and Others v. Norway* (2019) European Court of Human Rights [GC], Application No. 37283/13
19. *Taganrog Lro and Others v. Russia* (2022) European Court of Human Rights, Application No. 32401/10
20. *Vojnity v. Hungary* (2013) European Court of Human Rights, Application No. 29617/07

UN COMMITTEE ON THE RIGHTS OF THE CHILD – GENERAL COMMENTS

1. UN Committee on the Rights of the Child (2003). General Comment No. 5 (2003) – General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5, 27 November 2003.
2. UN Committee on the Rights of the Child, General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence (2016) CRC/C/GC/20, 06 December 2016.

PARENTHOOD WITHOUT BORDERS - JUDICIAL COOPERATION FOR CROSS-BORDER FAMILY SECURITY IN THE EU

Lilla Garayova, PhD, LLM, Associate Professor
Pan-European University, Faculty of Law
Tomasikova 20, 821 02 Bratislava, Slovakia
garay.lilla@gmail.com

ABSTRACT

Cross-border mobility and diverse family forms are increasingly common in the European Union, yet legal recognition of parenthood remains fragmented along national lines. This paper examines how the lack of mutual recognition of parent-child relationships across EU Member States – especially for children born via surrogacy, assisted reproduction, or adoption in "rainbow families" – undermines children's rights and legal certainty. We critically analyze the current legal framework, including the Brussels IIb Regulation's limitations and key jurisprudence from the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR) (V.M.A., Coman, Mennesson, Labassee, etc.). The analysis reveals that while incremental judicial solutions have advanced free-movement rights, significant gaps persist in protecting the continuity of parent-child bonds across borders. Building on evidence from the European Commission's 2022 ICF Study and recent policy debates, we explore options for ensuring mutual recognition of parenthood, notably the proposed EU Regulation introducing common private international law rules and a European Certificate of Parenthood. Adopting a child-centric, advocacy-oriented perspective, the paper argues that an EU-level solution is imperative to safeguard the best interests of the child. Practical and normative recommendations are offered to achieve an EU system in which "parent in one Member State, parent in all Member States" becomes a reality, placing children's rights at the core of cross-border family law cooperation.

Keywords: *Best Interests of the Child, Children's Rights, Cross-Border Parenthood, EU Private International Law, European Certificate of Parenthood, Mutual Recognition of Family Status*

1. INTRODUCTION

In an increasingly integrated Europe, families often move or have legal ties spanning multiple countries. However, when it comes to the legal status of parents and children, national boundaries can abruptly fracture a child's identity. A child who is fully recognized as someone's son or daughter in one Member State may find

that parenthood status denied or ignored in another. This discrepancy poses more than an abstract legal problem – it strikes at the heart of a child's sense of security and rights. Cases of children born via surrogacy, conceived through assisted reproductive techniques (ART), or adopted by non-traditional families have exposed a patchwork of rules across the EU, in which the parent-child relationship is sometimes not portable across borders. The result is a landscape of uncertainty: parents travel or relocate at the risk of one of them being treated as a legal stranger to their own child, and children face the possibility that their family ties will vanish when crossing an internal EU border. This paper explores how such fragmentation undermines children's fundamental rights and what the European Union can do to establish "parenthood without borders" through enhanced judicial cooperation. The central premise of this discussion is that the best interests of the child must be a primary consideration in all actions concerning children – a principle enshrined in Article 3 of the UN Convention on the Rights of the Child (UNCRC)[1] and Article 24 of the EU Charter of Fundamental Rights.[2]

From a children's rights perspective, the current lack of automatic cross-border recognition of parenthood is not just a bureaucratic inconvenience; it is a direct threat to a child's right to identity, family life, and non-discrimination. The problem has gained urgency in light of social changes and increased mobility. More children are being born via cross-border surrogacy arrangements or to LGBTQ+ families, and more EU citizens are living abroad with their families. The European Commission estimates that up to two million children in the EU currently may face difficulties having their parenthood recognized when moving between Member States.[3] Each such case represents a child whose status and rights could be in limbo.[4] The question this paper addresses is how EU law and policy can evolve to ensure that children do not lose their legal parents when they cross a border. In pursuit of that answer, we will first map the fragmentation of parenthood recognition in Europe and the attendant risks to children, then critically assess the existing legal framework and judicial responses, and finally propose pathways toward an EU-wide solution that places children's rights at the forefront.

---

1 Convention on the Rights of the Child, United Nations Treaty Series, vol. 1577, p. 3.

2 Charter of Fundamental Rights of the European Union [2000] OJ C 364/1.

3 Explanatory Memorandum to the Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM(2022) 695 final, 7 December 2022, accompanied by SEC(2022) 432 final and SWD(2022) 390–392 final.

4 Barzó, T., *A demográfiai kihívásokra adott családpolitikai válasz hazánkban [Family Policy Response to Demographic Challenges*], Miskolci Jogi Szemle, Vol. 18, No. 2, 2023, pp. 23–41.

2. FRAGMENTATION OF LEGAL PARENTHOOD RECOGNITION IN THE EU

European countries have developed their parentage laws independently, resulting in fragmented rules on who is recognized as a child's legal parent. This fragmentation is especially pronounced for children born through surrogacy, conceived via ART (assisted reproductive technologies), or born into non-traditional families (such as same-sex couples or unmarried partners). In the absence of a unifying EU framework, a child's legal parents in one Member State may not be considered the legal parents in another.

Perhaps the starkest divergence surrounds children born through **international surrogacy arrangements**. At least 14 EU Member States categorically do not recognize parenthood established via surrogacy abroad.[5] Countries like Poland and Finland, for example, will only acknowledge the woman who gives birth as the mother, thus refusing to recognize the intending parent(s) listed on a foreign birth certificate. By contrast, about nine Member States (including Austria, Belgium, France, and others) do recognize surrogacy-based parenthood from abroad, despite often banning surrogacy domestically.[6] These states have turned to principles like the *best interests of the child* and the child's right to identity to justify recognition even when surrogacy violates national public policy. For example, Austrian courts, applying the best-interests principle, have recognized foreign surrogacy arrangements notwithstanding Austria's ban on surrogacy. France, after years of resistance, now allows full transcription of a foreign birth certificate for children born via surrogacy abroad, following landmark judgments and pressure from the ECtHR. The Belgian judiciary, lacking legislative guidance, has issued conflicting decisions – some refusing recognition as against public policy, others accepting it in light of the child's rights. This inconsistency across (and even within) jurisdictions means the legal parentage of a surrogate-born child is a dice roll dependent on which country (or even which court) is involved.

Advances in ART and evolving social norms have enabled **same-sex couples** to become parents (e.g. two mothers through donor insemination, or two fathers through surrogacy or joint adoption). Yet, Member States differ greatly in recognizing these family ties. A majority of EU countries now permit some form of same-sex parenting (especially for two women, if one gives birth and the other can

---

5 Morel, S. *et al.*, Study to support the preparation of an impact assessment on a possible Union legislative initiative on the recognition of parenthood between Member States. Final Report, European Commission, Directorate-General for Justice and Consumers, Unit A1 – Civil Justice, Brussels, 2022, p. 17.

6 *Ibid*.

adopt or be registered as co-mother), but a significant minority do not. For instance, by 2022 only 8 Member States allowed joint adoption by same-sex couples in a registered partnership (beyond those that allow same-sex marriage).[7] Several countries (primarily in Central-Eastern Europe) still exclude same-sex couples from recognition as joint parents altogether. If a child has two legal mothers or two fathers in State A, that status may be rejected in State B which insists a child cannot have parents of the same gender. Such was the predicament in the CJEU's *V.M.A.* case: a child born in Spain to a Bulgarian–Gibraltarian same-sex couple had a Spanish birth certificate listing two mothers, but Bulgarian authorities refused to issue a Bulgarian birth certificate because Bulgarian law did not recognize two mothers.[8] This lack of consensus extends to births via donor gametes or IVF: some Member States still impose requirements that reflect traditional heteronormative assumptions (e.g. requiring a father's name even if the child has none, or only recognizing the birth mother and treating her female partner as a legal stranger). Transgender parents also face uncertainty – for example, if a trans man gives birth, some national laws might insist on listing him as "mother", causing cross-border confusion if another country lists him as father.[9][10] In short, children of LGBTQ+ families face a high risk of non-recognition in many jurisdictions, a direct consequence of Member State divergences on marriage, partnership, and parentage equality.

Adoption laws are another area of divergence. While all EU countries recognize adoption in some form, who can adopt and which adoptions are recognized varies. Many states historically restricted adoption to married heterosexual couples, though this has gradually liberalized. If a child is adopted by a single parent or by an unmarried couple in one country, will that adoption be recognized elsewhere? Not necessarily. For example, a single-parent adoption valid in State X may not be recognized in State Y that does not allow singles to adopt, or a second-parent adoption by a same-sex partner may be denied recognition in a country that forbids same-sex adoption. A notable case is *Wagner v. Luxembourg*,[11] where Luxembourg refused to recognize a Peruvian single-mother adoption, leaving the child legally parentless in Luxembourg – a situation the ECtHR found violated the child's right to family life.

---

7 Morel *et al.*, *op. cit.,* note 4, p. 27.

8 Case C-490/20 *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* ECLI:EU:C:2021:1008, para. 22.

9 McConnell v Registrar General for England and Wales [2020] EWCA Civ 559.

10 *R (on the application of TT) v Registrar General for England and Wales* [2019] EWHC 2384 (Fam).

11 Judgment *Wagner and J.M.W.L. v. Luxembourg* (2007) European Court of Human rights, Application No. 76240/01.

Even among EU states that are party to the 1993 Hague Adoption Convention,[12] which streamlines intercountry adoption recognition, gaps remain: the Convention covers adoptions between different countries, but not all cross-border situations. For instance, a purely domestic adoption (child and parents same nationality) might not be automatically recognized elsewhere if the family later moves.

The European Commission has noted that non-recognition of adoptions can create obstacles for children in claiming nationality or inheritance from their adoptive parents. Especially sensitive are cases of adoption by unmarried or same-sex couples, which some states refuse to acknowledge.[13] Thus, an adoptive parent in one country might not be seen as a parent in another, again subjecting the child to a legal vacuum.

Fragmentation also appears in **less common scenarios**, such as the recognition of kafala (Islamic guardianship) or foster parenthood, or situations involving multiple parent figures. Few EU states allow any form of multi-parent recognition (more than two legal parents), while others strictly adhere to the two-parent model, potentially clashing if a child from a jurisdiction with a different concept moves. Moreover, differing rules on establishing parentage (e.g. the marital presumption of paternity, which in some countries is rebuttable and in others irrebuttable) can lead to conflicting results as to who the "legal" father or mother is. In cross-border cases, these differences can surface unexpectedly – for example, if a birth certificate from Country A lists a father by virtue of marriage presumption, Country B might refuse recognition if in B the timing of birth would not attribute paternity or if B requires a genetic link for paternal recognition. Each discrepancy represents a point where one legal system's determination of parenthood may be deemed invalid by another system.

This panorama of divergent laws demonstrates that legal parenthood in the EU is anything but uniform. What one Member State's law "joins together" (a parent and child), another may "put asunder." Such fragmentation means families cannot count on continuity of their legal status when they cross borders, undermining the predictability and legal certainty that should ideally accompany the EU's free movement regime. It is important to note that these conflicts are not merely theo-

[12] Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, Hague Conference on Private International Law, concluded 29 May 1993, entered into force 1 May 1995.

[13] Explanatory Memorandum to the Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM(2022) 695 final, 7 December 2022, accompanied by SEC(2022) 432 final and SWD(2022) 390–392 final.

retical. They have materialized in numerous court cases and personal ordeals, often with harsh consequences for the children involved. We turn next to the risks and rights implications that arise when parenthood is not recognized across borders.

3. RISKS TO CHILDREN'S RIGHTS AND LEGAL CERTAINTY

When a child's legally recognized parenthood is not carried over from one country to another, the child pays the price. The effects of non-recognition reverberate through virtually every aspect of a child's life, from the mundane to the profound. Here, we analyze the risks posed to children's rights and well-being, illustrating them with examples and drawing on human rights norms that underscore why continuity of parenthood is vital.

3.1. LEGAL LIMBO AND IDENTITY CRISIS

At the most fundamental level, a child whose parent-child relationship is not recognized abroad is plunged into legal limbo. The child may suddenly have no legally recognized parents in the host country, or only one parent instead of two. This directly implicates the child's right to an identity. Under Article 7 of the UNCRC, every child has the right to be registered immediately after birth, to a name, and to know and be cared for by their parents.[14] Non-recognition effectively negates this right by denying the legal parentage that is part of the child's identity. The UNCRC Committee has taken a firm position[15] that failure to recognize a parent-child relationship can lead to a denial of the child's enjoyment of fundamental rights,[16] and it calls on states to diligently solve these remaining problems.[17] Imagine a child who in their home country has an official birth certificate naming their mother and second mother – suddenly, in a new country, that document is rejected and one of their mothers "disappears" in the eyes of the law. The child's personal identity – which includes their family ties – is being stripped away. The trauma and confusion this can inflict on a child should not be underestimated. Psychologically, children rely on the stability of knowing who their parents are and that those parents have the authority to care for them. Legal limbo undermines that stability.

---

14 Convention on the Rights of the Child, United Nations Treaty Series, vol. 1577, p. 3.

15 UN Committee on the Rights of the Child, Concluding Observations: Paraguay, UN Doc. CRC/C/15/Add.27, 1994, para. 10.

16 UN Committee on the Rights of the Child, Concluding Observations: China, UN Doc. CRC/C/15/Add.56, 1996, para. 16.

17 Ziemele, I., *A Commentary on the United Nations Convention on the Rights of the Child – Article 7*, Martinus Nijhoff, Leiden/Boston, 2007.

3.2. OBSTACLES TO BASIC RIGHTS AND SERVICES

A panoply of practical problems flows from the non-recognition of parenthood. Children may encounter difficulties accessing healthcare, education, or other social services in the host country if their parent is not legally acknowledged. For example, medical consent for a procedure might be refused because the accompanying adult (unrecognized parent) has no legal standing, or a school might not allow a parent to enroll or pick up a child without proof of parentage. Even something as simple as obtaining a library card or signing a permission slip can turn into an ordeal if a parent's signature is not legally valid. In more serious situations, the lack of legal parenthood can hinder the child's right to maintenance and inheritance. If one of the unrecognized parents dies, the child might be unable to claim a survivor's pension or inheritance in a country that didn't consider that person their parent. In the *Mennesson* case,[18] the twin girls born via surrogacy to French parents in the United States were not recognized as the French father's children for years, which gave them an "inferior status" in French law, including diminished inheritance rights, and created practical difficulties in day-to-day life. The ECtHR noted that this harmed the children's rights under Article 8 ECHR (right to private life) because nationality and inheritance are facets of identity and legal security. Non-recognition can also jeopardize a child's right to nationality. Many countries confer citizenship to a child through their parents (*ius sanguinis*). If a state refuses to recognize a legal parent who is its national, the child might be denied citizenship by descent from that parent. In extreme cases, a child could become stateless – for instance, if the country of birth doesn't grant nationality and the parents' home country won't acknowledge the parent-child link needed for the child to acquire their citizenship. The *V.M.A.* case presented such a risk: the child, born in Spain, was a Bulgarian citizen by descent through her Bulgarian mother, but without a Bulgarian birth certificate (which was denied due to the two mothers issue) she could not get a Bulgarian passport.[19] Thus, Bulgaria's non-recognition effectively trapped the child in a limbo with respect to citizenship and travel documents.

3.3. IMPEDIMENTS TO FREE MOVEMENT

A core promise of the EU is the freedom of movement – the idea that citizens (including children) can move and reside freely in any Member State. When parenthood isn't recognized, this freedom is undermined for families. A child may be unable to obtain a passport or identity card if the competent authority in the

[18] Judgment *Mennesson v. France* (2014) European Court of Human Rights, Application No. 65192/11.

[19] Judgment *Wagner and J.M.W.L. v. Luxembourg* (2007) European Court of Human Rights, Application No. 76240/01.

home country refuses to issue documents listing the "unrecognized" parent. In *V.M.A. v. Bulgaria*, the Bulgarian authorities' refusal to issue a birth certificate listing both mothers meant the child could not get a Bulgarian passport. The CJEU found this to be incompatible with the child's EU free movement rights: every EU citizen child must have documentation to travel with their parents, and a Member State is obligated to issue an ID or passport to its citizen regardless of that state's discomfort with the child's parentage as established abroad.[20] In effect, the Court said Bulgaria must practice a form of *"functional recognition"* – at least to the extent of acknowledging the parent-child relationship for issuing identity documents.[21] Indeed, the CJEU has emphasized that a child cannot be deprived of the genuine enjoyment of their EU rights due to the form of their family. A similar logic applied in *Coman v. Romania* (2018),[22] where the CJEU held that for the purpose of granting an EU citizen's spouse a residence right, a Member State must recognize a same-sex marriage lawfully concluded abroad. Just as *Coman* prevented a Member State from invoking public policy to refuse to treat a same-sex spouse as "spouse" under EU free movement law, *V.M.A.* prevents a state from denying the parenthood of a same-sex couple's child when it would impede the child's movement and residence with their parents.[23] These cases underscore that non-recognition of status can act as a travel ban on children: families may be deterred from moving altogether, or face mobility hurdles that other families do not. Such unequal access to free movement is a form of discrimination against the child on the basis of their family situation, something EU law and the Charter (Article 21 non-discrimination) cannot tolerate.[24]

3.4. EMOTIONAL AND DEVELOPMENTAL HARM

Beyond formal rights, the human impact on a child caught in these legal uncertainties is significant. Children sense when a parent is marginalized or disempow-

---

20 Marinkás, G., *Some Remarks on the CJEU's 'Pancharevo' Decision With Special Regard to the Nexus Between the Primacy of EU Law and the National Identity of Member States*, Law, Identity and Values, Vol. 3, No. 1, 2023, pp. 177–201.

21 EAPIL Editorial, Functional Recognition of Same-sex Parenthood for the Benefit of Mobile Union Citizens – Brief Comments on the CJEU's Pancharevo Judgment, EAPIL Blog, 3 February 2022, available at: [https://eapil.org/2022/02/03/functional-recognition-of-same-sex-parenthood-for-the-benefit-of-mobile-union-citizens-brief-comments-on-the-cjeus-pancharevo-judgment/], Accessed 28 March 2025.

22 Case C-673/16 *Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [2018] ECLI:EU:C:2018:385.

23 Gyeney, L., *Same Sex Couples' Right to Free Movement in Light of Member States' National Identities. The legal analysis of the Coman case*, Iustum Aequum Salutare, Vol. 14, No. 2, 2018, pp. 149–171.

24 Case C-2/21, *Rzecznik Praw Obywatelskich v K.S. and Others*, Order of the Court (Tenth Chamber) of 24 June 2022, ECLI:EU:C:2022:502.

ered. If, for instance, one of their two parents is consistently unable to sign forms, make decisions for them, or is not acknowledged by authorities, the child may internalize a message that something about their family is "illegitimate" or not accepted. This can cause stress, stigma, and anxiety. Particularly in cases involving LGBTQ+ families, children may face the added psychological burden of seeing their family relationships invalidated by law due to prejudice. This contravenes the spirit of the child's right to non-discrimination (UNCRC Article 2 and Charter Article 21), which guarantees that children should not suffer any disadvantage because of the status of their parents (including sexual orientation or mode of conception). The *Coman* and *V.M.A.* judgments implicitly acknowledged that the children of same-sex couples must not be treated worse than those of different-sex couples. Fragmentation also can lead to separation of families: consider a situation where only one parent is legally recognized in the host state – if something happens to that parent (illness, death, or even a bureaucratic requirement that the recognized parent be the one to sign for something), the child might be left in a vulnerable position because the other parent has no rights to step in. In extreme scenarios, families have had to split up or leave a country due to non-recognition. The ECtHR has recognized that where a de facto family life exists between a child and intending parents, the state's failure to recognize those ties violates Article 8 (the right to family life) because it fails to respect the family life that actually exists.[25] The Court has repeatedly ruled that it is the child who suffers from such legal gaps, and the child's best interests – to have stability and security in their family relationships – should normally overcome abstract public policy concerns the state may have about, for example, surrogacy or the parents' marital status.

3.5. LEGAL INEQUALITIES AND UNCERTAINTY

From the perspective of legal certainty, the current situation creates intolerable unpredictability. Parents cannot know in advance whether their family will be recognized or rejected in a given jurisdiction without embarking on costly legal proceedings in each new country. The 2022 ICF study highlighted that families face lengthy administrative and judicial procedures to establish or confirm parentage in cross-border situations – often involving duplicate lawsuits, translations of documents, and sometimes re-adoption or parentage orders in the new state.[26] This is financially onerous and emotionally taxing.

The study estimated that households across the EU incur hundreds of millions of euros in costs annually trying to resolve cross-border parenthood issues (court fees,

[25] Morel *et al.*, *op. cit.*, note 4, p. 56.

[26] Morel *et al.*, *op. cit.*, note 4, p. 55.

lawyers, travel), with a projected €5–12 billion aggregate cost over a decade. Likewise, national administrations and courts expend significant resources on these disputes. These are resources and energy diverted from a child's upbringing into legal battles that would be unnecessary if a uniform recognition regime existed.

Moreover, outcomes can vary dramatically even for similar facts, leading to inequalities among children. A child with two mothers moving to Country A may obtain recognition via a court order applying the child's best interests, while an essentially identical family moving to Country B may be flatly denied because that country's courts or laws take a stricter view. Such disparities are fundamentally at odds with the notion that all children in the EU are entitled to the same basic protections. The Charter of Fundamental Rights affirms that children have the right to maintain a relationship with both parents (Article 24(3)) and that in all actions concerning children, their best interests must be a primary consideration (Article 24(2)).[27] National divergences that cause one parent to vanish from the legal framework violate these principles by effectively denying the child the care and protection of one parent.

In summary, the failure to ensure cross-border continuity of parenthood status gravely endangers children's rights to identity, family life, and non-discrimination, and introduces harmful uncertainty into their lives. Non-recognition is not a neutral act – it actively deprives the child of protections and benefits they previously had, which is why both the CJEU and ECtHR have condemned it in strong terms. When children of same-sex or surrogate-born families are denied rights granted to other children, it amounts to unequal treatment that the EU's fundamental values cannot justify. The gravity of these risks sets the stage for examining how the law currently addresses – or fails to address – the problem, and why a better solution is needed.

4. THE CURRENT LEGAL FRAMEWORK AND ITS GAPS: BRUSSELS IIB AND BEYOND

Given the significant cross-border implications described above, one might expect that EU law would already provide a safety net to ensure parenthood is respected Union-wide. However, the legal reality is that establishing and recognizing parenthood has largely remained within the domain of national law, with only piecemeal international coordination. The historical and ideological legacies of CEE countries continue to shape their legal frameworks, leading to disparities in the protec-

[27] Charter of Fundamental Rights of the European Union [2000] OJ C 364/1.

tion and recognition of children's rights.[28] In this section, we critically examine the existing framework, highlighting its gaps and the reasons they persist. We focus first on EU legislation (particularly the Brussels IIb Regulation) and then on relevant international instruments, before turning to the stop-gap solutions provided by case law.

Brussels IIb Regulation (EU) 2019/1111 – also known as Brussels IIb or Brussels IIa Recast – is the EU's principal regulation on matrimonial matters and parental responsibility, which entered into application in August 2022.[29] While this recast introduced improvements in custody and child abduction procedures, it explicitly excludes issues of legal parentage from its scope. Article 1(3)(a) of Brussels IIa (and similarly in Brussels IIb) provides that the Regulation *"shall not apply to the establishment or contesting of a parent-child relationship"*. This exclusion means that Brussels IIb, like its predecessor, offers no rules on international jurisdiction**,** applicable law, or recognition of decisions in matters of parenthood or filiation. A judgment establishing parenthood in Member State X is not automatically recognizable in Member State Y under Brussels IIb, because such judgments fall outside its material scope.

For example, if a court in State A issued an order recognizing a man's paternity via surrogacy or a second-parent adoption by a woman's same-sex spouse, that order cannot be directly enforced in State B under Brussels IIb. By contrast, if it were a custody or contact order (parental responsibility), Brussels IIb would generally ensure recognition and enforcement across the EU. This dichotomy is a crucial gap: parental *responsibility* rights travel, but the basic legal fact of *parenthood* does not necessarily travel.

The rationale for excluding parentage from Brussels IIa/IIb was historically tied to Member State sensitivities. "Family law" in matters of status (marriage, filiation, adoption) is seen as touching on national identity, cultural and moral values. Under the EU Treaties, any measures in the field of family law with cross-border implications require unanimity in the Council (TFEU Article 81(3)),[30] giving each Member State a veto. As a result, EU legislators have trodden carefully – Brussels IIa (2003) was ground-breaking in covering divorce and parental responsibility,

---

[28] Váradi-Csema, E., *Children's Rights and the Criminal Protection of Minors*, in: Gárdos-Orosz, F.; Varga, Zs. (eds.), Criminal Legal Studies: Legal Studies on Central Europe, Central European Academic Publishing, Miskolc–Budapest, 2022, pp. 413–435.

[29] Regulation (EU) 2019/1111 of the European Parliament and of the Council 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 L178/1 (Brussels IIb Regulation).

[30] Treaty on the Functioning of the European Union (TFEU) (Lisbon).

but parentage was a bridge too far at that time. Two decades on, Brussels IIb still avoids the issue, reflecting the reality that Member States did not yet agree to bring filiation into EU competence. Some states likely feared that including parentage recognition could force them to accept results (like parentage through surrogacy or of same-sex partners) that contradict their domestic public policy. Indeed, the Regulation's recitals and the legislative history indicate that matters of civil status are left to national law. This cautious approach, however, has perpetuated an uneven patchwork. EU law has frameworks for recognizing foreign judgments in civil and commercial matters, and even for many family-related orders (maintenance, custody, child abduction), but the *family status* of a child is essentially ungoverned at the EU level.

International law offers only partial remedies. Several Council of Europe conventions exist on family status (for example, the 1967 European Convention on the Adoption of Children,[31] revised in 2008,[32] and conventions by the International Commission on Civil Status (CIEC) on recognition of surnames,[33] etc.), but these have limited uptake and often exclude controversial scenarios. The 1967 Adoption Convention (revised 2008) sets some common principles on adoption, but not all EU states are party and it does not ensure automatic cross-border recognition of adoptions in all cases. For instance, it doesn't guarantee that an adoption by an unmarried couple in State A will be accepted in State B. The CIEC conventions, where applicable, facilitate cooperation among civil registrars, but again not all EU countries participate.

More significant is the 1993 Hague Adoption Convention, to which all EU Member States are now party.[34] This Convention does require recognition of adoptions made in other contracting states, *if* the adoption falls under the Convention's scope (essentially, an adoption where the child was habitually resident in one state and moved to the adoptive parents' state). The Hague Convention greatly helps in typical intercountry adoption cases, but it does not cover all possible adoption scenarios. Specifically, domestic adoptions that later need recognition abroad, or

---

31 European Convention on the Adoption of Children, Council of Europe, opened for signature 24 April 1967, entered into force 26 April 1968, European Treaty Series No. 58.

32 European Convention on the Adoption of Children (Revised), Council of Europe, opened for signature 27 November 2008, entered into force 1 September 2011, Council of Europe Treaty Series No. 202.

33 International Commission on Civil Status, Convention No. 4 on the Changes of Surnames and Forenames, signed at Istanbul on 4 September 1958, entered into force 16 February 1961.

34 Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, concluded 29 May 1993, entered into force 1 May 1995, Hague Conference on Private International Law.

adoptions by couples not recognized in the other state (e.g. same-sex or unmarried) are not conclusively handled by the Convention.

Another avenue, the European Convention on Human Rights (ECHR),[35] isn't a direct recognition mechanism but sets human rights standards that indirectly pressure states to recognize foreign family ties to avoid violating Article 8 (right to private/family life). We will discuss ECtHR case law shortly; suffice to say here that while the ECtHR can declare a violation, it does not itself register a child's parentage – the state still must implement a solution.

As a result of these gaps, the burden falls on families to navigate a conflict of laws thicket. In practice, when facing a cross-border parenthood issue, a family might have to rely on national private international law (PIL) rules of the host country. Some Member States have introduced conflict rules or legislative fixes: for example, a country may allow recognition of a foreign birth certificate unless it manifestly contravenes public policy. But "public policy" (ordre public) is a notoriously subjective exception. One state's protective public policy (e.g. upholding traditional parentage) is another state's violation of child rights.

From a children's rights perspective, the status quo is untenable. The Office of the UN High Commissioner for Human Rights has underlined that every child has the right *"to recognition everywhere as a person before the law"* (echoing Article 7 UNCRC).[36] The fragmentation in the EU undermines this by making a child's legal personhood (in terms of who their parents are) variable by jurisdiction. The fundamental rights implications have not been lost on EU institutions. The European Commission explicitly acknowledged that non-recognition of parenthood *interferes with multiple fundamental rights*: the right to private and family life (ECHR Article 8; EU Charter Article 7), the right to identity and to have one's birth registered (stemming from UNCRC Article 7), and the right to non-discrimination (Charter Article 21). In fact, a host State's failure to recognize family ties lawfully established elsewhere can amount to a violation of the child's and parents' rights under both the ECHR and the EU Charter. The ECtHR has repeatedly held that where a de facto family life exists, a state must provide a legal possibility to recognize that relationship; outright refusal is usually a dispropor-

[35] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR), adopted 4 November 1950, entered into force 3 September 1953, Council of Europe, ETS No. 5.

[36] OHCHR, Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law, United Nations, 2014, available at: [https://www.ohchr.org/en/documents/thematic-reports/ahrc2722-birth-registration-and-right-everyone-recognition-everywhere], Accessed 28 March 2025.

tionate interference with Article 8. This was established in cases like *Mennesson* and *Labassee* (France's refusal to recognize foreign surrogacy parentage violated the child's right to identity), and *Wagner* (Luxembourg's non-recognition of foreign adoption violated Article 8). Given these human rights pressures, national courts and the CJEU have attempted to plug the gaps case by case.

Despite these judicial interventions, the current framework remains unsystematic. Families ideally should not have to litigate up to Strasbourg or Luxembourg to have their parenthood respected. The cases we've discussed – *Coman*, *V.M.A.*, *Mennesson*, etc. – are the tip of the iceberg, likely representing only a fraction of affected families (many of whom either avoid travel or endure hardships in silence).

5. TOWARD MUTUAL RECOGNITION - POLICY OPTIONS AND PROPOSED SOLUTIONS

Acknowledging the problems detailed above, European institutions have moved the issue of cross-border parenthood up the agenda. There is growing consensus that an EU-level solution is required to ensure that children's familial status is respected across the Union. In this section, we explore the policy options that have been considered, with a focus on the European Commission's recent proposal for a Regulation on the recognition of parenthood.[37] We also touch upon complementary or alternative mechanisms (such as international conventions or soft law) and evaluate how each might address the identified gaps.

On 7 December 2022, the European Commission adopted a proposal for a Regulation on private international law rules relating to parenthood, aiming to harmonize how parenthood established in one Member State is recognized in others. The proposal's guiding principle is simple yet profound: if you are a legal parent in one EU country, you will be considered a parent in all EU countries, for all purposes. The core elements of the proposed regulation include:

Uniform Rules on Jurisdiction and Applicable Law: The proposal would set out which country's courts have the authority to establish parenthood in cross-border situations and which country's law applies to determine who the parents are. By unifying these rules, the regulation seeks to avoid situations where, for example, two countries each claim a different person as the parent or where no country accepts jurisdiction to establish parentage for a child. Consistent jurisdiction rules prevent parents from "forum shopping" or conversely, from being left without a

[37] European Commission, Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM(2022) 695 final, 7 December 2022.

forum. Consistent choice-of-law rules mean that the question "who is this child's parent" will have the same answer irrespective of which Member State you ask, because they will all refer to the same applicable law criteria. This by itself increases predictability: parents will know under which law their status is determined (often this might be the law of the child's habitual residence or of the birth).

Mutual Recognition of Parenthood: At the heart of the proposal is the obligation for every Member State to recognize the parenthood established in another Member State. This covers parenthood as evidenced either by a court decision or an "authentic instrument" (e.g. a notarized act or civil registry record) from the country of origin. In practice, this means if a child has a birth certificate or court order from Country A confirming X and Y as the parents, Countries B, C, and so on should accept X and Y as the legal parents with no need for re-litigation or re-registration. The recognition is intended to be automatic and for "all purposes" – meaning not just for EU free movement, but for any legal context (school enrollment, inheritance, etc.). There will, however, be limited exceptions: the Commission recognizes that some Member States might insist on a public policy escape hatch. The draft provides for "strictly defined exceptions" where recognition could be refused, but critically, any refusal must be evaluated case-by-case and in a non-discriminatory way. For example, a Member State might raise an exception if recognizing a particular parent-child relationship would be manifestly contrary to its fundamental principles (its public policy). But the text emphasizes that even public policy cannot be used arbitrarily, especially not in a way that discriminates against children of same-sex parents or other vulnerable groups. The expectation is that refusals would be very rare – perhaps conceivable in cases involving, say, clear abuse of process or something truly against ordre public – and even then subject to the overriding requirement to respect the child's best interests and fundamental rights.

European Certificate of Parenthood (ECP): Taking inspiration from the successful European Certificate of Succession (used in inheritance matters), the proposal introduces a European Certificate of Parenthood. This would be an official document that families can obtain to easily prove parenthood across the EU. The ECP would be issued by a national authority (likely the civil registry or a designated office in the Member State where the child's parenthood was originally established) and would contain standardized information about the child and parent(s). Crucially, it would not replace national birth certificates; it is optional and complementary. A parent could request an ECP, which would then be honored in all other Member States without the need for further formalities. The ECP is meant to be a user-friendly tool: for instance, if a Spanish birth certificate of a child with two mothers might confuse or alarm an official in another country,

an ECP – being an EU-recognized form – could smoothly demonstrate the legal parenthood. The ECP would contain key details such as the child's name, date/place of birth, and the names of the parent(s) (potentially using neutral terms like "Parent 1 / Parent 2" to avoid gendered language that might trigger bias).

Scope and Limits: The regulation is proposed under the justice cooperation competence (Article 81 TFEU), which means it binds all Member States except Denmark (which has an opt-out in justice matters) and possibly Ireland (which can choose to opt in or out). So at minimum it would cover 26 Member States, and potentially 27 if Ireland opts in. The proposal intentionally does not force any Member State to change its substantive family law internally. For example, a country that prohibits surrogacy or does not allow same-sex marriage would remain free to keep those bans domestically. The regulation would not oblige that state to start allowing surrogacy arrangements on its soil; it would only require that state to recognize a parent-child relationship that was validly established in another state. This distinction is crucial for acceptability: it respects national sovereignty over family law definitions, while ensuring children are not harmed by those differences once a status has been created elsewhere. In essence, it tries to decouple status recognition from status creation. The idea is that recognizing a child's existing legal parentage is a matter of that child's rights and does not equate to endorsing or permitting the underlying process (be it surrogacy, adoption by a same-sex couple, etc.) in the recognizing state. The proposed regulation also clarifies that recognition duties apply regardless of how the child was conceived or the type of family (so it explicitly covers children born through ART, surrogacy, etc., and families of all constellations). However, it does not extend to recognition of parenthood established in non-EU countries – that remains subject to national law. The focus is on intra-EU situations, which is where the Union has the strongest interest and where mutual trust can be fostered. (That said, if this regulation is adopted, Member States might in practice also become more receptive to foreign parenthood cases generally).

The Commission's objectives with this regulation are explicitly framed around children's fundamental rights. The official rationale is to strengthen the protection of the fundamental rights of children in cross-border situations, including their right to identity, to non-discrimination and to family life, taking the child's best interests as a primary consideration. This language reflects the influence of the UNCRC and the Charter. By proposing this law, the Commission has aligned itself with the principle that no child should be worse off just because their family is cross-border or non-traditional. The proposal is a clear response to the type of hardships documented: it cites how children can lose rights to inheritance or

maintenance when parenthood isn't recognized, and how currently families face administrative burdens and emotional distress.

The Commission's proposal, ambitious as it is, faces a challenging political path. Since it touches on sensitive matters (LGBTQ+ rights, surrogacy), unanimous approval by Member States is not guaranteed. However, there are encouraging signs. The European Parliament strongly backed the proposal in a plenary vote on 14 December 2023, with 366 votes in favor versus 145 against.[38] The Parliament's endorsement sends a political message that a majority of Europe's representatives agree with the principle of EU-wide parenthood recognition, regardless of sexual orientation of the parents or means of the child's birth. Members of European Parliament emphasized ending discrimination and the unequal treatment of "rainbow families" as a key goal of the regulation. The Parliament's support is important because, although family law measures use a special legislative procedure (Council unanimity with mere consultation of Parliament), it increases pressure on the Council to find consensus. It also reflects a shift in attitudes: many governments might now find it harder to openly oppose something framed as protecting children.

Still, opposition exists, primarily from certain more conservative governments. Some argue that recognizing parenthood from abroad, particularly in cases of surrogacy, might incentivize practices they prohibit at home (often labeled "surrogacy tourism" concerns). Others raise the specter of this undermining national identity or constitutional definitions of family. The Commission has attempted to allay these fears by the proposal's careful design: no change to domestic family law, only recognition of status for children's sake. The concept of public policy exception remains as a safety valve, albeit one to be used sparingly and under judicial oversight to ensure it's not covering arbitrary discrimination.

Another aspect of viability is practical implementation. The European Certificate of Parenthood would require each Member State to set up procedures to issue it. This entails training civil registrars, possibly digitizing records, and ensuring a quick turnaround so that families can get the certificate when needed (e.g. before a move). The regulation would likely also create a network or designate central authorities to facilitate information exchange (similar to what exists under Brussels IIb for child abduction, etc.), so that if any question arises about an ECP or a foreign birth certificate's authenticity, officials can verify details promptly. These

[38] Baccini, F., *EU Parliament with the Commission: parenthood to be recognized in all member states, against discrimination*, EUNews, 14 December 2023, available at: [https://www.eunews.it/en/2023/12/14/eu-parliament-with-the-commission-parenthood-to-be-recognized-in-all-member-states-against-discrimination/], Accessed 28 March 2025.

are surmountable logistical tasks, especially since a lot can be modeled on existing systems for documents like the European Succession Certificate or even the EU Digital COVID Certificate (which showed Member States can cooperate on issuing standard documents). It is imperative that EU Member States adapt their legal systems to address the evolving challenges posed by digital environments, ensuring that children's rights are uniformly protected across borders.[39]

European legal systems often fail to translate abstract commitments into tangible protections for children.[40] The proposed EU Regulation and the European Certificate of Parenthood are therefore not merely legislative instruments, but vital tools to finally align legal practice with the child-centered values already enshrined in the UNCRC and EU Charter.

In the next and final section, we present concrete recommendations – both practical steps and normative guidance – to ensure that the emerging EU framework truly delivers cross-border family security with children's best interests at the center.

6. CONCLUSION

Family life in Europe is diverse and dynamic, but the guiding principle must be constant: the child's rights transcend borders. The fragmentation of parenthood recognition across EU Member States has persisted as an anomaly in an otherwise integrated Europe – a painful gap where children's identities and security fall through. As we have shown, this gap exposes children to tangible harms and fundamental rights violations, from bureaucratic limbo to deep personal trauma. However, the momentum for change is undeniable. Through careful doctrinal analysis and the advocacy lens of children's rights, this paper has illuminated both the problem and the pathway to its solution.

The critical analysis of the status quo underscored that instruments like the Brussels IIb Regulation, while valuable in other respects, stop short of protecting children's family status. Judicial developments – the CJEU's recognition of "functional" family ties for free movement and the ECtHR's insistence on legal parentage for surrogate-born children – have laid important stepping stones. Yet, relying on case-by-case court battles is neither efficient nor fair to children, who cannot wait through protracted litigation during their formative years. The European Union,

---

[39] Guštin, M., *Challenges of Protecting Children's Rights in the Digital Environment*, EU and Comparative Law Issues and Challenges Series (ECLIC), Vol. 6, 2022, pp. 453–486.

[40] Rešetar, B.; Emery, R., C*hildren's Rights in European Legal Proceedings: Why Are Family Practices So Different from Legal Theories?*, Family Court Review, Vol. 46, No. 1, 2007, pp. 65–77.

founded in part to ensure freedom, security and justice without internal frontiers, cannot fulfill that mission if a child's parent suddenly vanishes at a border checkpoint.

Encouragingly, the EU is on the cusp of a landmark reform. The proposed Regulation on cross-border recognition of parenthood, complete with a European Certificate of Parenthood, embodies the principle that a child's legal parent-child relationship is portable and must be respected everywhere in the Union. It reflects what should be self-evident: when a family enters a new country, they do not cease to be a family. Adoption of this Regulation would mark a quantum leap forward for children's rights in Europe – filling the void that has left too many families in uncertainty. It would give practical reality to the rights enshrined in the UNCRC, the EU Charter, and the case law: the right to an identity, to non-discrimination, to family life, and to have one's parents care for you without legal obstacle.

Of course, laws on paper alone will not suffice. That is why we need to emphasize implementation and broader recommendations: ensuring authorities embrace the new tools, courts uphold the spirit of mutual recognition, and stakeholders remain vigilant to put children's best interests first. A change of this magnitude also carries symbolic weight – it sends a message to every child in the EU that you matter, your family matters, and we, as a society, will protect that. Achieving parenthood without borders in the EU requires not only legislative adoption but implementation and a firm commitment to children's rights in practice. Member States should urgently approve the proposed EU Regulation. It ensures that parenthood established in one Member State is recognized across the EU, with narrow and exceptional public policy exclusions. National authorities should swiftly designate issuing bodies, ensure a uniform and secure certificate format, and promote awareness among officials and the public. The ECP must contain only essential, non-discriminatory data and be recognized as conclusive proof of parenthood EU-wide. Monitoring systems and feedback loops should be established to address operational challenges. All decisions on recognition must default to protecting the child's legal, emotional, and social continuity. Authorities should be legally required to assess the child's welfare before any refusal. Judges, registrars, and civil servants should be trained to apply this principle consistently. While substantive family law remains national, Member States should streamline administrative procedures for recognizing foreign parenthood and consider reforms—such as allowing second-parent adoption or clarifying surrogacy outcomes—to reduce cross-border conflicts. These recommendations aim to ensure that the legal reforms don't exist in a vacuum but are effective on the ground. The overarching theme is that children's rights and best interests must lead every step – from lawmaking to day-to-day administration.

In advocating for an EU system that places the child at the center, we are reminded of the simple yet profound truth that children themselves voiced in debates around these issues: *"I just want both my parents to be my parents everywhere."* No legal technicality should ever stand in the way of that modest wish. The EU's motto is "United in Diversity." It is time to extend that unity to family law, by recognizing the rich diversity of family forms and ensuring that every child, regardless of how or where they were born or who their parents are, can rely on a continuum of care and legal recognition across borders.

Parenthood without borders is not a radical slogan – it is an affirmation of the core European values of equality, dignity, and the rule of law. It means a child from Paris to Warsaw, Madrid to Sofia, can hold an official document (a birth certificate or an ECP) and know that it speaks the same truth in any language: "These are my parents, and I am their child." In a Europe that aspires to break down barriers, the last barriers falling should be those that separate a child from their parent. The reforms and recommendations discussed herein chart a course to that destination. The best interests of Europe's children demand nothing less.

REFERENCES

BOOKS AND ARTICLES

1. Barzó, T., *A demográfiai kihívásokra adott családpolitikai válasz hazánkban* [Family Policy Response to Demographic Challenges], Miskolci Jogi Szemle, Vol. 18, No. 2, 2023, pp. 23–41
2. Guštin, M., *Challenges of Protecting Children's Rights in the Digital Environment, EU and Comparative Law* Issues and Challenges Series (ECLIC), Vol. 6, 2022, pp. 453–486
3. Gyeney, L., *Same Sex Couples' Right to Free Movement in Light of Member States' National Identities*. The legal analysis of the Coman case, Iustum Aequum Salutare, Vol. 14, No. 2, 2018, pp. 149–171
4. Marinkás, G., *Some Remarks on the CJEU's 'Pancharevo' Decision With Special Regard to the Nexus Between the Primacy of EU Law and the National Identity of Member States*, Law, Identity and Values, Vol. 3, No. 1, 2023, pp. 177–201
5. Morel, S. et al., *Study to support the preparation of an impact assessment on a possible Union legislative initiative on the recognition of parenthood between Member States.* Final Report, European Commission, Directorate-General for Justice and Consumers, Unit A1 – Civil Justice, Brussels, 2022, p. 17
6. Rešetar, B.; Emery, R., *Children's Rights in European Legal Proceedings: Why Are Family Practices So Different from Legal Theories?,* Family Court Review, Vol. 46, No. 1, 2007, pp. 65–77
7. Váradi-Csema, E., *Children's Rights and the Criminal Protection of Minors*, in: Gárdos-Orosz, F.; Varga, Zs. (eds.), Criminal Legal Studies: Legal Studies on Central Europe, Central European Academic Publishing, Miskolc–Budapest, 2022, pp. 413–435

8. Ziemele, I., *A Commentary on the United Nations Convention on the Rights of the Child – Article 7*, Martinus Nijhoff, Leiden/Boston, 2007

COURT OF JUSTICE OF THE EUROPEAN UNION

1. Case C-490/20 V.M.A. v Stolichna obshtina, rayon 'Pancharevo' ECLI:EU:C:2021:1008
2. Case C-673/16 Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne [2018] ECLI:EU:C:2018:385,
3. Case C-2/21, Rzecznik Praw Obywatelskich v K.S. and Others, Order of the Court (Tenth Chamber) of 24 June 2022, ECLI:EU:C:2022:502

ECHR

4. ECHR
5. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR), adopted 4 November 1950, entered into force 3 September 1953, Council of Europe, ETS No. 5
6. ECtHR, Judgment *Mennesson v. France* (2014) App no. 65192/11
7. ECtHR, Judgment *Wagner and J.M.W.L. v. Luxembourg* (2007) App no. 76240/01

EU LAW

1. Charter of Fundamental Rights of the European Union [2000] OJ C 364/1
2. European Commission, Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM(2022) 695 final, 7 December 2022
3. Explanatory Memorandum to the Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM(2022) 695 final, 7 December 2022, accompanied by SEC(2022) 432 final and SWD(2022) 390–392 final
4. Regulation (EU) 2019/1111 of the European Parliament and of the Council 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 L178/1 (Brussels IIb Regulation)
5. Treaty on the Functioning of the European Union (TFEU) (Lisbon)

INTERNATIONAL INSTRUMENTS

1. Convention on the Rights of the Child, United Nations Treaty Series, vol. 1577
2. European Convention on the Adoption of Children, Council of Europe, opened for signature 24 April 1967, entered into force 26 April 1968, European Treaty Series No. 58
3. European Convention on the Adoption of Children (Revised), Council of Europe, opened for signature 27 November 2008, entered into force 1 September 2011, Council of Europe Treaty Series No. 202

4. Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, Hague Conference on Private International Law, concluded 29 May 1993, entered into force 1 May 1995
5. International Commission on Civil Status, Convention No. 4 on the Changes of Surnames and Forenames, signed at Istanbul on 4 September 1958, entered into force 16 February 1961
6. OHCHR, Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law, United Nations, 2014, [https://www.ohchr.org/en/documents/thematic-reports/ahrc2722-birth-registration-and-right-everyone-recognition-everywhere], Accessed 28 March 2025
7. UN Committee on the Rights of the Child, Concluding Observations: China, UN Doc. CRC/C/15/Add.56, 1996
8. UN Committee on the Rights of the Child, Concluding Observations: Paraguay, UN Doc. CRC/C/15/Add.27, 1994

LIST OF NATIONAL REGULATIONS, ACTS AND COURT DECISIONS

1. *McConnell v Registrar General for England and Wales* [2020] EWCA Civ 559, para. 56
2. *R (on the application of TT) v Registrar General for England and Wales* [2019] EWHC 2384 (Fam)

WEBSITE REFERENCES

1. Baccini, F., *EU Parliament with the Commission: parenthood to be recognized in all member states, against discrimination*, EUNews, 14 December 2023, available at: [https://www.eunews.it/en/2023/12/14/eu-parliament-with-the-commission-parenthood-to-be-recognized-in-all-member-states-against-discrimination/], Accessed 28 March 2025
2. EAPIL Editorial*, Functional Recognition of Same-sex Parenthood for the Benefit of Mobile Union Citizens – Brief Comments on the CJEU's Pancharevo Judgment*, EAPIL Blog, 3 February 2022, available at: [https://eapil.org/2022/02/03/functional-recognition-of-same-sex-parenthood-for-the-benefit-of-mobile-union-citizens-brief-comments-on-the-cjeus-pancharevo-judgment/], Accessed 28 March 2025

SELF-EFFICACY AND EMOTIONAL REGULATION AS PREDICTORS OF DEPRESSIVE SYMPTOMS AMONG SOCIAL WORKERS: ALIGNING RESEARCH WITH EUROPEAN UNION WORKPLACE MENTAL HEALTH GUIDELINES*

Nikol Bogdan, LLM, Teaching Assistant
Josip Juraj Strossmayer University of Osijek, Faculty of Law
Stjepana Radića 13, 31000 Osijek, Croatia
nbogdan@pravos.hr

Daniela Šincek, PhD, Full Professor
Josip Juraj Strossmayer University of Osijek, Faculty of Humanities and Social Sciences
Lorenza Jägera 9, 31000 Osijek, Croatia
dsincek@ffos.hr

Dinka Caha, PhD, Assistant Professor
Josip Juraj Strossmayer University of Osijek, Faculty of Law
Stjepana Radića 13, 31000 Osijek, Croatia
dcaha@pravos.hr

ABSTRACT

Occupational health and safety have been a priority for the European Union (EU) since the 1980s. Over the past decades, the EU has developed a series of strategic documents underscoring the importance of mental health. Several of these specifically address mental health in the workplace, including Directive 89/391/EEC, which serves as a foundational legislative framework. More recently, the European Commission issued a Communication on a Comprehensive Approach to Mental Health, further highlighting workplace mental health as a policy priority. These initiatives demonstrate a sustained and growing commitment by the EU to improving mental health outcomes within occupational settings.
Against this backdrop, the present study aimed to examine the contribution of self-efficacy and emotion regulation to levels of depressive symptoms among social workers employed in Croatian

* This paper is a product of work that has been fully supported by the Faculty of Law Osijek Josip Juraj Strossmayer University of Osijek under the project nr.11 „Strengthening capacities for the positive development of individuals and the community (IP-PRAVOS-11)".

social welfare institutions. Additionally, the research explored potential differences in depressive symptoms, self-efficacy, and emotion regulation based on the length of service within the social care system. The study included 256 participants employed across regional offices of the Croatian Institute of Social Work.

The findings indicate that social workers with longer tenure in the social care system reported more depressive symptoms. Moreover, self-efficacy and emotional suppression emerged as significant predictors of depressive symptoms in this population. Considering current EU policy directions, these results underscore the need for policymakers and organizational leaders to implement comprehensive mental health strategies that align with EU standards. Future initiatives at the EU level should more explicitly address sector-specific psychological risk factors and develop tailored interventions for professions characterized by high emotional labor. Such targeted approaches are essential to enhancing the effectiveness of workplace mental health policies.

***Keywords**: depressive symptoms, European Union mental health guidelines, emotional regulation, social workers, self-efficacy*

1. INTRODUCTION

1.1. DEPRESSIVE SYMPTOMS, SELF-EFFICACY AND EMOTIONAL REGULATION

Depressive symptoms constitute a major contribution to the global burden of mental health disorders, significantly impairing psychological and physical well-being and diminishing overall quality of life.[1] Depression is characterized by a persistent sense of sadness or loss of interest in daily activities. It often leads to a variety of emotional and somatic problems, undermining an individual's capacity to function at work and at home.[2] The global prevalence of depression underscores its seriousness, with estimates indicating that over 300 million individuals are affected worldwide.[3] Although depression is prevalent among the general population, caregiving professionals are at heightened risk of developing depressive symptoms.[4] Social workers, in particular, exhibit a notable susceptibility to de-

---

1 Chodavadia, P.; Teo, I.; Poremski, D.; Fung, D. S. S.; Finkelstein, E. A., *Prevalence and economic burden of depression and anxiety symptoms among Singaporean adults: results from a 2022 web panel*, BMC psychiatry, Vol. 23, No. 1, 2023, pp. 104 – 112; Zaid, S. M.; Fadel, A. M.; Taresh, S. M.; Mohammed, L. A.; Fitriana, N., *Psychologists' perspective of mental health in Yemen during the civil war and COVID-19: a qualitative inquiry*, Current Psychology, Vol. 43, No. 16, 2024, pp. 14774 – 14785.

2 National Institute of Mental Health, *Depression*, 2024, available at: [https://www.nimh.nih.gov/health/topics/depression], Accessed 17 March 2025

3 Alowais, S. A.; Alghamdi, S. S.; Alsuhebany, N.; Alqahtani, T.; Alshaya, A. I.; Almohareb, S. N.; Aldairem, A.; Alrashed, M.; Bin Saleh, K.; Badreldin, H. A.; Al Yami, M. S.; Al Harbi, S.; Albekairy, A. M., *Revolutionizing healthcare: the role of artificial intelligence in clinical practice*, BMC medical education, Vol. 23, No. 1, 2023, pp. 689 – 704.

4 Deutsch, C. J., *A survey of therapists' personal problems and treatment*, Professional Psychology: Research and Practice, Vol. 16, No. 2, 1985, p. 305.

pression.[5] This vulnerability is related to the frequent exposure to traumatic situations inherent in their professional roles.[6] Additionally, research that compared depression among social workers and other helping professionals demonstrates higher levels of depression among social workers.[7] Social workers frequently experience high levels of stress and burnout, which may exacerbate pre-existing mental health conditions or increase the risk of developing depressive symptoms.[8] The implications of depression extend beyond the personal well-being of social workers, as impaired mental health can adversely affect the quality of services. . [9] For instance, studies from the US show that about 29% of social workers experience depression.[10] During the COVID-19 pandemic, this figure rose to 37 %.[11] Additionally, a qualitative study conducted among 50 social workers with depressive symptoms showed that high job demands, limited control over workload, and the stressful nature of the job caused feelings of pressure and stress, which were identified as major predictors of depression.[12]

Albert Bandura defines perceived self-efficacy as individuals' judgments regarding their ability to organize and execute the necessary actions to achieve specific goals and attain desired performance in various contexts.[13] Perceived self-efficacy refers to an individual's judgment of their capability to perform specific tasks in certain situations. It differs from outcome expectations, which refer to beliefs about the consequences of actions, but if they doubt their ability to carry out the necessary behavior, they are unlikely to initiate it or persist when faced with challeng-

---

5 Maddock, A., *Psychological Protective and Risk Factors for Depression, Anxiety and Mental Well-Being in Social Workers*, The British Journal of Social Work, Vol. 54, No. 8, 2024a, pp. 3773-3793.

6 Connorton, E.; Perry, M. J.; Hemenway, D.; Miller, M., *Humanitarian relief workers and trauma-related mental illness*, Epidemiologic reviews, Vol. 34, No. 1, 2012, pp. 145-155.

7 Bennet, P.; Evans, R.; Tattersall, A., *Stress and coping in social workers: A preliminary investigation*, The British Journal of Social Work, Vol. 23, No. 1, 1993, pp. 31-44.

8 Maddock, A., *The relationships between stress, burnout, mental health and well-being in social workers*, The British Journal of Social Work, Vol. 54, No. 2, 2024b, pp. 668-686.

9 Siebert, D. C., *Depression in North Carolina social workers: Implications for practice and research*, Social Work Research, Vol. 28, No. 1, 2004, pp. 30-40.

10 Straussner, S. L. A.; Senreich, E.; Steen, J. T., *Wounded healers: A multistate study of licensed social workers' behavioral health problems*, Social work, Vol. 63, No. 2, 2018, pp. 125-133.

11 Park, D.; Lee, M.; Osborne, K.; Minnick, D., *Stress and depression in Ohio Social Workers during the COVID-19 pandemic: the buffering role of Social Connectedness*, Health & Social Work, Vol. 48, No. 1, 2023, pp. 33-42.

12 Stanley, N.; Manthorpe, J.; White, M., *Depression in the profession: Social workers' experiences and perceptions*, British Journal of Social Work, Vol. 37, No. 2., 2007, pp. 291-298.

13 Bandura, A., *Social Foundations of Thought and Action: A Social Cognitive Theory*, Prentice-Hall, Inc., New Yersey, 1986, p. 94.

es.[14] Thus, self-efficacy is not a fixed personal trait, but a context-specific factor that varies across situations. Moreover, among helping professionals, professional self-efficacy significantly influences well-being. For example, a study of secondary school teachers found that higher levels of professional self-efficacy were associated with more challenge-related job demands and fewer hindrance-related demands. This perception is associated with increased engagement and reduced burnout, suggesting that self-efficacy contributes to better psychosocial well-being.[15] Similarly, research on the career self-efficacy consistently indicates that it is a strong predictor of various career-related behaviors from adolescence through adulthood.[16] This study is grounded in *Social Cognitive Theory*[17], which posits that self-efficacy plays a crucial role in reducing distress and enhancing motivation, particularly when individuals face challenging, threatening, or emotionally demanding tasks. In the context of social work, professionals with higher levels of self-efficacy are more likely to effectively mobilize and develop coping resources, and to implement adaptive coping strategies in their work environment.[18]

As a theoretical construct, emotional regulation encompasses physiological, behavioral, and cognitive processes through which individuals adjust and control their emotional responses.[19] It involves managing the onset, duration, and expression of emotional experiences.[20] Individuals rely on emotional regulation in everyday life to navigate and cope with stressful or difficult life situations, often employing such strategies unconsciously. It is important to emphasize that not all emotional regulation strategies are equally effective, and some may be maladaptive if used excessively or inappropriately.[21] This study examines two fundamentally different

---

14 Zimmerman, B. J.; Cleary, T. J., *Adolescents' Development of Personal Agency - The Role of Self-efficacy Beliefs and Self-regulatory Skills*, in: Pajares, F.; Urdan, T. (eds.), Self-Efficacy Beliefs of Adolescents, 2006, pp. 61-82.

15 Ventura, M.; Salanova, M.; Llorens, S., *Professional self-efficacy as a predictor of burnout and engagement: The role of challenge and hindrance demands*, The Journal of psychology, Vol. 149, No. 3, 2015, pp. 277-302.

16 Hackett, G.; Betz, N. E., *Self-efficacy and career choice and development. Self-efficacy, adaptation, and adjustment: Theory, research, and application*, Plenum Press, New York, 1995, p. 247.

17 Bandura, A., *Social foundations of thought and action: a social cognitive theory*, 1986, Englewood Cliffs, Prentice-Hall, p. 129.

18 Indregard, A. M. R.; Knardahl, S.,; Nielsen, M. B., *Emotional dissonance, mental health complaints, and sickness absence among health-and social workers, The moderating role of self-efficacy*, Frontiers in psychology, 2018, Vol. 9, p. 592.

19 Azam, H.; Rehman, M.; Rehman, M.*, Burnout, Compassion Fatigue and Vicarious Traumatic Experiences Among Social Workers: Emotional Regulation as a Protective Factor*, Pakistan Journal of Humanities and Social Sciences, Vol. 11, No. 4, 2023, pp. 4694-4710.

20 Gross, J. J., *Emotion regulation: Current status and future prospects,* Psychological inquiry, Vol. 26, No. 1, 1998, pp. 1-26.

21 Azam, H.; Rehman, M.; Rehman, M.*, op. cit.*, note 16, p. 192.

emotion regulation strategies: cognitive reappraisal and emotional suppression. Cognitive reappraisal involves reinterpreting a situation to modify its emotional significance, whereas emotional suppression entails deliberately holding back the outward expression of emotions[22]. Both strategies are particularly relevant for social workers, who must often accurately reassess emotionally charged situations to provide a more objective professional opinion and regulate their emotional responses. Additionally, social workers often need to suppress strong emotional reactions, such as anger or sadness, during client interactions. The use of these regulation strategies can modulate the intensity and duration of emotional responses, ultimately influencing the social worker's psychological resilience and quality of client care.[23]

1.1.1. The relationship between depressive symptoms, self-efficacy and emotional regulation

The relationship between self-efficacy, emotional regulation, and depressive symptoms has been substantiated through research across diverse populations. Self-efficacy has been identified as a mediator in the relationship between life stressors and depressive symptoms[24], a finding particularly relevant for high-stress professions. Observational studies indicate that a robust sense of self-efficacy is positively associated with subjective well-being, optimism, and life satisfaction.[25] Conversely, low self-efficacy has been linked to symptoms of anxiety, stress, and depression.[26]

Emotional regulation can be an important predictor of depression. For instance, a study involving 336 teachers showed that the tendency to use emotional reg-

---

22 Lazarus, R. S.; Alfert, E., *Short-circuiting of threat by experimentally altering cognitive appraisal*, The Journal of Abnormal and Social Psychology, Vol. 69, No. 2, 1964, p. 195.

23 Popov, S., *Relacije gognitivne emocionalne regulacije, osobina ličnosti i afektiviteta*, Primjenjena psihologija, Vol. 3, No. 1, 2010, pp. 59-76.

24 Maciejewski, P. K.; Prigerson, H. G.; Mazure, C. M., *Self-efficacy as a mediator between stressful life events and depressive symptoms: Differences based on history of prior depression*, The British Journal of Psychiatry, Vol. 176, No.4, 2020, pp. 373-378.

25 Azizli, N.; Atkinson, B. E.; Baughman, H. M.; Giammarco, E. A., *Relationships between general self-efficacy, planning for the future, and life satisfaction*, Personality and Individual Differences, Vol. 82, 2015, pp. 58-60; Bandura, A., *Self-efficacy mechanism in psychobiologic functioning*, in: Schwarzer, R., (ed.), Self-efficacy: Thought control of action, Hemisphere, 1992, pp. 355-394; Luszczynska, A.; Gutiérrez-Doña, B.; Schwarzer, R., *General self-efficacy in various domains of human functioning: Evidence from five countries*, International journal of Psychology, Vol. 40, No. 2, 2005, pp. 80-89.

26 Kashdan, T. B.; Roberts, J. E., *Social anxiety's impact on affect, curiosity, and social self-efficacy during a high self-focus social threat situation*, Cognitive Therapy and Research, Vol. 28, 2004, pp. 119-141; Kwasky, A. N.; Groh, C. J., *Vitamin D, depression and coping self-efficacy in young women: Longitudinal study*, Archives of Psychiatric Nursing, Vol. 28, No. 6, 2014, pp. 362-367

ulation contributes to a reduction in depressive symptoms.[27] Similarly, research conducted among 546 teachers found that individuals more prone to experience positive emotions tend to report lower levels of depressive symptoms and are more likely to employ effective emotional regulation strategies.[28] Another study involving 198 psychologists found that the use of self-compassion as a strategy is associated with reduced level of stress symptoms.[29]

Self-efficacy plays a central role in emotional regulation.[30] Perceived self-efficacy shapes emotional responses by shaping one's confidence, thereby reducing stress. Individuals with low self-efficacy often experience anxiety, fear, and apprehension, which may hinder cognitive processing and reduce persistence in completing tasks.[31] Additionally, low self-efficacy is linked to feelings of helplessness and depressive symptoms[32] and may function as a source of work-related stress.[33] While numerous studies have confirmed the positive association between self-efficacy and emotional regulation, it is noteworthy that most of these studies have been conducted within the educational setting, particularly among teachers.[34]

A study involving 238 teachers found that professional self-efficacy significantly influenced burnout - a major indicator of impaired mental health through the

---

27 Mérida-López, S.; Extremera, N.; Rey, L., *Emotion-regulation ability, role stress and teachers' mental health*, Occupational Medicine, Vol. 67, No. 7, 2017, pp. 540-545.

28 Qu, J.; Wang, Y., *Modelling the interaction between EFL teachers' personality traits, emotion regulation strategies, and teachers' depression: A structural equation approach*, European Journal of Education, Vol. 59, No. 4, 2024, pp. 1-20.

29 Finlay-Jones, A. L.; Rees, C. S.; Kane, R. T., *Self-compassion, emotion regulation and stress among Australian psychologists: Testing an emotion regulation model of self-compassion using structural equation modeling*, PloS one, Vol. 10, No. 7, 2015, pp. 1-19.

30 Bandura, A., *op. cit.*, note 14, p. 137.

31 Bandura, A., *Self-efficacy mechanism in human agency*, American psychologist, Vol. 37, No. 2, 1982, pp. 122-147; Caprara, G. V.; Steca, P.; Gerbino, M.; Paciello, M.; Vecchio, G. M., *Looking for adolescents' well-being: Self-efficacy beliefs as determinants of positive thinking and happiness*, Epidemiology and psychiatric sciences, Vol 15, No. 1, 2006, pp. 30-43.

32 Bandura, A., *op. cit.*, note 14, p. 146; Bandura, A., *op. cit.*, note 37, p. 134; Caprara, G. V.; Steca, P.; Gerbino, M.; Paciello, M.; Vecchio, G. M., *Looking for adolescents' well-being: Self-efficacy beliefs as determinants of positive thinking and happiness*, Epidemiology and psychiatric sciences, Vol. 15, No. 1, 2006, pp. 30-43.

33 Dijk, M., *Employee self-efficacy and job stress during organizational change: The mediating effect of risk perception*, University Twente Student Theses, 2009, p. 12.

34 Chan, D. W., *Perceived emotional intelligence and self-efficacy among Chinese secondary school teachers in Hong Kong*, Personality and individual differences, Vol. 36, No. 8, 2004, pp. 1781-1795; Chan, D. W., *Emotional intelligence, self-efficacy, and coping among Chinese prospective and in-service teachers in Hong Kong*, Educational Psychology, Vol. 28, No. 4, 2008, pp. 397-408; Mouton, A.; Hansenne, M.; Delcour, R; Cloes, M., *Emotional intelligence and self-efficacy among physical education teachers*, Journal of Teaching in Physical Education, Vol. 32, No. 4, 2013, pp. 342-354.

mediating role of emotional regulation.[35] Similarly, research involving 937 healthcare and social workers demonstrated that self-efficacy moderates the impact of emotional dissonance on mental distress, further reinforcing the interrelationship among these variables.[36]

1.2. EUROPEAN UNION GUIDELINES FOR WORKPLACE MENTAL HEALTH

The principal legislative instrument governing occupational safety and health within the European Union is the Framework Directive 89/391/EEC on the Safety and Health of Workers at Work. This directive establishes employers' general responsibilities to ensure the health and safety of workers across all work-related aspects, with a strong emphasis on preventive measures. Over the past three decades, a series of specific directives have been adopted to address different areas of occupational risk, building upon the general principles set forth in the Framework Directive. While these specific directives introduce more detailed and stricter regulations in specific areas, the core principles of the Framework Directive remain universally applicable. Under this legal framework, employers are obligated to manage all work-related risks, including those affecting mental health, often referred to as psychosocial risks. The directive mandates preventive measures and the implementation of health and safety procedures. Although the directive does not explicitly mention mental health concerns, psychosocial risks, or work-related stress, it mandates the identification and mitigation of all hazards at their source, as well as adjustments to work environments, equipment, and methods to reduce repetitive tasks and inflexible work structures.[37]

The European Union has also introduced several policy initiatives aimed at promoting mental health at work, but these initiatives are not binding. In 2023, the European Commission President announced a comprehensive approach to mental health, following insights from the " Call for Evidence" paper. This initiative highlights key priorities, including the reduction of psychosocial risks in the workplace, improving quality of life, supporting appropriate and patient-centered follow-up care and reintegration into work, and advancing destigmatization and rights protection. Two key aspects emphasized in the context of workplace mental

---

35 Fathi, J.; Greenier, V.; Derakhshan, A., *Self-efficacy, reflection, and burnout among Iranian EFL teachers: the mediating role of emotion regulation*, Iranian Journal of Language Teaching Research, Vol. 9, No. 2, 2021, pp. 13-37.

36 Indregard, A. M. R; *et al.*, *op. cit.*, note 18, p. 592.

37 Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L 183.

health are the right to disconnect from work and the right to return to employment following mental illness. Both rights are considered essential for fostering psychological safety and inclusive work environments.[38]

The European Parliament has also advanced several non-binding initiatives concerning mental health at workplace. In January 2021, it adopted a resolution urging the European Commission to propose legislation ensuring employees have the right to disconnect outside working hours without adverse consequences. The resolution advocates for employers to refrain from contacting employees during non-working hours and for Member States to safeguard employees who exercise this right. It also calls for an effective complaint mechanism and for professional training to be recognized as part of regular working hours, unless appropriately compensated.[39]

In March 2022, the European Parliament adopted a resolution outlining a renewed EU strategy for occupational health and safety beyond 2020. The resolution emphasizes that a supportive work environment enhances mental and physical well-being, thereby improving work performance. It recommends stronger measures to support mental health, including the incorporation of the right to disconnect within the EU Commission's Strategic Framework. Additionally, it proposes the development of the a directive focusing on the prevention of psychosocial risks.[40]

Further developments include the July 2022 report *Mental Health in the Digital World of Work*, which identifies risks to workers' mental well-being and privacy. The report emphasizes the disproportionate impact of the digital transition on individuals vulnerable to digital exclusion and calls for urgent, cross-sectoral policies integrated into broader EU mental health strategies. It also urges the European Commission to draft a directive that establishes minimum standards for mental health protection to guarantee all workers can effectively exercise their right to disconnect and regulate the use of digital tools in the workplace.[41]

---

38 Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions on a comprehensive approach to mental health [2023] Brussels.

39 Report of the European Law Institute, Guiding Principles on Implementing Workrs` Right to Disconnect, 2022, European Law Institute.

40 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Empty Eu strategic framework on health and safety at work 2021-2027 Occupational safety and health in a changing world of work [2O21] Brussels.

41 Committee on Employment and Social Affairs, Report on mental health in the digital world of work, 2022.

Additionally, European Agency for Safety and Health at Work (EU-OSHA) plays a significant role in supporting EU strategies, including the Strategic Framework on Health and Safety at Work 2021–2027.[42] EU-OSHA is responsible for collecting, analyzing, and disseminating information related to occupational safety and health. The agency promotes a culture of prevention to create better working conditions throughout the region[43] and has developed several non-binding policy initiatives: Mental Health Promotion in the Workplace: A good practice report (2011), European Campaign: Healthy Workplaces Manage Stress (2014-2015), EU Strategic Framework on Health and Safety at Work (2021-2027), Managing Stress and Psychosocial Risks E-guide (2023).[44] Given the increasing emphasis placed by the European Union on safeguarding mental health in the workplace, particularly through the identification and prevention of psychosocial risks, there is a growing need to better understand the psychological factors that contribute to workers' well-being. Investigating the interplay between depressive symptoms, self-efficacy, and emotional regulation among social workers can offer valuable insights that support evidence-based interventions aligned with EU mental health priorities.

2. AIM, PROBLEMS, AND HYPOTHESES

The aim of this research is to examine the contribution of individual psychosocial factors to the mental health of social workers.

Problem 1: To examine whether self-efficacy and emotional regulation predict the depressive symptoms of social workers.

Hypothesis 1: Low level self-efficacy and low level of emotion regulation will contribute negatively to the more depression symptoms among social workers .

Problem 2: To explore differences in mental health, self-efficacy, and emotional regulation among social worker based on their length of professional experience within the social welfare system

Hypothesis 2: Social workers with more years of professional experience will report lower level of depression symptoms, along with higher level of self-efficacy and emotional regulation.

---

42 *About EU-OSHA*, available at: [https://osha.europa.eu/en/about-eu-osha], Accessed 25 March 2025.

43 *European Agency for Safety and Health at Work (EU-OSHA)*, available at: [https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/european-agency-safety-and-health-work-eu-osha_en], Accessed 25 March 2025.

44 Marking, C.; Wynne, R., *Protecting and Promoting Mental Health in the Workplace – A guide to EU Policy Initiatives*, European Network for Health Promotion, 2024, pp. 13-20.

3. METHODS

3.1. PARTICIPANTS

A study sample comprised 256 social workers employed in the Regional Offices of the Croatian Institute for Social Work participated in the study. Descriptive characteristics of the participants are presented in Table 1.

Table 1 *Characteristics of the participants (N = 256)*

WORK EXPERIENCE IN THE SOCIAL WELFARE SYSTEM	PERCENTAGE OF PARTICIPANTS
up to six months	5.5 %
from seven months to one year	2.3 %
from one year and one month to two years	8.6 %
from two years and one month to three years	8.6 %
from three years and one month to four years	5.1 %
from four years and one month to five years	6.3 %
from five years and one month to ten years	21.9 %
from ten years and one month to twenty years	19.5 %
more than twenty years	22.3 %

3.2. INSTRUMENTS AND PROCEDURE

Four instruments were employed to collect the data: the Questionnaire on Sociodemographic Data, the Depression, Anxiety, and Stress Scale (DASS-21), the General Self-Efficacy Scale, and the Emotion Regulation Questionnaire.

The Questionnaire on Sociodemographic Data gathered data on participants' workplace, total years of professional experience within the social welfare system, current job responsibilities, tenure in their current role, and participation in support-related activities.

To measure the mental health status, the Depression, Anxiety, and Stress Scale (DASS-21) was used[45], instrument that assesses emotional symptoms across three dimensions (depression, anxiety, and stress) over the past two months. The questionnaire consists of 21 items – seven items per subscale – rated on a four-point response scale (0 = did not apply to me at all; 3 = applied to me almost entirely or most of the time). Higher scores reflect greater frequency of emotional symptoms. In this study, the score on the

[45] Lovibond, P. F.; Lovibond, S. H., *The structure of negative emotional states: Comparison of the Depression Anxiety Stress Scales (DASS) with the Beck Depression and Anxiety Inventories*, Behaviour research and therapy, Vol. 33, No. 3, 1995, 335-343; Udruga "Kako si", *DASS-21*, available at: [https://mentalnozdravlje.zagreb.hr/saznaj-kako-si-ispuni-upitnik-dass-21/], Accessed 5 February 2025.

depression subscale was used as a measure of depressive symptoms. The Cronbach's alpha coefficient for the depression subscale in this sample was α = .87

To measure participants' beliefs in their ability to manage challenges and overcome stressors , the General Self-Efficacy Scale was used.[46] . It consists of 10 items rated on a four-point scale (1 = not true at all; 4 – exactly true). Total scores are obtained by summing the responses, with higher scores indicating greater self-efficacy. The internal consistency coefficient of the scale in this study was α = .90.

The Emotion Regulation Questionnaire measures two emotion regulation strategies (cognitive reappraisal and emotional suppression).[47] The questionnaire consists of ten items —six assessing cognitive reappraisal and four assessing emotional suppression—rated on seven-point Likert-type response scale (1 = strongly disagree to 7 = strongly agree). Higher scores indicate more frequent use of the respective strategy. The internal consistency coefficient of the scale in this study was α =.79.

The study was conducted using an online survey administered through Google Forms. The study sample is convenience-based; the link to the survey was distributed via two channels: email invitations sent to the heads of the Regional Offices of the Croatian Institute for Social Work and posts within professional Facebook groups for social workers. Prior to data collection, ethical approval was obtained from the Expert Committee for Ethical Acceptability of Research at the Faculty of Law in Osijek, and institutional consent was granted by the Central Office of the Croatian Social Welfare Institute.

Before proceeding with the questionnaire, participants provided an informed consent.

4. RESULTS

Testing the Prerequisites for Normality Distribution (N = 256).

Field's standards were adopted as the criteria for assessing these prerequisites. According to All prerequisites for using parametric procedures were met. Table 1. displays descriptive data of the study sample.

---

[46] Jerusalem, M.; Schwarzer, R., *General Self-Efficacy Scale--Revised--English Version (Gse-R)*, [Database record], 1995, APA PsycTests; Vuković, E., *Povezanost između lokusa kontrole, samoefikasnosti i subjektivnog doživljaja uspješnosti*, 2021, ffunsa, p. 41.

[47] Gross, J. J.; John, O. P., *Individual differences in two emotion regulation processes: implications for affect, relationships, and well-being*, Journal of personality and social psychology, Vol. 85, No. 2, 2003, p. 348; Gračanin, A.; Kardum, I.; Gross, J. J., *The Croatian version of the Emotion Regulation Questionnaire: Links with higher-and lower-level personality traits and mood*, International Journal of Psychology, Vol. 55, No. 4, 2020, pp. 609-617.

Table 1 *Descriptive Indicators for Measured Variables in the Study (N = 256)*

	M	SD	α	TR	PR
Depressives symptoms	5.54	4.76	.87	0 - 21	0 – 21
Self-efficacy	28.25	5.33	.90	10 - 40	12 - 40
Cognitive Reappraisal	26.39	6.98	.84	6 – 42	6 – 36
Emotional Suppression	12.70	5.01	.79	4 - 28	4 – 28

Note: M – Arithmetic Mean, SD – Standard Deviation, α – Cronbach's Alpha Coefficient, TR – Theoretical Range, PR – Perceived Range

The findings suggest that participants generally report lower levels of depressive symptoms. On average, participants rated themselves as moderately self-efficacious and believed they possessed adequate strategies for emotion regulation, both in terms of cognitive reappraisal and emotional suppression. Notably, greater-than-expected variability was observed in the self-efficacy scores, while lower variability was noted in the emotion regulation measures.

Table 2 *Pearson's Correlation Coefficients for Variables Used in the Study*

	Work Experience in the Social Welfare System	Depression Symptoms	Self-Efficacy	Cognitive Reappraisal	Emotional Suppression
Work Experience in the Social Welfare System	-	.15*	-.13*	.07	-.01
Depression Symptoms		-	-.19**	-.05	.25**
Self-Efficacy			-	.31**	-.05
Cognitive Reappraisal				-	22**
Emotional Supression					-

Note: ** p < .01, * p < .05

As shown in Table 4, depressive symptoms are weakly negatively correlated with self-efficacy (r = -.19, p < .01), and positively correlated with emotional suppression (r = .25, p < .01), suggesting that participants who tend to suppress their emotions report higher levels of depressive symptoms. Additionally, self-efficacy was positively correlated with cognitive reappraisal (r = .31, p < .01), indicating that individuals with higher self-efficacy are more likely to employ cognitive reappraisal.

Prior to interpreting the results of the regression analysis, several assumptions were verified. The Durbin-Watson coefficient is 1.80, indicating independence of residuals and satisfying the acceptable range (1–3) as recommended by Field (2009) Further, tests for multicollinearity revealed acceptable values: ranged from .38

to .98 (above the critical threshold of .10), and Variance Inflation Factors (VIF) ranged from 1.02 to 2.70 (well below the upper limit of 10). These results confirm the absence of multicollinearity and support the validity of the regression models.

Table 3 Regression analysis with depressive symptoms as a dependent variable (N = 256)

		R2	***ΔR2***	***β***	***ΔF***
Model	Predictors				
I	Work Experience in the Social Welfare System	.05	.05	.13*	6.89**
	Self-efficacy			-.17**	
II	Work Experience in the Social Welfare System			.14*	
	Self-efficacy	.12	.06	-.13*	8.98**
	Cognitive Reappraisal			-.08	
	Emotional Suppression			.26**	

The results of the hierarchical regression analysis are presented in Table 5. The results for Model I show that both work experience in the social welfare system and self-efficacy were significant predictors of depressive symptoms. Specifically, work experience was positively associated with depressive symptoms (β = .13, p < .01), whereas self-efficacy had a negative association (β = -.17, p < .01).

Model II incorporated additional predictors: cognitive reappraisal and emotional suppression, alongside the variables from Model I. In this model, work experience (β = .14, p < .05) and emotional suppression (β = .26, p < .01) were significant predictors, while self-efficacy retained a weaker but still statistically significant negative effect (β = -.13, p < .05). In contrast, cognitive reappraisal was not a significant predictor in this model. The increase in explained variance was modest, rising from R^2 = .05 in Model I to R^2 = .06 in Model II after integrating additional predictors.

Hypothesis 2, which posits that social workers with greater overall work experience would demonstrate better mental health, higher self-efficacy, and more effective emotional regulation, was tested using correlation analysis. Although the DASS-21 instrument includes subscales for anxiety, stress, and depression, this study focused exclusively on depressive symptoms. The decision to limit the analysis to depression was driven by the specific aim of examining how self-efficacy and emotion regulation contribute to the presence of depressive symptoms among social workers. Contrary to expectations, the findings, summarized in Table 4, did not support the hypothesis. Specifically, greater work experience was positively correlated with depressive symptoms (r = .15; p < .05) and negatively correlated

with self-efficacy ($r = -.13$; $p < .05$). These results indicate that social workers with more years of service report higher levels of depressive symptoms and lower levels of self-efficacy. No significant correlations were observed between work experience and measures of emotion regulation (either cognitive reappraisal or emotional suppression).

5. DISCUSSION

The objective of this study was to examine which individual psychosocial factors contribute to the depressive symptoms among social workers. It was hypothesized that self-efficacy and emotional regulation would exert a statistically negative effect on the depressive symptoms among social workers.

Descriptive indicators reveal that participants report relatively lower levels of depressive symptoms. Additionally, the descriptive data suggest that participants perceive themselves as moderately self-efficacious and as competent in employing cognitive reappraisal and emotional suppression strategies. These findings diverge from those reported in earlier studies. For instance, research conducted among employees of the Social Welfare Center in Zagreb, found that 45.2% of employees experienced an initial stage of burnout.[48] Similarly, Ilijaš found that up to 80% of social workers in social welfare institutions reported moderate to high emotional exhaustion.[49] Prior research has also consistently demonstrated that chronic exposure diminishes professional effectiveness.[50] This is consistent with the descriptive indicators of this study, as social workers perceive themselves as moderately effective while also reporting lower levels of depressive symptoms.

The first hypothesis, proposing a statistically negative effect of self-efficacy and emotional regulation on depressive symptoms in social workers, was partially supported. Specifically, self-efficacy and emotional suppression emerged as significant predictors of depressive symptoms, whereas cognitive reappraisal did not. The results demonstrate that social workers who perceive themselves as having higher self-efficacy tend to report lower levels of depressive symptoms. These findings are consistent with prior research among mental health professionals, including psychiatrists and psychologists, which identified a positive relationship between

---

48 Friščić, Lj., *Čimbenici profesionalnog stresa i sagorijevanja u radu socijalnih radnika u Centru za socijalnu skrb Zagreb*, Ljetopis socijalnog rada, Vol. 13, No. 2, 2006, pp. 347-370.

49 Ilijaš, A., *Odrednice profesionalnog stresa i zdravlja socijalnih radnika u centrima za socijalnu skrb u Republici Hrvatskoj*, 2023, University in Zagreb, Dabar. p. 86.

50 Bakker, A. B.; Demerouti, E.; Sanz-Vergel, A. I., *Burnout and work engagement: The JD–R approach*, Annual review of organizational psychology and organizational behavior, Vol. 1, No. 2014, 2014, pp. 389-411.

self-efficacy and psychological well-being.[51] A study conducted with social workers in Croatia also highlighted the role of self-efficacy in mitigating emotional exhaustion.[52] However, even some studies do not confirm that self-efficacy is a statistically significant predictor of mental health[53]. Its relevance remains evident, particularly in the context of professional helpers such as social workers.[54] The descriptive findings from this study further support this association.

Emotional suppression was the only emotional regulation strategy that significantly predicted depressive symptoms, with increased use of this strategy correlating with levels of depression. Comparable results were found in the research conducted among medical personnel, where surface acting as an emotion regulation strategy was positively associated with burnout.[55] These study results align with the findings of Kshtriya et al., which demonstrated a positive relationship between professional stress and emotional suppression, while there was no significant effect for cognitive reappraisal.[56] However, a study conducted among mental health professionals showed that cognitive reappraisal and emotional expression regulation do not alleviate secondary traumatic stress Although the literature presents divergent results regarding the relationship between emotional regulation and mental health, a pattern emerges in which emotional suppression is consistently associated with negative psychological outcomes among helping professionals.[57] The habitual use of emotional suppression is often necessitated by the emotionally charged nature of social work, yet it may foster inauthenticity and reduce the likelihood of experiencing positive emotions, thereby contributing to the onset of depressive symptoms.

---

51 Saleem, T.; Hawamdeh, E. S., *Counselor self-efficacy, spiritual well-being and compassion satisfaction/ fatigue among mental health professionals in Pakistan*, Current Psychology, Vol. 42, No. 16, 2023, pp. 13785-13797.

52 Ilijaš, A., *op. cit.,* note 49, p. 72.

53 Vax, S.; Schreuer, N.; Sachs, D., *Work-related self-efficacy of occupational therapists in mental health*, Scandinavian Journal of Occupational Therapy, Vol 19, No. 1, 2012, pp. 42-48; Dianat, I.; Azemi, S.; Abdollahazade, F.; Bazazan, A.; Jafarabadi, M. A., *Does self-efficacy mediate the relationship between occupational stress and mental health problems?A study among nursing professionals,* Health Promotion Perspectives, Vol. 11, No. 3, 2021, p. 344.

54 Ilijaš, A., *op. cit.,* note 64, p. 74.

55 Zammuner, L. V.; Lotto, L.; Galli, C., *Regulation of emotions in the helping professions: nature, antecedents and consequences*, Australian e-Journal for the Advancement of Mental Health, Vol. 2, No. 1, 2003, pp. 43-55.

56 Kshtriya, S.; Lawrence, J.; Kobezak, H. M.; Popok, P. J.; Lowe, S., *Investigating strategies of emotion regulation as mediators of occupational stressors and mental health outcomes in first responders*, International journal of environmental research and public health, Vol. 19, No. 12, 2022, p. 7009.

57 Gross, J. J.; *et al.*, *op. cit.,* note 47, p. 359.

The second hypothesis posited that social workers with greater tenure in the social welfare system would exhibit less depressive symptoms and higher self-efficacy and emotional regulation capabilities. Contrary to this assumption, the findings reveal that social workers with longer work experience report more depressive symptoms and lower self-efficacy. Although it is generally recognized that professional experience serves as a protective factor— facilitating the development of coping mechanisms, emotional intelligence, and resilience—this was not supported by the current data.[58] A previous study which included 160 social workers, found that experienced social workers adapt better to job demands.[59] Research conducted among social work students, showed that symptoms of secondary stress decline with increased experience.[60] However, some studies report opposing results, which partially align with our findings. For instance, Poulin and Walter reported that older social workers, who presumably have more work experience, are more susceptible to emotional exhaustion and depersonalization.[61] Although previous research has established a link between work experience and mental health, it is possible that social workers encounter challenges that cannot be resolved through individual professional development - such as lack of institutional support, excessive workloads, and frequent policy changes. Since social workers cannot eliminate such challenges through their own professional development and development, work experience may not substantially enhance mental health in such contexts.

These current findings also indicate that social workers with shorter tenures perceive themselves as more self-efficacious. This contradicts much of the existing literature. Studies involving nurses and medical technicians, professions characterized by high levels of stress, have shown that individuals with more work experience tend to report higher self-efficacy[62] Similarly, research among psychiatrists found that those over the age of 30 assessed their self-efficacy more positively

---

58 Hajncl, Lj.; Vučenović, D., *Odnos opće mentalne sposobnosti, osobina ličnosti i transformacijskog stila rukovođenja: Uloga izvora procjene*, Psihologijske teme, Vol. 23, No. 3, 2014, pp. 369-387.

59 Michalopoulos, L. M.; Aparicio, E., *Vicarious trauma in social workers: The role of trauma history, social support, and years of experience*, Journal of Aggression, Maltreatment & Trauma, Vol. 21, No. 6, 2012, pp. 646-664.

60 Ben-Porat, A.; Shemesh, S.; Reuven Even Zahav, R.; Gottlieb, S.; Refaeli, T., *Secondary traumatization among social work students—The contribution of personal, professional, and environmental factors*, The British Journal of Social Work, Vol. 51, No. 3, 2021, pp. 982-998.

61 Poulin, J.; Walter, C., *Social worker burnout: A longitudinal study*, Social Work Research and Abstracts, Vol. 29, No. 4, 1993, pp. 5-11.

62 Soudagar, S.; Rambod, M.; Beheshtipour, N., *Factors associated with nurses' self-efficacy in clinical setting in Iran, 2013*, Iranian journal of nursing and midwifery research, Vol. 20, No. 2, 2015, pp. 226-231; Kurnia, T. A.; Trisyani, Y.; Prawesti, A., *Factors associated with nurses' self-efficacy in applying palliative care in intensive care unit*, Jurnal Ners, Vol. 13, No. 2, 2019, pp. 219-226.

compared to younger professionals.[63] A study among social workers yielded partially contradictory results, failing to establish a statistically significant relationship between self-efficacy, work experience, or age.[64]

Finally, the relationship between emotional regulation and work experience was not confirmed in the present study, despite general support for this association in existing literature. Prior research involving healthcare workers found that older participants, who also had more work experience, were more likely to use adaptive emotional regulation strategies.[65] Contrary to this expectation, however, a study by Cheavens et al. found that older psychiatrists were more inclined to employ maladaptive emotional regulation strategies compared to their younger colleagues.[66] Additionally, findings by Kafetsios and Loumakou suggest that interpersonal emotional intelligence significantly predicts job satisfaction among older employees.[67] Opposite to the proposed hypothesis, a study conducted among teachers found that those with longer work experience had poorer emotional regulation compared to less experienced peers.[68]

5.1. ALIGNING WORKPLACE MENTAL HEALTH POLICIES WITH SELF-EFFICACY AND EMOTIONAL REGULATION

The findings of this study emphasize the pivotal role of self-efficacy and emotional regulation in alleviating depressive symptoms among social workers. These findings align with and reinforce the European Union's (EU) occupational health and safety framework, particularly regarding the management of psychosocial risks in the workplace. The Framework Directive 89/391/EEC requires employers to implement preventive measures to protect workers from all job-related hazards, in-

63 Wang, C. M.; Qu, H. Y.; Xu, H. M., *Relationship between social support and self-efficacy in women psychiatrists*, Chinese Nursing Research, Vol. 2, No. 4, 2015, pp. 103-106.

64 Berlanda, S.; Pedrazza, M.; Trifiletti, E.; Fraizzoli, M., *Dissatisfaction in child welfare and its role in predicting self-efficacy and satisfaction at work: A mixed-method research*, BioMed research international, 2017, Vol. 2017, No. 1, p. 5249619.

65 Scheibe, S.; Spieler, I.; Kuba, K., *An older-age advantage? Emotion regulation and emotional experience after a day of work*, Work, Aging and Retirement, Vol. 2, No. 3, 2016, pp. 307-320.

66 Cheavens, J. S.; Zachary Rosenthal, M.; Banawan, S. F.; Lynch, T. R., *Differences in emotional experience and emotion regulation as a function of age and psychiatric condition*, Aging and Mental Health, Vol. 12, No. 4, 2008, pp. 478-487.

67 Kafetsios, K.; Loumakou, M., *A comparative evaluation of the effects of trait emotional intelligence and emotion regulation on affect at work and job satisfaction*, International Journal of Work Organisation and Emotion, 2007, Vol. 2, No. 1, pp. 71-87.

68 Ercegovac, I. R.; Koludrović, M.; Jukić, T., *Emocionalna kompetentnost i stres u nastavničkim zanimanjima*, Zbornik radova Filozofskog fakulteta u Splitu, No. 2-3, 2009, pp. 85-96.

cluding those affecting mental health.[69] In view of the current study's finding that higher self-efficacy correlates with lower levels of depressive symptoms, there is a compelling rationale for workplace policies that promote employees' capacity to manage occupational stressors. Employers who implement self-efficacy-enhancing measures—such as structured professional development programs, peer mentoring initiatives, and systematic feedback channels can make meaningful contributions to improving mental health outcomes in accordance with EU policy objectives.

Additionally, emotional regulation emerged as a significant protective factor against depressive symptoms, highlighting the necessity of workplace environments that actively support psychological well-being. The European Commission's 2023 comprehensive approach to mental health identifies psychosocial risk management as a central focus[70]. The present study substantiates this priority by demonstrating that individuals with stronger emotional regulation skills report lower levels of depressive symptoms. These findings hold particular relevance to the EU's commitment to facilitating reintegration into the workforce following periods of mental illness. If workplaces encourage environments that actively promote emotional regulation through flexible work arrangements, access to psychological support services, and stress management training, they can facilitate a smoother return to work and long-term well-being.

Moreover, the study's results resonate with the European Parliament's initiative to institutionalize the right to disconnect as a fundamental worker protection. The established association between emotional regulation and reduced depressive symptoms suggests that policies enabling employees to disengage from occupational stress outside of working hours are integral to mental health promotion. The EU Parliament's 2021 resolution advocating for a legal framework for the right to disconnect is thus particularly pertinent.[71] The present study provides empirical support for such policies by illustrating how effective emotional responses can buffer work-related psychological distress. Employers who uphold workers' boundaries and minimize excessive job demands -by limiting after-hours communication - may enhance work-life balance and reduce workplace-induced depressive symptoms.

---

69 Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L 183.

70 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee Of The Regions on a comprehensive approach to mental health [2023] Brussels.

71 Report of the European Law Institute, Guiding Principles on Implementing Workrs` Right to Disconnect, 2022, European Law Institute.

The European Agency for Safety and Health at Work (EU-OSHA) has consistently prioritized mental health promotion through various initiatives, including the "Managing Stress and Psychosocial Risks E-Guide" (2023).[72] The findings of the present study offer strong support for the fundamental messages of these initiatives: that effective management of psychosocial risks should include individual-level interventions designed to strengthen self-efficacy and emotional regulation. As this study demonstrates, individuals exhibiting higher levels of self-efficacy and superior emotional regulation skills report fewer symptoms of depression. This affirms the importance of embedding psychological skill-building modules into occupational health and safety strategies. In addition to systemic policy reforms, targeted interventions aimed at fortifying psychological resilience among employees may play an essential role in safeguarding mental health in high-stress professions.

These findings not only align with existing EU strategies but also underscore the need for more explicit institutional commitments to psychosocial risk management. Future policy developments, such as the expansion of EU-OSHA guidelines, should consider integrating mandatory psychological skill-building interventions, particularly those targeting self-efficacy and emotional regulation. By embedding these protective factors into legal and institutional frameworks, the EU can move beyond general recommendations and toward enforceable standards that proactively safeguard mental health in the workplace.

6. CONCLUSION

This study underscores the significant role of self-efficacy and emotional regulation on the mitigation of depressive symptoms among social workers, reinforcing the broader European policy framework for promoting mental health in occupational settings. Given the emotionally demanding nature of social work, fostering psychological resilience is essential to maintaining both the personal well-being and professional efficacy.

The findings resonate with the European Commission's directives concerning mental health in the workplace, which advocate for proactive strategies such as psychological support systems, resilience-building programs, and organizational policies addressing occupational stress. By aligning institutional practices with

[72] *About EU-OSHA*, available at: [https://osha.europa.eu/en/about-eu-osha], Accessed 25 March 2025; *European Agency for Safety and Health at Work (EU-OSHA)*, available at: [https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/european-agency-safety-and-health-work-eu-osha_en], Accessed 25 March 2025.

these directives, organizations can construct a more supportive work environment that reduces the risks of burnout, emotional exhaustion, and depressive symptoms.

Furthermore, the present study contributes to the growing body of research advocating for systematic and evidence-based mental health policies in the social work sector. Implementing targeted interventions, such as training programs focused on emotional regulation and the development of self-efficacy, has the potential to significantly improve social workers' capacity to manage occupational stress and avert mental health decline. These interventions not only benefit the individual professionals but also enhance the overall quality of social services provided to equity-deserving populations.

In accordance with European policy recommendations, it is imperative for policymakers and organizational leaders to prioritize mental health protection as a fundamental aspect of workplace well-being. Future research should explore longitudinal interventions and policy-based initiatives that reinforce the connection between workplace mental health programs and sustained professional viability of social workers. By adopting a holistic approach to mental health, institutions can cultivate a more resilient and competent workforce capable of addressing the complex challenges inherent in the social work profession.

REFERENCES

BOOKS AND ARTICLES

1. Alowais, S. A.; Alghamdi, S. S.; Alsuhebany, N.; Alqahtani, T.; Alshaya, A. I.; Almohareb, S. N.; Aldairem, A.; Alrashed, M.; Bin Saleh, K.; Badreldin, H. A.; Al Yami, M. S.; Al Harbi, S.; Albekairy, A. M., *Revolutionizing healthcare: the role of artificial intelligence in clinical practice*, BMC medical education, Vol. 23, Issue 1, 2023, 689 – 704.
2. Azam, H.; Rehman, M.; Rehman, M., *Burnout, Compassion Fatigue and Vicarious Traumatic Experiences Among Social Workers: Emotional Regulation as a Protective Factor*, Pakistan Journal of Humanities and Social Sciences, Vol. 11, Issue 4, 2023, pp. 4694-4710.
3. Azizli, N.; Atkinson, B. E.; Baughman, H. M.; Giammarco, E. A., Relationships between general self-efficacy, planning for the future, and life satisfaction, *Personality and Individual Differences*, Vol. 82, 2015, pp. 58-60.
4. Bakker, A. B.; Demerouti, E.; Sanz-Vergel, A. I., *Burnout and work engagement: The JD–R approach*, Annual review of organizational psychology and organizational behavior, Vol. 1, Issue 2014, 2014, pp. 389-411.
5. Bandura, A., *On the functional properties of perceived self-efficacy revisited*, Journal of management, Vol. 38, Issue 1, 2012, pp. 9-44.
6. Bandura, A., *Self-efficacy – The excercise of control*, W.H. Freeman, 1997
7. Bandura, A., *Self-efficacy mechanism in psychobiologic functioning*, in: Schwarzer, R., (ed.), Self-efficacy: Thought control of action, Hemisphere, 1992, pp. 355-394.

8. Bandura, A., Self-efficacy mechanism in human agency, *American psychologist*, Vol. 37, Issue 2, 1982, pp. 122-147.
9. Bandura, A., Social Foundations of Thought and Action: A Social Cognitive Theory, Prentice-Hall, Inc., New Yersey, 1986, pp. 94-107.
10. Bandura, A., Social foundations of thought and action: a social cognitive theory, 1986, Englewood Cliffs, Prentice-Hall
11. Bennet, P.; Evans, R.; Tattersall, A., *Stress and coping in social workers: A preliminary investigation*, The British Journal of Social Work, Vol. 23, Issue 1, 1993, pp. 31-44.
12. Ben-Porat, A.; Shemesh, S.; Reuven Even Zahav, R.; Gottlieb, S.; Refaeli, T., *Secondary traumatization among social work students—The contribution of personal, professional, and environmental factors*, The British Journal of Social Work, Vol. 51, Issue 3, 2021, pp. 982-998.
13. Berlanda, S.; Pedrazza, M.; Trifiletti, E.; Fraizzoli, M., *Dissatisfaction in child welfare and its role in predicting self-efficacy and satisfaction at work: A mixed-method research*, BioMed research international, 2017, Vol. 2017, Issue 1, pp. 1-12.
14. Caprara, G. V.; Steca, P.; Gerbino, M.; Paciello, M.; Vecchio, G. M., *Looking for adolescents' well-being: Self-efficacy beliefs as determinants of positive thinking and happiness*, Epidemiology and psychiatric sciences, Vol. 15, Issue 1, 2006, pp. 30-43.
15. Chan, D. W., *Perceived emotional intelligence and self-efficacy among Chinese secondary school teachers in Hong Kong*, Personality and individual differences, Vol. 36, Issue 8, 2004, pp. 1781-1795.
16. Cheavens, J. S.; Zachary Rosenthal, M.; Banawan, S. F.; Lynch, T. R., *Differences in emotional experience and emotion regulation as a function of age and psychiatric condition*, Aging and Mental Health, Vol. 12, Issue 4, 2008, pp. 478-487.
17. Chodavadia, P.; Teo, I.; Poremski, D.; Fung, D. S. S.; Finkelstein, E. A., *Prevalence and economic burden of depression and anxiety symptoms among Singaporean adults: results from a 2022 web panel*, BMC psychiatry, Vol. 23, Issue 1, 2023, pp. 104 – 112.
18. Connorton, E.; Perry, M. J.; Hemenway, D.; Miller, M., *Humanitarian relief workers and trauma-related mental illness*, Epidemiologic reviews, Vol. 34, Issue 1, 2012, pp. 145-155
19. Deutsch, C. J., A *survey of therapists' personal problems and treatment*, Professional Psychology: Research and Practice, Vol. 16, Issue 2, 1985, p. 305-315.
20. Dianat, I.; Azemi, S.; Abdollahazade, F.; Bazazan, A.; Jafarabadi, M. A., *Does self-efficacy mediate the relationship between occupational stress and mental health problems?A study among nursing professionals*, Health Promotion Perspectives, Vol. 11, Issue 3, 2021, pp. 344-350.
21. Dijk, M., *Employee self-efficacy and job stress during organizational change: The mediating effect of risk perception*, University Twente Student Theses, 2009, pp. 1-14.
22. Ercegovac, I. R.; Koludrović, M.; Jukić, T., *Emocionalna kompetentnost i stres u nastavničkim zanimanjima*, Zbornik radova Filozofskog fakulteta u Splitu, Issue 2-3, 2009, pp. 85-96.
23. Fathi, J.; Greenier, V.; Derakhshan, A., *Self-efficacy, reflection, and burnout among Iranian EFL teachers: the mediating role of emotion regulation*, Iranian Journal of Language Teaching Research, Vol. 9, Issue 2, 2021, pp. 13-37.
24. Field, A., Discovering Statistics Using SPSS, Sage publications, London, 2009

25. Finlay-Jones, A. L.; Rees, C. S.; Kane, R. T., Self-compassion, emotion regulation and stress among Australian psychologists: Testing an emotion regulation model of self-compassion using structural equation modeling, PloS one, Vol. 10, Issue 7, 2015, pp. 1-19.
26. Friščić, Lj., *Čimbenici profesionalnog stresa i sagorijevanja u radu socijalnih radnika u Centru za socijalnu skrb Zagreb*, Ljetopis socijalnog rada, Vol. 13, Issue 2, 2006, pp. 347-370.
27. Gross, J. J., *Emotion regulation: Current status and future prospects*, Psychological inquiry, Vol. 26, Issue 1, 1998, pp. 1-26.
28. Gross, J. J.; John, O. P., *Individual differences in two emotion regulation processes: implications for affect, relationships, and well-being*, Journal of personality and social psychology, Vol. 85, Issue 2, 2003, pp- 348-362.
29. Hackett, G.; Betz, N. E., *Self-efficacy and career choice and development. Self-efficacy, adaptation, and adjustment: Theory, research, and application*, Plenum Press, New York, 1995, p. 232-334.
30. Hajncl, Lj.; Vučenović, D., *Odnos opće mentalne sposobnosti, osobina ličnosti i transformacijskog stila rukovođenja: Uloga izvora procjene*, Psihologijske teme, Vol. 23, Issue 3, 2014, pp. 369-387.
31. Hur, W. M.; Moon, T. W.; Han, S. J., *The role of chronological age and work experience on emotional labor: The mediating effect of emotional intelligence*, Career Development International, Vol. 19, Issue 7, 2014, pp. 734-754.
32. Ilijaš, A., Odrednice profesionalnog stresa i zdravlja socijalnih radnika u centrima za socijalnu skrb u Republici Hrvatskoj, 2023, University in Zagreb, Dabar, pp. 1-94.
33. Indregard, A. M. R; Knardahl, S.; Nielsen, M. B., *Emotional dissonance, mental health complaints, and sickness absence among health-and social worker*, The moderating role of self-efficacy, Frontiers in psychology, Vol. 9, 2018, pp. 1-9.
34. Jerusalem, M.; Schwarzer, R., *General Self-Efficacy Scale--Revised--English Version (Gse-R)*, [Database record], 1995, APA PsycTests
35. Kafetsios, K.; Loumakou, M., *A comparative evaluation of the effects of trait emotional intelligence and emotion regulation on affect at work and job satisfaction*, International Journal of Work Organisation and Emotion, 2007, Vol. 2, Issue 1, pp. 71-87.
36. Kashdan, T. B.; Roberts, J. E., *Social anxiety's impact on affect, curiosity, and social self-efficacy during a high self-focus social threat situation*, Cognitive Therapy and Research, Vol. 28, 2004, pp. 119-141.
37. Kshtriya, S.; Lawrence, J.; Kobezak, H. M.; Popok, P. J.; Lowe, S., *Investigating strategies of emotion regulation as mediators of occupational stressors and mental health outcomes in first responders*, International journal of environmental research and public health, Vol. 19, Issue 12, 2022, pp. 1-13.
38. Kurnia, T. A.; Trisyani, Y.; Prawesti, A., *Factors associated with nurses' self-efficacy in applying palliative care in intensive care unit,* Jurnal Ners, Vol. 13, Issue 2, 2019, pp. 219-226.
39. Kwasky, A. N.; Groh, C. J., *Vitamin D, depression and coping self-efficacy in young women: Longitudinal study, Archives of Psychiatric Nursing*, Vol. 28, Issue 6, 2014, pp. 362-367.
40. Lazarus, R. S.; Alfert, E., *Short-circuiting of threat by experimentally altering cognitive appraisal*, The Journal of Abnormal and Social Psychology, Vol. 69, Issue 2, 1964, pp. 195-205.

41. Lovibond, P. F.; Lovibond, S. H., *The structure of negative emotional states: Comparison of the Depression Anxiety Stress Scales (DASS) with the Beck Depression and Anxiety Inventories*, Behaviour research and therapy, Vol. 33, Issue 3, 1995, pp. 335-343.
42. Luszczynska, A.; Gutiérrez-Doña, B.; Schwarzer, R., *General self-efficacy in various domains of human functioning: Evidence from five countries*, International journal of Psychology, Vol. 40, Issue 2, 2005, pp. 80-89.
43. Maciejewski, P. K.; Prigerson, H. G.; Mazure, C. M., Self-efficacy as a mediator between stressful life events and depressive symptoms: Differences based on history of prior depression, The British Journal of Psychiatry, Vol. 176, Issue 4, 2020, pp. 373-378.
44. Maddock, A., *Psychological Protective and Risk Factors for Depression, Anxiety and Mental Well-Being in Social Workers*, The British Journal of Social Work, Vol. 54, Issue 8, 2024a, pp. 3773-3793.
45. Maddock, A., *The relationships between stress, burnout, mental health and well-being in social workers*, The British Journal of Social Work, Vol. 54, Issue 2, 2024b, pp. 668-686.
46. Marking, C.; Wynne, R., *Protecting and Promoting Mental Health in the Workplace – A guide to EU Policy Initiatives*, European Network for Health Promotion, 2024, pp. 13-20.
47. Mérida-López, S.; Extremera, N.; Rey, L., *Emotion-regulation ability, role stress and teachers' mental health*, Occupational Medicine, Vol. 67, Issue 7, 2017, pp. 540-545.
48. Michalopoulos, L. M.; Aparicio, E., *Vicarious trauma in social workers: The role of trauma history, social support, and years of experience*, Journal of Aggression, Maltreatment & Trauma, Vol. 21, Issue 6, 2012, pp. 646-664.
49. Mouton, A.; Hansenne, M.; Delcour, R.; Cloes, M., *Emotional intelligence and self-efficacy among physical education teachers*, Journal of Teaching in Physical Education, Vol. 32, Issue 4, 2013, pp. 342-354.
50. Park, D.; Lee, M.; Osborne, K.; Minnick, D., *Stress and depression in Ohio Social Workers during the COVID-19 pandemic: the buffering role of Social Connectedness*, Health & Social Work, Vol. 48, Issue 1, 2023, pp. 33-42.
51. Popov, S., *Relacije gognitivne emocionalne regulacije, osobina ličnosti i afektiviteta*, Primjenjena psihologija, Vol. 3, Issue 1, 2010, pp. 59-76.
52. Poulin, J.; Walter, C., *Social worker burnout: A longitudinal study*, Social Work Research and Abstracts, Vol. 29, Issue 4, 1993, pp. 5-11.
53. Qu, J.; Wang, Y., *Modelling the interaction between EFL teachers' personality traits, emotion regulation strategies, and teachers' depression: A structural equation approach*, European Journal of Education, Vol. 59, Issue 4, 2024, pp. 1-20.
54. Saleem, T.; i Hawamdeh, E. S., *Counselor self-efficacy, spiritual well-being and compassion satisfaction/fatigue among mental health professionals in Pakistan*, Current Psychology, Vol. 42, Issue 16, 2023, pp. 13785-13797.
55. Scheibe, S.; Spieler, I.; Kuba, K., *An older-age advantage? Emotion regulation and emotional experience after a day of work*, Work, Aging and Retirement, Vol. 2, Issue 3, 2016, pp. 307-320.
56. Siebert, D. C., *Depression in North Carolina social workers: Implications for practice and research*, Social Work Research, Vol. 28, Issue 1, 2004, pp. 30-40.

57. Singh, J.; Hassard, J., *Emotional labour, emotional regulation strategies, and secondary traumatic stress: a cross-sectional study of allied mental health professionals in the UK*, The Social Science Journal, Vol. 2, Issue 1, 2021, pp. 1-15.
58. Soudagar, S.; Rambod, M.; Beheshtipour, N., *Factors associated with nurses' self-efficacy in clinical setting in Iran, 2013*, Iranian journal of nursing and midwifery research, Vol. 20, Issue 2, 2015, pp. 226-231.
59. Stanley, N.; Manthorpe, J.; White, M., *Depression in the profession: Social workers' experiences and perceptions*, British Journal of Social Work, Vol. 37, Issue 2., 2007, pp. 291-298.
60. Straussner, S. L. A.; Senreich, E.; Steen, J. T., *Wounded healers: A multistate study of licensed social workers' behavioral health problems*, Social work, Vol. 63, Issue 2, 2018, pp. 125-133.
61. Vax, S.; Schreuer, N.; Sachs, D., *Work-related self-efficacy of occupational therapists in mental health*, Scandinavian Journal of Occupational Therapy, Vol 19, Issuse 1, 2012, pp. 42-48.
62. Ventura, M.; Salanova, M.; Llorens, S., *Professional self-efficacy as a predictor of burnout and engagement: The role of challenge and hindrance demands*, The Journal of psychology, Vol. 149, Issue 3, 2015, pp. 277-302.
63. Vuković, E., *Povezanost između lokusa kontrole, samoefikasnosti i subjektivnog doživljaja uspješnosti*, 2021, ffunsa, pp. 1-28.
64. Wang, C. M.; Qu, H. Y.; Xu, H. M., *Relationship between social support and self-efficacy in women psychiatrists*, Chinese Nursing Research, Vol. 2, Issue 4, 2015, pp. 103-106.
65. Zaid, S. M.; Fadel, A. M.; Taresh, S. M.; Mohammed, L. A.; Fitriana, N., *Psychologists' perspective of mental health in Yemen during the civil war and COVID-19: a qualitative inquiry*, Current Psychology, Vol. 43, Issue 16, 2024, pp. 14774 – 14785.
66. Zammuner, L. V.; Lotto, L.; Galli, C., *Regulation of emotions in the helping professions: nature, antecedents and consequences*, Australian e-Journal for the Advancement of Mental Health, Vol. 2, Issue 1, 2003, pp. 43-55.
67. Zimmerman, B. J.; Cleary, T. J., *Adolescents' Development of Personal Agency - The Role of Self-efficacy Beliefs and Self-regulatory Skills*, in: Pajares, F.; Urdan, T. (eds.), Self-Efficacy Beliefs of Adolescents, 2006, pp. 61-82.

WEBSITE REFERENCES

1. *About EU-OSHA*, available at: [https://osha.europa.eu/en/about-eu-osha], Accessed 25 March 2025
2. *European Agency for Safety and Health at Work (EU-OSHA)*, available at: [https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/european-agency-safety-and-health-work-eu-osha_en], Accessed 25 March 2025
3. National Institute of Mental Health, Depression, available at: [https://www.nimh.nih.gov/health/topics/depression], Accessed 17 March 2025
4. Udruga "Kako si", *DASS-21*, [https://mentalnozdravlje.zagreb.hr/saznaj-kako-si-ispuni-upitnik-dass-21/], Accessed 5 February 2025

EU LAW

1. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Empty Eu strategic framework on health and safety at work 2021-2027 Occupational safety and health in a changing world of work [2O21] Brussels.
2. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee Of The Regions on a comprehensive approach to mental health [2023] Brussels.
3. Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L 183
4. Report of the European Law Institute, Guiding Principles on Implementing Workrs` Right to Disconnect, 2022, European Law Institute

EXECUTION OF THE EUROPEAN COURT OF HUMAN RIGHTS JUDGMENTS RELATED TO RIGHTS OF PERSONS WITH DISABILITIES: TWO STEPS FORWARD, ONE STEP BACK?

Aleksandra Rabrenović, PhD, Senior Research Associate
Institute of Comparative Law
Terazije 41, 11000 Belgrade, Serbia
a.rabrenovic@iup.rs

Ljubomir Tintor, LLM, Research Assistant
Institute of Comparative Law
Terazije 41, 11000 Belgrade, Serbia
lj.tintor@iup.rs

ABSTRACT

The European Court of Human Rights plays an important role in safeguarding the rights of persons with disabilities in Europe through a dynamic interpretation of the European Convention on Human Rights in the light of the provisions of the United Nations Convention on the Rights of Persons with Disabilities and its fundamental principles. The objective of the paper is to examine the impact of ECtHR judgments on national legal frameworks regarding rights of persons with disabilities and the ways to improve the ECtHR judgments execution in national contexts. Key findings of the research indicate that despite positive developments, a number of challenges in the execution of ECtHR judgments remain, including varying levels of compliance among Contracting Parties of the ECHR, delays in the implementation process and limitations in addressing systemic discrimination of persons with disabilities, especially persons with mental and intellectual disabilities. In order to improve the effectiveness of the execution of the judgments of the ECtHR, the authors call for creating join forces between the ECtHR and other international actors in charge of monitoring the implementation of disability rights, national authorities, civil society organisations and persons with disabilities to establish synergic action and enable sustainable improvement in the quality of life of persons with disabilities throughout the European continent.

Keywords: *European Court of Human Rights, execution of judgments, Persons with disabilities*

1. INTRODUCTION

Persons with disabilities constitute approximately 27% of the EU population and are at increased risk of poverty or social exclusion, especially during emergencies and conflict situations. According to Eurostat estimates for 2023, there were around 101 million people with disabilities in the EU, which means that one in four adults in the EU is a person with disability.[1] Many individuals with disabilities face mistreatment or unfair 1treatment due to their condition. According to a 2023 Eurobarometer survey, around half of respondents (49%) who are EU citizens believed that discrimination on the basis of disability is widespread.[2]

Key international instrument governing the rights of persons with disabilities is certainly the UN Convention on the Rights of Persons with Disabilities, which implementation is monitored by the UN Committee on the Rights of Persons with Disabilities. The Committee produces periodic reports on the state of affairs of persons with disabilities in numerous countries which are signatories of the Convention. At the time of writing of this paper (April 2025), there were 164 signatories and 192 parties of the UNCRPD, 191 states and the European Union (which ratified it on 23 December 2010).[3] Given the number of countries signatories to the UNCRPD and relatively limited capacities of the Committee to cover complex disability issues in each country signatory to the Convention, persons with disabilities, especially in the countries which are members of the Council of Europe, have increasingly started using other available legal instruments and institutions in order to ensure the protection of their rights, such as the European Court of Human Rights (hereinafter ECtHR).

Although the European Convention on Human Rights (hereinafter ECHR) does not contain explicit provisions related to the persons with disabilities, the ECtHR started emerging as an important actor to protect the rights of persons with disabilities through dynamic interpretation of the ECHR provisions. In order to "fill in the gaps" of the ECHR in relation to the rights of persons with disabilities, the ECtHR has frequently cross-referenced to other relevant international instruments, such as the Convention on the Rights of Persons with Disabilities and its Additional Protocols in order to align its practices with international standards

---

1 European Council, *Disability in the EU: Facts and Figures*, [https://www.consilium.europa.eu/en/infographics/disability-eu-facts-figures/#0], Accessed 5 April 2025.

2 European Commission, *Discrimination in the European Union*, Special Eurobarometer 535, April-May 2023, [https://europa.eu/eurobarometer/surveys/detail/2972]. Accessed 5 April 2025.

3 United Nations Convention on the Rights of Persons with Disabilities, Department of Economic and Social Affairs, [https://social.desa.un.org/issues/disability/crpd/convention-on-the-rights-of-persons-with-disabilities-crpd]. Accessed 5 April 2025.

and the jurisprudence of corresponding monitoring bodies.[4] Through judgments that interpret the ECHR in accordance with the UN Convention on the Rights of Persons with Disabilities, the ECtHR started to safeguard the rights of persons with disabilities both through addressing individual cases and initiating systemic changes in national legislations.

At the same time, one of the key issues for debate within the academic community and the Council of Europe (CoE) has been the process of the execution of the judgments of the ECtHR within national contexts, especially those that require changes of national legislation. A number of authors have critically analysed the process of execution of the ECtHR judgments in a more general manner,[5] while others examined this issue in relation to individual subjects (e.g. prisoners' right to vote, asylum seekers etc etc)[6] or individual countries (especially UK[7] and Russia).[8] The matter of execution of the judgments of the ECtHR has also become an issue of the debate within the Committee of Ministers (hereinafter the Committee), national governments and civil society. Various scholarly and policy-oriented initiatives, such as conferences and workshops, have also aimed to outline the obstacles

---

4 For example, the ECtHR often makes references to: UN Human Rights Committee; UN Committee against Torture (CAT); European Committee for the Prevention of Torture and Inhuman and Degrading Treatment; report of the Commissioner for Human Rights of the CoE, etc. Cf. Lubarda B., *The Rights of Persons with Disabilities in the Case-law of the European Court of Human Rights*, 2021(1) 3, Europe of Rights & Liberties/Europe des Droits & Libertés, p. 6.

5 Gerards J.H.; Fleuren J.W.A. (eds), *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case law. A comparative analysis*, Antwerp, Intersentia, 2014; Mottershaw E.; Murray, R. H., *National responses to human rights judgments: the need for government co-ordination and implementation*, European Human Rights Law Review 6 (2012): 639; De Londras F.; Dzehtsiarou K. *Mission Impossible? Addressing Non-Execution Through Infringement Proceedings in the European Court of Human Rights*, International and Comparative Law Quarterly, 2017; 66(2):467-49, Jaskiernia J., *Actual Challenges for the Implementation of Judgments of the European Court of Human Rights*, Review of European and Comparative Law, 2022, Vol. 48, No. 1, 103–131; Abdelgawad, E., *Measuring the Judicial Performance of the European Court of Human Rights*, May 2017, International Journal for Court Administration, Vol. 8, No. 2.

6 Kucuksu A., *Enforcing Rights Beyond Litigation: Mapping NGO Strategies in Monitoring ECtHR Judgment Implementation*, Human Rights Law Review. Volume 22, Issue 2, 2022, p. 1-24; Bruskina N., *Execution of the ECtHR Judgment in Beizaras and Levickas v. Lithuania Case: Effectiveness and Legal Implications*, Teisė. 2023, Vol. 126, pp. 21-37.

7 Dzehtsiarou K., *The United Kingdom and the European Convention on Human Rights: Together Until the End?*, European Convention on Human Rights Law Review 5, 2024, pp. 1–7; Stanić M., *Neophodnost određivanja pritvora i naknada štete u praksi Evropskog suda za ljudska prava,* Prouzrokovanje štete, naknada štete i osiguranje, Institut za uporedno pravo, 2019, pp. 269-281.

8 Usenkov I.; Morozov I., *Enforceability of ECtHR Judgements in Russia: Alternatives of Interaction Between Jurisdictions*, SHS Web of Conferences 50, 01192, 2018; Mottershaw E.; Murray R.H., *National responses to human rights judgments: the need for government co-ordination and implementation*, European Human Rights Law Review 6, 2012, p. 639.

to effective implementation of ECtHR rulings, including issues such as delayed execution, improper implementation, and resistance by States.[9]

The topic of the execution of judgments of the ECtHR related to persons with disabilities has not been the subject of sufficient academic attention so far. This topic was instead brought to the forefront of the public attention in September 2024, when the Department for the Execution of Judgments of the European Court of Human Rights issued a "Thematic Factsheet: Rights of Persons with Disabilities", [10] with key positive examples of measures reported by states in the context of the execution of the ECtHR judgments concerning rights of persons with disabilities, which brought about systemic changes in the national legislation.

The key objective of this paper is to critically analyse a sample of judgments of the ECtHR related to the rights of persons with disabilities in order to try to answer the following questions: what are the wider implications of judgments where the ECtHR has found a violation of the rights of persons with disabilities in the CoE member states? Which measures have these countries undertaken in order to prevent similar violations from occurring in the future? Should persons with disabilities be encouraged to use the ECtHR as their advocate for making systemic changes, in cases when they cannot find justice and adequate support for realisation of their rights in their national systems?

In order to provide answers these questions, the paper shall first analyse the normative framework regarding the implementation of the judgments of the ECtHR, as a background against which the implementation of the judgments related to the rights of persons with disabilities will be assessed. The second, central section of the paper shall explore the ECtHR's judicial approach in five disability-related cases in different areas of the ECHR: the right to life (Article 2), prohibition of torture and inhuman or degrading treatment (Article 3) and the right to respect of private and family life (Article 8), focusing on the implementation of these cases in national legal systems. Particular attention shall be given to assessing transformative potential of the ECtHR's jurisprudence and the Committee in aligning national legislation with human rights standards related to persons with disabilities.

---

9 Concurrently, these initiatives also focus on sharing best practices to enhance the execution process, such as a German Presidency's Workshop, Guidance for National Human Rights Institutions (NHRIs), Conference on Systemic Non-Implementation, etc.

10 Department for the Execution of the Judgments of the European Court of Human Rights, *Rights of Persons with Disabilities*, 2024, [https://rm.coe.int/persons-with-disabilities-final-en/1680b1bf48]. Accessed 27 April 2025.

2. THE NORMATIVE FRAMEWORK REGARDING IMPLEMENTATION OF THE ECTHR JUDGMENTS

As the ECtHR has limited powers to implement its judgments, it has to rely on "assistance" of national institutions, especially regarding systemic issues of human rights violations. A judgment rendered by the ECtHR must be executed within the territory of the contracting state that has breached the provisions of the ECHR. This entails not only the formal compliance with the judgment but also its substantive implementation to restore the violated rights of the individual. Failure to execute ECtHR judgments may call into question the very purpose of the ECHR and undermine trust in the international human rights protection system.[11]

The implementation of judgments of the ECtHR is governed in more details by Article 46 of the ECHR, which requires parties to the Convention to abide by the final judgment of the ECtHR in any case to which they are parties.[12] The Article 46 further authorises the Committee to supervise the execution of final judgments.[13] This means that if the ECtHR finds that a party to the Convention did not implement its judgment, it shall refer the case to the Committee for consideration of the measures to be taken.

The effectiveness of the execution of the ECtHR judgments has, however, become a source of a growing concern over the past two decades, especially in resource intensive or politically sensitive cases, which then fed into the problem of repetitive applications before the ECtHR.[14] For these reasons, the system of implementation of judgments of ECtHR was substantively reformed by the Protocol 14 of the ECHR (that entered into force in 2010), which allowed the Committee to bring infringement proceedings against a Contracting Party that has failed to execute the judgment, even after being served with a notice to comply by the Committee.[15]

---

11 Krstić I.; Marinković T, *Evropsko pravo ljudskih prava- 2nd edition*, Council of Europe,2021, p.82.

12 Article 46, para. 1 of the ECHR.

13 Article 46, para. 2 of the ECHR.

14 Council of Europe, *Explanatory Report to Protocol 14*, 13 May 2004, para. 16, https://rm.coe.int/ CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d380f.

15 According to the Protocol 14 of the ECHR, the states who are parties to the ECHR were required to undertake a number of measures to ensure execution of the ECtHR judgments. These are, *inter alia*, to designate a co-ordinator – individual or body – of execution of judgments at the national level, with reference contacts in the relevant national authorities involved in the execution process; identify as early as possible the measures which may be required in order to ensure rapid execution; rapidly prepare, where appropriate, action plans on the measures envisaged to execute judgments, if possible including an indicative timetable etc. Furthermore, considering the importance of rapid execution of judgments, in particular in cases concerning structural problems, in order to prevent repetitive applications, the Protocol allowed the Committee of Ministers to decide, in exceptional circumstances and with a 2/3

Since 2011, a dual-track supervision system of the execution of the ECtHR judgments has been in operation, which includes two key procedures: standard and enhanced procedure. As a general rule, cases are examined under the standard procedure unless their complexity or structural significance necessitates application of the enhanced procedure. The enhanced track is reserved for cases where the ECtHR and the Committee find reflecting persistent and systemic issues.[16] The Committee retains the discretion to reclassify a case between the standard and enhanced procedures in response to changing circumstances. Cases initially classified as 'simple' and placed under standard supervision may later be transferred to enhanced supervision if the execution process becomes more complex due to political, economic, or other considerations.[17] The Committee is responsible for ensuring continuous oversight of the execution of judgments and decisions, with such oversight lasting until the state demonstrates that it has taken all necessary measures to implement the judgment.[18] The state against which a judgment has been rendered is required to submit an action plan to the Committee and, once all prescribed measures have been taken, an action report.

Although the Committee assumes a primary role in the execution process, its work is substantively supported by the Execution Section of the European Court of Human Rights and also by the Parliamentary Assembly of the Council of Europe (PACE). The supervision of the execution of judgments takes place at special meetings of the Committee and the Execution Section of the ECtHR, where human rights are discussed, which are held four times a year.[19] Within PACE, the Committee on Legal Affairs and Human Rights plays a key role by regularly analyzing the status of judgment execution, preparing reports on execution-related issues, and adopting resolutions and recommendations. While resolutions carry political weight, recommendations are formal acts directed at the Committee of Ministers and member states, providing concrete proposals to enhance the execution of judgments.[20]

---

majority, to initiate proceedings of non-compliance in the Grand Chamber of the Court in order to make the state concerned execute the Court´s initial judgment. These proceedings before the Court would result in another judgment related to the lack of an effective execution. See also De Londras F.; Dzehtsiarou K., *op. cit*, note 7, p. 481.

16 Committee of Ministers, *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights. 8th Annual Report of the Committee of Ministers*, 2014, [https://rm.coe.int/ CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680592ae9>28]. Accessed 7 May 2025.

17 *Ibid.*

18 Resolution DH (99) 26 of January 18, 1999,

19 Krstić I.; Marinković T., *op. cit*., note 14, p. 92.

20 See: Resolution 1787 (2011) Implementation of judgments of the European Court of Human Rights.

The most recent 2024 Report of the Committee highlights notable progress in the implementation of ECtHR judgments during 2023, while also emphasizing that several key challenges persist. In 2024, the Committee closed supervision of around 900 cases,[21] which is indeed a great achievement. However, the Report notes that following a steady decline in recent years, the number of significant cases pending for over five years has begun to rise again.[22] This is line with trend noted over past years, where serious delays were observed in cases where a judgment demands that national legislation be modified.[23]

3. SELECTED CASELAW OF THE ECTHR RELATED TO THE RIGHTS OF PERSONS WITH DISABILITIES AND ITS IMPACT ON NATIONAL LEGISLATION

One of the key cases brought before the ECtHR regarding violation of the rights of persons with disabilities in relation to Article 2 (right to life) of the ECHR is *Nencheva and Others v. Bulgaria*.[24] This case was invoked in 2006 by nine applicants who were parents of seven of the fifteen children and young adults under the age of twenty-two who died during the winter 1996-1997 in a home for children with severe mental disabilities in the village of Dzhurkovo in Bulgaria. The ECtHR found that the Bulgarian authorities had not taken practical and sufficient measures to prevent these deaths, despite having concrete prior knowledge of a real danger to the lives and health of the children.[25] The oversight revealed systemic deficiencies in the functioning of social protection of children with disabilities in Bulgaria and underscored the need for reform.

This case prompted a response from Bulgarian authorities to start implementing a series of reforms aimed at improving the social protection system, under the enhanced procedure for monitoring the implementation of the judgment. This included measures such as closing of the former social care homes and placement of children with developmental disabilities in foster families or new family-type residential centres. Furthermore, several domestic bodies for monitoring and evaluating social protection services were established. Notably, the Agency for the Quality of Social Services was established under the Social Services Act of 2019 and began operating in 2020. This agency is tasked with monitoring institutional

---

21 Council of Europe, *18th Annual Report of the Committee of Ministers, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights*, Council of Europe 2025, p. 5.

22 *Ibid.*

23 Jaskiernia J, *op. cit*, note 7, p. 105.

24 *Nencheva and Others v. Bulgaria* (48609/06), Judgment 18 June 2013 [Section IV].

25 *Ibid.* paras 123-125.

conditions, ensuring compliance with standards, and responding to potential violations of the rights of social protection users. In addition, the new law has been drafted to support biological families in order to reduce the reliance on institutional care for children with disabilities.[26]

In spite of all these efforts, the status of the execution of this judgment *Nencheva and Others v. Bulgaria* in the Department for the Execution of Judgments of the ECtHR is still marked as "pending", almost 20 years after the case was brought before the ECtHR. This means that the systemic measures to improve the quality of life of children with mental and developmental disabilities in Bulgaria have still not been fully implemented.

Another important case regarding violation of the right to life and degrading treatment of persons with disabilities is certainly the case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania,* which illustrate deep-rooted problems in the human rights protection system of adults with intellectual disabilities in Romania.[27] The application was lodged by a non-governmental organisation, the Centre for Legal Resources, on behalf of a young Roma man with intellectual disabilities, Mr. Câmpeanu, who died in a psychiatric hospital in 2004 at the age of 18.[28] In addition to this judgment, the ECtHR acknowledged that Romania had violated the Convention in thirteen leading judgments concerning psychiatry and the rights of persons with mental disabilities, by far the most of all Council of Europe convicted states on this important topic.[29]

---

26 Department for the Execution of the Judgments of the European Court of Human Rights, *op. cit*, note 13.

27 Romania has 12 landmark rulings on the inadequacy of legal protections and the lack of proper medical and social care for vulnerable individuals, as well as the failure to thoroughly investigate the deaths of persons with mental disabilities in state institutions. Cf. Tsereteli N.; Jaraczewski J,; Iliescu I.; Bisiouli I; Lefebvre V.; Ciccarone A., *Justice Delayed and Justice Denied, Non-implementation of European Courts Judgments and the Rule of Law*, Democracy Reporting International, European Implementation Network, 2024, p. 49.

28 Valentin Câmpeanu was a young Roma man living with HIV and a severe intellectual disability. Abandoned at birth, he spent his entire childhood in an orphanage. In 2004, upon reaching adulthood, he was required to transition to an institution for adults. However, he was repeatedly moved between various facilities, with several institutions refusing to admit him—either due to his intellectual disability or his HIV-positive status. These transfers were carried out without consideration for his heightened vulnerability and specific medical needs. Shortly after being placed at the Poiana Mare Psychiatric Hospital, he was discovered by a civil society monitoring team in a locked, unheated room. Although the monitoring team promptly alerted the authorities, Valentin passed away later that same evening. Cf. *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC]* - 47848/08 Judgment 17 July 2014 [GC].

29 Strasbourg Observers, The Implementation of ECtHR Psychiatry-Related Judgments In Romania: UN-CRPD Standards as a Way Forward, available at: https://strasbourgobservers.com/2023/06/16/the-implementation-of-ecthr-psychiatry-related-judgments-in-romania-un-crpd-standards-as-a-way-forward/.

In its judgment of 17 July 2014, the ECtHR identified a serious breach of Article 2 of the ECHR, citing significant deficiencies in the social and medical care provided to the applicant prior to his death at the neuropsychiatric hospital. Pursuant to Article 46 of the ECHR, the ECtHR urged Romania to adopt appropriate general measures to guarantee that individuals with intellectual disabilities and mental health conditions, in situations similar to that of Mr. Câmpeanu, are granted independent representation. Furthermore, the ECtHR found that the institute of guardianship, which assumed full deprivation of legal capacity of individuals with intellectual disabilities stripped these individuals of their ability to make independent decisions about their lives. Such an approach did not allow for a proportionate response to their specific needs and resulted in those under protection becoming completely dependent on their guardians, thereby undermining their dignity and fundamental rights. [30]

Six years after the judgment was passed, a number of reform steps were undertaken to improve the position of persons with intellectual and mental disabilities in Romania, especially regarding the system of guardianship. The first step was prompted by a human rights activist, Constantin Cojocariu, a well-known Romanian lawyer, who filed a claim to the Romanian Constitutional Court to challenge the guardianship system established by the Article 164(1) of the Romanian Civil Code. In 2020, the Constitutional Court of Romania declared the Article 164(1) of the Civil Code unconstitutional, pointing out that this system severely violated human dignity.[31] In order to remedy such situation, measures were introduced to protect legal capacity rights of persons with intellectual and mental disabilities.[32] Courts were required to reassess the position of individuals with intellectual and mental disabilities under guardianship according to the old legislation. Additionally, there was an obligation for adequate training of judges and prosecutors regarding the new forms of protection, reflecting an ambition to reform judicial practice and align it with contemporary human rights protection standards.

In May 2024, the Romanian Government adopted a National Action Plan for the Execution of the ECtHR judgments, which represents an additional step toward rectifying serious deficiencies in the health and social care system of persons

---

30 Centre for legal resources on behalf of *Valentin Câmpeanu v Romania* (47848/08) Judgment final on 17/07/2014, paras 132-133.

31 Romanian Constitutional Court Decision, No. 601/2020 on the unconstitutionality of the provisions of Art. 164 paragraph (1) of the Civil Code.

32 The first measure allows a person to retain full legal capacity, but with the help of a notary when making important decisions. The second and third measures introduce limitations of legal capacity in accordance with the degree of autonomy and specific needs of the individual.

with disabilities.[33] This plan was prepared under high level coordination under the Prime Minister's Office and included the Ombudsperson and the National Council responsible for monitoring the implementation of the Convention on the Rights of Persons with Disabilities, as well as relevant civil society and professional organisations. The plan is to be implemented during the period 2024–2029, and foresees improvements in medical and social services and strict oversight and supervision by the Committee,[34] which marks a significant step forward in the execution of this landmark case in practice.

Another important case, with respect to persons to deprivation of capacity rights of persons with mental disabilities and breach of the Article 8 of the ECHR is the case of *X and Y v. Croatia* (Application No. 5193/09, judgment of 3 November 2011). In this case, the Social Welfare Centre initiated proceedings for deprivation of legal capacity of the persons with mental disability based on a report by a psychiatrist who spoke to the applicant by telephone only once. Prior to that conversation, the applicant had been hospitalized twice in a psychiatric ward, from which she was discharged because she responded well to therapy and the prognosis for further treatment was positive. The ECtHR pointed out that deprivation of legal capacity is a very serious measure that should be activated only in exceptional circumstances. In this case, the fact that the applicant independently and successfully took care of all her needs, including paying bills, purchasing food and social life, did not indicate that she harmed anyone's interests. Therefore, the ECtHR found that initiating proceedings to deprive her of legal capacity was contrary to Art. 8 of the Convention.[35] In the similar case of *Ivinović v. Croatia* (Application No. 13006/13, judgment of 18 September 2014), the ECtHR stated that complete deprivation of legal capacity must be a measure of last resort, applied only when the national authorities conclude that no other, less restrictive measure is appropriate or when other measures have been unsuccessfully attempted.[36]

Shortly after these ECtHR decisions were adopted, the Croatian Parliament adopted a new Family Law,[37] which abolished the institute of full deprivation of legal

---

[33] Department for the Execution of the Judgments of the ECtHR, *Romania: Government adopts national action plan on mental health care and disability rights*, [https://www.coe.int/en/web/execution/-/romania-government-adopts-national-action-plan-on-mental-health-care-and-disability-rights], Accessed 18 February 2025.

[34] *Ibid.*

[35] Spadina, H., *Lišenje poslovne sposobnosti osoba s duševnim poremećajima u sudskoj praksi Europskog suda za ljudska prava*, in: Savic, D. (eds), Collection of Papers from Scientific Conference „Society and Politics": Everyday Life of Persons With Disabilities: Between Proclaimed Inclusivity and the Culture of Accessibility, Banja Luka, 2024. p. 108.

[36] *Ibid.*

[37] Law on Family, Official Gazette of the Republic of Croatia, No. 103/2015, of 29/9/2015.

capacity. Instead of full deprivation of legal capacity, the new Law introduced the concept of "person of trust" as an alternative to the traditional system of guardianship system, which is fully in line with Article 12 of the UN Convention of the Rights of Persons with Disabilities.

However, in 2023, the Constitutional Court of the Republic of Croatia made a Decision by which it abolished the ban on complete deprivation of legal capacity introduced by the Croatian Family Law of 2015.[38] This decision was made despite numerous abuses of the institute of complete deprivation of legal capacity for persons with mental disabilities by the competent courts before 2015,[39] and represents an obvious step back in the regulation of the rights of persons with disabilities, especially intellectual and mental disabilities.

Another important case concerning the deprivation of legal capacity of persons with mental disabilities and procedural fairness is the case of *Salontaji-Drobnjak v. Serbia*,[40] which implementation had a direct impact on amendments of legislation in the Republic of Serbia concerning the deprivation of legal capacity. In this case, Ms. Salontaji-Drobnjak filed a complaint with the ECtHR after she was deprived of legal capacity in Serbia, claiming that the domestic courts in the proceedings for the deprivation of legal capacity did not sufficiently investigate her condition, nor did they ensure her presence at the hearing, all of which the proceedings resulted in her being placed under guardianship, without her having been able to express her will or preferences in this regard.

The ECtHR found that the applicant had been deprived of her right to a fair trial within the meaning of Article 6, as she had not been adequately involved in the proceedings. The ECtHR concluded that the Serbian courts had failed to meet the standards of fairness by deciding on her legal capacity without her presence and without a proper assessment of her mental state. This omission constitutes a serious violation of the right to participate in the proceedings and the possibility of expressing one's own interests.[41] The Court also found a violation of Article 8 of the European Convention on Human Rights and concluded that deprivation of legal capacity, especially when not based on thorough assessments and respect for

---

38 Decision of the Constitutional Court of the Republic of Croatia (U-I-394/2015. of 18 April 2023) on the repeal of the provision of 234, paragraph 2 of the Law on Family of 2015.

39 According to data from the Ministry of Demography, Family, Youth and Social Policy of the Republic of Croatia from 2017 on the total number of persons deprived of legal capacity from 2007 to 2015, the share of persons completely deprived of legal capacity was 88%, while only 12% of persons with mental disabilities were partially deprived of legal capacity. See: Decision and Ruling of the Constitutional Court of the Republic of Croatia, 2023, Spadina H., *op. cit.*, note 45, p. 101.

40 *Salontaji-Drobnjak v. Serbia*, Application No. 36500/05, Judgment of 13 October 2019.

41 *Ibid*.

the person's will, can seriously undermine an individual's right to autonomy and control over their own life.[42]

The importance of this judgment is reflected in the fact that it provided the basis for amendments to the Law on Non-Contentious Procedure in the Republic of Serbia, with a view to a more favorable procedural position for persons with disabilities. However, in spite of these amendments, the Law on Non-Contentious Procedure is still not fully aligned with the provisions of the United Nations Convention on the Rights of Persons with Disabilities.[43] Furthermore, in spite of several efforts to amend the Law on Family and abolish the possibility of full deprivation of legal capacity in the Serbian legislation, this substantive change has not happened yet and will probably wait for a while to be implemented. [44]

Finally, we want to highlight the case of *Alajos Kiss v. Hungary,* regarding the voting rights of persons with mental disabilities, which results in amendments of the Hungarian Constitution in 2012. In its decision, the European Court of Human Rights stressed that the non-selective and automatic deprivation of voting rights from persons with mental disabilities those placed under partial guardianship constitutes an unjustifiable restriction of their civil rights.[45] The Court noted that such a practice is not compatible with legitimate grounds for limiting voting rights because the deprivation was carried out without an individualized judicial assessment and solely on the basis that the person has a mental disability requiring partial guardianship.[46] According to the Court, this approach represents discrimination and undermines the fundamental principles of equality and non-discrimination enshrined in international human rights conventions.

To align domestic legislation with European standards and remove constitutional barriers that had enabled systemic discrimination against persons with mental disabilities, amendments to the Constitution were enacted in 2012. These amendments introduced an obligation for courts to conduct a detailed assessment in every individual case and to decide whether the personal circumstances of an individual justify the retention of guardianship and the restriction of voting rights. As a result, the deprivation of voting rights is no longer an automatic consequence of partial or total incapacity for legal transactions—a significant step toward protect-

---

42 *Ibid*, paras. 143-145.

43 Jović Prlainović, O., *Međunarodni standardi u nacionalnom sistemu poslovne sposobnosti osoba sa invaliditetom*, Zbornik radova „Pravo, tradicija i promjene", Istočno Sarajevo, 2020, p. 92.

44 Tintor Lj.; Rabrenovic, A., *Poslovna sposobnost kao osnova za kvalitetat* život *osoba sa invaliditetom: međunarodni instrumenti i praksa Evropskog suda za ljudska prava*, Pravni horizonti, 7 (9). p. 110.

45 *Alajos Kiss v. Hungary*, Application No. 38832/06, Judgment final on 20/08/2010, paras 39-41.

46 *Ibid*, para. 44.

ing the rights of persons with disabilities and ensuring their equal participation in social and political life. These changes are particularly important for persons with mental disabilities, as they allow for an individualized assessment of their capacity to participate in the electoral process, rather than excluding them based on generalized assumptions.

In addition to constitutional changes, a new Electoral Procedure Act was enacted in 2013, further elaborating the criteria and modalities for excluding the voting rights of incapable persons. This law specifies that domestic courts, when deciding guardianship proceedings, must provide detailed reasoning for their decisions and clearly state whether, based on the available evidence, it can be unequivocally determined that a person—due to mental impairment—is unable to exercise their voting rights. This process includes an obligation for the court to examine all relevant facts and to consider medical reports, expert opinions, and other pertinent evidence when making its decision. Moreover, it guarantees the affected individual the right to be heard personally before any decision is made regarding the restriction of their voting rights. This provision is intended to ensure that the decision-making process is conducted in a fair manner that respects the individual's right to participate in their own legal proceedings.[47] In this way, persons with mental disabilities are given the opportunity to present their views and actively participate in proceedings that directly affect their fundamental civil rights. The introduction of these legislative amendments has significantly improved the position of persons with mental disabilities in the electoral process, as their voting rights can no longer be automatically restricted without a detailed judicial assessment. These reforms ensure that any limitation on voting rights may be based solely on objective and individually determined circumstances, in accordance with the principles of proportionality and necessity.[48] Consequently, domestic legislation is aligned with international human rights protection standards, including those of the European Convention on Human Rights and the United Nations Convention on the Rights of Persons with Disabilities.

5. CONCLUDING REMARKS

The findings of our analysis of a sample of judgments of the ECtHR regarding human rights of persons with disabilities show that the ECtHR does have a potential to have a multilayered and transformative impact on the development of national

[47] Resolution CM/ResDH(2020)317, Execution of the judgments of the European Court of Human Rights Three cases against Hungary, Adopted by the Committee of Ministers on 8 December 2020 at the 1391st meeting of the Ministers' Deputies.

[48] *Ibid*.

legal frameworks in this area. In its role as the international guardian of the Convention, the ECtHR not only resolves individual complaints but also, through its interpretative decisions, establishes standards that shape and guide national legislative practice and its implementation. The judgments of the ECtHR often function as a "living" instrument of human rights protection, which can lead to an expansion of human rights, including the rights of persons with disabilities.

The key issues with respect to execution of the ECtHR judgments related to the rights of persons with disabilities are similar to those of other human rights issues and include primarily a lack of capacity of the ECtHR and the Committee to handle growing number of both new complex and repetitive cases. Although the reform of the execution process which took place in 2010 shown positive results overall, the Committee is now tasked with overseeing a range of unprecedented challenges that raise novel legal questions and require solutions previously unencountered, such as environmental issues, such as climate change mitigation, the ongoing influx of cases related to international conflicts, extensive migration concerns, and the rise of emerging digital technologies.[49] This naturally does not leave sufficient time and resources for the Committee to devote to each individual case regarding individual human rights issues, including the area of rights of persons with disabilities, which can have a negative impact on further work of the Committee and persons with disabilities throughout Europe.

In spite of a number of positive developments, our analysis shows that there is a varying level of compliance in the execution of ECtHR judgments in individual countries in the area of the rights of persons with disabilities. One of the most, perhaps surprising, successes is an example of Hungary, which introduced Constitutional amendments in 2012 order to reflect the recommendations of the ECtHR judgment regarding voting rights of persons with mental disabilities. The case of Serbia, in turn, has shown that changes initiated by the cases invoked before the ECtHR can bring about systemic improvements, but only to a limited extent. The case of Croatia, which recently re-instituted full abolishment of legal capacity for persons with intellectual and mental disabilities also shows that policy reversals in this area a reality and that positive changes that were initiated by the ECtHR judgments could go backwards if there is a lack of a sustained domestic support to sustain the reform efforts.

Complex cases of breaches of human rights of persons with mental disabilities in Bulgaria and Romania have demonstrated that, in spite of the resistance to

[49] Council of Europe, Committee of Ministers, *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights*, 2024, [https://www.coe.int/en/web/execution/annual-report-2024], Accessed 29 April 2025.

change, improvements in these areas are indeed possible, but require a significant amount of time and efforts on part of both EC institutions, national authorities and civil society organisations. As the reform of legal capacity rights of persons with disabilities and other vulnerabilities prompted by the case *Valentin Câmpeanu v Romania* shows, a strong Government support for improving the rights of persons with mental and intellectual disabilities (especially by placing the authority for the rights of persons with disabilities within the Prime Minister's Office), with active role of civil society organisations and independent human rights activities can provide a synergic action in the implementation and oversight of measures that affect the rights of persons with disabilities.

Our analysis thus confirms the arguments of other authors that compliance with the ECtHR judgments is only partly a legal issue, but even more so a matter of national politics.[50] Therefore, improvement of the position of persons with disabilities, or any other vulnerable group in the society, primarily depends on the will of the ruling elites to initiate substantive changes in the respective areas. Responsibility for execution of the judgments hence does not and should not lie with the institutions of the CoE, but on the member states themselves, who should have the obligation to lead and follow through the systematic changes initiated by legal cases. For countries which do not have a long tradition of democratic governance, such an institutional national response is unfortunately often not possible without a strong support/pressure of civil society organisations, respected individuals, persons with disabilities and the society as a whole. And sometimes even all this internal pressure will not simply work, to the detriment of a rising population of persons with disabilities throughout Europe and all of the world.

The coordinated external pressure is, of course, always a welcome development to push national Governments agendas further. In this sense, it would be advisable to increase cooperation between various Council of Europe bodies, such as the Commissioner for Human Rights and the Venice Commission.[51] The role of the Parliamentarians of the CoE in the area of the rights of persons with disabilities could also be strengthened, looking at the example of the EU Parliamentarians and good national practices.[52] It would also be helpful to establish a better collaboration between the work of the Committee and other international actors in charge of ensuring rights of persons with disabilities, especially the UN Commit-

[50] Jerzy Jaskiernia, Actual Challenges for the Implementation of the Judgments of the European Court of Human Rights, Review of European and Comparative Law, Vol. 48, No. 1, 103–131, [https://doi.org/10.31743/recl.12447]

[51] Jaskiernia J., *op. cit*, note 7, p. 130.

[52] Nikolic O.; Manojlovic S., *Razvoj i funkcije parlamenta i njegov odnos prema izvršnoj vlasti u zemljama Evropske unije*, Strani pravni život, Vol. 66, No. 3/2022, pp. 367-384.

tee on the Rights of Persons with Disabilities, which on its own cannot manage huge workload mandated to it by the Convention on the Rights of Persons with Disabilities throughout the world.

Finally, to answer to the question posed at the outset of this paper of whether persons with disabilities should be encouraged to use the ECtHR as their advocate for making systemic changes in their national systems, we would say – yes, certainly, but please bear in mind the outlined caveats. The ECtHR and the Committee are indeed good counterparts to consider in the fight for improvement of the rights and position of persons with disabilities, but don't assume that their actions will be sufficient to bring about substantive changes without extensive advocacy efforts from the national level.

In spite of the overall positive trend, we believe that the current pace of the execution of ECtHR judgments related to persons with disabilities is slower than needed. Two steps forward, one step back - best reflects current realities in this matter. And what we need is not only to catch up, but to speed up, and go two steps ahead, in order to help a rising number of persons with disabilities lead fulfilled and dignified lives.

REFERENCES

BOOKS AND ARTICLES

1. Abdelgawad, E., *Measuring the Judicial Performance of the European Court of Human Rights*, May 2017, International Journal for Court Administration, Vol. 8, No. 2
2. Bruskina N., *Execution of the ECtHR Judgment in Beizaras and Levickas v. Lithuania Case: Effectiveness and Legal Implications*, Teisė. 2023, Vol. 126
3. De Londras F.; Dzehtsiarou K., *Mission Impossible? Addressing Non-Execution Through Infringement Proceedings in the European Court of Human Rights*, International and Comparative Law Quarterly. 2017;66(2): 467-490, [doi:10.1017/S002058931700001X]
4. Dzehtsiarou K., *The United Kingdom and the European Convention on Human Rights: Together Until the End?*, European Convention on Human Rights Law Review 5, 2024, pp. 1–7, [doi:10.1163/26663236-bja10086]
5. Gerards J.H.; Fleuren J.W.A. (eds), *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case law. A comparative analysis*, Antwerp, Intersentia, 2014
6. Jaskiernia J., *Actual Challenges for the Implementation of Judgments of the European Court of Human Rights*, Review of European and Comparative Law, 2022 Vol. 48, No. 1
7. Jović Prlainović, O., *Međunarodni standardi u nacionalnom sistemu poslovne sposobnosti osoba sa invaliditetom*, Zbornik radova „Pravo, tradicija i promjene", Istočno Sarajevo, 2020

8. Kucuksu A., *Enforcing Rights Beyond Litigation: Mapping NGO Strategies in Monitoring ECtHR Judgment Implementation*, Human Rights Law Review. Volume 22, Issue 2, 2022
9. Lubarda B., *The Rights of Persons with Disabilities in the Case-law of the European Court of Human Rights*, 2021(1) 3, Europe of Rights & Liberties/Europe des Droits & Libertés
10. Murray R. H., *National responses to human rights judgments: the need for government co-ordination and implementation*, European Human Rights Law Review 6 (2012)
11. Mottershaw E.; Murray R.H., *National responses to human rights judgments: the need for government co-ordination and implementation*, European Human Rights Law Review 6, 2012
12. Krstić I.; Marinković T., *Evropsko pravo ljudskih prava- 2nd edition*, Council of Europe, 2021
13. Nikolic O.; Manojlovic S., *Razvoj i funkcije parlamenta i njegov odnos prema izvršnoj vlasti u zemljama Evropske unije*, Strani pravni život, Vol. 66, No. 3/2022
14. Spadina, H., *Lišenje poslovne sposobnosti osoba s duševnim poremećajima u sudskoj praksi Europskog suda za ljudska prava*, in Savic, D. (eds), Collection of Papers from Scientific Conference „Society and Politics": Everyday Life of Persons With Disabilities: Between Proclaimed Inclusivity and the Culture of Accessibility, Banja Luka, 2024
15. Stanić M., *Neophodnost određivanja pritvora i naknada štete u praksi Evropskog suda za ljudska prava,* Prouzrokovanje štete, naknada štete i osiguranje, Institut za uporedno pravo, 2019
16. Tintor Lj.; Rabrenovic, A., *Poslovna sposobnost kao osnova za kvalitetat život osoba sa invaliditetom: međunarodni instrumenti i praksa Evropskog suda za ljudska prava*, Pravni horizonti, 7 (9), 2024
17. Tsereteli N., *et al., Justice Delayed and Justice Denied, Non-implementation of European Courts Judgments and the Rule of Law*, Democracy Reporting International, European Implementation Network, 2024
18. Usenkov I.; Morozov I., *Enforceability of ECtHR Judgements in Russia: Alternatives of Interaction Between Jurisdictions*, SHS Web of Conferences 50, 01192 (2018), [https://doi.org/10.1051/shsconf/20185001192 CILDIAH-2018]

EU LAW

1. European Commission, Discrimination in the European Union, Special Eurobarometer 535, April-May 2023, [https://europa.eu/eurobarometer/surveys/detail/2972]
2. Council of Europe, Committee of Ministers, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights, 2024, [https://www.coe.int/en/web/execution/annual-report-2024]
3. Department for the Execution of the Judgments of the European Court of Human Rights, *Rights of Persons with Disabilities*, 2024, [https://rm.coe.int/persons-with-disabilities-final-en/1680b1bf48]
4. United Nations, *Convention on the Rights of Persons with Disabilities*, 2006.
5. European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

6. Council of Europe, *Explanatory Report to Protocol 14*, 13 May 2004, para. 16, [https://rm.coe.int/ CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d380f]

NATIONAL LAW

1. Law on Family, Official Gazette of the Republic of Croatia, No. 103/2015, of 29/9/2015
2. Law on Non-Contentious Procedure, Official Gazette of the Republic of Serbia, Nos. 25/82, 48/88, 46/95, 18/2005, 85/2012, 45/2013, 55/2014, 6/2015, 106/2015 and 14/2022
3. Decision of the Constitutional Court of the Republic of Croatia (U-I-394/2015. of 18 April 2023) on the repeal of the provision of 234, paragraph 2 of the Law on Family of 2015.

EUROPEAN COURT OF HUMAN RIGHTS

1. Committee of Ministers of the ECHR, Resolution CM/ResDH(2020)317, Execution of the judgments of the European Court of Human Rights Three cases against Hungary, Adopted by the Committee of Ministers on 8 December 2020 at the 1391st meeting of the Ministers' Deputies.
2. *Nencheva and Others v. Bulgaria* (48609/06), Judgment 18 June 2013
3. *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania Application* No. 47848/08 Judgment 17 July 2014
4. *X and Y v. Croatia*, Application No. 5193/09, judgment of 3 November 2011
5. *Ivinović v. Croatia*, Application No. 13006/13, judgment of 18 September 2014
6. *Salontaji-Drobnjak v. Serbia*, Application No. 36500/05, Judgment of 13 October 2019
7. *Alajos Kiss v. Hungary*, Application No. 38832/06, Judgment final on 20 August 2010

INTERNATIONAL LAW

1. Romanian Constitutional Court Decision, No. 601/2020 on the unconstitutionality of the provisions of Art. 164 paragraph (1) of the Civil Code
2. Secretariat of the Committee of Ministers, 1468th meeting, 5-7 June 2023 (DH), Human rights, H46-22 Centre for Legal Resources on behalf of Valentin Câmpeanu and N. (No. 2) v. Romania (Applications Nos. 47848/08 and 38048/18), Supervision of the execution of the European Court's judgments.

WEBSITE REFERENCES

1. Department for the Execution of the Judgments of the ECtHR, Romania: Government adopts national action plan on mental health care and disability rights, [https://www.coe.int/en/web/execution/-/romania-government-adopts-national-action-plan-on-mental-health-care-and-disability-rights], Accessed 18 February 2025
2. European Council, *Disability in the EU: Facts and Figures*, [https://www.consilium.europa.eu/en/infographics/disability-eu-facts-figures/#0], Accessed 5 April 2025

Review article

CLIMATE CHANGE AND HUMAN RIGHTS: AN OVERWIEW OF INTERNATIONAL CASE LAW*

Mira Lulić, PhD, Full Professor
Josip Juraj Strossmayer University of Osijek, Faculty of Law
Stjepana Radića 13, Osijek, Croatia
miral@pravos.hr

Davor Muhvić, PhD, Associate Professor
Josip Juraj Strossmayer University of Osijek, Faculty of Law
Stjepana Radića 13, Osijek, Croatia
dmuhvic@pravos.hr

Ivana Rešetar Čulo, PhD
Josip Juraj Strossmayer University of Osijek, Faculty of Law
Stjepana Radića 13, Osijek, Croatia
iresetarc@pravos.hr

ABSTRACT

Climate change in recent decades has increasingly affected various aspects of human life. Rising sea levels, extreme weather conditions such as heat waves and heavy rains, resulting in drought, forest fires and floods, lead to complex socioeconomic consequences and threats to fundamental human rights. Sea level rise due to climate change directly affects coastal and island states and indirectly almost all states in the world. Climate change affects human health, the availability of resources (especially drinking water and food) and, consequently, migration. These changes particularly affect poor and vulnerable groups due to their reduced ability to adapt to new circumstances. Climate change threatens the right to life, the right to adequate food and water, the right to the highest attainable standard of physical and mental health, the right to adequate housing, the right to cultural identity, etc.

The problems and challenges caused by climate change have led to the adoption of international treaties that regulate this matter, such as the 1992 UN Framework Convention on Climate Change, the 1997 Kyoto Protocol and the 2015 Paris Agreement. Due to the significant impact of climate change on the respect for human rights, but also due to the lack of effective

* This paper is a product of work that has been fully supported by the Faculty of Law Osijek, Josip Juraj Strossmayer University of Osijek, under the project No. IP-PRAVOS-23 "Contemporary Issues and Problems in the Protection and Promotion of Human Rights".

international legal mechanisms of international treaties relating to climate change, individual complaints are increasingly being filed before international human rights treaty bodies. This includes UN human rights treaty bodies such as the Committee on Human Rights, as well as regional bodies such as the European Court of Human Rights and the Inter-American Court of Human Rights. The paper provides an overview of the relevant international legal framework and (quasi)judicial practice in the area of climate change impact on human rights. The authors place a special emphasis on the advisory proceedings before various international courts and relevant case law of the human rights treaty bodies.

Key words: *climate change, human rights, international law, advisory proceedings, individual complaints mechanisms*

1. INTRODUCTION

Climate change in recent decades has increasingly affected various aspects of human life. Rising sea levels, extreme weather conditions such as heat waves and heavy rains, resulting in drought, forest fires and floods, lead to complex socioeconomic consequences and threats to fundamental human rights. Sea level rise due to climate change directly affects coastal and island states (about 70 states) and indirectly almost all states in the world. Climate change affects human health, the availability of resources (especially drinking water and food) and, consequently, migration. Considering that the impacts of climate change intersect with other factors, such as race, gender, age and socioeconomic status,[1] these changes particularly affect poor and vulnerable groups (women and children, persons with disabilities, indigenous peoples and other disadvantaged rights holders) due to their reduced ability to adapt to new circumstances. Numerous rights are associated with environmental changes, for example, the right to life, right to private and family life, right to adequate standard of living, right to health, right to participation in decision-making, right to access to justice, right to property, right to culture, freedom of movement, right to residence on their ancestor's land, right to natural resources, the right to return etc. All environmental factors, natural and/or man-made (climate change, natural disasters, and environmental degradation), are interconnected and interdependent.[2] In this regard, we should first examine what climate change is, then what is the difference between climate change and natural disasters, and, finally, what is their connection to human rights.

---

1 *Promotion and protection of human rights in the context of climate change, Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change,* UN, General Assembly, A/78/255, 28 July 2023, p. 3.

2 Borges, I. M., *Environmental Change, Forced Displacement and International Law - From Legal Protection Gaps to Protection Solutions,* Routledge, New York, 2019, p. 21.

The problems and challenges caused by climate change have led to the adoption of several international treaties that regulate this matter. In accordance with them, states are obliged to take measures to avoid and redress these climate impacts, and so, to moderate climate change. In addition to that, they are obliged to ensure that all individuals have the vital capacity to adjust to the climate crisis.[3] Climate justice requires that climate activity is steady with existing human rights assertions, commitments, benchmarks and standards.[4] Experts, who deal with the protection of human rights in the context of climate change, have reached two common conclusions: climate change and its impacts threaten a broad range of human rights, and second, as a result, states and private actors have extensive human rights obligations and responsibilities.[5]

Solving the problems that individuals face due to climate change can be approached from an environmental (climate change law) perspective and from a human rights perspective. Environmental perspective to climate change is aimed at reducing the harmful consequences of climate change by reducing the emission of greenhouse gases and does not provide individuals and groups with legal avenues to protect their rights. In contrast to the rest of international environmental law, a human rights perspective directly addresses environmental impacts on the life, health, private life, and property of individual humans rather than on other states or the global environment.[6] In the lack of effective international legal mechanisms of international treaties relating to climate change, individual complaints are increasingly being filed before international human rights treaty bodies. This includes UN human rights treaty bodies such as the Committee on Human Rights, as well as regional bodies such as the European Court of Human Rights and the Inter-American Court of Human Rights.

After the introduction, chapter 2. assesses the impact of climate change on human rights and distinguishes between the terms environment and climate change and their impact on human rights. Chapter 3. compares climate change related treaties with human rights treaties and determines the position of the individual and his human rights in them. After that, in chapter 4., an overview of the relevant international legal framework and (quasi)judicial practice in the area of climate

---

3 Modi, R.; Goyal, N., *Analysing the Impact of Climate Change on Human Rights Through the Legislative Framework,* GLS Law Journal, Vol. 5, No. 2, 2023, p. 50.

4 *Ibid.*

5 *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment,* UN, General Assembly, A/74/161, 15 July 2019, pp. 15 – 16.

6 Boyle, A., *Climate Change, the Paris Agreement and Human Rights,* International and Comparative Law Quarterly, Vol. 67, No. 4, 2018, p. 765.

change impact on human rights is provided. The authors place a special emphasis on the advisory proceedings on climate change before various international courts and relevant case law of the human rights treaty bodies. At the end of the work, the authors provide some conclusions (5.).

2. THE IMPACT OF CLIMATE CHANGE ON HUMAN RIGHTS

2.1. ON CLIMATE CHANGE IN GENERAL

Climate change has caused substantial damages, and increasingly irreversible losses, in terrestrial, freshwater, cryospheric, and coastal and open ocean ecosystems.[7] As a result, deserts are spreading, and on the other, massive flooding occurs in some other parts of the world. Water salinization, drought, melting of polar ice, rising tide levels, dying ocean currents, deforestation and forest destruction, strong winds and storms are just a few examples of the consequences of dramatic climate change.[8] We also witness air pollution, acid rains, famines, ozone depletion, the accumulation of nuclear and solid waste etc., changes which Glantz marks as „creeping environmental problems".[9] As a result, plant and animal species are dying out and biodiversity is radically decreasing.[10] Ironically, vulnerable communities and peoples, who have contributed the least to current climate change situation, are disproportionately affected.[11] Individual livelihoods have been affected through, for instance, destruction of homes and infrastructure, and loss of income, human health and food security, with dramatic and adverse effects on gender and social equity.[12] Groups such as children, women, the elderly and persons with disabilities are often particularly vulnerable to the adverse effects of climate change on the enjoyment of their human rights.[13] Climate and weather extremes are increasingly driving displacement in Africa, Asia, North America, and Central and South America, according to the Report of the Intergovernmental Panela on Climate Change, with small island states in the Caribbean and South Pacific that are particularly vulnerable and exposed to the extreme consequences of

---

7 *The Synthesis Report: The Intergovernmental Panel on Climate Change,* IPCC AR6 SYR, 2023, p. 5.

8 Lulić, M.; Muhvić, D.; Rešetar Čulo, I., *In Support of the Debate on the Terminology Related to the Terms Climate Refugees, Climate Migrants, Environmentally Displaced Persons and Similar Terms,* EU and Comparative Law Issues and Challenges Series (ECLIC), Vol. 7, 2023, p. 6.

9 For more details, see: Glantz, M. H., *Creeping Environmental Problems, Natural Science Essay,* The World and I, 1994b, pp. 218–225.

10 Lulić; Muhvić; Rešetar Čulo, *op. cit.,* note 8, p. 6.

11 *The Synthesis Report The Intergovernmental Panel on Climate Change, loc. cit.,* note 7.

12 *Ibid.,* p. 6.

13 *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights,* UN, General Assembly, A/HRC/10/61, 15 January 2009, p. 30.

climate change.[14] However, in addition to climate change itself, it is worrying that measures adopted to deliver climate change mitigation and adaptation may themselves negatively affect the enjoyment of human rights.[15] For example, measures constraining access to, and use of, natural resources (land, water, forests, etc.) can lead to jeopardizing the enjoyment of rights such as those to culture, food, water, and respect for private and family life.[16]

The concept of "climate change", as is known, has similarities, but also significant differences, in relation to the phenomena we call "natural disasters". Climate change is long-term, has been monitored for decades and is caused, as a rule, by human activity (greenhouse gas emissions), and the consequences are global warming, melting glaciers, rising ocean and sea levels, severe storms and bad weather, etc. "Natural disasters" are sudden and individual events in the environment that are not caused by humans, but which cause major human casualties and damage to property and the environment (e.g. earthquakes, volcanic eruptions, floods, droughts, hurricanes, etc.). Both climate change and natural disasters threaten the lives, health, safety, right to water and food of millions of people, they are related to the environment, and they hit the most vulnerable and the poorest the hardest. The key differences between these two concepts are that humans can influence climate change (by reducing harmful activities), climate change is long-term, unlike natural disasters, which are short-term and, in principle, cannot be influenced by humans. Climate change gradually changes the world around us, unlike natural disasters that are of shorter duration, although the consequences of both on living beings and nature are enormous. Climate change affects the occurrence of natural disasters, but changes in the patterns of natural disasters (e.g. rainfall, hurricanes, droughts, heat waves, floods, etc.) also affect the development of climate change. Therefore, we cannot observe them separately, because they are intertwined and connected. As Borges notes, such problems are interconnected, cross-disciplinary, and cross-boundary.[17]

---

14 *The Synthesis Report The Intergovernmental Panel on Climate Change, loc. cit.,* note 7. See also McNevin, A., *Forced Migration in Australia, New Zealand, and the Pacific,* in: Fiddian-Qasmiyeh, E.; Loescher, G.; Long, K.; Sigona, N. (eds.): The Oxford Handbook of Refugee and Forced Migration Studies, Oxford University Press, 2014, p. 6.

15 Savaresi, A., *UN Human Rights Bodies and the UN Special Rapporteur on Human Rights and Climate Change: All Hands on Deck*, Yearbook of International Disaster Law Online, Vol. 4, No. 1, 2023, p. 396.

16 *Ibid.*

17 Borges, *op. cit.,* note 2, p. 19.-20.

2.2. ENVIRONMENT, CLIMATE CHANGE AND HUMAN RIGHTS

We need to distinguish between "the connection between human rights and the environment" and "the connection between human rights and climate change", which are not the same problems and issues. Although both issues are extremely important and delicate for our understanding of the survival of living beings in the modern world and both require urgent legal and political interventions, there are important differences between them.

"Human rights and the environment" is a broader concept, within which we answer the question of how the environment affects human rights. This includes issues such as the right of every person to health, to a healthy environment, clean air, drinking water, food free from pesticides, to information and participation of the local community on projects that damage the environment, to agricultural land and property. For example, pollution of drinking rivers and groundwater from waste, construction of mines which potentially endangers local communities, air pollution from industry, deforestation of the Amazon rainforest which threatens the traditional way of life and land rights of indigenous peoples, increased traffic which causes respiratory diseases, pesticides contaminate soil and agricultural products etc. These issues may or may not be related to climate change.

On the other hand, the issue of "human rights and climate change", which is a more specific and narrow area, provides an answer to the question of how today's climate change affects the realization of human rights of individuals, communities and peoples and what are the negative consequences of extreme weather conditions. Climate change is about suffering those results directly from the damage we are doing to nature.[18] For example, due to climate change, the sea level, storms, floods and strong winds are rising, so even now islands, but also coastal countries and cities that are low-laying are threatened by landslides and submergence, and in some parts (e.g. Pacific islands) the complete loss of territory in the coming decades (e.g. Tuvalu, Kiribati, Nauru, Marshal Islands, Maldives, etc.). In addition to losing homes, droughts prevent crops from being harvested, diseases spread, people are often forced to leave their homes because the changes are so severe and the consequences are almost impossible to repair, children cannot be educated in such environments, etc. Violence and physical conflicts occur over control of natural resources. Lack of water and food, because of droughts caused by climate change, makes basic human survival impossible. The responsibility for climate

[18] *Climate Change and Human Rights: A Rough Guide,* International Council on Human Rights Policy, Versoix, 2008, p. 3.

change lies with states that are major polluters, but also with the inability of international organizations to effectively stop further climate change.

2.2.1. Environment and Human rights

The first connections between human rights and the environment have been discussed since the 1970s.[19] The documents that linked these two concepts were, for the most part, non-binding declarations and resolutions. Let us recall the historically most important documents in the context of human rights and the environment. The UN Declaration on the Human Environment, adopted in Stockholm in 1972, declares: "Man is both creature and moulder of his environment, which gives him physical substance and affords him the opportunity for intellectual, moral, social and spiritual growth" (Art. I, para. 1).[20] Two decades later, the UN Conference on Environment and Development (Rio De Janeiro, 1992) states similar formulations: „Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature." (Principle 1).[21] However, there is still no direct reference to human rights here. Not until 2022, when the UN welcomed the recognition by the General Assembly that "a clean, healthy and sustainable environment is a human right".[22]

We should also mention a few regional instruments here that explicitly recognize „the right to environment". For example, the 1981 African Charter on Human and Peoples' Rights in Art. 24 states that „[a]ll peoples shall have the right to a general satisfactory environment favourable to their development".[23] It is also important to mention the Protocol of San Salvador, as a key legal document for human rights protection within the framework of the Organization of American States, which states in Art. 11 that „[e]veryone shall have the right to live in a healthy environment and to have access to basic public services" and that „[t]he States Parties shall

---

19 Koivurova, T; Duyck, S.; Heinämäki, L., *Climate Change and Human Rights,* in: Hollo, E. J.; Kulovesi, K.; Mehling, M. (eds.), Ius Gentium: Comparative Perspectives on Law and Justice, Vol. 21, 2013, p. 290.

20 Declaration of the UN Conference on the Human Environment, Stockholm, 5-16 June 1972, Report of the UN Conference on the Human Environment, UN Doc. A./CONF.48/14, 1972.

21 United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992, Report of the UN Conference on Environment and Development, Volume I, UN Doc. A./CONF.151/26/Rev1 (Vol.1), 1993.

22 *What is the Right to a Healthy Environment, Information note,* United Nations Human Rights Office of the High commissioner, UN Environment Programme, UNDP, 2023, p. 4. See also: *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment,* UN, General Assembly, A/73/188, 19 July 2018.

23 African Charter on Human and Peoples' Rights, Organization of African Unity, Adopted by the Assembly of Heads of State and Government, June 1981, OAU Doc. CAB/LEG/67/3.

promote the protection, preservation, and improvement of the environment".[24] It should also be mentioned the 1998 Aarhus Convention on Access to Information[25] which does not define „the right to environment" as a „human right", but gives citizens the right to access environmental information as well as participation in decision-making and access to justice in environmental matters. The last in line regional document that indirectly mentions the environment is the 1996 revised European Social Charter, which in Art. 11 states "the right to health", but not the right to a healthy environment.[26] Finally, the European Court of Human Rights linked human rights and environmental problems in a series of judgments (e.g. *Lopez Ostra v. Spain*,[27] *Fadeyeva v. Russia*[28] and *Cordella and others v. Italy*[29]).[30] In addition to international instruments, many national constitutions have also explicitly recognized "environmental human rights".[31] Maybe not all have the same formulation, but these emerging statements of rights have stirred heated debate about their definition, scope, nature and enforcement.[32]

2.2.2. Climate Change and Human Rights

Climate change is deeply connected and intertwined with a range of human rights. This connection is strong, complex, inherent and inextricable. It should also be noted that this connection is "relatively a recent phenomenon" in the theory and practice of international organizations and policy makers.[33] It was only at the beginning of the 21st century that states and international organizations began to link human rights and climate change and to introduce some kind of legal framework for the protection of human rights from climate change. In parallel, the concept of "climate justice" has been developing.

---

24 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Protocol of San Salvador, Organization of American States, A-52, November 16, 1988.

25 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 1998, *United Nations Treaty Series*, Vol. 2161, p. 447.

26 *European Treaty Series,* No. 163.

27 *Lopez Ostra v. Spain*, ECtHR, Application no. 16798/90, Judgment, 9 December 1994.

28 *Fadeyeva v. Russia*, ECtHR, Application no. 55723/00, Judgment, 9 June 2005.

29 *Cordella and others v. Italy*, ECtHR, Application nos. 54414/13 and 54264/15, 24 June 2019.

30 European Court of Human Rights, Guide to the case-law of the European Court of Human Rights – Environment, Updated 31 August 2024.

31 Hajjar Leib, L., *Human Rights and the Environment Philosophical, Theoretical and Legal Perspectives,* Martinus Nijhoff Publishers, 2011, p. 2.

32 *Ibid.*

33 Jolly, S.; Ahmad, N., *Climate Refugees in South Asia - Protection Under International Legal Standards and State Practices in South Asia,* Springer, Singapore, 2019, p. 64.

In this context, we must first start from the famous petition of the indigenous Inuit people against the USA in 2005 (*Sheila Watt-Cloutier et al. v. U.S.*), which is considered the first case of linking climate change and human rights violations. It is a petition in which the Inuit claimed before the Inter-American Commission on Human Rights that greenhouse gas emissions by the USA threatened their traditional way of life.[34] Inuit argued that the USA was violating the human rights of the Inuit through its contribution to global warming. Commission has rejected the petition for lack of admissibility.[35] While the Commission refused to hear the petition, this marked the beginning of a movement who linked climate change with the concept of human rights.[36]

The UN Human Rights Council (UNHRC) recognized the link between climate change and human rights at the 13th UN Climate Change Conference in Bali in 2007.[37] In 2008 the UNHRC expressed concern that climate change „poses an immediate and far-reaching threat to people and communities around the world" and requested the Office of the High Commissioner for Human Rights (OHCHR) to prepare a study on the relationship between climate change and human rights.[38] It was in 2008 that the UNHRC began a series of resolutions and initiatives on the connection between human rights and climate change.[39] Thus, already in 2009, the UNHRC adopted the Annual Report of the OHCHR as a first report on the impact of climate change on a whole set of various human rights.[40] In that Report, it is

---

34 Inuit Petition Inter-American Commission On Human Rights To Oppose Climate Change Caused By The United States Of America, submitted by Sheila Watt-Cloutier, With the Support of the Unuit Circumpolar Conference, on Behalf of All Inuit of the Artic Regions of the USA and Canada, December 7, 2005. Climate Change Litigation Databases, Columbia Law School, available at: [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2005/20051208_na_petition.pdf], Accessed 17 April 2025.

35 *Sheila Watt-Cloutier et al. v. U.S.*, Petition No. P-1413-05, Letter of the Inter-American Commission on Human rights, 16 November 2006, available at Climate Change Litigation Databases, [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2006/20061116_na_decision.pdf], Accessed 11 April 2025.

36 For more details, see Harrington, J., *Climate Change, Human Rights, and the Right to Be Cold*, Fordham Environmental Law Review, Vol. 18, 2006, p. 513. *et seq.* and Osofsky, H. M., *The Inuit Petition as a Bridge, Dialectics of Climate Change and Indigenous Peoples' Rights,* American Indian Law Review, Vol. 31, No. 2, 2006/2007, p. 675 *et seq.*

37 Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007, United Nations, FCCC/COP/2007/6/Add.1, 14 March 2008.

38 Human Rights and Climate Change, UN Human Rights Council Resolution 7/23, 28 March 2008.

39 For more details see official pages of the OHCHR, [https://www.ohchr.org/en/climate-change/reports-human-rights-and-climate-change], Accessed 11 April 2025.

40 Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, *op. cit.,* note 13.

stated, *inter alia*, that climate change-related impacts have a „range of implications for the effective enjoyment of human rights", and that such effects „will be felt most acutely by those segments of the population who are already in a vulnerable situation".[41] Particularly vulnerable are those living on the "front line" of climate change, where „even small climatic changes can have catastrophic consequences for lives".[42] It was also noted that the threat of extreme weather may severely jeopardize the right to life at any given moment, but climate change will generally have "an indirect and gradual effect on human rights".[43] The 2015 Paris Agreement[44] is the first international document related to climate change in which human rights are mentioned in its preamble. It states that the Parties should „when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity".[45]

Migration caused by climate change represents a particular problem. Since the 1990s, there has been a significant scientific and conceptual debate as to the introduction of a new category of refugees in existing international treaties or to adopt a completely new treaty that would protect only this category of vulnerable persons.[46] Their reasons for leaving their homes are caused by changes in the environment, climate change and/or natural disasters, but are often combined with other difficult living conditions (e.g. ongoing violence and war, political instability, high unemployment, etc.). Therefore, it is often difficult to distinguish which reasons for leaving home dominate, environmental, humanitarian, political, social or economic.[47] A major problem is the fact that there is no universally accepted terminology for this vulnerable group, which numbers several million people.[48] Despite the fact that different areas of international law, such as international

41 *Ibid.,* p. 29 and 15.

42 *Ibid.,* p. 30.

43 *Ibid.,* p. 29.

44 *United Nations Treaty Series,* Vol. 3156, p. 79.

45 *Ibid.*

46 Renaud, F.; Bogardi, J. J.; Dun, O.; Warner, K., *Control, Adapt or Flee – How to Face Environmental Migration?,* United Nations University, Institute for Environment and Human Security, No. 5, 2007, p. 35.

47 Lulić; Muhvić; Rešetar Čulo, *op. cit.,* note 8, p. 8.

48 For example, terms such as climate refugees, climate migrants, environmentally displaced persons, ecological migrants or eco-migrants, climate induced migrants, seasonal migrants, low-lying peoples, forced climate migrants, climate change-related migrants, survival refugees, etc. See in more detail *ibid.,* p. 3. *et seq.*

environmental law, international refugee law or international human rights law, touch upon this subject, none of them in their current form and practice provides (adequate and/or sufficient) legal solutions to this problem.[49]

All these impacts of climate change and the violations of human rights that they lead to, create the need to develop adequate instruments and mechanisms to protect the human rights of individuals and groups from these violations. In addition to international organizations, states, and academia becoming active in the area of human rights protection in the context of climate change, case law has also begun to develop. In the last 10 or so years, national and international courts have begun to issue decisions and judgments that directly link climate change, justice, politics, and accountability to human rights, as discussed below. In the following chapters, we will focus exclusively on the issue of the impact of climate change on human rights as a narrower and more specific area compared to the wider area of environment and human rights.

3. CLIMATE CHANGE RELATED TREATIES VS. HUMAN RIGHTS TREATIES: LEGAL REMEDIES FOR INIVIDUALS AFFECTED BY CLIMATE CHANGE

Taking into account the distinctions clarified in the previous chapter between human rights and the environment and human rights and climate change,[50] when considering legal remedies for individuals affected by climate change, it should be noted that climate change and the protection of individuals from climate change can be approached from a human rights perspective and from an environmental perspective. Environmental protection and human rights evolved as two separate legal regimes and as such have distinct features.[51] Related to the above is the legal nature of the provisions of climate change related treaties, on one hand, and human rights treaties, on the other hand, and the obligations arising from them, the goals they want to achieve and the mechanisms intended to achieve them.

3.1. CLIMATE CHANGE RELATED TREATIES AND HUMAN RIGHTS

International climate change treaties ("climate change law") form one part of the overall body of rules known as international environmental law. Climate change

---

49 *Ibid.*, p. 26.

50 For more details, see *supra,* p. 5 - 7.

51 Atapattu, S., *Human Rights Approaches to Climate Change, Challenges and Opportunities,* Routledge, New York, 2016, p. 49.

law, which some authors consider a new legal discipline,[52] encompasses legal rules, regulations, and policies, which relate to addressing the challenges of climate change. Namely, the previously mentioned problems and challenges caused by climate change[53] have led to the adoption of international treaties that regulate this matter, of which the most important are: the 1992 United Nations Framework Convention on Climate Change (UNFCCC),[54] the 1997 Kyoto Protocol[55] and the already mentioned 2015 Paris Agreement, which operationalize the UNFCCC. The aforementioned instruments aim at stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. According to these climate change related treaties states have three types of obligations regarding climate change that can collectively be referred to as "climate change response measures".[56] Those are: mitigation (mitigating the degree of climate change, in particular by reducing greenhouse gas emissions), adaptation (finding the best ways to adapt to the challenges and threats posed by climate change) and protection (the obligation to secure the rights and addressing the (humanitarian) needs of people affected by negative effects of climate change).[57] However, the problem of climate change cannot be approached in a one-dimensional manner. Three key concepts have been identified as informing climate change law and policy: climate change is an extremely complex issue, which includes science, law, politics, culture, and economics; law relating to climate change is not just environmental; and it cannot be fully addressed through international negotiations under the UNFCCC framework and requires action at multiple levels by a multitude of actors.[58] It is precisely the complexity of the problem of climate change and its impact on people that led to the consideration of this problem, not only from an environmental perspective but also from the aspect of human rights.

As we have outlined in the previous chapter, the link between climate change and human rights has been recognised at the UN level, and the linkage between taking action to address climate change and respecting, promoting and considering

---

52 For more detail, see: Peel, J., *Climate Change Law: The Emergence of a New Legal Discipline,* Melbourne University Law Review, Vol. 32, No. 3, 2008, pp. 922 – 978.

53 For more details, see *supra,* p. 3 – 4.

54 *United Nations Treaty Series*, Vol. 1771, p. 107.

55 *United Nations Treaty Series*, Vol. 2303, p. 162.

56 Savaresi, *loc. cit.,* note 15.

57 Kälin, W.; Schrepfer, N., *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches,* United Nations High Commissioner for Refugees, Division of International Protection, Geneva, 2012, p. 17.

58 Atapattu, *op. cit.,* note 51, p. 18.

human rights obligations is stipulated in the preamble of the Paris Agreement.[59] Boyle interestingly notes that the Paris Agreement on climate change „is relevant to human rights law, not for what it says about human rights— which is next to nothing—but for what it says about the need to address the risk of climate change taking global temperatures above 1.5 or 2 °C".[60] However, Boyle further concludes that despite its transparent weakness, the reference to human rights in the preamble of the Paris Agreement does reinforce their significance in the sense that Paris Agreement may not require states to comply with human rights commitments, but human rights commitments could and should require states to implement Paris Agreement. Their record in doing so can and should be monitored and assessed by UN human rights bodies in the same way that they would monitor and assess any other set of policies that adversely impact on the fulfilment of human rights.[61] Special Rapporteur on the promotion and protection of human rights in the context of climate change notes that from a human rights perspective, loss and damage are closely related to the right to remedy and the principle of reparations, including restitution, compensation and rehabilitation.[62] In its Art. 8, the Paris Agreement states that "Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change". Paris Agreement does not provide means to compensate the harm to persons, property and the environment associated with climate change, and to hold state and non-state actors accountable for these.[63] Instead, Parties to the Paris Agreement excluded compensation from the scope of the treaty.[64]

As early as 2016, the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment warned that states have procedural and substantive obligations relating to climate change, as well as duties to protect the rights of the most vulnerable.[65] In relation to climate change, states are primarily obliged to take action to reduce emissions and to adapt to changes that are foreseeable, such as rising sea levels, or increased

---

59 For more details, see *supra*, p. 7 - 8 and *Promotion and protection of human rights in the context of climate change, op. cit.,* note 1, p. 7.

60 Boyle, *op. cit.,* note 6, p. 759.

61 *Ibid.,* p. 770.

62 *Promotion and protection of human rights in the context of climate change, Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change,* UN, General Assembly, A/77/226, 26 July 2022 , p. 8.

63 Savaresi, A., *Human Rights and the Impacts of Climate Change: Revisiting the Assumptions,* Onati Socio-Legal Series – Climate Justice in the Anthropocene, Vol. 11, No. 1, 2021, p. 234.

64 *Ibid.*

65 *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment,* UN, General Assembly, A/HRC/31/52, 1 February 2016, p. 1.

floods, wildfires, etc.[66] However, states must also guarantee effective remedies for human rights violations associated with the impacts of climate change.[67] They must also take adequate measures to protect all persons from human rights harms caused by business activities and, where such harms do occur, ensure effective remedies.[68] In accordance with UNFCCC and the Paris Agreement, states around the world have enacted laws and adopted policies that prescribe national and international responses to climate change.[69] However, even though states are obliged to limit greenhouse gas emissions to prevent the current and future negative human rights impacts of climate change and have enacted laws and adopted policies to deal with climate change, they are still failing in their human rights obligation to mitigate climate change and prevent its negative human rights impacts.[70] Savaresi notes that the Paris Agreement set the path to net zero emissions, but it does not provide the means to hold state actors to account for failing to deliver on their promised emission reductions.[71] Special Rapporteur on the promotion and protection of human rights in the context of climate change warns that overall, the incorporation of human rights obligations in climate change legislation throughout the world appears to be a relatively recent development.[72] Therefore, persons and communities whose rights have been violated as a result of climate change do not have an adequate legal recourse within the climate change law to protect their rights.

Some of the reasons for the above can be found in the differences between environmental law (or in our case its specific part - climate change law) and human rights law. Namely, the main focus of the legal regime governing environmental issues is prevention and the regulation of activities that are likely to cause environmental damage, rather than providing remedies for violations.[73] On the other hand, while prevention of damage is one of the objectives of the human rights regime, providing remedies in the event of violations is as important as prevention.[74] Furthermore, the human rights regimes do tend to be more legalistic in

66 Savaresi, *Human Rights and the Impacts of Climate Change: Revisiting the Assumptions, op. cit.,* note 63, pp. 237 - 238.

67 *Ibid.*

68 *Ibid.*

69 *Promotion and protection of human rights in the context of climate change, loc. cit.,* note 1.

70 *Ibid.,* p. 4.

71 Savaresi, *Human Rights and the Impacts of Climate Change: Revisiting the Assumptions, op. cit.,* note 63, p. 239.

72 *Promotion and protection of human rights in the context of climate change, op. cit.,* note 1, p. 7.

73 Atapattu, *op. cit.,* note 51, p. 49.

74 *Ibid.*

nature than international environmental regimes.[75] Even though climate change treaties are, as same as human rights treaties, the product of negotiation, there is an important difference between them. As Bodansky notes, in human rights treaties, the end point of the negotiations is a common core of human rights to be respected, while the result of international environmental negotiations are often different requirements for different states.[76] Brodansky also emphasizes that another important difference between international environmental law and human rights law is that the former depends on reciprocity while the latter does not.[77] In the context of human rights protection states owe obligations not only to one another, but also to individuals and one state's respect for human rights does not depend on, and may not be conditioned on, compliance by other states.[78] Given that climate change treaties do not provide for the protection of individual rights, we will provide below an overview of human rights treaties relevant to the protection of individuals and groups from the impact of climate change.

3.2. HUMAN RIGHTS TREATIES AND CLIMATE CHANGE

Climate change treaties are therefore aimed at stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system through the introduction of climate change response measures. As such, although they contain certain references to human rights, they are not aimed at protecting the rights of individuals and groups and do not contain mechanisms that would provide individuals or groups with adequate legal recourse for the protection of human rights violated in the context of climate change. Therefore, individuals and groups turn to human rights instruments and mechanisms to protect their rights. As early as 2009, Humphreys noted that human rights law is relevant to climate change for the simple reason that climate change affects and will increasingly impinge upon human rights and that as harms due to climate change are felt, it is likely that those affected will turn to the hard language of human rights enforcement mechanisms for protection.[79] Due to the significant impact of climate change on the respect for human rights, but also due to the lack of effective international legal mechanisms of international treaties relating to climate change, individual complaints are increasingly being

---

75 Bodansky, D., *Introduction: Climate Change and Human Rights: Unpacking the Issues,* Georgia Journal of International and Comparative Law, Vol. 38, No. 3, 2010, p. 515.

76 *Ibid.,* p. 516.

77 *Ibid.*

78 *Ibid.*

79 Humphreys, S., *Introduction: Human rights and climate change,* in: Humphreys, Stephen (ed.), Human Rights and Climate Change, Cambridge University Press, Cambridge, 2009, p. 7 – 8.

filed before international human rights treaty bodies. This includes UN human rights treaty bodies such as the Committee on Human Rights, as well as regional bodies such as the European Court of Human Rights and the Inter-American Court of Human Rights.

Humphreys states that to speak of basic subsistence needs (water, food, healthcare, shelter, etc.) in terms of rights also implies referral to a body of internationally agreed norms that have raised those needs to the level of entitlements for all.[80] Nevertheless, these entitlements do not translate unproblematically into corresponding obligations, much less into fulfilled demands.[81] Human rights approach to climate change shifts attention to the individual victims of climate change[82] and some authors' use of human rights law consider as an interim "gap filler" to redress the harm caused by the impacts of climate change, while other and more specific means are devised. Atapattu states that the main advantage of the human rights machinery is that it contains remedies that victims can avail themselves of.[83] Savaresi interestingly notes that far from representing an optimal avenue, human rights are often the last resort to try to provide some redress to the victims and to hold those responsible accountable.[84]

Until the eventual adoption of special instruments and mechanisms for the protection of human rights in the context of climate change, individuals and groups whose rights have been violated by climate change turn for protection to the provisions of fundamental international treaties for the protection of human rights. These include in the first place the 1966 International Covenant on Civil and Political Rights[85] and the 1966 International Covenant on Economic, Social and Cultural Rights.[86] In addition to the above, in the context of particularly vulnerable social groups, which are especially susceptible to human rights violations due to climate change, protection is attempted by referring to other UN core human rights treaties that protect, for example, the rights of children[87] or people with

---

80 *Ibid.,* p. 9 – 10.

81 *Ibid.*

82 Bell, D., *Climate Change and Human Rights,* Wiley Interdisciplinary Reviews: Climate Change, Vol. 4, br. 3, 2013, p. 159.

83 Atapattu, *op. cit.,* note 51, p. 41.

84 Savaresi, *Human Rights and the Impacts of Climate Change: Revisiting the Assumptions, op. cit.,* note 63, p. 236.

85 *United Nations Treaty Series,* Vol. 999. p. 171.

86 *United Nations Treaty Series,* Vol. 993, p. 3.

87 The 1989 Convention on the Rights of the Child, *United Nations Treaty Series,* Vol. 1577, p. 3.

disabilities.[88] In addition to these universal human rights instruments for protecting human rights from the impacts of climate change, Charter-based mechanisms are also important: Special Rapporteur on the human right to a clean, healthy and sustainable environment, and Special Rapporteur on the promotion and protection of human rights in the context of climate change.[89] In the previous chapter, we briefly outlined the development of the human right to a healthy environment at the universal level and the UN General Assembly landmark Resolution recognizing the human right to a healthy environment adopted in 2022.[90] This Resolution was an unprecedented decision, adopted with unparalleled support (161 votes in favor, no votes against, and eight abstentions).[91] Of course, it represents a great step forward, but the mere recognition of rights does not automatically mean an improvement in the situation related to a healthy environment and an improvement in protection against climate change and its impact on human rights.

Considering the large number of different human rights, which may be violated due to climate change, the environmental rights discourse has in many respects blurred the distinction between different generations of human rights, because it relies on all three generations to articulate them.[92] Individuals referred to first generation rights in the context of climate change protection (e.g. right to life and right to privacy, and participatory rights, such as right to information and right to participate in the decision-making process and access to remedies) and second generation rights (right to health, right to a livelihood, right to water, food and an adequate standard of living). Moreover, some believe that environmental rights are group rights, hence implicating third generation rights, to the extent they are accepted under international law.[93] In recent years, human rights bodies have clarified the content of states' obligations in this connection. This interpretative work shows that obligations associated with both substantive human rights (e.g. the right to life, adequate housing, food, and the highest attainable standard of health) and procedural human rights (e.g. the right to access to remedies and to

---

88 The 2006 Convention on the Rights of Persons with Disabilities, *United Nations Treaty Series,* Vol. 2515, p. 3.

89 For more details, see official pages of the United Nations, [https://spinternet.ohchr.org/ViewAllCountryMandates.aspx?Type=TM&lang=en], Accessed 7 April 2025.

90 For more details, see *supra,* p. 5 – 6.

91 *Report of the Special Rapporteur on the human right to a clean, healthy and sustainable environment, Overview of the implementation of the human right to a clean, healthy and sustainable environment,* UN, General Assembly, A/79/270, 2 August 2024, p. 3.

92 Atapattu, *op. cit.,* note 51, p. 45 – 46.

93 *Ibid.*

take part in the conduct of public affairs) take on a specific character in relation to climate change.[94]

As far as regional human rights systems are concerned, the right to a healthy environment is expressly recognized and protected in several regional instruments. Some of them were already mentioned earlier. Art. 24 of the African Charter on Human and Peoples' Rights, the first regional instrument to recognize the right to a healthy environment, states that "all peoples shall have the right to a general satisfactory environment favourable to their development". Art. 18 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,[95] further states that women shall have "the right to live in a healthy and sustainable environment". Since 2001, the African Commission on Human and Peoples' Rights has protected the right to a healthy environment.[96] In the Inter-American system, Art. 11(1) of the Protocol of San Salvador (Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights)[97] recognizes everyone's right to "live in a healthy environment". Art. 38 of the Arab Charter on Human Rights[98] includes the right to a healthy environment, but has no institution for its implementation nor for its enforcement. The Association of Southeast Asian Nations (ASEAN) Declaration on Human Rights (2012)[99] includes the right to a healthy environment, noting it constitutes an unenforceable political declaration. South-East Asia is developing a regional treaty regarding the right to a safe, clean, healthy and sustainable environment, access to information, public participation and access to justice in environmental matters.[100]

Within the framework of the Council of Europe the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (the European Conven-

---

94 Savaresi, *Human Rights and the Impacts of Climate Change: Revisiting the Assumptions, op. cit.,* note 63, p. 237. – 238.

95 African Charter on Human and Peoples' Rights on the Rights of Women in Africa, African Union, Adopted by the 2nd Ordinary Session of the Assembly of the Union, 11 July 2003, available at: [https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa].

96 Report of the Special Rapporteur on the human right to a clean, healthy and sustainable environment**,** *op. cit.,* note 91, p. 6.

97 See *supra* note 24.

98 Arab Charter on Human Rights, 2004, english translation available at: [https://al-bab.com/documents-reference-section/arab-charter-human-rights-2004].

99 Association of Southeast Asian Nations (ASEAN) Declaration on Human Rights (2012), avaiable at: [https://asean.org/asean-human-rights-declaration/].

100 Report of the Special Rapporteur on the human right to a clean, healthy and sustainable environment, *op. cit.,* note 91, p. 6.

tion on Human Rights)[101] does not contain a specific provision aimed at protecting human rights in relation to climate change and does not include the right to a healthy environment. However, the European Court of Human Rights has given a ruling in over 300 environment-related cases recognizing human rights violations.[102] Specific climate change related case law of the European Court of Human Rights will be discussed in detail in the next chapter.[103] In 2021, the Parliamentary Assembly of the Council of Europe proposed a new protocol to the European Convention on Human Rights establishing the right to a healthy environment.[104]

Given that the human right to a clean, healthy and sustainable environment is a compound right,[105] it remains to be seen how new international law developments, such as pending advisory opinions of the International Court of Justice and Inter-American Court of Human Rights regarding climate change, will affect the realization of climate change related human rights protection. Of course, apart from the international instruments themselves for the development of the protection of climate change related human rights, the case law of international tribunals that will be the subject of the next chapter is of particular importance.

4. AN OVERVIEW OF CLIMATE CHANGE AND HUMAN RIGHTS RELATED CASE LAW BY THE INTERNATIONAL BODIES

Cases before international courts and other bodies in which the question of the impact of climate change on the enjoyment of human rights is raised have appeared only recently. Judgments and other decisions in such cases are still few. However, it is to be expected that the number of such judgments and decisions will increase in the coming period. A good indicator of this is the fact that two proceedings are currently underway before different international courts for the issuance of advisory opinions related to the issue of climate change and its (to a greater or lesser extent) impact on human rights, while the third has already been concluded. Proceedings are ongoing before the International Court of Justice (ICJ) and the Inter-American Court of Human Rights (IACtHR), and the proceedings before the International Tribunal of the Law of the Sea (ITLOS) have already been com-

---

101 Convention for the Protection of Human Rights and Fundamental Freedoms (1950), *European Treaty Series,* No. 5.

102 *Report of the Special Rapporteur on the human right to a clean, healthy and sustainable environment, op. cit.,* note 91, p. 7.

103 See *infra*, p. 17 – 20.

104 *Report of the Special Rapporteur on the human right to a clean, healthy and sustainable environment, op. cit.,* note 91, p. 7.

105 *Ibid.*, p. 9.

pleted. After the presentation of the aforementioned advisory procedures, relevant judgments and other types of decisions of the individual complaints mechanisms of the universal and regional human rights treaties will be presented.

4.1. ADVISORY PROCEEDINGS

The request for the advisory opinion from ITLOS was requested by the Commission of Small Island States in 12 December 2022 and after the procedure,[106] the Tribunal has issued its Advisory Opinion on 21 May 2024.[107] Although it is a specialized court in the field of the law of the sea, and although the Request does not explicitly mention the issue of the impact of climate change on human rights, some judges in their declarations attached to the Advisory Opinion objected that the ITLOS could have been somewhat more explicit and progressive in this context. The view was thus expressed that the Tribunal could have gone a little further in this regard than simply noting "that climate change represents an existential threat and raises human rights concerns" (para. 66.) and that it „is mindful of the fact that climate change is recognized internationally as a common concern of humankind" (para. 122.). Judge Pawlak criticized the majority for ignoring the precedents of the European Court of Human Rights and the Human Rights Committee, which will be discussed below, according to which states can be held responsible „for the lack of adequate protection of persons against diverse impacts of climate change within the framework of international human rights law". According to him, that could have been an argument which ITLOS could have used „to support its findings in the current Advisory Opinion, but it did not do so".[108] ITLOS, therefore, only marginally touched on the issue of the impact of climate

[106] For the details of the proceedings and relevant documents see the official pages of the ITLOS, Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, avaiable at:
[https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/], Accessed April 2025.

[107] Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, ITLOS, List of Cases No. 21, Advisory Opinion, 21 May 2024, available at official pages of ITLOS, avaiable at:
[https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/], Accesssed 8 April 2025.

[108] Declaration of Judge Pawlak, para. 4. See also Declaration of Judge Infante Caffi. But see the different opinion in Declaration of Judge Kittichaisaree, para. 28. All Declarations of individual Judges attached to the Advisory Opinion are available at official pages of ITLOS, Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, available at:

change on human rights, it is to be expected that the advisory opinions of the ICJ and IACtHR will be much more relevant in this context.

The UN General Assembly submitted to the ICJ a Request for advisory opinion on Obligations of States in respect of Climate Change in April 2023.[109] Although the questions of the General Assembly addressed to the ICJ are broader than the issue of the impact of climate change on human rights alone, since they relate to "the obligations of States under international law" regarding climate change in general, they certainly also cover human rights.[110] Namely, in a series of international instruments referred to by the General Assembly, the 1948 Universal Declaration of Human Rights,[111] the 1966 International Covenant on Civil and Political Rights[112] and the 1966 International Covenant on Economic, Social and Cultural Rights were highlighted.[113] Also, one of the questions specifically refers to „legal consequences under these obligations for States" regarding „[p]eoples and individuals of the present and future generations affected by the adverse effects of climate change" ((b)(ii)). After the written part of the procedure, public hearings were held 2-13 December 2024 on which 96 states and 11 international organizations presented oral statements.[114] The Court is currently in deliberation and the date of the delivering of the advisory opinion is still not known.[115] Despite its non-binding nature, because of broad material jurisdiction of the ICJ and its authority as a leading international judicial institution, this advisory opinion has a big potential in that, as Farran noted, „could provide the vehicle to bring human rights and climate change together in a principled way".[116]

[https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/], Accessed 8 April 2025.

109 Obligation of States in respect of Climate Change, ICJ, Request for Advisory Opinion transmitted to the Court pursuant to General Assembly Resolution 77/276 of 29 March 2023, 14 April 2023.

110 See Farran, S., *Vanuatu Leads Drive to Secure an Opinion from the International Court of Justice on State Responsibilities to Turn Words into Action on Climate Change,* University of Queensland Law Journal, Vol. 42, No. 3, 2023, p. 420.

111 UN General Assembly Resolution 217A, 10 December 1948.

112 See *supra* note 85.

113 See *supra* note 86.

114 Obligation of States in respect of Climate Change (Request for Advisory Opinion), Conclusion of the public hearings held from 1 to 13 December 2024, ICJ Press Release no. 2024/81, 13 December 2024.

115 For the details of the proceedings and relevant documents see the official pages of the ICJ, Obligations of States in respect of Climate Change, available at:
[https://www.icj-cij.org/case/187], Accessed 7 April 2025.

116 Farran, *op. cit.,* note 110, p. 430.

The request for an advisory opinion on the Climate Emergency and Human Rights of the IACtHR was brought by Chile and Colombia on 9 January 2023.[117] The request is very thoroughly explained and contains as many as 18 questions grouped into six categories (A.-F.). The general purpose of seeking an advisory opinion is „to clarify the scope of State obligations, in their individual and collective dimension, in order to respond to the climate emergency within the framework of international human rights law, paying special attention to the differentiated impacts of this emergency on individuals from diverse regions and population groups, as well as on nature and on human survival on our planet" (p. 1; text bolding removed). In the context of this procedure, the Court held public hearings during April and May 2024.[118] According to the President of the IACtHR, it is an advisory procedure „with the highest participation in the history of the Court, reflecting the interest that the issue of the climate emergency summons from different actors from various parts of the world".[119] As many as 265 *amicus curiae* briefs from various actors worldwide were submitted to the Court as part of the proceedings, including states, international organizations, civil society, academia and individual scientists and activists.[120] The date of the delivering of the advisory opinion is still unknown.[121]

Advisory opinions, although legally non-binding in nature, can certainly make a significant contribution to the development of this field. Unlike contentious cases, they have effect that is more general and are formed at a higher level of legal generality. In addition, a larger number of states can participate in such a procedure than is usual in contentious cases.[122] On the other hand, the parallel conduct of such procedures by several different international courts also has its negative aspects related to the coherent interpretation of the corresponding international legal obligations. Courts may be influenced by various factors when issuing advisory

---

117 Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, January 9, 2023, available at the official pages of the IACtHR, [https://www.corteidh.or.cr/observaciones_oc_new.cfm?nId_oc=2634], Accessed 8 April 2025.

118 See IACtHR Press Release, I/A Court H.R._PR-34/2023 English, available at: [https://www.corteidh.or.cr/docs/comunicados/cp_34_2024_eng.pdf] and IACtHR Press Release, I/A Court H.R._PR-27/2024 English, available at: [https://www.corteidh.or.cr/docs/comunicados/cp_27_2024_eng.pdf], 8 Accessed April 2025.

119 IACtHR Press Release, I/A Court H.R._PR-27/2024 English, available at: [https://www.corteidh.or.cr/docs/comunicados/cp_27_2024_eng.pdf], Accessed 8 April 2025.

120 *Ibid.*

121 For the details of the proceedings and relevant documents see the official pages of the IACtHR, [https://www.corteidh.or.cr/observaciones_oc_new.cfm?nId_oc=2634], Accessed 9 April 2025.

122 Bodansky, D., *The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections,* Arizona State Law Journal, Vol. 49, Special Issue, 2017, p. 711.

opinions, such as „the need to preserve an intra-institutional coherent jurisprudence, or their ambition to be perceived as more progressive".[123] If we ignore the marginal touch of climate change and human rights link in the Advisory Opinion of ITLOS, each of the remaining two courts has something to offer in this area. The ICJ has broad jurisdiction, universal significance and the greatest authority of all the courts in the international community, while the IACtHR, as a specialized court, has, despite its regional significance, extensive experience in human rights cases.

4.2. INDIVIDUAL COMPLAINTS MECHANISMS' DECISIONS

The number of judgments and other decisions before international judicial and quasi-judicial bodies of the human rights treaties, both at the universal and regional levels, is not numerous. However, it is expected that their number will progressively increase in the coming years. That is why it is important at this time to provide an overview of existing judgments and decisions in order to contribute to the proper development of future practice. Until now, decisions on the merits of the impact of climate change on respect for human rights have been made by the Human Rights Committee on the universal level and the European Court of Human Rights on the European regional level. There were also cases in which applications were declared inadmissible. For example, in the previously mentioned case *Sheila Watt-Cloutier et al. v. U.S.* (Inuit People v. U.S.) before the Inter-American Commission on Human Rights the application was rejected due to lack of required information,[124] and in the case *Sacchi et al. v. Argentina et al.* before the Committee on the Rights of the Child because of the non-exhaustion of domestic remedies.[125] In addition, in cases *Carême v. France*[126] and *Duarte Agostinho and Others v. Portugal and 32 others*[127] before the European Court of Human Rights the applications were declared inadmissible due to absence of relevant link of the applicant with affected territory and due to lack of foundation for the extension of extraterritorial jurisdiction and non-exhaustion of domestic remedies. In this

---

123 Tigre, M. A.; Rocha, A., *Competing Perspectives and Dialogue in Climate Change Advisory Opinions*, AJIL Unbound, Vol. 117, 2023, p. 291.

124 *Sheila Watt-Cloutier, S et al. v. U.S.*, Petition No. P-1413-05, *loc. cit.,* note 35.

125 See *Sacchi et al. v. Argentina*, Committe on the Rights of the Child, Communication No.104/2019, Decision adopted by the Committee, 22 September 2021, UN Doc. CRC/C/88/D/104/2019, 8 October 2021. There are separate decisions for each of the respondent States which are available in one place here: Sacchi, et al. v. Argentina, et al., Climate Change Litigation Databases, [https://climatecasechart.com/non-us-case/sacchi-et-al-v-argentina-et-al/], Accessed 11 April 2025.

126 *Carême v. France*, ECtHR. Application no. 7189/21, Decision (Grand Chamber), 9 April 2024.

127 *Duarte Agostinho and Others v. Portugal and 32 Others*, ECtHR. Application no. 39371/20, Decision (Grand Chamber), 9 April 2024.

presentation, we will only focus on the decisions in which the merits of the cases were decided.

We have categorized the decisions of international bodies regarding individual complaints in the context of the impact of climate change on human rights that have been made so far into those before universal international bodies (which are at the same time of the quasi-judicial character) and those before regional international bodies (which are at the same time of the judicial character in the full sense of the word). Specifically, there are two decisions of the Human Rights Committee in the first category and one judgment of the European Court of Human Rights in the second category. This categorization was applied more for the sake of systematicity and clarity than for some analytical differences. Of course, the conclusions of different international bodies regarding individual complaints must be considered in the context of their different scope (universal scope/regional scope) and different nature (binding and non-binding). However, for now we have very few pioneering decisions, which, for the purposes of this paper, we analyze only in the context of their principled positions in the context of the relationship between climate change and human rights and the determination of the biggest potential problems in the context of the further development of this practice. We leave the subtleties of the distinctions in the approach to the problem of climate change and human rights of various international bodies for some future research.

4.2.1. Universal level/quasi-judicial bodies

The Human Rights Committee (as the implementing body of the 1966 International Covenant on Civil and Political Rights[128]) first considered the impact of climate change on human rights in the case *Teitiota v. New Zaeland* in 2019.[129] It was about a complaint of a Kiribati citizen who claimed that "the effects of climate change and sea level rise forced him to migrate from the island of Tarawa in Kiribati to New Zealand" (para. 2.1). According to the claimant, [s]ea level rise in Kiribati has resulted in the scarcity of habitable space, which has in turn caused violent land disputes that endanger the author's life, and environmental degradation, including saltwater contamination of the freshwater supply" (para. 3). The complainant therefore considered that New Zealand, by refusing him asylum - and thereby forcing him to return to Kiribati, violated his right to life guaranteed by the Art. 6 of the Covenant (paras. 2.2 and 3). Although the Committee in the

128 See *supra* note 85.

129 *Ioane Teitiota v. New Zaeland*, Human Rights Committee, Communication No. 2728/2016, Views adopted by the Committee, 24 October 2019. UN Doc. CCPR/C/127/D/2728/2016, 23 September 2020.

end concluded "that the facts before it do not permit it to conclude that the author's removal to Kiribati violated his rights under article 6 (1) of the Covenant" (para. 10), it also presented certain considerations that are significant for future similar cases. The Committee concluded, among other things, that „the author has not demonstrated clear arbitrariness or error in the domestic authorities' assessment as to whether he faced a real, personal and reasonably foreseeable risk of a threat to his right to life as a result of violent acts resulting from overcrowding or private land disputes in Kiribati" (para. 9.7). It also concluded that „the author has not provided sufficient information indicating that the supply of fresh water is inaccessible, insufficient or unsafe so as to produce a reasonably foreseeable threat of a health risk that would impair his right to enjoy a life with dignity or cause his unnatural or premature death" (para. 9.8). Nevertheless, the Committee gave a kind of warning for future similar cases, noting that „given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized" (para. 9.11). In addition, he emphasized that the conclusions of this case do not affect „the continuing responsibility of the State party to take into account in future deportation cases the situation at the time in Kiribati and new and updated data on the effects of climate change and rising sea levels" (para. 9.14). Despite the fact that the Committee did not accept the claimant's allegations, this decision was recognized as a landmark decision because it nevertheless recognized the existence of an obligation on states not to deny asylum to persons whose lives are seriously endangered by circumstances arising from climate change.[130]

The second case decided by the Human Rights Committee was *Billy et al. v. Australia* in 2022 (Torres Strait Islanders case).[131] This is the first case in which one of the UN human rights treaty bodies has established a violation of human rights in the climate change context based on an individual complaint.[132] It was about a complaint of group of nationals of Australia and indigenous minority group of

---

130 Mile, A., *Emerging Legal Doctrines in Climate Change Law - Seeking an Advisory Opinion from the International Court of Justice,* Texas International Law Journal, Vol. 56, No. 1, 2021, p. 86.

131 *Daniel Billy and others v. Australia*, Human Rights Committee, Communication No. 3624/2019, Views adopted by the Committee, 21 July 2022. UN Doc. CCPR/C/135/D/3624/2019, 18 September 2023.

132 See Luporini, R., *Climate Change Litigation before International Human Rights Bodies: Insights from Daniel Billy et al. v. Australia (Torres Strait Islanders Case),* Italian Review of International and Comparative Law, Vol. 3, No. 2, 2023, p. 239, Schuijers, L., *Australia's Inaction on Climate Change Is a Violation of Torres Strait Islanders' Human Rights: Billy v Australia,* Melbourne Journal of International Law, Vol. 24, No. 1, July 2023, p. 153 and McGaughey, F., Maguire, A., Purcell, S., *Torres Strait Islanders Leading the Charge on the Human Rights Implications of Climate Change: Daniel Billy et al v Australia,* University of Western Australia Law Review, Vol. 51, No. 1, 2023, p. 95.

the Torres Strait islands. The authors „reside in low-lying islands" and are „among the populations most vulnerable to the impact of climate change" (paras. 1.1 and 2.1). This is manifested in „flooding and erosion on the authors' islands, and higher temperature and ocean acidification" that has, among other things, „produced coral bleaching, reef death and the decline of seagrass beds and other nutritionally and culturally important marine species" (para. 2.3). According to the claimants, Australia „has failed to adopt adaptation measures (infrastructure to protect the lives of the authors and their way of life, homes and culture against the impacts of climate change, especially sea-level rise)" (para. 3.1). They referred to violations, among other things, of Art. 6 (right to life), Art. 17 (right to private, family and home life) and Art. 27 (minority rights). Regarding Art. 6 the Committee noted that it „is not in a position to conclude that the adaptation measures taken by the State party would be insufficient and therefore represent a direct threat to the authors' right to life with dignity" under Art. 6 (para. 8.7). However, regarding Art. 17 and Art. 27 the Committee concluded that there had been a violation of the rights guaranteed by those provisions. In the context of Art 17 the Committee observed that „the State party has not explained the delay in sea wall construction with respect to the islands where the authors live" and „has not provided alternative explanations concerning the reduction of marine resources used for food and the loss of crops and fruit trees on the land on which the authors live and grow crops". Based on this, it concluded that Australia had failed „to discharge its positive obligation to implement adequate adaptation measures to protect the authors' home, private life and family" (para. 8.12) . In the context of the Art. 27 the Committee has stated that „the State party's failure to adopt timely adequate adaptation measures to protect the authors' collective ability to maintain their traditional way of life and to transmit to their children and future generations their culture and traditions and use of land and sea resources discloses a violation of the State party's positive obligation to protect the authors' right to enjoy their minority culture" (para. 8.14). With the instruction on the obligation of state party to provide for effective remedy to claimants and continuation of necessary measures for safeguarding the community in question the Committee has also underlined the state party's „obligation to take steps to prevent similar violations from occurring in the future" (para. 11).

4.2.2. Regional level/judicial bodies

The European Court of Human Rights (as the implementing body of the 1950 European Convention on Human Rights[133]) ruled for the first time on individual

[133] See *supra* note 101.

cases of the impact of climate change on human rights on 9 April 2024. These cases are *Carême v. France* and *Duarte Agostinho and Others v. Portugal and 32 others*, which were already mentioned, and case *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*[134], all before the Grand Chamber of the Court. The first two applications the Court has, as it was already stated, declared inadmissible, but in the third case the Court has passed the judgment in favour of (part of) the applicants.

In *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland,* it was about the application submitted by a non-profit association registered under Swiss law and four older women, members of that association (para. 1 and 11). This non-governmental organization is engaged in activism in the field of combating climate change, and its members are mostly older women (para. 10). The complainants referred to „the failures by the Swiss authorities to mitigate climate change, and in particular the effects of global warming, including a lack of access to a court in that connection" in the context of violations of, among others, Art. 6 (right to a fair trial) and Art. 8 (right to respect for private and family life) of the European Convention on Human Rights (para. 291). The Court did not recognise the victim status of four individual applicants because it found that a particularly high threshold which consists of „high intensity of exposure […] to the adverse effects of climate change" and „a pressing need to ensure […] individual protection" was not met (paras. 527 and 535). On the other hand, the complaint of the association was accepted (para. 526). The Court explained its decision very extensively and set criteria for future cases (para. 502). It emphasized, among other things, that „although in the absence of a measure directly affecting them the Court does not normally grant victim status to associations […] there may be "special considerations"" (para. 475). It also stated that „when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively" (para. 489). According to the Court, in the „context where intergenerational burden-sharing assumes particular importance […] collective action through associations or other interest groups may be one of the only means through which the voice of those at a distinct representational disadvantage can be heard" (para. 489).

The Court took the general view that „there are sufficiently reliable indications that anthropogenic climate change exists, that it poses a serious current and future threat to the enjoyment of human rights guaranteed under the Convention" (para.

134 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, ECtHR. Application no. 53600/20, Judgment (Grand Chamber), 9 April 2024.

436). Accordingly, Art. 8 covers also the „right for individuals to enjoy effective protection by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change" (para. 544). Considering „the causal relationship between climate change and the enjoyment of Convention rights", according to the Court „the State's primary duty is to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change" (para. 545). The Court found „some critical lacunae in the Swiss authorities' process of putting in place the relevant domestic regulatory framework, including a failure by them to quantify, through a carbon budget or otherwise, national GHG emissions limitations" and on that basis found a violation of Art. 8. Given that „individual applicants/members of the association were not given access to a court, and nor was there any other avenue under domestic law through which they could bring their complaints to a court", the Court has concluded that there was also a violation of the Art 6(1) of the Convention (para. 637 and 640). Given that the decisions (views) of the UN human rights treaty bodies are of a non-binding nature, this judgment is the first real precedent in the area of the impact of climate change on human rights. It is particularly important because it is the first time that a state was declared responsible before such a body for not fulfilling the mitigation of the climate change obligations in the matter of greenhouse gas emissions.[135]

* * *

Given their international character and strategic importance due to attracting a number of different actors to participate in such proceedings through *amicus curiae* briefs and the like, it can be said that international human rights bodies, despite the fact that they were not originally intended to address environmental issues, are currently "the primary international fora for climate change litigation".[136] What could be concluded, given the experiences with individual complaints mechanisms so far, is that the main obstacles to a positive outcome for the complainants are procedural ones: the exhaustion of domestic remedies, jurisdiction and victim requirement.[137] The aforementioned decisions certainly provided important guidelines for future cases before such bodies. In particular, the judgment in the

---

135 See Heri, C., *The ECtHR's KlimaSeniorinnen Judgment: A Cautious Model for Climate Litigation,* Spanish Yearbook of International Law (SYbIL), Vol. 28, 2024, p. 311.

136 Luporini, *op. cit.,* note 132, p. 240-241, 259.

137 Luporini, R., Savaresi, A., *International Human Rights Bodies and Climate Litigation: Don't Look Up?,* The Review of European, Comparative & International Environmental Law (RECIEL) 2022, p. 9, available at:
SSRN: [https://ssrn.com/abstract=4230278], Accessed 11 April 2025.

case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* is of the utmost importance because it managed to maneuver a narrow legal path to a judgment of the European Court of Human Rights to specialized non-governmental organizations between the *actio popularis* prohibited by the ECHR and its stringent victim requirements.[138] Many questions are of course still open and many will only be resolved through new and different cases, but the first foundations for climate change and human rights international litigation have been laid.

5. CONCLUSION

Climate change affects numerous aspects of human life, and thus the enjoyment of human rights guaranteed by international and regional treaties and national constitutions and laws. Climate change threatens various human rights, including the right to life, the right to adequate food and water, the right to the highest attainable standard of physical and mental health, the right to adequate housing, the right to cultural identity, etc. Environmentally displaced persons suffer particular consequences of numerous violations of human rights due to climate change. All this brings into focus the issue of human rights protection in the context of climate change and the existence of an (in)adequate legal avenues for the protection of the rights of individuals and groups.

The issue of climate change in international law is most often approached from an environmental perspective. Therefore, the problems and challenges caused by climate change have led to the adoption of international treaties that regulate this matter, such as the 1992 UN Framework Convention on Climate Change, the 1997 Kyoto Protocol and the 2015 Paris Agreement. However, these international treaties impose three types of obligations on states: mitigation (mitigating the degree of climate change, in particular by reducing greenhouse gas emissions), adaptation (finding the best ways to adapt to the challenges and threats that climate change brings) and protection (the obligation to secure the rights and addressing the (humanitarian) needs of people affected by negative effects of climate change) and do not provide individuals and groups with a legal remedies to protect their individual and group rights.

Due to the significant impact of climate change on the respect for human rights, but also due to the lack of effective international legal mechanisms of international treaties relating to climate change, individual complaints are increasingly being

[138] See Heri, *op. cit.,* note 135., p. 314-315 and Weber, T., *KlimaSeniorinnen: Changing Legal Opportunity Structures in the Face of the Climate Crisis,* Austrian Law Journal,Vol. 2024, No. 1, 2024, p. 109, 110-113.

filed before international human rights treaty bodies. Thus, the human rights perspective is increasingly used as a "gap filler" through existing universal and regional international human rights mechanisms. To date, the UN human rights treaty bodies such as the Committee on Human Rights, as well as regional bodies such as the European Court of Human Rights have issued some important decisions in cases relating to the protection of individuals and groups from climate change, such as the landmark decisions in the cases *Billy and others v. Australia* and *KlimaSeniorinnen v. Switzerland*.

However, we consider the efforts made so far in the international community to be insufficient. Resolving the problem of human rights violations resulting from climate change must be approached in a multidimensional and multisectoral manner, requiring cooperation from all parties, states, international governmental and non-governmental organizations, and local communities. The goal is to ensure sustainable development and to place a human rights approach at the center of policy and strategy development to address the problems faced by individuals and groups due to climate change, especially the categories of people most affected by climate change - environmentally displaced persons or the persons that are at risk of environmental displacement. In order to give the aforementioned problem the attention it deserves, it would be ideal to adopt new, more effective binding instruments, but the question is how realistic is this in the present time. In any case, there is certainly room in the context of existing legal avenues to instruct states and governments on which policies and measures they should adopt in order to jointly resolve the crisis that the entire world has been facing in recent decades. We hope that the advisory opinions of the International Court of Justice and the Inter-American Court of Human Rights that we await will encourage states and international organizations to more effectively combat climate change, but also to more effectively use existing and (maybe) establish new legal remedies for people and groups most at risk from climate change.

REFERENCES

BOOKS AND ARTICLES

1. Atapattu, S., *Human Rights Approaches to Climate Change, Challenges and Opportunities,* Routledge, New York, 2016.
2. Bell, D., *Climate Change and Human Rights,* Wiley Interdisciplinary Reviews: Climate Change, Vol. 4, No. 3, 2013, pp. 159 – 170.
3. Bodansky, D., *Introduction: Climate Change and Human Rights: Unpacking the Issues,* Georgia Journal of International and Comparative Law, Vol. 38, No. 3, 2010, pp. 511-524.

4. Bodansky, D., *The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections,* Arizona State Law Journal, Vol. 49, Special Issue, 2017, pp. 659 - 712.
5. Boyle, A., *Climate Change, the Paris Agreement and Human Rights,* International and Comparative Law Quarterly, Vol. 67, No. 4, 2018, pp. 759 – 777.
6. Borges, I. M., *Environmental Change, Forced Displacement and International Law - From Legal Protection Gaps to Protection Solutions,* Routledge, New York, 2019.
7. Farran, S., *Vanuatu Leads Drive to Secure an Opinion from the International Court of Justice on State Responsibilities to Turn Words into Action on Climate Change,* University of Queensland Law Journal, Vol. 42, No. 3, 2023.
8. Glantz, M. H., *Creeping Environmental Problems, Natural Science Essay,* The World and I, 1994b, pp. 218–225.
9. Hajjar Leib, L., *Human Rights and the Environment Philosophical, Theoretical and Legal Perspectives,* Martinus Nijhoff Publishers, 2011.
10. Harrington, J., *Climate Change, Human Rights, and the Right to Be Cold*, Fordham Environmental Law Review, Vol. 18, 2006, p. 513 – 535.
11. Heri, C., *The ECtHR's KlimaSeniorinnen Judgment: A Cautious Model for Climate Litigation,* Spanish Yearbook of International Law (SYbIL), Vol. 28, 2024, pp. 311 - 319.
12. Humphreys, S., *Introduction: Human rights and climate change,* in: Humphreys, Stephen (ed.), Human Rights and Climate Change, Cambridge University Press, Cambridge, 2009, pp. 1 – 33.
13. Jolly, S.; Ahmad, N., *Climate Refugees in South Asia - Protection Under International Legal Standards and State Practices in South Asia,* Springer, Singapore, 2019.
14. Kälin, W.; Schrepfer, N., *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches,* United Nations High Commissioner for Refugees, Division of International Protection, Geneva, 2012.
15. Koivurova, T; Duyck, S.; Heinämäki, L., *Climate Change and Human Rights,* in: Hollo, E. J.; Kulovesi, K.; Meh00000000000000000ling, M. (eds.), Ius Gentium: Comparative Perspectives on Law and Justice, Vol. 21, 2013, pp. 287 - 325.
16. Lulić, M.; Muhvić, D.; Rešetar Čulo, I., *In Support of the Debate on the Terminology Related to the Terms Climate Refugees, Climate Migrants, Environmentally Displaced Persons and Similar Terms,* EU and Comparative Law Issues and Challenges Series (ECLIC), Vol. 7, 2023, pp. 3 – 32.
17. Luporini, R., *Climate Change Litigation before International Human Rights Bodies: Insights from Daniel Billy et al. v. Australia (Torres Strait Islanders Case),* Italian Review of International and Comparative Law, Vol. 3, No. 2, 2023, pp. 238 – 259.
18. Luporini, R., Savaresi, A., *International Human Rights Bodies and Climate Litigation: Don't Look Up?,* The Review of European, Comparative & International Environmental Law (RECIEL) 2022, p. 9, available at SSRN: [https://ssrn.com/abstract=4230278], Accessed 11 April 2025.

19. McGaughey, F., Maguire, A., Purcell, S., *Torres Strait Islanders Leading the Charge on the Human Rights Implications of Climate Change: Daniel Billy et al v Australia,* University of Western Australia Law Review, Vol. 51, No. 1, 2023, pp. 88 – 98
20. McNevin, A., *Forced Migration in Australia, New Zealand, and the Pacific,* in: Fiddian-Qasmiyeh, E.; Loescher, G.; Long, K.; Sigona, N. (eds.): The Oxford Handbook of Refugee and Forced Migration Studies, Oxford University Press, 2014
21. Mile, A., *Emerging Legal Doctrines in Climate Change Law - Seeking an Advisory Opinion from the International Court of Justice,* Texas International Law Journal, Vol. 56, No. 1, 2021, p. 59 – 94
22. Modi, R.; Goyal, N., *Analysing the Impact of Climate Change on Human Rights Through the Legislative Framework,* GLS Law Journal, Vol. 5, No. 2, 2023, pp. 49. – 61
23. Osofsky, H. M., *The Inuit Petition as a Bridge, Dialectics of Climate Change and Indigenous Peoples' Rights,* American Indian Law Review, Vol. 31, No. 2, 2006/2007, pp. 675 – 697
24. Peel, J., *Climate Change Law: The Emergence of a New Legal Discipline,* Melbourne University Law Review, Vol. 32, No. 3, 2008, pp. 922 – 978
25. Renaud, F.; Bogardi, J. J.; Dun, O.; Warner, K., *Control, Adapt or Flee – How to Face Environmental Migration?,* United Nations University, Institute for Environment and Human Security, No. 5, 2007
26. Savaresi, A., *UN Human Rights Bodies and the UN Special Rapporteur on Human Rights and Climate Change: All Hands on Deck,* Yearbook of International Disaster Law Online, Vol. 4, No. 1, 2023, pp. 396 – 409
27. Savaresi, A., *Human Rights and the Impacts of Climate Change: Revisiting the Assumptions,* Onati Socio-Legal Series – Climate Justice in the Anthropocene, Vol. 11, No. 1, 2021, pp. 231 – 253
28. Schuijers, L., *Australia's Inaction on Climate Change Is a Violation of Torres Strait Islanders' Human Rights: Billy v Australia,* Melbourne Journal of International Law, Vol. 24, No. 1, July 2023, pp. 1 – 16
29. Tigre, M. A.; Rocha, A., *Competing Perspectives and Dialogue in Climate Change Advisory Opinions*, AJIL Unbound, Vol. 117, 2023, pp. 287 - 291.
30. Weber, T., *KlimaSeniorinnen: Changing Legal Opportunity Structures in the Face of the Climate Crisis,* Austrian Law Journal, Vol. 2024, No. 1, 2024, pp. 110 – 116

INTERNATIONAL DOCUMENTS

1. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Protocol of San Salvador, Organization of American States, A-52, November 16, 1988
2. African Charter on Human and Peoples' Rights, Organization of African Unity, Adopted by the Assembly of Heads of State and Government, June 1981, OAU Doc. CAB/LEG/67/3
3. African Charter on Human and Peoples' Rights on the Rights of Women in Africa, African Union, Adopted by the 2nd Ordinary Session of the Assembly of the Union, 11 July 2003, [https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa]

4. Arab Charter on Human Rights, 2004, english translation available at: [https://al-bab.com/documents-reference-section/arab-charter-human-rights-2004]
5. Association of Southeast Asian Nations (ASEAN) Declaration on Human Rights (2012), available at: [https://asean.org/asean-human-rights-declaration/]
6. Convention for the Protection of Human Rights and Fundamental Freedoms (1950), *European Treaty Series,* No. 5
7. Convention on the Rights of Persons with Disabilities (2006), *United Nations Treaty Series,* Vol. 2515
8. Convention on the Rights of the Child (1989), *United Nations Treaty Series,* Vol. 1577, p. 3
9. Declaration of the UN Conference on the Human Environment, Stockholm, 5-16 June 1972, Report of the UN Conference on the Human Environment, United Nations, Doc. A./CONF.48/14, 1972
10. European Social Charter (1996), *European Treaty Series,* No. 163
11. Human Rights and Climate Change, UN Human Rights Council Resolution 7/23, 28 March 2008
12. International Covenant on Civil and Political Rights (1966), *United Nations Treaty Series,* Vol. 999. p. 171
13. International Covenant on Economic, Social and Cultural Rights (1966), *United Nations Treaty Series,* Vol. 993, p. 3
14. Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997), *United Nations Treaty Series*, Vol. 2303, p. 162
15. United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992, Report of the UN Conference on Environment and Development, Volume I, United Nations, Doc. A./CONF.151/26/Rev1 (Vol.1), 1993
16. United Nations Framework Convention on Climate Change (1992), *United Nations Treaty Series*, Vol. 1771, p. 107
17. Universal Declaration of Human Rights (1948), United Nations, General Assembly Resolution 217A, 10 December 1948

JUDGMENTS AND OTHER DECISIONS

1. *Carême v. France*, ECtHR. Application no. 7189/21, Decision (Grand Chamber), 9 April 2024
2. *Cordella and others v. Italy*, ECtHR, Application nos. 54414/13 and 54264/15, 24 June 2019
3. *Daniel Billy and others v. Australia*, Human Rights Committee, Communication No. 3624/2019, Views adopted by the Committee, 21 July 2022. UN Doc. CCPR/C/135/D/3624/2019, 18 September 2023
4. *Duarte Agostinho and Others v. Portugal and 32 Others*, ECtHR, Application no. 39371/20, Decision (Grand Chamber), 9 April 2024
5. *Fadeyeva v. Russia*, ECtHR, Application no. 55723/00, Judgment, 9 June 2005

6. *Ioane Teitiota v. New Zaeland*, Human Rights Committee, Communication No. 2728/2016, Views adopted by the Committee, 24 October 2019. UN Doc. CCPR/C/127/D/2728/2016, 23 September 2020
7. *Lopez Ostra v. Spain*, ECtHR, Application no. 16798/90, Judgment, 9 December 1994
8. Inuit Petition Inter-American Commission On Human Rights To Oppose Climate Change Caused By The United States Of America, submitted by Sheila Watt-Cloutier, With the Support of the Unuit Circumpolar Conference, on Behalf of All Inuit of the Artic Regions of the USA and Canada, December 7, 2005. Climate Change Litigation Databases, Columbia Law School, [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2005/20051208_na_petition.pdf], Accessed 17 April 2025
9. Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, January 9, 2023, available at the official pages of the IACtHR, [https://www.corteidh.or.cr/observaciones_oc_new.cfm?nId_oc=2634], Accessed 8 April 2025
10. Obligation of States in respect of Climate Change, ICJ, Request for Advisory Opinion transmitted to the Court pursuant to General Assembly Resolution 77/276 of 29 March 2023, 14 April 2023
11. Obligation of States in respect of Climate Change (Request for Advisory Opinion), Conclusion of the public hearings held from 1 to 13 December 2024, ICJ Press Release no. 2024/81, 13 December 2024
12. *Sacchi et al. v. Argentina*, Committe on the Rights of the Child, Communication No.104/2019, Decision adopted by the Committee, 22 September 2021, UN Doc. CRC/C/88/D/104/2019, 8 October 2021
13. *Sheila Watt-Cloutier et al. v. U.S.*, Petition No. P-1413-05, Letter of the Inter-American Commission on Human rights, 16 November 2006, available at Climate Change Litigation Databases, available at: [https://climatecasechart.com/wp-content/uploads/non-us-casedocuments/2006/20061116_na_decision.pdf], Accessed 11 April 2025
14. *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, ECtHR. Application no. 53600/20, Judgment (Grand Chamber), 9 April 2024

REPORTS AND GUIDES

1. *Climate Change and Human Rights: A Rough Guide,* International Council on Human Rights Policy, Versoix, 2008
2. *Guide to the case-law of the European Court of Human Rights – Environment,* European Court of Human Rights, Updated 31 August 2024
3. *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment,* UN, General Assembly, A/74/161, 15 July 2019

4. *Promotion and protection of human rights in the context of climate change, Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change,* UN, General Assembly, A/77/226, 26 July 2022
5. *Promotion and protection of human rights in the context of climate change, Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change,* UN, General Assembly, A/78/255, 28 July 2023
6. *Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007,* United Nations, FCCC/COP/2007/6/Add.1, 14 March 2008
7. *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment,* UN, General Assembly, A/HRC/31/52, 1 February 2016
8. *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights,* UN, General Assembly, A/HRC/10/61, 15 January 2009
9. *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment,* UN, General Assembly, A/73/188, 19 July 2018
10. *Report of the Special Rapporteur on the human right to a clean, healthy and sustainable environment, Overview of the implementation of the human right to a clean, healthy and sustainable environment,* UN, General Assembly, A/79/270, 2 August 2024
11. *What is the Right to a Healthy Environment, Information note,* United Nations Human Rights Office of the High commissioner, UN Environment Programme, UNDP, 2023
12. *The Synthesis Report: The Intergovernmental Panel on Climate Change,* IPCC AR6 SYR, 2023

WEBSITE REFERENCES

1. IACtHR Press Release, I/A Court H.R._PR-34/2023 English, available at: [https://www.corteidh.or.cr/docs/comunicados/cp_34_2024_eng.pdf], Accessed 7 April 2025
2. IACtHR Press Release, I/A Court H.R._PR-27/2024 English, available at: [https://www.corteidh.or.cr/docs/comunicados/cp_27_2024_eng.pdf], Accessed 8 April 2025
3. Official pages of the United Nations, [https://spinternet.ohchr.org/ViewAllCountryMandates.aspx?Type=TM&lang=en], Accessed 11 April 2025
4. Official pages of the ITLOS, Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, [https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/], Accessed 7 April 2025
5. Official pages of the ICJ, Obligations of States in respect of Climate Change, [https://www.icj-cij.org/case/187], Accessed 7 April 2025
6. Official pages of the IACtHR, [https://www.corteidh.or.cr/observaciones_oc_new.cfm?nId_oc=2634], Accessed 9 April 2025

7. Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, ITLOS, List of Cases No. 21, Advisory Opinion, 21 May 2024, available at official pages of ITLOS, [https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/], Accessed 8 April 2025
8. Sacchi, et al. v. Argentina, et al., Climate Change Litigation Databases, [https://climatecasechart.com/non-us-case/sacchi-et-al-v-argentina-et-al/], Accessed 11 April 2025
9. Official pages of the ICJ, Obligations of States in respect of Climate Change, [https://www.icj-cij.org/case/187], Accessed 7 April 2025

Chapter 4

Review article

TRANSPARENCY OF CIVIL PROCEEDINGS IN THE DIGITAL AGE

Katarina Knol Radoja, PhD, Associate Professor
Josip Juraj Strossmayer University of Osijek, Faculty of Law
Stjepana Radića 13, 31 000 Osijek, Croatia
kknol@pravos.hr

Dinka Šago, PhD, Full Professor
University of Split, Faculty of Law
Domovinskog rata 8, 21 000 Split, Croatia
dsago@pravst.hr

ABSTRACT

This paper examines the significance of the principle of publicity in civil proceedings, highlighting its role in promoting transparency, accessibility, and the openness of the judiciary. The principle of publicity enhances the efficiency of the judicial system and fosters public trust in the courts by enabling citizens to monitor court operations, thereby ensuring societal oversight of judicial processes. Public access to court proceedings and judgments also has a positive impact on judges, contributing to their accountability and compliance with the rules of civil procedural law. Court hearings and judgments are public, except in cases involving the protection of privacy, national security, or other exceptional circumstances. In such instances, the court may decide to exclude the public to safeguard the interests of justice. The digitalisation of court proceedings represents a crucial step toward the modernisation of European judiciary systems, significantly enhancing the transparency of the judicial system and enabling faster and easier access to court information, thereby promoting a more efficient realisation of the principle of publicity. Through digital tools, courts can reduce administrative obstacles and expedite case processing, contributing to more efficient proceedings and reducing the workload of judges and other judicial personnel. Additionally, digitalisation provides citizens with easier and more direct access to court processes, further strengthening their trust in the judicial system. However, due to the digitalisation of judicial proceedings, modern challenges arise, where such digital tools sometimes allow access to a larger number of individuals, despite confidentiality markings on documents. This presents a challenge in terms of data protection and information security in civil proceedings. Therefore, it is important to ensure that the use of digital technology does not undermine the procedural guarantees of other, diametrically opposed rights. In conclusion, the need for further improvement and more precise legal solutions is therefore emphasized to ensure effective protection of privacy and confidentiality of data in the context of digitalisation.

Keywords*: confidentiality, fair trial, publicity, privacy, transparency*

1. INTRODUCTION

The openness of the judiciary contributes to the development of civil society, making citizens more aware of their rights and responsibilities. It enhances the legal culture of society, raises the professional standards of those involved in legal proceedings, and strengthens the credibility of the judiciary.[1] Moreover, the effective implementation of the principle of publicity in civil proceedings will facilitate the proper and timely resolution of civil disputes, strengthen guarantees of judicial independence, improve the consistency of case law, and enhance the overall standing of the judiciary.[2] However, there appears to be a need for further development in the area of judicial transparency in civil cases, particularly in defining the scope of guarantees and limitations, as well as for a comprehensive examination of the implementation of the principle of publicity in civil proceedings in light of judicial reform and the advancement of information technology, particularly digitalisation. Digitalisation can play a key role in improving access to justice,[3] particularly in procedural aspects such as enhancing transparency of proceedings, ensuring equality of parties, fairness, and reasonable duration of proceedings, as well as reducing litigation costs.[4] However, this does not mean that the application of these technologies in practice automatically leads to better access to justice, as accessibility is not always effectively built in. On the contrary, the pandemic has revealed a significant problem of technological inequality, primarily due to the lack of electronic devices or internet access.[5] Therefore, it is crucial to ensure that the use of digital technology does not diminish procedural guarantees for those who lack access to new technologies.[6] Moreover, publicly available electronic communication services over the internet provide users with new opportunities but also introduce new risks.[7] Despite all the advantages that digitalisation of the judiciary offers, it is essential to approach the issue of potential

---

1 Dika, M.; Čizmić, J., *Komentar Zakona o parničnom postupku Federacije Bosne i Hercegovine*, Sarajevo, OSCE Democratization Department, 2000., pp. 36-42.

2 Dika, M., *Načelo javnosti u parničnom postupku - prilog pokušajima opravdanja i reafirmacije instituta* -Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 29, No. 1, 2008., pp. 1-26.

3 Grbić, S.; Bodul, D.; Bartulović, Ž., *Pravo na pošteno suđenje i e-pravosuđe: sistemska greška ili korak naprijed u zaštiti prava?*, Harmonius, Beograd, Vol. 1, 2021., pp. 15-35.

4 Consultative Council of European Judges (further in the text: CCJE) Opinion no. 14. on justice and information technologies (IT), 2011., retrived from: [https://www.coe.int/en/web/ccje/opinion-n-14-on-justice-and-information-technologies-it-], Accessed 12 February 2025.

5 Kiršienė, Julija, *et al., Digital Transformation of Legal Services and Access to Justice: Challenges and Possibilities,* Baltic Journal of Law & Politics, Vytautas Magnus University, Vol. 15, No. 1, 2022, pp. 141-172., p. 166.

6 CCJE, Opinion no. 14., *op. cit.*, note 4, § 10.

7 Preambul of the Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ L 201, 31 September 2002, pp. 37–47., t. 6.

abuses with particular caution. In the online environment, where transparency is significantly greater, it is crucial to adequately protect opposing rights, such as the right to privacy and the protection of personal data.

2. THE PRINCIPLE OF PUBLICITY IN CIVIL PROCEEDINGS

The principle of publicity in civil proceedings implies that every person, without restrictions and without prior determination of who may attend, has the right to freely attend court hearings.[8] The principle of publicity is provided for in international documents, primarily in Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms[9] and Article 47 of the Charter of Fundamental Rights of the European Union,[10] The principle of publicity is one of the fundamental principles of civil procedure, and its violation is considered a significant breach of procedural rules. This issue has also been examined by the European Court of Human Rights, which has determined that a public hearing is a necessary prerequisite for a fair trial at least at one instance. Only in exceptional circumstances may a court deviate from the requirement of a public hearing.[11] The principle of publicity guarantees judicial independence and judges' adherence to the law. It ensures an impartial and thorough case review, leading to fair and lawful decisions. Open court proceedings reflect the democratic nature of the process.[12] Public court proceedings allow citizens to attend hearings, follow the process, and share information through media or other means. However, courtroom capacity limits the number of attendees. Since space is needed for judges, clerks, parties, and legal representatives, there is often little room left for the public.[13] These spatial limitations can make the judge's work more challenging, as they must quickly and efficiently address the issue of seating all attendees while respecting the principle of public proceedings.[14] However, case law holds that the principle of publicity is not violated if attendance is granted to those citizens

---

8 Triva, S.; Dika, M., *Građansko parnično procesno pravo*, 7th ed., Narodne novine, Zagreb, 2004., p. 195.

9 European Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette (further in the text: OG), International treaties, No. 18/97., 6/99., 14/02., 13/03., 9/05., 1/06., 2/10.

10 Charter of Fundamental Rights of the European Union [2012], OJ C 326, 26 October 2012.

11 European Court of Human Rights, Judgment *Fischer v Austria* [1995], Application No. 16922/90, 26 April 1995.

12 Hess, B.; Koprivica Harvey, A., *Open justice - the role of courts in a democratic society*, Baden Baden, Nomos Verlag, 2019.

13 Čizmić, J., *Javnost glavne rasprave,* Zbornik Pravnog fakulteta Sveučilišta u Rijeci*,* Vol. 42, No. 2, 2021., pp. 283-301., p. 287.

14 Smiljan Pervan, L., *Položaj sudaca u Republici Hrvatskoj*. retrived from: [https://www.iusinfo.hr/strucni-clanci/CLN20V01D2017B1052. -], Accessed 15 January 2025.

who arrive first and find space in the courtroom, as long as no selection system involving tickets or passes for selected individuals is introduced, which would be unacceptable.[15] The use of technology, especially remote hearings via audiovisual tools and online platforms, expands access to court proceedings. With no spatial limitations, participants can join from different locations, enhancing transparency and credibility. Online trials enable citizens, the media, monitoring organizations, NGOs, and academics to follow public hearings more easily.[16] However, this option will depend on the court's technical capacity (the number of connections relies on internet quality to prevent overload and maintain audio and video quality) and the resources, access, and digital literacy of the interested parties themselves.[17] Moreover, according to modern interpretations of the principle of hearing the parties, with the advancement of efficient videoconferencing technologies, it is now accepted that participation through such means can be equivalent to physical presence and is therefore not contrary to the European Convention on Human Rights. Additionally, secure videoconferencing facilities provide the necessary level of privacy and confidentiality in proceedings, even in cases where this would not be possible without the use of technology.[18] Therefore, videoconferencing can be useful for holding hearings or proceedings, especially in situations where greater security is required or when it is necessary to hear witnesses or experts who are at a distance. However, the downside is that the judge may not be able to fully observe how a party, witness, or expert reacts, which could impact the quality of

---

15 Čizmić *loc. cit.* note 13.

16 All public hearings of ECtHR are filmed and streamed on its website. Morning sessions are usually available by 2:30 p.m., and afternoon sessions by the end of the day, unless there are technical issues. Since 2007, all hearings have been recorded and can be viewed in full with French and English interpretation, retrived from:
[https://www.echr.coe.int/recent-webcasts-], Accessed 22 February 2025.; Also, to facilitate public access to its judicial activities, the Court of Justice of the European Union offers a streaming system for hearings. The delivery of the Court's judgments and the opinions of Advocates General are broadcast live on the website, with streaming activated at the start of the scheduled session, as per the Court's calendar. Additionally, certain hearings before the Court are available with a time delay. These typically include cases heard by the full Court, the Grand Chamber, or, exceptionally, a five-judge panel when justified by the case's significance. The video recordings of such hearings remain available on the website for up to one month after the session concludes, retrived from:
[https://curia.europa.eu/jcms/jcms/p1_1477137/hr/-]. Accessed 23 February 2025.

17 For more see: Lhullier J.; Lhullier-Solenik, D., *Access to justice in Europe*, CEPEJ, 2007, retrived from: [https://rm.coe.int/evropska-komisija-za-efikasnost-pravnih-sistema-cepej-novi-zadatakza-/1680748156], Accessed 17 February 2025.

18 Consultative Council of European Judges (CCJE), Opinion no. 26 (2023). t. 83., Kretanje naprijed: Primjena pomoćnih tehnologija u sudbenoj vlasti, Strasbourg, 1 December 2023, retrived from:
[https://rm.coe.int/ccje-opinion-no-26-20023-croatian/1680ae1a40-], Accessed 17 January 2025.; European Court of Human rights, Judgment *Sakharovsky v Rusia* [2018] Application no. 39159/12966, 27 November 2018.

the trial.[19] When it comes to court cases in which the public is excluded, such as family proceedings, there is a risk that hearings could be recorded without the knowledge of the court or other participants. Additionally, the question arises as to whether conducting such proceedings remotely would be advisable in a given case. It is therefore important to ensure that the use of videoconferencing and the presentation of evidence in this manner do not undermine the rights of the parties, particularly the right to a fair trial and the principle of equality of arms in civil proceedings. Additionally, excessive public and media access to such hearings may create pressure on judges, making it more difficult to render impartial decisions. Continuous scrutiny of hearings available online could compromise the privacy and reflective space judges require to perform their duties effectively. The transition from physical to hybrid or fully virtual hearings may also undermine the symbolic significance of the judicial process. Participating from outside the courtroom, for example, from home, a car, or public places, may weaken society's perception of the importance of court proceedings. In this way, the institutional legitimacy of the judiciary as a branch of government is put at risk. In individual cases, participants may not take the trial seriously, which could negatively affect the quality of evidence, particularly the significance of witness oaths, thereby undermining the judiciary's ability to ensure a fair trial.[20]

2.1. PRINCIPLE OF PUBLICITY IN THE REPUBLIC OF CROATIA

The development of the principle of publicity in civil proceedings is closely linked to ensuring the right of access to information during the resolution of civil cases. In the Republic of Croatia, court hearings are public, and judgments are pronounced publicly (Article 117 of the Constitution of the Republic of Croatia).[21] Parties may also inspect the files and obtain copies of them. The court allows third parties to inspect and copy the files if they have a legitimate interest (Art. 150 of the Civil Procedure Code). Case law provides an example where the defendant had the right to examine and copy medical documentation attached to the case file but not to request that the court or the opposing party deliver those documents to them.[22] On the other hand, the High Commercial Court ruled that the first-instance court correctly determined that the applicant had not demonstrated a legitimate interest to be granted access to and copying of the case file. This decision was based on the fact that the legal entity, registered in the Republic of Austria,

19 CCJE, Opinion no. 14., *op. cit.*, note 4, § 30.

20 *Ibid.*, § 66.-67.

21 Constitution of the Republic of Croatia, OG, No. 85/10., 05/14.

22 VSRH, Rev-240/99 from 6 September 2000.

was not a party to the proceedings in which it sought access to the file. Additionally, the case in question did not concern real estate owned by the commercial company in which the Austrian legal entity was a member.[23]

The right to public hearings is not absolute and may be limited to protect other important interests. In doing so, it is crucial to ensure a balance between the preservation of these interests and the right of the public to access the proceedings. Restrictions on the public must be proportionate and justified by a real social need.[24] This approach is in line with the European Convention on Human Rights, which also allows exceptions to the principle of publicity. In certain cases, public presence at court hearings may jeopardise the proceedings.[25] The Civil Procedure Act (hereinafter: CPA)[26] has prescribed the principle of public hearings since 1977 (Article 306/1 of the CPA). However, it also allows for the exclusion of the public when required to protect official, business, or personal secrets, as well as public order or morality. Following the 2003 amendment, the law specified that exclusion may be justified if necessary to protect morality, public order (e.g., unlawful public gatherings or mass physical conflicts), or national security, as well as to safeguard military, official, or business secrets, or to protect the private lives of the parties involved. However, such exclusions are permitted only to the extent deemed absolutely necessary by the court in exceptional circumstances where public access could be detrimental to the interests of justice (Article 307/1 of the CPA). In addition, since 1977, the public may also be excluded from the main hearing if the measures for maintaining order prescribed by this law are insufficient to ensure the undisturbed conduct of the proceedings (Article 307/2 of the CPA). Only adults may attend the hearing, who may not carry weapons or dangerous tools (306/2 and 3 of the CPA).[27] Under the Family Act,[28] the principle of publicity is excluded *ex lege* in proceedings concerning status matters, parental care, personal relationships, measures for the protection of the rights and well-being of the child, and child maintenance (Article 351 of the Family Act). Although the principles of imme-

---

23 VTSRH, Pž-1910/13 from 6 June 2013.

24 Uzelac, A., *Pravo na pošteno suđenje: opći i građanski aspekti čl. 6. st. 1. Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda,* in: I. Radačić (ed.), Usklađenost zakonodavstva i prakse sa standardima Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda, Zagreb: Centre for Peace Studies, 2011, pp. 88-125.

25 European Court of Human Rights, Judgment *B. and P. v the United Kingdom* [2001] Applications nos. 36337/97 and 35974/97, 5 September 2001, § 39.; European Court of Human Rights, Judgment *Zagorodnikov v Russia*, Application no. 66941/01, 7 September 2007, § 26.

26 Civil Procedure Act, OG, No. 53/91., 91/92., 112/99., 129/00., 88/01., 117/03., 88/05., 2/07., 96/08., 84/08., 123/08., 57/11., 148/11. 25/13., 89/14., 70/19., 80/22., 114/22., 155/23.

27 Carrying weapons at the main hearing is exceptionally permitted only for officials, security personnel (Art. 306/4. of the CPA).

28 Family Act, OG, No. 103/15., 98/19., 47/20., 49/23., 156/23.

diacy, adversarial proceedings, and publicity are fully realised only in the context of an oral hearing,[29] a public hearing is often unnecessary due to the specific nature of certain proceedings. In many cases, the urgency of the procedure, the need for efficiency, or confidentiality justifies the absence of a hearing, thereby significantly limiting the application of the principle of publicity. For example, to enhance efficiency, in commercial disputes, written procedures were prescribed to speed up the decision-making process. Therefore, pursuant to Article 492.a of the CPA, in proceedings before commercial courts, the court will generally establish the decisive facts based on documentary evidence. Additionally, the court may require the parties to submit written statements of the parties or witnesses, signed before a notary public, and limit the oral examination of parties or witnesses to questions aimed at verifying, supplementing, or clarifying the contents of those statements.

If no party disputes a notarised written statement from a party, witness, or expert, and the court deems their oral hearing unnecessary, the court will not conduct an oral examination of those individuals. However, if a party contests such a written statement or if the court finds an oral hearing necessary, and the party or witness subsequently fails to appear or refuses to testify (even when coercive measures are applied to the witness), the court will disregard the notarised written statement of that party or witness (Article 492.c of the CPA). The small claims procedure is also based on a written procedure, whereby a hearing will only be held if the court deems it necessary for the purpose of conducting the evidentiary procedure or if at least one of the parties submits such a reasoned proposal. Nevertheless, the court will reject a party's request for a hearing by way of a ruling if it determines, considering the circumstances of the case, that a fair trial can be ensured without holding a hearing (Article 461a/4 of the CPA). There is no data on the extent to which, following the 2022 amendments to the CPA, judges have become inclined to conduct small claims procedure without hearings. Likewise, it remains unclear how frequently parties request hearings and what decisions courts make regarding such requests.[30] However, some authors have already noted that the legislative amendment granting judges discretionary power to decide whether to conduct written proceedings significantly transforms adjudication in small claims procedure.[31] Additionally, a notable issue is the absence of prescribed rules on how the written procedure will be implemented in practice.[32]

---

29 Triva; Dika, *op. cit.,* note 8, p. 189.

30 Jelinić, Z., *Pisani postupak i pravo na usmenu raspravu u sporovima male vrijednosti*, Pravni vjesnik, Vol. 40, No. 4, 2024., pp. 7-30., p. 27.

31 *Ibid*.; Buljan, I., *Pisani postupak u sporovima male vrijednosti - radikalna promjena dosadašnje paradigme*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 45, No. 1, 2024., pp. 251-271.

32 Jug, J.; Maganić, A., *Novela Zakona o parničnom postupku i ostala sporna pitanja*, Priručnik za polaznike Pravosudne akademije, 2022, p. 35.

Secrets are classified into state, military, official, business, and professional secrets, and in legal doctrine, they are generally divided into two categories: public and private.[33] The court will warn individuals attending a hearing from which the public has been excluded that they are obliged to keep confidential all information they learn during the proceedings and will also inform them of the consequences of disclosing such information (Article 308/4 of the CPA). If a person reveals a secret learned during a closed hearing, they commit a criminal offense. Such conduct constitutes a breach of trust and a violation of rules protecting privacy and procedural confidentiality, and the law explicitly sanctions it to preserve the integrity of judicial proceedings and protect the participants. The Courts Act[34] mandates that judges, court officials, lay judges, interpreters, experts, and appraisers maintain confidentiality about information they learn during judicial duties. This includes details about the parties, their rights, obligations, and legal interests, as well as any data not publicly discussed in court. Confidential information encompasses anything designated as secret by law, regulations, or a legal entity, and documents marked as confidential by authorities or the court president (Article 130 of the Courts Act).

If the public has been excluded from the main hearing, the pronouncement of the judgment will always be read publicly, and the court will decide whether and to what extent the public should be excluded from the announcement of the judgment (Article 336/2 of the CPA). The unlawful exclusion of the public from the main hearing constitutes a ground for absolute nullity of the judgment (Article 354/2, item 10 of the CPA). Conversely, if the public were allowed to participate contrary to the law or a court decision on its exclusion, this could lead to inaccurate or incomplete fact-finding and/or a relatively significant violation of civil procedure rules. Such a situation may arise if, due to the presence of the public, a party decides not to present key facts, if witnesses refuse to testify or answer certain questions, or if parties withhold their statements, all of which could affect the fairness and legality of the proceedings.[35]

From the above, it is evident that the regulations in the Republic of Croatia provide for the protection of data confidentiality and privacy, but only during the main hearing. However, they do not regulate the handling of case files from proceedings in which the public was excluded. There are no specific provisions governing the treatment of case files in proceedings where the public was excluded to protect data confidentiality or the privacy of the persons involved, neither at the

[33] For more see Čizmić, *op. cit.*, note 15, p. 290.; Dika, *op. cit.*, note 2; Gavella, N., *Osobna prava. I. dio,* Zagreb, Pravni fakultet u Zagrebu, 2000., p. 222.

[34] The Courts Act, OG, No. 28/13., 33/15., 82/15., 82/16., 67/18., 126/19., 130/20., 21/22., 60/22., 16/23., 155/23., 36/24.

[35] Dika, *op. cit.*, note 2, p. 24.

statutory level nor in subordinate regulations such as the Court Rules of Procedure[36] or the Rules on Operations within the eSpis System.[37]

3. DIGITALISATION OF CIVIL PROCEDURE

One of the key advantages of the digitisation of civil procedure is the acceleration of proceedings through the automation of administrative processes, cost reduction, and increased accessibility of information for participants. Parties, lawyers, and judges can electronically access case files, submit pleadings, monitor the progress of proceedings, and present evidence. On November 25, 2020, the revised Regulation (EU) 2020/1783 of the European Parliament and the Council on cooperation between the courts of the Member States of the European Union in the taking of evidence in civil or commercial matters[38] was adopted. Since the entry into force of Regulation 1206/2001, the predecessor of the said Regulation, the Commission has discussed its application in the framework of various meetings of the European Judicial Network in civil and commercial matters. During these meetings, among other things, discussions were held on the use of modern technologies in cross-border evidence taking, specifically the fact that in many Member States, the technical means for using videoconferencing are still not available, as well as on issues related to communication between courts.[39] As a result, resolutions[40] were adopted calling for efforts to train practitioners in applying

---

36 Court Rules of Procedure, OG No. 37/14., 49/14., 8/15.,35/15., 123/15., 45/16., 29/17., 33/17., 34/17., 57/17., 101/18., 119/18., 81/19., 128/19., 39/20., 47/20., 138/20., 147/20., 70/21., 99/21., 145/21., 23/22.

37 Rules on Operations within the eSpis System, OG, No. 35/15., 123/15., 45/16., 29/17., 112/17., 119/18., 39/20., 138/20., 147/20., 70/21., 99/21., 145/21., 23/22., 12/23., 9/24.

38 Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast), OJ L 405, 2 December 2020, p. 1–39. (hereinafter referred to as: Regulation 2020/1783). Until the application of this Regulation began, Regulation (EC) No. 1206/2001 of May 28, 2001, on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters was in force. Regulation (EC) No. 1206/2001 of May 28, 2001, on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters was published in the Official Journal of the European Communities, No. L 174/2001, pp. 1-24 (hereinafter: Regulation 1206/2001).

39 For more see: Commission of the European Communities, (2007), Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of the Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, COM(2007) 769 final, Brussels.

40 European Parliament resolution of 10 March 2009 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (2008/2180(INI)); European Parliament resolution of 23 November 2010 on civil law, commercial law, family law and private international law aspects of the Action Plan Implementing the Stockholm Programme (2010/2080(INI)).

of the Regulation and to promote the broader use of modern technology and videoconferencing in cross-border evidence taking. The proposal for the Regulation 2020/1783 therefore introduces certain solutions aimed at eliminating legal uncertainty, promoting electronic communication as the norm, and encouraging the use of modern technologies.[41] A decentralised IT system for data exchange is planned in line with technological advancements (such as e-CODEX[42]). However, Member States are also emphasized as having the duty to maintain their national IT systems and bear responsibility as data controllers, following Regulation (EU) 2016/679 (hereinafter: GDPR),[43] for the processing, exchange, and transfer of personal data. It was also emphasized that personal data under Regulation 2020/1783 should be processed only for the specific purposes defined by that Regulation,[44] in accordance with the GDPR, as well as Regulation (EU) 2018/1725 on the protection of individuals regarding the processing of personal data by the institutions, bodies, offices, and agencies of the Union and on the free movement of such data,[45] and Directive 2002/58/EC on the processing of personal data and the protection of privacy in the field of electronic communications.[46]

Based on Article 27 of Regulation 2020/1783, the Commission is responsible for developing, maintaining, and further enhancing the reference implementation software, which Member States may use as their back-end system instead of

41 European Commission, (2018), Proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between thecourts of the Member States in the taking of evidence in civil or commercial matters, COM(2018) 378 final, Brussels. Furthermore, the use of modern technology, videoconferencing, or other remote communication technologies in evidence taking is also encouraged by other instruments, such as the Model European Rules of Civil Procedure of the European Law Institute (ELI) and the International Institute for the Unification of Private Law (UNIDROIT).

42 E-CODEX, Communication via Online Data Exchange – is a decentralised IT system that provides an interoperable solution for cross-border exchange of judiciary data, thus allowing all Member States (citizens, businesses and legal professionals) to communicate with each other using their existing national systems. Retrieved from:
[https://www.e-codex.eu/faq-e-codex-]. Accessed 25 February 2025.

43 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) (Text with EEA relevance) OJ L 119, 4 May 2016, pp. 1–88.

44 Preambul of the Regulation 2020/1783, t. 32.

45 Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21 November 2018, pp. 39–98.

46 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ L 201, 31 July 2002, p. 37–47.

a national IT system. This software should include appropriate technical measures and enable the organisational measures necessary to ensure a level of security and interoperability suitable for the exchange of information in the context of evidence taking. The Regulation also provides for exceptional circumstances in which communication via the decentralised IT system is not possible due to certain difficulties. In such cases, it allows for the use of alternative means of communication (e.g., other secure electronic methods or postal services). In the Preamble of the Regulation, exceptional circumstances are interpreted as cases where converting extensive documentation into electronic form would impose a disproportionate administrative burden on the competent authorities or where a document needs to be in its original (paper) form to assess its authenticity. [47] Although the Regulation generally provides for the direct taking of evidence via videoconferencing or other remote communication technology when hearing a person (such as a witness, party to the proceedings, or expert) located in another Member State (Article 20(1) of Regulation 2020/1783), this is not an absolute rule. The same provision stipulates that this approach will not apply if the necessary technology is unavailable to the court or if the court deems its use inappropriate due to specific circumstances of the case. However, it should be noted that the possibility of cross-border evidence taking via videoconferencing also existed under the (previous) Regulation 1206/2001, but its practical application has been limited. In other words, the use of videoconferencing or other remote communication technologies in court proceedings depends on the efforts made by Member States in this area.[48] Furthermore, Regulation 2020/1783 introduces a solution for the mutual recognition of the legal effects of documents in electronic form. However, this will pose a challenge for some Member States whose national procedural systems do not regulate either electronic evidence or the methods for its presentation.[49]

3.1. DIGITALISATION OF CIVIL PROCEDURE IN THE REPUBLIC OF CROATIA

Building on the foundations for electronic communication introduced by the 2013 amendments to the CPA for proceedings before commercial courts, the 2019 Amendment to the CPA further advanced the digitalisation of civil procedure in the Republic of Croatia. It is important to note, however, that the 2008

47 Preambul of the Regulation 2020/1783, t. 12.

48 Aras Kramar, S., *Novine Uredbe (EU) 2020/1783 o izvođenju dokaza u građanskim ili trgovačkim stvarima*, Godišnjak Pravnog Fakulteta „Justinijan Prvi" u Skopju, Liber amicorum u čast prof. dr. Arsena Janevskog, Zoroska – Kamilovska, T. (ed.). Skoplje, Pravni Fakultet „Justinijan Prvi" Sveučilišta „Sv. Kiril i Metodij" u Skopju, 2023. pp. 349-365, p. 360.

49 *Ibid*.

Amendments to the CPA[50] had already provided for the possibility of serving certain documents electronically, in accordance with a separate law (former Article 133(1) of the CPA). It was also stipulated that hearings in urgent cases in proceedings before commercial courts could be scheduled electronically, again in accordance with a separate law (Article 495 of the CPA). However, despite these legal provisions, a special law that would comprehensively regulate electronic communication in civil proceedings was not adopted, which in practice limited the application of these provisions.[51] The consistent implementation of the digitalisation of civil proceedings was enabled only with later amendments and the adoption of the Regulation on Electronic Communication.[52] These amendments laid the foundation for the application of electronic communication in all types of civil proceedings, not just before commercial courts. The Regulation on Electronic Communication[53] regulates *eSpis* as a unified information system for managing and handling court cases. This system consists of a standard application, computer and telecommunication equipment and infrastructure, system software and tools, as well as all data entered, stored, and transmitted through this system from all types of registries at municipal, county, and commercial courts, the High Commercial Court of the Republic of Croatia, and the Supreme Court of the Republic of Croatia, in accordance with the applicable Regulation on the Operation of the eSpis System (Article 5, Point 2). A particularly important functionality of the *eSpis* system is the automatic and random assignment of cases. This feature is crucial as it represents a european standard for ensuring impartiality and independence in court proceedings.[54]

The 2019 Amendment to the CPA introduced additional innovations in digitalisation, including audio recording[55] of hearings and the possibility of holding remote hearings or presenting evidence using audiovisual devices. These changes have modernised and accelerated civil proceedings, aligning them with modern technological standards.[56]

---

50 Amendments to the CPA 2008., O.G. no. 84/08.

51 Aras Kramar, S., Elekronifikacija parničnog postupka nakon Novele ZPP-a iz 2019. godine, Pravo i porezi, XXIX, 2020., pp. 46-52.

52 Regulation on Electronic Communication, O.G. no. 5/20.

53 Regulation on Electronic Communication, Official Gazette No. 139/21., 27/23., 39/24., 36/24.

54 Ljubanović, B.; Britvić Vetma, B., *Sustav eSpis u funkciji efikasnog djelovanja upravnih i sudskih tijela*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 41 (1), 2020., pp. 313-326., p. 317.

55 It should be noted that the provisions on audio recording of hearings had already been included in the CPA with its amendments in 2011 (Act on Amendments to the CPA, O.G. no. 57/11).

56 Aras Kramar 2020., *op. cit.*, note 51., p. 46.

In addition to all the aforementioned advancements, an important step in the modernisation of judicial communication is the e-Bulletin Board of Courts (*e-oglasna*) project. Amendments to the CPA[57] aimed to promote the publication of decisions and documents via the courts' e-Bulletin Board. Through the central search engine, users can search for published decisions and other court documents, as well as publications from the Financial Agency (FINA) and public notaries. All publications from competent authorities are available immediately upon entry, and the system automatically removes notices once their designated publication period expires. This application significantly enhances transparency, speed, and efficiency in accessing information related to judicial and other legal proceedings.[58]

The public disclosure of court decisions is also regulated by the Courts Act. However, as of 2025, amendments to this Act[59] have come into force, mandating the public disclosure of court decisions that conclude proceedings on a dedicated website, subject to prior anonymisation and compliance with personal data protection rules. The purpose of public disclosure is to ensure the transparency and openness of court proceedings, provide continuous access to information about the judiciary, and strengthen public trust in the judicial system (Article 6, Points 5–7 of the Courts Act).

4. CONFLICT BETWEEN THE PRINCIPLE OF PUBLICITY AND OTHER RIGHTS

The principle of publicity may come into conflict with certain other rights of individuals involved in civil disputes, such as the right to privacy, personal, family, and business secrets, the protection of honor and reputation, and the privacy of correspondence, telephone conversations, and other communications. The right to privacy protection allows individuals to lead their lives independently, free from external influence, while respecting the rights of others and legal limitations. This means that no one, including other individuals, the public, or state authorities, may unlawfully intrude into this sphere of privacy.[60]

The digital age presents significant challenges regarding transparency and potential infringements on these rights. Current privacy protection systems for public documents and court cases are primarily designed for paper records and struggle to keep up with the demands of the digital era, where information can be quickly

[57] The Act on Amendments to the CPA of 2013, OG, No 25/13 and the Act on Amendments to the CPA of 2019, OG, No. 70/19.

[58] Aras Kramar 2020., o*p. cit.*, note 51., p. 46.

[59] The Act on Amendments to the Courts Act, OG, No. 36/24.

[60] Gavella, *op. cit.*, note 33, p. 211.

and easily accessed online.[61] In the past, personal data from court documents was also accessible, but not in a way that made it easily available to anyone with a mere "casual interest." Only those with a relatively strong interest in the information would take the time to wait in line at the clerk's office, fill out the necessary forms, and possibly pay the required fees. However, with information available online, a wide range of people can access it with incredible ease.[62]

The right to privacy is closely linked to the right to personal data protection, which is also a fundamental human right. Since May 25, 2018,[63] European Union member states have been subject to a regulation on personal data protection—Regulation (EU) 2016/679 on the protection of individuals concerning the processing of personal data and on the free movement of such data (GDPR).[64] According to Article 4(1) of the GDPR, "personal data" refers to any information related to an individual who is identified or identifiable. An individual can be identified directly or indirectly through identifiers like their name, ID number, location data, online identifiers, or other personal attributes. Article 5(1)(a) states that personal data must be processed lawfully, fairly, and transparently, while Article 5(1)(b) emphasizes that it must be collected for specific, legitimate purposes and not processed in ways inconsistent with those purposes. Personal data must be processed fairly, balancing the data subject's rights with the data controller's interests, ensuring the processing is not excessive in relation to its purpose.[65] Article 6(1) outlines lawful processing conditions, including the data subject's consent, the necessity for contract performance, legal compliance, protection of vital interests, public tasks, or legitimate interests of the data controller or a third party. However, legitimate interests may be overridden by the data subject's rights, especially if the individual is a child. The necessity requirement is key in determining the lawfulness of data processing. [66]

---

61 Donoghue, J., *The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice,* Modern Law Review, Vol. 80, No. 6, 2017., pp. 995.-1025.

62 Losinger, J., *Electronic Access to Court Records: Shifting the Privacy Burden Away from Witnesses and Victims*, University of Baltimore Law Review, Vol. 36, No. 3, 2007., p. 426.

63 Before that, the European Union's legal framework had already been established by Directive 95/46/EC of the European Parliament and the Council of October 24, 1995, on the protection of individuals concerning the processing of personal data and on the free movement of such data.

64 Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016, on the protection of individuals concerning the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR), OJ L 119 of 4 May 2016, pp. 1–88.

65 For more see: Craig, P.; de Búrca, G., *EU Law. Text, Cases, And Materials*, Oxford, Oxford University Press, 2015.

66 Zuiderveen Borgesius, F., *Improving privacy protection in the area of behavioural targeting*, Alphen aan den Rijn: Wolters Kluwer Business, 2015., p. 143.

The protection of personal data also safeguards other personality rights, such as the right to honor, reputation, and dignity, with a particular emphasis on the right to privacy.[67] These rights directly oppose judicial transparency and freedom of expression, which promote free access to court information, especially for the media. The media has greatly expanded judicial transparency, particularly through digitalisation and global information sharing. While few people attend court hearings in person, the media allows the public to stay informed about court proceedings. However, in the Republic of Croatia, the principle of public hearings in the context of remote proceedings is still upheld in a traditional manner—interested individuals must physically be present in the courtroom where the judge conducts the remote hearing or in another room within the court designated by the judge (Article 14 of the Regulation on Remote Hearings[68]).

The application of digital technology in court proceedings undoubtedly enhances judicial processes.[69] However, the digitalisation of court procedures has also introduced challenges related to electronic transactions and document security. In a digital environment, data protection requires exceptionally high standards to prevent unauthorized access to any document or piece of information.[70] Namely, although a document or case may be marked as confidential in the *eSpis* system, it is often still accessible to a larger number of individuals. This becomes particularly problematic in proceedings, where confidential information is exchanged, as the *eSpis* system has not yet been fully adapted to the highest standards of information security. Access to the digital *eSpis* is granted through the information system for electronic communication. The allocation of access rights to this system and the method of access are regulated by the provisions of the Regulation on Electronic Communication. To ensure security while respecting the right to privacy, electronic communication is conducted using credentials with prior authentication and authorization through the National Identification and Authentication System. For example, once a person's identity has been confirmed using authentication credentials, a natural person will be able to review all cases before all courts in Croatia in which they are a party to the proceedings. Parties have the ability to access all documents that have been digitally created in their case. Legal entities and state authorities gain access to the information system by registering a verified email address. Lawyers, notaries public, court experts, court assessors, court

---

67 Kokott, J.; Sobotta, C., *The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR,* International Data Privacy Law, Vol. 3, No. 4, 2013., pp. 222-228.

68 Regulation on Remote Hearings, OG, No. 154/22.

69 For more see: Kevin D. Ashley, *Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age,* Cambridge, Cambridge University Press, 2017.

70 Losinger, *op. cit.*, note 62., p. 426.

interpreters, bankruptcy trustees, trustees, and trustees in consumer bankruptcy proceedings gain access to the system by submitting the required data through the bodies responsible for maintaining registries and lists, which then forward the information to the system administrator (the ministry responsible for justice) (Article 7(4) of the Regulation on Electronic Communication). Liquidators and special guardians gain access to the system upon being granted said status by the court in *eSpis* for a specific court case, while the State Attorney's Office is provided with direct access to the system through its own information system (Article 8 of the Regulation on Electronic Communication). Taking all factors into account, it becomes evident that, during work on a court case, all court officials can access the physical case file. On the other hand, access to the electronic part of the file is not limited to key court users but also extends to employees of the Ministry of Justice and Administration, technical support staff, and others. Consequently, a potentially large number of individuals, aside from judges and parties to the proceedings, may have access to this data. This issue also raises concerns regarding the right of access to the court for individuals who may need to disclose confidential information during the proceedings.

Furthermore, it should not be overlooked that, thanks to advancements in the application of technology in the judiciary, court hearings are audio recorded. The audio recording of a hearing is part of the case file (Article 126.b(1) of the CPA). The audio recording of the hearing will be available to the parties in electronic form through the information system. If a party is not included in the information system, the electronic recording will be made available in an appropriate manner (Article 126.a(2) of the CPA). Regarding the transcripts of these recordings, before the amendments to the CPA in 2022, Maganić stated that the idea of requiring parties to the proceedings to bear the cost of issuing a transcript of the audio recording, in accordance with the Regulation on the Procedure for Charging and the Amount of the Fee for Transcribing Court Hearing Audio Recordings,[71] was not well-conceived and could lead to serious legal and financial concerns. This raises the question of whether fundamental principles of a fair trial are being compromised, as the rule "if you don't pay, you can't obtain it" is not appropriate in this context. Parties must have the ability to review the transcript of the recording in order to compare it with the original audio and, if necessary, submit an objection.[72] However, following the amendments to the CPA in 2022, the preparation of transcripts of audio recordings is no longer provided *ex officio* by the court (arg.

---

71 Regulation on the Procedure for Charging and the Amount of the Fee for Transcribing Court Hearing Audio Recordings, OG, No. 15/20., Art. 4.

72 For more see: Maganić, A., *Primjena elektroničke tehnologije u parničnom postupku* u *Novine u parničnom procesnom pravu*, J. Barbić (ed,), Zagreb, HAZU, 2020., pp. 79-109., p. 109.

ex amended Article 126.c of the CPA), nor is there a procedure for objections based on discrepancies between the recording and the transcript.

On the other hand, the increased use of technology—including e-filings, digital case management, and case tracking systems—carries the risk of potential system failures. Such malfunctions could render case data inaccessible. Without effective technological or paper-based backup systems, there is a real risk that access to the judiciary could become hindered and inefficient.[73] Therefore, in accordance with Article 126.c of the CPA, the audio recording of the hearing and the hearing record form a single entity. In the event of discrepancies between the content of the hearing record and the audio recording, the content of the audio recording shall prevail.

Furthermore, data and information contained in registers, individual cases, preparatory notes and drafts, court decisions, and statistical data on the judiciary and court management should be handled with an appropriate level of data security. [74]Given the nature of disputes heard before the court, the availability of certain court decisions on the internet could jeopardize individuals' right to privacy and the interests of business entities. Therefore, Opinion No. 14 of the Consultative Council of European Judges calls on courts and judicial authorities to take appropriate measures to protect data in accordance with applicable laws.[75] Čuveljak points out that the Croatian *eSpis* system does not fully comply with strict information security requirements. Therefore, since the CPA recognizes only the institution of excluding the public from part or all of the main hearing, data confidentiality protection systems should be modernized—both by aligning terminology with special laws and by introducing other effective data confidentiality protection mechanisms.[76] In this regard, protecting confidential data in court files presents significant financial and technical challenges. Ensuring data security requires costly and complex systems, raising questions about the necessity of such investments. One proposed solution is to keep confidential documents in physical form rather than including them in the digital court file (*eSpis*). This way, confidential documents would be excluded from electronic storage and accessible only through physical records, thereby further reducing the risks of unauthorized access.[77]

---

73 CCJE, Opinion no. 26., *op. cit.*, note 18, § 78.

74 CCJE, Opinion no. 14., *op. cit.*, note 4, § 16.

75 *Ibid*, § 17.

76 Čuveljak, J., *Tajnost parničnog postupka*, in: Šago *et al.,* Zbornik radova VIII. međunarodnog savjetovanja: „Aktualnosti građanskog procesnog prava – nacionalna i usporedna pravnoteorijska i praktična dostignuća", Split, Pravni fakultet Sveučilišta u Splitu, 2022. pp. 417-438., p. 434.

77 *Ibid.*

The recently mentioned amendment to the Courts Act,[78] which limits the public disclosure of court decisions by requiring prior anonymization, should also contribute to privacy protection. By mandating anonymization, the legislator aims to balance the protection of personal data and privacy with the public's right to information. However, the success of this measure will depend on various practical factors. Inadequate anonymization may lead to "de-anonymisation," where individuals can be identified based on context. Relying solely on automated tools risks leaving sensitive data exposed, while manual anonymisation can be slow and costly. Consistency across courts is crucial to avoid legal uncertainty, and proper training for judges and court staff is necessary to ensure effective implementation. Additionally, overly redacted decisions may lose their meaning, limiting legal analysis and finally, inadequate anonymization could lead to legal consequences, especially under GDPR regulations.

In recent years, the issue of personal data protection in public registers, which are legally accessible to the public, has become increasingly relevant.[79] The principle of public access is particularly important for maintaining the transparency of land registers. The right to inspect the land register by property is unrestricted, meaning that no legal or other interest needs to be proven to access and review it.[80] In accordance with the Land Register Act,[81] the land register system publishes information about real estate, as well as all data deemed legally relevant for legal transactions. This primarily includes ownership and other real rights, certain obligatory rights, as well as legal facts and personal relations (Article 18(2) of the Land Register Act). This data serves as the foundation for legal certainty in real estate transactions. However, what has been shown to be controversial is the information about registered rights holders, such as name, address, personal identification number (OIB), financial encumbrances, and personal circumstances and relationships. Ernst and Josipović emphasize the importance of publishing this data in the land register system due to its close connection with real estate legal transactions. They point to the existence of restrictions that may either prevent or impose additional

---

78 The Act on Amendments to the Courts Act, OG, No. 36/24.

79 Dešić, J.; Brajković, L., *Komparativna rješenja odnosa publiciteta zemljišnih knjiga i zaštite osobnih podataka,* Godišnjak Akademije pravnih znanosti Hrvatske, Vol. 12, No. 1, 2021., pp. 327-344; Josipović, T., *Izazovi digitalizacije zemljišnih knjiga: načelo publiciteta stvarnih prava v. načela zaštite osobnih podataka*, in: Popović D. (ed.), Liber amicorum prof. dr. Mirko Vasiljević, Beograd, Univerzitet u Beogradu Pravni fakultet, 2021., pp. 679-703.; Knol Radoja, K., *Pravo na zaštitu privatnosti vs. načelo javnosti zemljišnih knjiga,* Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 45, No. 2, 2024., pp. 403-418.; Ernst, H.; Josipović, T., *Javnost zemljišne knjige i zaštita osobnih podataka,* Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 45, No. 2, 2024., pp. 283-311.

80 Josipović, T., *Zemljišnoknjižno pravo*, Zagreb, Informator, 2001., p. 128.

81 Land Register Act, OG, No.. 63/19., 128/22., 155/23.

conditions on the disposal or acquisition of a registered right. In this way, publication ensures legal certainty and transparency in real estate transactions, providing relevant information to all interested parties.[82] The main book of the land register contains the necessary data, relieving third parties of the costs and risks associated with independently verifying the legal effects of published documents.[83] However, the collection of documents often includes information that is not essential for real estate transactions, raising the question of their public disclosure in light of personal data protection. Although it is not necessary to publish all details from a document for the legal status of a property, Ernst and Josipović consider this public disclosure justified, as it is based on the consent of the parties. Contracts, such as sales agreements, often contain additional clauses that are not essential for land register entries but remain publicly available because the parties consented to this when submitting the registration request. Additionally, parties have the option to disclose only the minimum necessary data for public access. Therefore, they conclude that "the fear of potential misuse of the public nature of land registers is exaggerated."[84]

Given the importance of the publicity function of land registers, any restrictions on access should be carefully justified. However, the digital revolution has made searching these records incredibly easy, raising concerns about privacy. Unlike before, when accessing such data required effort, anyone can now find and retrieve information instantly. This calls into question whether such broad accessibility is truly necessary and whether it aligns with the principle of proportionality.[85] Informational curiosity often goes beyond what is strictly necessary, highlighting the need for legal mechanisms to prevent the misuse of data from land registers. As technology and data processing advance, the obligations for data protection grow, potentially affecting open data policies within the EU. Public authorities that publish personal data must reconsider their role in ensuring privacy protection.[86] Knol Radoja suggests restricting public access to land registers by requiring proof of legitimate interest to protect the privacy of rights holders. Access would be granted for legal or economic reasons, not mere curiosity. This would protect personal data while maintaining publicity and legal certainty. Additionally, a no-

---

82 Ernst, Josipović, *op. cit.*, note 79, p. 287.

83 *Ibid.* p. 288.

84 *Ibid*. p. 307.

85 Lokhorst G.; Van Eechoud, M., *Public Registers Caught between Open Government and Data Protection–Personal Data, Principles of Proportionality and the Public Interest*, Data Protection and Privacy, Data Protection and Democracy, 12, 2020., p. 222.; Knol Radoja, *op. cit.*, note 79., p. 405.

86 *Ibid*.; van Loenen, B., Kulk S., Ploeger, H., *Data protection legislation: a very hungry caterpillar. the case of mapping data in the European union,* Government Information Quarterly 33 (2), pp. 338–345.; J. Solove, D., *A Taxonomy of Privacy*, University of Pennsylvania Law Review, 154 (2006), p. 477.

tification system is recommended to inform rights holders about access to their data, except when it would compromise criminal investigations or the work of authorities.[87] Such notification would contribute to upholding the principle of transparency and the rights of the subject whose personal data is being accessed, not only in land registers but more broadly.

5. CONCLUSION

The societal significance of transparency lies in placing the work of the court under public scrutiny, establishing a connection between the judiciary and the public. The public may be excluded from an entire hearing or a part of it for reasons deemed necessary in a democratic society to protect morality, public order, or national security—particularly in cases involving minors, to safeguard the privacy of the parties, or to preserve military, official, or business secrets, as well as the security and defense of the Republic of Croatia. The extent of such exclusion is determined by the court, strictly limited to what is absolutely necessary under special circumstances where public access could be detrimental to the interests of justice. Additionally, court decisions in most countries are publicly available through various digital platforms for accessing case law.

The digitalisation of judicial proceedings enables faster and more transparent information exchange between parties, as well as greater opportunities to uphold the principle of public access. However, it also raises concerns about how to protect personal data and trade secrets in the digital sphere, particularly in cases involving sensitive information (such as financial records, contractual terms, intellectual property, and personal relationships). Striking the right balance between transparency and privacy protection is crucial for modernizing the judiciary without compromising individual rights. A well-balanced approach ensures that modernization strengthens, rather than undermines, legal security and individual privacy. In this context, modernizing data protection systems should involve effective yet financially sustainable measures, such as the "good old" practice of storing confidential documents physically rather than in digital systems. Additionally, the anonymisation of court decisions and the introduction of a legitimate interest test for accessing public registries are examples of regulations aimed at preventing the improper use of personal data.

[87] Knol Radoja, *op. cit.*, note 80., p. 415.

REFERENCES

BOOKS AND ARTICLES

1. Aras Kramar, S., *Novine Uredbe (EU) 2020/1783 o izvođenju dokaza u građanskim ili trgovačkim stvarima*, Godišnjak Pravnog Fakulteta „Justinijan Prvi" u Skopju, Liber amicorum u čast prof. dr. Arsena Janevskog, Zoroska – Kamilovska, T. (ed.). Skoplje: Pravni Fakultet „Justinijan Prvi" Sveučilišta „Sv. Kiril i Metodij" u Skopju, 2023. pp. 349-365.
2. Aras Kramar, S., *Elekronifikacija parničnog postupka nakon Novele ZPP-a iz 2019. godine,* Pravo i porezi, XXIX (2020), Vol. 9, pp. 46-52.
3. Ashley, K. D. *Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age,* Cambridge, Cambridge University Press, 2017.
4. Buljan, I., *Pisani postupak u sporovima male vrijednosti - radikalna promjena dosadašnje paradigme*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 45, No. 1, 2024., pp. 251-271.
5. Craig, P.; de Búrca, G., *EU Law. Text, Cases, And Materials*, Oxford, Oxford University Press, 2015.
6. Čizmić, J., *Javnost glavne rasprave,* Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 42, No. 2, 2021., pp. 283-301.
7. Čuveljak, J., *Tajnost parničnog postupka*, in: Šago, D. (ed.), Zbornik radova VIII. međunarodnog savjetovanja: Aktualnosti građanskog procesnog prava – nacionalna i usporedna pravnoteorijska i praktična dostignuća, Split, Pravni fakultet Sveučilišta u Splitu, 2022. pp. 417-438.
8. Dešić, J.; Brajković, L., *Komparativna rješenja odnosa publiciteta zemljišnih knjiga i zaštite osobnih podataka,* Godišnjak Akademije pravnih znanosti Hrvatske, Vol. 12, No. 1, 2021., pp. 327-344.
9. Dika, M.; Čizmić, J., *Komentar Zakona o parničnom postupku Federacije Bosne i Hercegovine,* Sarajevo, OSCE Democratization Department, 2000.
10. Dika, M., *Načelo javnosti u parničnom postupku - prilog pokušajima opravdanja i reafirmacije instituta,* Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 29, No. 1, 2008., pp. 1-26.
11. Donoghue, J., *The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice,* Modern Law Review, Vol. 80, No. 6, 2017., pp. 995.-1025.
12. Ernst, H.; Josipović, T., *Javnost zemljišne knjige i zaštita osobnih podataka,* Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 45, No. 2, 2024., pp. 283-311.
13. Grbić, S.; Bodul, D.; Bartulović, Ž., *Pravo na pošteno suđenje i e-pravosuđe: sistemska greška ili korak naprijed u zaštiti prava?*, Harmonius, Beograd, Vol. 1, 2021., pp. 15-35.
14. Hess, B.; Koprivica Harvey, A., *Open justice - the role of courts in a democratic society*, Baden Baden, Nomos Verlag, 2019.
15. Gavella, N., *Osobna prava. I. dio,* Zagreb, Pravni fakultet u Zagrebu, 2000.
16. Jelinić, Z., *Pisani postupak i pravo na usmenu raspravu u sporovima male vrijednosti*, Pravni vjesnik, Vol. 40, No. 4, 2024., pp. 7-30.
17. Josipović, T., *Izazovi digitalizacije zemljišnih knjiga: načelo publiciteta stvarnih prava v. načela zaštite osobnih podataka*, in: Popović D. (ed.), Liber amicorum prof. dr. Mirko Vasiljević, Beograd, Univerzitet u Beogradu Pravni fakultet, 2021., pp. 679-703.

18. Josipović, T., *Zemljišnoknjižno pravo*, Zagreb, Informator, 2001.
19. Jug, J.; Maganić, A., *Novela Zakona o parničnom postupku i ostala sporna pitanja*, Priručnik za polaznike Pravosudne akademije, 2022.
20. Kiršienė, J.; Amilevičius D.; Stankevičiūtė, D., *Digital Transformation of Legal Services and Access to Justice: Challenges and Possibilities,* Baltic Journal of Law & Politics, Vytautas Magnus University, Vol. 15, No. 1, 2022, pp. 141-172.
21. Knol Radoja, K., *Pravo na zaštitu privatnosti vs. načelo javnosti zemljišnih knjiga,* Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 45, No. 2, 2024., pp. 403-418.
22. Kokott J.; Sobotta, C., *The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR*, International Data Privacy Law, Vol. 3, No. 4, 2013., pp. 222-228.
23. Lokhorst G.; Van Eechoud, M., *Public Registers Caught between Open Government and Data Protection–Personal Data, Principles of Proportionality and the Public Interest*, Data Protection and Privacy, Data Protection and Democracy, Vol. 12, 2020., pp. 209-236.
24. Losinger, J., *Electronic Access to Court Records: Shifting the Privacy Burden Away from Witnesses and Victims*, University of Baltimore Law Review, Vol. 36, No. 3, 2007., pp. 419-449.
25. Ljubanović, B.; Britvić Vetma, B., *Sustav eSpis u funkciji efikasnog djelovanja upravnih i sudskih tijela*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 41, No. 1, 2020., pp. 313-326.
26. Maganić, A. *Primjena elektroničke tehnologije u parničnom postupku* u *Novine u parničnom procesnom pravu*, J. Barbić (ed.), Zagreb, HAZU, 2020., pp 79-109.
27. Solove, D., *A Taxonomy of Privacy*, University of Pennsylvania Law Review, Vol. 154, 2006., pp. 477-560.
28. Triva, S.; Dika, M., *Građansko parnično procesno pravo*, 7th ed., Narodne novine, Zagreb, 2004.
29. Uzelac, A., *Pravo na pošteno suđenje: opći i građanski aspekti čl. 6. st. 1. Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda,* in: I. Radačić (ed.), Usklađenost zakonodavstva i prakse sa standardima Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda, Zagreb: Centre for Peace Studies, 2011, pp. 88-125.
30. van Loenen, B.; Kulk S.; Ploeger, H., *Data protection legislation: a very hungry caterpillar. the case of mapping data in the European union,* Government Information Quarterly , Vol. 33., No. 2, pp. 338-345.
31. Zuiderveen Borgesius, F., *Improving privacy protection in the area of behavioural targeting*, Alphen aan den Rijn, Wolters Kluwer Business, 2015.

LIST OF NATIONAL REGULATIONS, ACTS AND COURT DECISIONS

1. Civil Procedure Act, OG, No. 53/91., 91/92., 112/99., 129/00., 88/01., 117/03., 88/05., 2/07., 96/08., 84/08., 123/08., 57/11., 148/11. 25/13., 89/14., 70/19., 80/22., 114/22., 155/23.
2. Constitution of the Republic of Croatia, OG, No. 85/10., 05/14.
3. Court Rules of Procedure, OG, No. 37/14., 49/14., 8/15.,35/15., 123/15., 45/16., 29/17., 33/17., 34/17., 57/17., 101/18., 119/18., 81/19., 128/19., 39/20., 47/20., 138/20., 147/20., 70/21., 99/21., 145/21., 23/22.

4. Courts Act, OG., No. 28/13., 33/15., 82/15., 82/16., 67/18., 126/19., 130/20., 21/22., 60/22., 16/23., 155/23., 36/24.
5. Family Act, OG, No. 103/15., 98/19., 47/20., 49/23., 156/23.
6. Land Register Act, OG, No. 63/19., 128/22., 155/23.
7. Regulation on Electronic Communication, OG, No. 5/20., 139/21., 27/23., 39/24., 36/24.
8. Regulation on Remote Hearings, OG, No. 154/22.
9. Regulation on the Procedure for Charging and the Amount of the Fee for Transcribing Court Hearing Audio Recordings, OG, No. 15/20.
10. Rules on Operations within the eSpis System, OG, No. 35/15., 123/15., 45/16., 29/17., 112/17., 119/18., 39/20., 138/20., 147/20., 70/21., 99/21., 145/21., 23/22., 12/23., 9/24.
11. VSRH, Rev-240/99 from 6 September 2000.
12. VTSRH, Pž-1910/13 from 6 June 2013.

EU LAW

1. Charter of Fundamental Rights of the European Union [2012], OJ C 326, 26 October 2012.
2. Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of the Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, COM(2007) 769 final, Brussels.
3. Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ L 201, 31 September 2002.
4. European Commission, (2018), Proposal for a regulation of the European Parliament and of theCouncil amending Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, COM(2018) 378 final, Brussels
5. European Convention for the Protection of Human Rights and Fundamental Freedoms, OG, International treaties, No. 18/97., 6/99., 14/02., 13/03., 9/05., 1/06., 2/10.
6. European Parliament resolution of 10 March 2009 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (2008/2180(INI)) European Parliament resolution of 23 November 2010 on civil law, commercial law, family law and private international law aspects of the Action Plan Implementing the Stockholm Programme (2010/2080(INI)).
7. Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016, on the protection of individuals concerning the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119 of 4 May 2016.
8. Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data,

and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21 November 2018.

9. Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast), OJ L 405, 2 December 2020
10. Regulation (EC) No. 1206/2001 of May 28, 2001, on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters was published in the Official Journal of the European Communities, No. L 174/2001

ECHR

1. European Court of Human Rights, Judgment *Fischer v Austria* [1995], Application No. 16922/90, 26 April 1995.
2. European Court of Human Rights, Judgment *B. and P. v the United Kingdom* [2001] Applications nos. 36337/97 and 35974/97, 5 September 2001
3. European Court of Human rights, Judgment *Sakharovsky v Rusia* [2018] Application no. 39159/12966, 27 November 2018.
4. European Court of Human Rights, Judgment *Zagorodnikov v Russia*, Application no. 66941/01, 7 September 2007.

WEBSITE REFERENCES

1. Consultative Council of European Judges (CCJE) Opinion no. 14. on justice and information technologies (IT), (2011). Retrieved from: [https://www.coe.int/en/web/ccje/opinion-n-14-on-justice-and-information-technologies-it-], Accessed 12 February 2025.
2. Consultative Council of European Judges (CCJE), Opinion no. 26 (2023). Kretanje naprijed: Primjena pomoćnih tehnologija u sudbenoj vlasti, Strasbourg, 1. December 2023., Retrieved from: [https://rm.coe.int/ccje-opinion-no-26-20023-croatian/1680ae1a40-], Accessed 17 January 2025.
3. CURIA, retrieved from: [https://curia.europa.eu/jcms/jcms/p1_1477137/hr/-]. Accessed 23 February 2025.
4. e-CODEX, retrieved from: [https://www.e-codex.eu/faq-e-codex-], Accessed 25 February 2025.
5. ECtHR, retrieved from: [https://www.echr.coe.int/recent-webcasts-], Accessed 22 February 2025.
6. Lhullier J.; Lhullier-Solenik, D., *Access to justice in Europe*, CEPEJ, 2007, retrieved from: [https://rm.coe.int/evropska-komisija-za-efikasnost-pravnih-sistema-cepej-novi-zadatak-za-/1680748156], Accessed 17 February 2025.
7. Smiljan Pervan, L., *Položaj sudaca u Republici Hrvatskoj*. Retrieved from: [https://www.iusinfo.hr/strucni-clanci/CLN20V01D2017B1052. -], Accessed 15 January 2025.

Original scientific paper

OPENING/FALLING OF THE BOW VISOR/RAMP AS THE CAUSE OF MARITIME CASUALTIES – LIABILITY AND INSURANCE ASPECTS

Željka Primorac, PhD, Full Professor
University of Split, Faculty of Law
Domovinskog rata 8, 21000 Split, Croatia
zeljka.primorac@pravst.hr

Marija Pijaca, PhD, Associate Professor
University of Zadar, Maritime Department
Ulica Mihovila Pavlinovića 1, 23000 Zadar, Croatia
mpijaca@unizd.hr

Božena Bulum, PhD, Scientific Adviser with Tenure
Adriatic Institute of the Croatian Academy of Science and Arts
Šenoina 4, 10000 Zagreb, Croatia
bbulum@hazu.hr

ABSTRACT

One of the fundamental determinants concerning the safety of maritime navigation is the need to comply with all safety standards of ship maintenance and safe working conditions, the non-fulfiilment or non-observance of which is considered a decisive factor in the occurrence of maritime casualties. In this article, the international, European and national normative legal issues of liability for damages and insurance cover are presented and explained using the example of two maritime casualties involving ro-ro passenger ships: 15-year old ship "Estonia" from 1994 (the accident occurred due to the opening of the bow visor during the navigation, which led to the sinking of the ship in international waters of the Baltic Sea and the death of 852 people) and the 55-year old ship "Lastovo" from 2024 (the accident occurred as a result of the fall of the bow ramp on a crew member at the pier, resulting in the death of 3 crew members and serious bodily injuries to 1 crew member). Although these are maritime accidents that occurred almost 30 years apart, they have a common link and raise questions about the (un)seaworthiness of the ship - which was established in the case of the maritime accident of the ship "Estonia" and seaworthiness of the ship which was established in the case of the maritime accident of the ship "Lastovo". Given the above, the authors refer to the changes in the international and European legal framework (changes in ferry safety regulations, changes in liability and insurance cover regulations) that followed the „Estonia" maritime casualties, and which, since a more compre-

hensive analysis was not possible, focussed exclusively on the damage suffered by passengers. At the same time, the national legal framework of liability and insurance coverage (according to the decisions of the Croatian Maritime Code, national Collective Agreement, Maritime Labour Convention, and P&I Club Rules) is considered in relation to damage caused by the death or physical injury of a „Lastovo" crew member. The paper aims to discuss important issues related to the appropriate application of the International Safety Management Code (ISM Code), which was adopted immediately after the „Estonia" maritime casualties, in order to ensure the safety of all operations related to the operation of the ship, including the prevention of injury or loss of life to passengers/crew members. Although the ISM Code does not regulate property liability issues, its non-application may be an important factor in determining the shipowner's liability for all contractual and non-contractual obligations that may arise from the shipping operation and thus for the successful exercise of maritime insurance rights.

Keywords: *maritime casualties, insurance, ISM Code, liability*

1. INTRODUCTION

Safety of maritime navigation is based on meeting extremely demanding maritime navigation safety standards, which also apply to ro-ro passenger ships (ferries). It is unquestionable that it includes complying with international convention and European rules (for ships on international voyages and voyages between 2 EU Member States) and European and national rules (for ships on domestic voyages - between ports of 1 EU Member State).[1] Passenger ships as a special category of vessels must meet stringent and comprehensive technical requirements for navigation safety, which generally implies a higher level of safety in relation to other types of ships.[2] Latent defects of the ship, its poor maintenance, but also failures in the management of the shipping company are factors that contribute to a greater likelihood of maritime accidents.[3] Likewise, worn-out condition and average age of ships (the operational life of most merchant ships is 20-25 years)[4] directly affect the much higher operating cost for their maintenance[5] which in turn brings into

---

1 See more Jacobs, K., *Safety of ro-ro passenger ships – Stability requirements*, European Parliament, July 2023, p. 2, available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733616/EPRS_BRI(2022)733616_EN.pdf], Accessed 10 February 2025.

2 Rukavina, B.; Luttenberger, A., *Investigations of Maritime Accidents Involving Passengers Ships in the Republic of Croatia*, Poredbeno pomorsko pravo, No. 175, 2021, p. 140.

3 See more Vio, I., *Pravni okvir odgovornosti brodara za smrt i tjelesne ozljede člana posade u angloameričkom pomorskom zakonodavstvu*, Poredbeno pomorsko pravo, Vol. 61, No. 176, p. 388.

4 Anderson, C. B., *Shipping and the environment law and practice*, Informa, London, 2009, p. 1029. The average ocean-going commercial vessel will have an operational life of 28 years, Prentiss Pskowski, R., *No Country for Old Ships?: Emerging Liabilities for Ship Recycling Stakeholders*, Tulane Maritime Law Journal, Vol. 45, No. 61, 2020, p. 62.

5 Some ship machinery and equipment break down or wear out faster than others, so their timely renewal extends the life of the ship (see more: Hlača, V., *Hrvatsko pomorsko pravo*, Pravni fakultet u Rijeci, 2001, p. 229).

question their seaworthiness.[6] One of the fundamental objectives of European maritime policy includes determining that a ship is seaworthy,[7] i.e. establishing a system for early detection of substandard ships and measures to prevent their further navigation through regular technical controls – technical supervision, i.e. ship inspection.[8] Classification societies have an important role when it comes to the safety of maritime navigation, because their high-quality and efficient work leaves less room for substandard ships.[9] In classification society rules there are set out a numerous standards for safe operation, including about seaworthiness. But it is sometimes considered that a certificate of seaworthiness issued by a classification society only reflects the condition of the ship at the time of the inspection and loses its validity once the ship sails.[10] In any case, failure to maintain a ship seaworthy has a direct impact on the safety of maritime navigation, or the possible occurrence of a maritime accident that can have tragic consequences for passengers and crew members. However, it is important to emphasise that the requirements of the new safety standards exceed the traditional supervision and the role of classification societies, extending them to the assessment of ship management and crew procedures, which represents significantly more complex requirements for classification societies. [11]

In this paper, the authors conduct a legal analysis of normative provisions on liability and insurance coverage for damages incurred to passengers (in the case of a maritime accident involving the 15-year-old passenger ship "Estonia") or to crew members (in the case of a maritime accident involving the 55-year-old passenger

---

6 More about the legal standardisation of a ship's seaworthiness in terms of meeting the requirements for safe navigation see Bolanča, D.; Barun, M., *Neke novosti na području usklađivanja hrvatskog pomorskog upravnog prava sa pravnom stečevinom Europske unije*, Zbornik Pravnog fakulteta u Splitu, Split, No. 4, 2008, p. 747-752; Bolanča, D.; Primorac, Ž., *Sigurnost plovidbe u Zakonu o izmjenama i dopunama Pomorskog zakonika iz 2007. godine*, Naše more, Dubrovnik, No. 3-4, 2008, p. 148-151; Capar, R., *Pomorsko upravno pravo*, Školska knjiga, Zagreb, 1987, p. 60-77; Grabovac, I., *Pomorsko pravo*, knjiga prva, Visoka pomorska škola u Splitu, Split, 2001, p. 62-64.; Luttenberger, A., *Pomorsko upravno pravo*, Pomorski fakultet u Rijeci, Rijeka, 2008, p. 110-116. More about the carrier's responsibility for the ship's seaworthiness see Marin, J., *Odgovornost prijevoznika za plovidbenu sposobnost broda*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 58, No. 1-2, 2008, p. 489-507.

7 The standard applied for the determination or whether or not a ship is seaworthy is an objective one. Arguably, it is only possible to make this determination before and at the beginning of the undertaking of a voyage when the ship is still in port, Rong, P., *Liability in Criminal and Private Law Regarding Maritime Safety*, Journal of Maritime Law & Commerce, Vol. 48, No. 1, 2007, p. 68-69.

8 See more Luttenberger, A., *op. cit.*, note 6, pp. 111-113.

9 Bulum, B., *Pomorski promet,* in: Europsko prometno pravo, Pravni fakultet u Zagrebu, Zagreb, 2011, p. 326.

10 Rong, P., *op. cit.*, note 7, pp. 68-69.

11 Kiperaš, Ž., *ISM Kodeks – primjena od strane države zastave*, Uporedno pomorsko pravo, Vol. 38, No. 149-152, 1996, p. 78.

ship "Lastovo"), with regard to the fact that the maritime accident occurred due to the opening of the bow visor during navigation ("MV Estonia") and the falling of the bow ramp on a crew member at the pier in the ferry port ("Lastovo"). Since there are various mechanisms (hydraulic mechanisms, etc.) that serve as measures to ensure the application of safety procedures for implementing all phases of opening/closing bow visors and ramps, their adherence and appropriate application aim to prevent their uncontrolled manoeuvre.

2. MARITIME CASUALTIES WITH OPENING BOW VISOR / FALLING BOW VISOR ON RO-RO PASSENGER SHIPS – LIABILITY AND INSURANCE ASPECTS

Civil liability of a shipowner for damage caused to passengers and crew members is the subject of insurance under maritime liability insurance. Determining liability is preceded by an assessment of whether, at the time of the maritime accident, the requirements regarding the application of valid international unification instruments and European maritime law on the safety of navigation and the fulfilment of standardised safe navigation norms, i.e. the application of safety standards, were met.[12] This is particularly significant since non-compliance and/or inadequate application of safety standards are among the determining factors in the occurrence of maritime accidents so the question arises on the liability of the shipowner as the possessor of the ship, organiser and bearer of maritime ventures.

The contractual liability of a shipowner arises from the breach of contractual obligations, which may manifest itself as the shipowner's failure to perform, improper performance or delay in performing his contractual obligation. It certainly includes the shipowner's liability for death and bodily injury to passengers and crew members when this is the result of a maritime accident. A special requirement that P&I clubs place on their members (shipowners) is that they strictly comply with the legal requirements of the country whose flag the member ship flies (ship nationality) in terms of use, construction, adaptation, condition of the ship, seaworthiness and equipment.[13] They must have, in relation to each ship from their fleet, met all international ship safety management standards (technical, organizational and procedural) fulfilled in order to achieve the safety of all operations related to the use of the ship.

---

[12] Historically, efforts have been made to incorporate stricter standards for navigation safety into global standards.

[13] Pavić, D., *Pomorsko osiguranje pravo i praksa*, Književni krug, Split, 2012, p. 454.

2.1. Accident of ro-ro passenger ship (ferry) "Estonia" in 1994

On 27 September 1994, the Estonian-owned ro-ro passenger ship (ferry) "Estonia"[14] set sail on its last route from Tallinn (Estonia) to Stockholm (Sweden). Due to a severe storm accompanied by strong waves, on the night of 28 September 1994, the bow visor was opened and ripped off the hull, which caused rapid water penetration to the lower deck (vehicle deck), jeopardizing the stability and buoyancy of the ship and consequently causing the ship to sink in a very short period of time (30 min.).[15] The "Estonia" sank to a depth of approximately 90 meters, and of the total number of people on board - 852 people died. After the maritime accident of the passenger ship "Titanic", this is an accident that is considered the largest peacetime maritime accident of a European passenger ship in Europe due to the number of fatalities. Since the maritime accident occurred in international waters of the Baltic Sea, Estonia, Finland and Sweden formed an international Accident Investigation Committee, which after 3 years (on 3 December 1997) published their joint Final Report on the Capsizing of the "Estonia".[16] It was concluded that "bow visor attachments were not strong enough for the hydrodynamic loads of the waves",[17] i.e. that the maritime accident was the result of mechanical failure of the ship's bow visor.[18] At the same time, the investigation determined that the bow ramp remained attached to the sunken ship. Based on data from the Final Report, we observed that the "Estonia" sank at a distance of about 22 nautical miles from the Finnish island of Utö. But her design was permitted for vessels in protected waters which would sail no further than 20 miles from land.[19] According to the Report, „Estonia" was not seaworthy. Neither the German shipbuilder nor the French agency Bureau Veritas that deemed the ship seaworthy were ever held responsible for the accident.[20]

---

14 „Estonia" was built in autum 1979, in Meyer Werft shipyard (Germany).

15 See more Dhillon, B. S., *Transportation Systems Reliability and Safety*, CRC Press, Boca Raton, 2016, p. 155; Whittingham, R., *The Blame Machine: Why Human Error Caouses Accidents*, Routledge, London, 2004, p. 130-131; Yang, Z.; Wang, J., *Ship Formal Safety Assessment*, Talley, W. K. (ed.), Maritime Safety, Security and Piracy, Informa Law from Routledge, London, 2009, p. 33.

16 See more Tiberg, H., *International Update: Swedeish Maritime Law 1999*, Tulane Maritime Law Journal, vol. 24, 2000., p. 864.

17 Klingbeil, D.; Klinger, C.; Kinder, J.; Baer, W., *Investigations for indications of deliberate blasting on the front bulkhead of the ro-ro ferry MV ESTONIA*, Engineering Failure Analysis, Vol. 43, 2014, p. 186-197.

18 *Sweden Closes Case of MV Estonia Sinking*, The Maritime Executive, available at: [https://maritime-executive.com/article/sweden-closes-case-of-mv-estonia-sinking], Accessed 21 February 2025.

19 Tiberg, H., *Why Cover the Wreck of a Sunken Ship?,* Scandinavian Studies in Law, Vol. 39, 2000., p. 481.

20 *Estonia shipwreck claimants have low hopes for compensation hearing*, 2019, available at: [https://www.france24.com/en/20190412-estonia-shipwreck-claimants-have-low-hopes-compensation-hearing], Accessed 2 March 2025.

At the time of the maritime accident "Estonia", the provisions of the most important and most complete international convention on safety at sea, protection of human life at sea,[21] had already entered into force. This is the International Convention for the Safety of Life at Sea - SOLAS Convention (1974), whose basic goal was to determine minimum safety standards for the construction, equipment and operation of ships.[22] The importance of the issue of liability of a maritime carrier for death and bodily injury to passengers (violation of their physical integrity)[23] and loss, damage and delay in the delivery of luggage is indicated by the provisions of the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea (1974),[24] which regulates them internationally and applies only to international transport.[25] This is the first international act that regulated the issue of contractual liability of a maritime carrier for death and bodily injury to passengers. Although Athens Convention has been incorporated into the legal systems of more than 30 countries from all around the world,[26] Estonia, Finland and Sweden were/are not state parties.[27] The resulting damage to passengers was paid from the carrier's liability insurance policy – through P&I Club "Sklud" using Swedish Maritime Code which had rules on limitation liability for damages to passengers to the order of 260 million crowns (only 100 000 SDR per passenger).[28]

2.1.1. Influence of the "Estonia" maritime accident on international and European legal framework changes

The maritime accident involving the ro-ro passenger ship "Estonia" contributed to the introduction of significant changes in terms of the legal basis and limits of liability of carriers for death and bodily injury to passengers, but also the introduction of mandatory passenger insurance in maritime transport according to

---

21 Grabovac, I., *Plovidbeno pravo Republike Hrvatske*, Književni krug, Split, 2003, p. 60.

22 Grabovac, I., *Suvremeno hrvatsko pomorsko pravo*, Književni krug, Split, 2005, p. 34. More on SOLAS Convention see Luttenberger, A., *op. cit.,* note 6, pp. 19.-20.

23 It is about any injury to the physical or psychological condition of a person in relation to his condition that existed before the injury, including death as the destruction of the physical existence of a person, Milošević-Pujo, B., *Pravna priroda ugovora o prijevozu putnika – posebno o odgovornosti brodara za fizički integritet putnika*, Naše more, Dubrovnik, No. 5-6, 2003, p. 211.

24 Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea (1974), further: Athens Convention.

25 More on international transport see Marin, J., *Međunarodne konvencije i protokoli kao izvori hrvatskog pomorskog prava*, Poredbeno pomorsko pravo, Vol. 46, No. 161, 2007, p. 107.

26 Soyer, B.; Leloudas, G., *Carriage of Passengers by Sea: A Critical Analysis of the International Regime*, Michigan State International Law Review, Vol. 26, No. 3, 2018., p. 486.

27 See more: Pospišil-Miler, M., *Novi sustav odgovornosti za smrt i tjelesne ozljede putnika u pomorskom prijevozu*, Pravni fakultet Sveučilišta u Rijeci, Rijeka, 2014, p. 195-198.

28 See Tiberg, H., *op. cit.*, note 19, p. 483.

the provisions of the Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea.[29] The aim of the provisions in question was to improve the legal position of passengers and enable greater safety for passengers in the event of a violation of their physical integrity. At the same time, amendments were made to the then valid international legal provisions, or rather, the implementation of new provisions[30] in the SOLAS Convention, which applies to passengers ships on international voyages. In particular, only 5 days after the "Estonia" maritime accident (on October 4, 1994) IMO started an initiative that included proposals for the adoption of special legal norms on ro-ro passenger ships safety. After only a year, amendments to existing provisions, as well as new provisions, were incorporated into the SOLAS Convention.

It is significant to note how the improvement of the normative legal framework of maritime safety regulation was approached even before the accident of the passenger ship "Estonia". Specifically, at the end of 1993, International Safety Management Code (ISM Code) was adopted [31] aiming to provide international safety standard for all ships in international voyages (including ro-ro passenger ships), which introduces demanding international standards regarding operational safety issues and safe management. ISM Code introduces higher global standards in terms of ship management by ship masters, officers and crew members, and in relation to functionality requirements in terms of management procedures within shipping companies on land.[32] The implementation of the ISM Code is obligatory for all shipping companies.[33] The basic principles according to ISM Code are that company[34] should provide, among others, for safe practices in ship opera-

---

[29] Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and Their Laggage by Sea (futher: Protocol of 2002 to the Athens Convention), see more Primorac, Ž., *Obvezno osiguranje od odgovornosti prijevoznika za smrt i tjelesne ozljede putnika prema odredbama protokola Atenske konvencije iz 2002.god.*, Pravni vjesnik, Osijek, Vol. 37, No. 3-4, 2011, pp. 257-274.

[30] More on all requirements which were made as a consequence of a several disasters, including Estonia accident in 1994, see: Szymonski, M., *Safety Management on ro-ro Passenger Ships*, TransNav, International Journal on Marine Navigation and Safety of Sea Transportation, Vol. 18, No. 2, 2024, pp. 281-285.

[31] See more: Grabovac, I., *Plovidbeno pravo Republike Hrvatske*, *op. cit.*, note 21, pp. 75-78; Pavić, D., *Pravni učinci primjene ISM kodeksa na ograničenje odgovornosti brodara*, Poredbeno pomorsko pravo, Zagreb, No. 155, 2001, pp. 57-70; Hess, M.; Kos, S.; Njegovan, M., *Procjena i kontrola operativnih rizika na brodu u skladu s ISM Pravilnikom*, Pomorstvo, Rijeka, No. 2, 2011, pp. 405-416. More on 5 amendments to the ISM Code (in 2000, 2004, 2005, 2008, 2013) see more: International Maritime Organization, *The International Safety Management (ISM) Code*, available at: [https://www.imo.org/en/ourwork/humanelement/pages/ISMCode.aspx], Accessed 2 March 2025.

[32] Bolanča, D., *Prometno pravo Republike Hrvatske*, Pravni fakultet u Splitu, Split, 2016, p. 72.

[33] Karakasnaki, M.; Vlachopoulos, P.; Pantouvakis, A.; Bouranta, N., *ISM Code implementation: an investigation of safety issues in the shipping industry*, WMU Journal of Maritime Affairs, Vol. 17, 2018, p. 462.

[34] Company means the owner of the ship or any other organization or person such as the manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship from the shipowner

tion and a safe working environment (1.2.2 of the ISM Code). Considering that managerial errors were identified as important causal factors (also in case of maritime accident of "Estonia") – IMO accelerated the work with a code to regulate workplace safety and pollution.[35] ISM Code was incorporated in a new chapter IX of the SOLAS convention and it became mandatory from July 1, 1998 in State Parties to the SOLAS Convention, for companies operating ro-ro passenger ships. Consequently, P&I clubs have prescribed the obligation that a ship must always have valid prescribed certificates regarding the company and ship safety management system (ISM Code), which aims to unify and improve existing ship safety management procedures in order to achieve the safety of all operations related to the use of a ship.[36] All EU Member States ratified SOLAS convention, but its provisions do not apply on domestic voyages.[37] While ensuring safety of ships is flag state responsibility, obligation of companies and EU Member States according to ISM Code were prescribed in Council Regulation (EC) No 3051/95[38] which was limited to safety management of ro-ro passenger ships (ferries) and was, after amending ISM Code in 2000, repealed by Regulation (EC) No 336/2006.[39] New European legal provisions adopted with the aim of achieving greater safety of maritime navigation were related to the adoption of the safety of passenger ships regulation:[40] a) Council Directive 98/18EC[41] with goal to introduce a uniform

---

and who, on assuming such responsibility, has agreed to take over all duties and responsibility imposed by the ISM Code (1.1.2. of the ISM Code). More on positive and negative consequences of the ISM Code for shipping companies see: Størkersen, K. V.; Antonsen, S.; Kongsvik, T., *One size fits all? Safety management regulation of ship accidents and personal injuries*, Journal of Risk Research, Vol. 20, No. 9, pp. 1162-1163.

35 *Ibid.*, p. 1157.

36 See more Herdzik, J., *ISM Code on Vessels With or Without Impact on a Number of Incidents Threats*, Journal of KONES Powertrain and Transport, vol. 26, no. 2, 2019, pp. 54-58.

37 See more: Wang. H. C.; Wu, C. H., *A Scenario Simulation-Evaluating Evacuation Analysis for ro-ro Passenger Ship in MV Tai Hwa*, Journal of ship production and design, Vol. 36, No. 4, 2020, pp. 240-249.

38 Council Regulation (EC) No 3051/95 of 8 December 1995 on the safety management of roll-on/roll-off passenger ferries (ro-ro ferries), [1995] OJ L320/14-24, further: Council Regulation (EC) No 3051/95. The provisions in question, whose application began on July 1, 1996 - ISM Code has become mandatory in the EU for ro-ro passenger ships (ferries) operating to or from EU Member States ports on a regular service regardless of its flag, demanding that companies which operating with that ships comply with ISM Code (see more Art. 1 and 3 of the Council Regulation (EC) No 3051/95).

39 Regulation (EC) No 336/2006 of the European Parliament and of the Council of 15 February 2006 on the implementation of the International Safety Management Code within the Community and repealing Council Regulation (EC) No 3051/95, [2006] OJ L64/1-36.

40 More on safety of passenger ships regulation see Jenisch, U., *The European Union as an Actor in the Law of the Sea: The Emergence of Regionalism in Maritime Safety, Transportation and Ports*, German Yearbook of International Law, Vol. 58, 2005, pp. 242-243.

41 Council Directive 98/18/EC of 17 March 1998 on safety rules and standards for passenger ships, [1998] OJ L144/1-110.

level of safety of life and property on new and existing passenger ships; b) Council Directive 1999/35/EC[42] which prescribes the establishment of a system of mandatory inspections,[43] etc.

The needs of modern maritime transport, as well as the legal aspects of protecting the legal position and safety of passengers in maritime transport, required higher limits on the liability of maritime carriers for violations of the physical integrity of passengers, so much so that the Protocol of 2002 to the Athens Convention introduced changes to the existing international system of liability and compensation for damage due to death or bodily injury to passengers, tightening the liability of carriers for the damages in question, but also introducing mandatory insurance of carriers' liability for violations of the physical integrity of passengers. Compulsory insurance was also intended to contribute to a higher standard of ship safety, because in order to be able to insure their ship, carriers are obliged to maintain the ship's seaworthiness and a certain standard of ship safety.[44]

2.1.1.1. Unseaworthiness - "CMA CGM LIBRA case"

Container ship "CMA CGM LIBRA" (Maltese flag) grounded shortly after leaving the Chinese port (Xiamen). The grounding itself was held to have been caused by negligent navigation by the master in that he departed from the marked fairway and into shallow waters, which turned out not to have sufficient depth for the ship's draft.[45] According to Art. 4(1) of the Hague Rules "neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and sup-

---

42 Council Directive 1999/35/EC of 29 April 1999 on a system of mandatory surveys for the safe operation of regular ro-ro ferry and high-speed passenger craft services, [1999] OJ L138/1-19. **S**ee more Vatankhan, S., *EU-Regulations on Inquiries into Maritime Casualties*, Ehlers, P.; Lagoni, R. (ed.), Enforcement of International and EU Law in Maritime Affairs, LIT Verlag, Münster, 2008, p. 129.

43 The provisions in question were repealed with the entry into force of the new Directive (EU) 2017/2110 of the European Parliament and of the Council of 15 November 2017 on a system of inspections for the safe operation of ro-ro passenger ships and high-speed passenger craft in regular service and amending Directive 2009/16/EC and repealing Council Directive 1999/35/EC [1999] OJ L315/61-77, which in Art. 14 prescribes the duty to carry out inspection of ro-ro passenger ships and high speed passenger craft in regular service.

44 Pospišil, M., *Protecting & Indemnity (P&I) osiguranje i obvezno osiguranje prema međunarodnim pomorskim konvencijama*, vlastita naklada, Crikvenica, 2021, p. 232.

45 Solvang, T., *The relationship between nautical fault and initial unseaworthiness under the Hague-Visby Rules*, Marius Scandinavian Institute of Maritime Law, SIMPLY 2020, p. 70, available at: [https://www.sjorettsfondet.no/journal/2022/565/mc-05/Selected_topics_of_causation_between_nautical_fault_and_initial_unseaworthiness_under_the_Hague-Visby_Rules_a_comparative_analysis], Accessed 8 June 2025.

plied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation". Because of the defective passage plan, the courts (in CMA CGM LIBRA case) concluded that the ship was unseaworthy[46] already at the moment of departure from the port. Although shipowners "argued that the defective passage plan was a matter that fell under the error in navigation exception under the Hague Rules and therefore they were not liable"[47] - in Judgement (from 8th March 2019) Admiralty Court concluded that "the vessel was unseaworthy before and at the beginning of the voyage from Xiamen because it carried a defective passage plan."[48] That means that shipower was not exempted from his liability for loss and damage.

Court of Appeal Judgement (from 4th March 2020) concluded that "a properly prepared passage plan is an essential document which the vessel must carry at the beginning of any voyage" and that "there is no reason why the absence of such a document should not render a vessel unseaworthy, just as in the case of any other essential document".[49] Also, it is important to note that according to that judgement "the shipowner cannot avoid liability by delegating responsibility for making the vessel seaworthy to the master and officers."[50] Namely, the Court found that the shipowner did not prove that he exercised due diligence to make the vessel seaworthy.[51]

The Supreme Court Judgement (from 10 November 2021) confirms the position of the lower court's judgements stating that: a) negligent navigation or management of the ship may cause unseaworthiness;[52] b) seaworthiness is not limited to physical defects in the vessel and her equipment (it extends, for example, to docu-

---

46 More on unseaworthiness arising from the defective passage plan see Heit, L., *ALIZE 1954 AND CMA CGM SA v ALLIANZ ELEMENTARY VERSICHERUNGS AG & ORS [2021] UKSC 51*, Australian and New Zealand Maritime Law Journal, Vol. 35, No. 1, 2021, p. 89.

47 Tezuka, S., *The "CMA CGM LIBRA" – Analysis of the impact on technical management practice of the UK Supreme Court's decision that a defective passage plan may make a ship unseaworthy*, April 2022, p. 1 [https://www.piclub.or.jp/en/news/9999999902], Accessed 8 June 2025.

48 Admiralty Court Judgement - Queen's Bench Division, [2019] EWHC 481, point 129, available at: [http://www.bailii.org/ew/cases/EWHC/Admlty/2019/481.html], Accessed 8 June 2025.

49 England and Wales Court of Appeal (Civil Division), [2020] EWCA Civ 293, point 87, available at: [https://www.bailii.org/ew/cases/EWCA/Civ/2020/293.html], Accessed 8 June 2025.

50 *Ibid.,* point 99.

51 Pospišil, M., *The impact of CMA CGM LIBRA on the allocation of risk in a maritime adventure*, Poredbeno pomorsko pravo, Vol.61, No.176, 2022, p. 461.

52 The Supreme Court of the United Kingdom, *Press summary – Alize 1954 and another (Appellants) v. Allianz Elementar Versicherungs AG and others (Respondents)*, [2021] UKSC 51, 10 November 2021, p.1 [https://supremecourt.uk/uploads/uksc_2020_0071_press_summary_b9b4e30e01.pdf], Accessed 8 June 2025.

mentary matters, to the knowledge and skill of the crew, to the vessel's systems and sometimes to the vessel's cargo or trading history);[53] c) it was "inconceivable" that a prudent owner would allow the vessel to depart on her voyage with a passage plan which was defective in the manner found;[54] d) carrier's seaworthiness obligation in relation to passage planning is not limited to providing a proper system for such planning.[55]

2.2. Accident of ro-ro passenger ship (ferry) "Lastovo" in 2024

On August 11, 2024, a maritime accident (very serious maritime accident) occurred involving the ro-ro passenger ship "Lastovo"[56] at the pier in the ferry port in Mali Lošinj. The maritime accident was caused by the fall[57] of the bow ramp on the ship's crew members, which resulted in the death of 3 ship's crew members and serious injury of 1 ship's crew member. Of utmost importance for establishing the circumstances and causes of a maritime accident is the impartial conduct of a safety investigation,[58] which is not intended to determine liability or appoint blame and, in this regard, to establish civil, administrative or criminal liability.[59] While safety investigation is launched in order to prevent maritime casualties and accidents in the future and to promote navigation safety, its Final Report[60] con-

---

53 *Ibid.* p. 2.

54 Supreme Court Judgement, [2021] UKSC 51, point 127 [https://supremecourt.uk/uploads/uksc_2020_0071_judgment_772c8b5f47.pdf], Accessed 8 June 2025.

55 *Ibid.*, point 145 on (viii).

56 "Lastovo" was built in 1969, in Japan. After 20 years it became part of the Jadrolinija fleet.

57 Technical problems with the bow ramp were also observed during the navigation of the ro-ro passenger ship "Mljet" (built in 2014) when during the navigation (when the ship docked in the port of Supetar) the ramp collapsed due to a breaking of the cable used to raise and lower the ramp, and the sea penetrated the interior of the ship. In the case of the maritime accident of the ro-ro passenger ship "Lastovo", the collapse of the bow ramp followed after its previous lifting for the purpose of inspecting the condition of the bow visor seal.

58 Conditions and manner for conducting safety investigation in Republic of Croatia are written in in Regulation on the manner and conditions of conducting safety investigation of marine casualties and incidents (Official Gazette, No. 122/2015), further: Regulation, which clearly emphasises its basic objectives: prevention of future marine incidents and casualties, promotion of navigation safety and prevention of pollution from ships (Art.1(1) of the Regulation). Initiation and implementation of the safety investigation is the responsibility of Agency for the Investigation of Accidents in Air, Maritime and Railway Traffic (Art.1(2) of the Regulation) – an independent investigative body. See more: Rukavina; Luttenberger, *op. cit.*, note 2, pp. 147-150.

59 Art.1(3) of the Regulation.

60 Agencija za istraživanje nesreća u zračnom, pomorskom i željezničkom prometu - Odjel za istrage nesreća u pomorskom prometu, *Završno izvješće vrlo ozbiljne pomorske nesreće ro-ro putničkog broda „Lastovo"*, Mali Lošinj, 11 August 2024, available at: [https://ain.hr/wp-content/uploads/2025/02/342-27_24-01_07_zavrsno_izvjesce.pdf], Accessed 17 February 2025, further: Final Report – Croatia.

tains important data such as: a) the seaworthiness of ships which, in relations to ships of Croatian nationality in national navigation, is determined by the Croatian Register of Shipping; [61] b) the working order/defectiveness of the equipment and devices that were used on board; c) equipment or maintenance of the ship according to the Technical Rules for Statutory Certification of Maritime Objects; d) possession of correct ship certificates, etc.

In order to collect evidence and data (to find the perpetrator and detect objects, traces and other evidence that may serve to determine the facts in a misdemeanour or criminal procedure) for the purpose of determining misdemeanour and criminal liability in relation to the maritime accident in question, independently of conducting a maritime casualty investigation,[62] an administrative investigation shall be conducted – according to the provisions of the Ordinance on the Methods, Requirements and Powers for Conducting Administrative Investigation of Marine Casualties.[63] The Ordinance stipulates that an administrative investigation shall be conducted only in case when an inquiry or inspection determines grounds for suspicion of a maritime offence[64] in connection with a maritime accident which in this case includes causing the death of a person or serious bodily injury on a ship of Croatian nationality.[65] However, it is important to emphasise that administrative investigation shall not be concluded if the competent State Attorney initiates criminal prosecution for the commission of a criminal offence that encompasses a maritime offence related to a maritime accident (Art.8(3) of the Ordinance).

There has been public speculation about technical difficulties/safety failures or failure to maintain safety standards on ships which are part of the shipping company's - Jadrolinija's[66] - fleet. Without entering into a polemic about the aforementioned speculations and insinuations, the aim of this paper is to point out the applicable

---

61 The Croatian Register of Shipping is a public institution that performs tasks of special interest to the Republic of Croatia, it was established by the Act on the Croatian Register of Shipping (Official Gazette, No. 81/1996, 76/2013, 62/2020), and its activity is social welfare in all respects, including the protection of life and property at sea and on inland waterways and the protection of the marine and inland waterways environment (Art.1 of the Act on the Croatian Register of Shipping).

62 It is important to note that the Final Report – Croatia itself emphasizes that it cannot be used as evidence in court proceedings aimed at determining civil, administrative or criminal liability, see Final Report – Croatia, p. 2.

63 Ordinance on the Methods, Requirements and Powers for Conducting Administrative Investigation of Marine Casualties (Official Gazette, No. 69/2016), further: Ordinance. See more: Rukavina; Lutteberger, *op. cit.*, note 2, pp. 150-153.

64 Art.1(8) of the Ordinance.

65 See Art.2 of the Ordinance.

66 Jadrolinija is a company for liner shipping and cargo, of strategic importance for the Republic of Croatia and is 100% owned by it. See more: Act on Jadroliniji, Rijeka, Official Gazette, No. 11/1996, 33/2006.

legal norms on liability and insurance coverage in relation to damages incurred to ship crew members from the aspect of compliance or non-compliance with the company's and ship's safety management system, as this is one of the conditions that must be met for a ship to be considered seaworthy.[67] Since accidents at work involving ship crew members can also be caused by technical deficiencies on older ships, faulty equipment, etc., it is important to note that maintaining safe working conditions on board is the duty of the company or owner of the ship who is obliged to maintain the condition of the ship and its equipment so that the ship retains the ship's seaworthiness in every sense, without carrying any risk for the ship, persons on board, cargo and environment (Art.85 of the CMC). Checking the ship's seaworthiness is carried out by inspection.[68]

The technical and safety standards of a ship of Croatian nationality that carries out public maritime transport in the internal waters and territorial sea of the Republic of Croatia and between ports in the Republic of Croatia are regulated by the Ordinance on Technical and Safety Standards in Public Liner and International Maritime Transport,[69] and the technical requirements for certain types of passenger ships and high-speed passenger craft that perform voyages in national navigation are prescribed by the Rules for Statutory Certification of Passenger Ships in National Navigation.[70] The seaworthiness of a ship is one of five cumulatively prescribed conditions that a ship that carries out public liner maritime transport in the Republic of Croatia must meet. In order to determine compliance with the above condition, the following documentation must be submitted: a) statutory ship certificates with all associated attachments and additional information on possible due or future statutory objections, certificates, documents and documents regarding compliance with statutory requirements regarding safety, environmental protection, passenger accommodation, cargo transport and occupational safety and crew accommodation, issued by the ship's flag state or a recognised organisation on behalf of the ship's flag state; [71] b) a class certificate with all accompanying

---

67 See Art.76(1) point 2 of the CMC.

68 See more Bolanča, D.; Amižić Jelovčić, P.: *Pomorsko pravo*, Pravni fakultet u Splitu, Split, 2023, p. 287-289.

69 Ordinance on Technical and Safety Standards in Public Liner and International Maritime Transport (Official Gazette, No. 47/2023), further: Ordinance - 2023.

70 Rules for Statutory Certification of Passenger Ships in National Navigation, Official Gazette, No. 106/2021.

71 Annex I. "Ship certificates, certificates and documents relating to compliance with the requirements of navigation safety, environmental protection, passenger accommodation, cargo transport and occupational safety and crew accommodation" of the Ordinance stipulates that, in relation to ro-ro passenger ships in national navigation, it is necessary to submit, among others, a Safety Management Certificate or an Interim Safety Management Certificate issued in accordance with the SOLAS Convention or the ISM Code.

annexes, together with additional information on the due or future class conditions, which must be issued by a recognised organisation; c) information on any exemptions, equivalent technical solutions or any restrictions issued or approved by the maritime administration of the ship's flag state. [72] The provisions in question correspond to the requirements which, at European level, are prescribed for all ships sailing within the EU, regardless of the flag the ship flies.

2.2.1. Legal framework for liability for damages

The shipowner as an employer and the seafarer as an employee-worker conclude an employment contract by which the seafarer undertakes to perform the duties of his/her job.[73] When the essential elements of the employment relationship are taken into account, the employment status of seafarers is primarily specific due to the double subordination: to the employer and to the ship's master as the main and responsible person on the ship.[74] Since 1 September 2023, the Collective Agreement for Seafarers on Ships in Coastal Liner Maritime Transport from 2023[75] has been in force in the Republic of Croatia. It replaced the previous one (National Collective Agreement for Croatian Seafarers on Passenger Ships and Ferries) concluded in 1998, which was in force for 25 years.[76] The Collective Agreement from 2023, as a national collective agreement,[77] applies as an integral part of every employment contract to all Croatian seafarers and seafarers from other Member States of the European Economic Area – EEA (who sail on ships engaged in coastal shipping in the Republic of Croatia)[78] and regulates the rights and obligations of seafarers employed on ships engaged in coastal shipping in the Republic of Croatia.[79] It is significant that the Collective Agreement from 2023 stipulates the employer's duty to procure and maintain facilities, devices, equipment, tools, workplaces and access to the workplace, and to organise work in a

72 Art. 5 of the Ordinance – 2023.

73 More on the responsibilities of seafarers for the performance of their work obligations see: Grabovac, I.; Perlain, J., *Prava i dužnosti pomoraca*, Školska knjiga, Zagreb, 1978, pp. 153-162.

74 Rozić, I.; Vuković, T., *Analiza radnopravnog statusa pomoraca u Bosni i Hercegovini i Republici Hrvatskoj*, Zbornik radova „Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse", No. 21, 2024, p. 214.

75 Collective Agreement for Seafarers on Ships in Coastal Liner Maritime Transport from 2023, Official Gazette, No. 93/2023, further: Collective Agreement from 2023. More about the legal nature of collective agreements for seafarers see: Učur, M. Đ., *Radnopravni status pomoraca*, Pravni fakultet Sveučilišta u Rijeci, Rijeka, 2003, pp. 83-85.

76 Rozić; Vuković, *op. cit.,* note 74, p. 227.

77 Decision on the extension of the application of the Collective Agreement for seafarers on ships engaged in liner coastal maritime transport (Official Gazette, No. 138/2023).

78 See Act on the Transport in Liner and Occasional Coastline Shipping, Official Gazette, No. 19/2022.

79 Art. 2(3) of the Collective Agreement from 2023.

manner that ensures the protection of the life and health of seafarers in accordance with special laws and other regulations, while the seafarer is obliged to comply with occupational safety measures and rules.[80]

When determining the shipowner's liability, the provisions of the Croatian Maritime Code[81] as the basic law of the Republic of Croatia in the field of maritime (private) law, which is harmonised with numerous European maritime law regulations and international unification instruments, will be relevant. According to Art. 48(2) of the CMC, the owner and/or company of a ship of Croatian nationality are obliged to: 1) establish and maintain a documented safety management system and a safety protection system if this is required according to Technical Rules and other regulations; 2) maintain the condition of the ship and its equipment so that while the ship is seaworthy in every respect and safe for the performance of all operations in service while performing them, without danger to the ship, persons on board, cargo and the environment; 3) ensure that the ship has valid certificates and documents prescribed by the Technical Rules and other regulations, except for the time when it is in a lay-up or under repair at the shipyard; 4) ensure that the requirements of the Technical Rules and other regulations are complied with on board and in connection with the ship. We realise that the provisions of the ISM Code, which prescribes the duty of the company to apply the requirements of the ISM Code, will be relevant when determining the liability of the shipowner.[82] Issues on civil liability are not regulated by the ISM Code, but non-application or non-compliance with the procedures prescribed by the ISM Code[83] may affect the determination of contractual or non-contractual liability. The obligation to moni-

---

80 Art. 8(2 and 5) of the Collective Agreement from 2023.

81 Croatian Maritime Code (Official Gazette, No. 181/2004, 76/2007, 146/2008, 61/2011, 56/2013, 26/2015, 17/2019), further: CMC.

82 Milošević-Pujo, B., *Pomorsko pravo – Odabrane teme po STCW konvenciji*, Sveučilište u Dubrovniku, 2006, p. 110.

83 Here we can see that the Final Report – Croatia (p. 61) states that in accordance with the ISM Code, part "1.2. Objectives" point 1.2.2.1 the company should provide for safe practices in ship operation and a safe working environment. In addition, the ISM Code in part "1.4. Functional requirements for a Safety Management System" point 1.4.2. requires that the company should develop, implement and maintain a Safety Management System (SMS) which includes instructions and procedures to ensure safe operation of ships and protection of the environment in compliance with relevant international and flag State legislation. Furthermore, the Final Report – Croatia (p. 6) states that "the prevailing causal factor of the marine casualty is considered to be the incomplete understanding of the design and technical characteristics of the bow ramp system, which is a consequence of the lack of instructions and more detailed documented information on the associated hydraulic system of the bow ramp, due to which the crew was not fully familiar with the capabilities and limitations of this system and the associated risks when operating the bow ramp."

tor whether the ships comply with the accepted standards lies primarily with the State whose flag the ship flies.[84]

If, due to any negligence on the part of the shipowner, a member of the ship's crew suffers damage on the ship itself or in its vicinity, the shipowner shall be liable.[85] He cannot limit his liability for obligations towards the ship's crew. According to the Art. 145 (1) of the CMC, shipowner is liable for damages – injury,[86] death or sickness of a crew member, which a crew member suffered while working or in connection with the work.[87] If the shipowner succeeds in proving that the damage to the ship's crew member was caused without the shipowner's guilt (therefore, he must prove his innocence), he will be released from liability for the damage incurred. This is the subjective liability of the shipowner based on a presumed guilt.

The shipowner shall be liable under special regulations for damage caused by: a) injury, death or sickness of a crew member caused by a dangerous object[88] or dangerous activity;[89] as well as for b) injury, death or sickness of a crew member if it was suffered at work or in connection with the work on board due to the lack of

---

84 Polić-Ćurčić, V., *Uloga i odgovornost klasifikacijskih društava*, Uporedno pomorsko pravo, Vol. 37, No. 1-4, 1995, p. 186.

85 See more Vio, I., *op. cit.,* note 3, p. 389. More about the fact that a claim for compensation for damage caused by bodily injury and/or impairment of health falls under a contractual relationship, and a claim for compensation due to the death of a seafarer – a non-contractual relationship, see: Kragić, P.; Jerolimov, D., *Odgovornost za smrt i tjelesne ozljede člana posade – razvoj hrvatskih pravnih rješenja*, Poredbeno pomorsko pravo, Vol. 54, No. 169, 2015, p. 174.

86 The employer cannot terminate the employment contract of a seafarer who has suffered an injury at work during the period of incapacity for work during treatment or recovery, and after the seafarer's treatment and recovery, based on the decision of the authorised body or authorised physician who determines that the seafarer is fit for work, the seafarer has the right to return to the jobs he previously worked on, or to other appropriate jobs (Art. 27(1 and 3) of the Collective Agreement from 2023).

87 It is important to note that it is not necessary for the damage to have occurred on board the ship, but the damage can also occur outside the ship if a member of the ship's crew left the ship with the approval of the master within the framework of the obligations under the employment contract, and in order to perform a task related to the ship and the voyage. Šimac, S., *Naknada štete zbog tjelesne ozljede ili smrti člana posade broda*, magistarski rad, Pravni fakultet u Splitu, 1999, p. 27.

88 A ship as a whole is not considered a dangerous thing, but individual parts of it may be considered a dangerous thing (e.g. a ship's crane that fell on a ship's crew member and injured him).

89 Certain actions of a ship's crew member in the engine room may be considered hazardous work on board, but their assessment depends on each case. This is best illustrated by the judgment of the Supreme Court of the Republic of Croatia VSRH Revt 365/2016-2, 25 October 2016 which explains that "the mere correct lifting of a load of 20 kg is not the cause of the injury to a ship's crew member who worked in the engine room as a first engineer officer." Therefore, the damage in question is not considered damage resulting from a hazardous work. At the same time, in the proceedings before the lower courts it was determined that "the work performed by the injured party and the means of work used did not involve increased danger", so the damage caused cannot be characterised as damage resulting from a dangerous thing.

safe working conditions.[90] Specifically, in these cases the shipowner shall be liable under the general regulations on liability for damage caused by dangerous objects or dangerous activities (Art. 1063-1064 Croatian Civil Obligations Act).[91] This is the objective (strict) liability of the shipowner.

For damages caused by injury, death or sickness of a crew member, the shipowner, ship operator, manager, company and employer are jointly and severally liable (Art.145 (3) of the CMC). This provision is in favorem of seafarers.[92] This concerns a wider circle of liable persons (passively legitimated persons) who are directly or indirectly involved in the exploitation of the ship, and whose fulfilment of civil law obligations includes the payment of the awarded amount of money as a form of participation in repairing the damage. For damages caused by death[93] of the crew member, the family members of the deceased crew member may file a claim for compensation for this type of damage against one, all or only some of the jointly and severally liable entities listed in Art. 145(3) of the CMC. This authorisation is also given to a crew member who suffered health impairment (injury or sickness).

According to the provisions of Art. 988 (a) of the CMC, for disputes involving compensation for damages resulting from physical injury or death of a crew member or due to damage to health suffered by a crew member at work or in connection with work on board a ship, the Croatian court has international jurisdiction if the claimant has his/her domicile in the territory of the Republic of Croatia. This provision protects Croatian seafarers, as they are enabled to file a claim for compensation before Croatian courts, regardless of the nationality of the ship, shipowner, company or employer.

2.2.2. Normative legal framework of insurance coverage

According to the provisions of the Standard A4.2.1(1) of the Maritime Labour Convention from 2006,[94] each member state shall adopt laws and regulations

---

90 Art. 145(2) of the CMC.

91 Croatian Civil Obligations Act, Official Gazette, No. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018, 126/2011, 114/2022, 156/2022, 155/2023.

92 Bolanča, D., *Hrvatsko plovidbeno upravno pravo*, Pravni fakultet u Splitu, Split, 2015, p. 165.

93 In case of the death of a seafarer, the employer or insurer (where applicable) will pay compensation to his heirs, which does not prevent the heirs from making a claim for compensation due to the death of the seafarer (Art. 28(1,4 and 5) of the Collective Agreement from 2023).

94 Maritime Labour Convention from 2006 (further: MLC) entered into force on August 20, 2013, and was ratified in the Republic of Croatia by the Law on Ratification of the Maritime Labour Convention from 2006 (Official Gazette, No., International Agreements, No. 11/2009) which entered into force on November 28, 2009. MLC convention had 4 amendments in 2014, 2016, 2018 and 2022 see

requiring that shipowners of ships that fly its flag are responsible for health protection and medical care of all seafarers working on board the ships. Furthermore, the following minimum standards which are shipowners responsibility are prescribed:[95] a) to bear the costs for seafarers working on their ships in respect of sickness and injury of the seafarers occurring between the date of commencing duty and the date upon which they are deemed duly repatriated, or arising from their employment between those dates; b) to bear the costs for of medical care, including medical treatment and the supply of the necessary medicines and therapeutic appliances, and board and lodging away from home until the sick or injured seafarer has recovered, or until the sickness or incapacity has been declared of a permanent character; and c) to bear the costs of burial expenses in the case of death occurring on board or ashore during the period of engagement.[96]

The CMC did not prescribe compulsory liability insurance of shipowner for death or bodily injuries of a crew member. However, according to the provision of the Standard A4.2.1(1)(b) of the MLC convention it is prescribed in more detail that shipowners shall provide financial guarantee to assure compensation in the event of the death or long-term disability of seafarers due to an occupational injury, illness or hazard, as set out in national law, the seafarers' employment agreement or collective agreement.[97] The 2014 amendments to the MLC convention prescribe that ship must have a special certificate or other document of financial guarantee, issued by the financial guarantee provider.[98] Moreover, according to Standard A4.2.1(8) of the MLC[99], provisions on contractual claims[100] have been implemented which regulate the duty of shipowners to maintain in force insurance or

International Labour Organization, Maritime Labour Convention, 2006 as amended [https://www.ilo.org/sites/default/files/2024-10/NORMES_MLC%20Amendments-EN_2022_Web_1.pdf], Accessed 6 March 2025. In relation to the questions in this chapter, the most important are the 2014 amendments to the MLC Convention, entered into force on January 18, 2017. The solutions in question have been implemented into the Croatian legal system by the Ordinance on the implementation of the Maritime Labour Convention 2006 (Official Gazette, No. 122/2016, 42/2019), further: Ordinance MLC.

95 Standard A4.2(1)(a, c and d) of the MLC convention.

96 See more Standard A4.2.1(2-7) of the MLC convention.

97 See more Nwokedi, T. C., *Sustainable Compensation Strategies for Ship Owners Liability for Occupational Injury and Death Costs Affecting Seafarers in Nigeria*, Journal of ETA Maritime Science, Vol.11, No.1, 2023, p. 28.

98 See more Petrinović, R.; Lovrić, I., *Novo pravo o pravu pomoraca za slučaj napuštanja i repatrijacije*, Book of Proceedings - 1st International Scientific Conference „Modern Challenges of Marine Navigation", Split, 2016, p. 295.

99 These provisions were implemented by the 2014 amendments to the MLC convention.

100 Contractual claim means any claim which relates to death or long-term disability of seafarers due to an occupational injury, illness or hazard as set out in national law, the seafarers' employment agreement or collective agreement (Standard A4.2.2(1) of the MLC convention; Art.7 of the Ordinance MLC).

other financial guarantee to cover the costs for contractual compensation. The provisions in question prescribe that contractual compensation: a) shall be paid in full and without delay;[101] b) there shall be no pressure to accept a payment less than the contractual amount; c) where the nature of the long-term disability of a seafarer makes it difficult to assess the full compensation to which the seafarer may be entitled, an interim payment or payments shall be made to the seafarer so as to avoid undue hardship; d) the seafarer shall receive payment without prejudice to other legal rights, but such payment may be offset by the shipowner against any damages resulting from any other claim made by the seafarer against the shipowner and arising from the same incident; and e) the claim for contractual compensation may be brought directly by the seafarer concerned, or their next of kin, or a representative of the seafarer or designated beneficiary.[102]

It is important to emphasise that the Croatian maritime legislator allows that in the case of liability for the death and bodily injury of a ship's crew member and impairment of the health of a ship's crew member, the injured party may claim an indemnity directly from the insurer for the damage suffered for which the insured is liable, but only up to the insured amount.[103] Therefore, in the above case, the claims of the ship's crew members for death, injury or sickness - direct action (actio directa) against the insurer of the insured party in case of liability - will be allowed.[104] However, this applies only to physical damages occurred to seafarers so other seafarers' rights could not be claimed directly from the insurer.[105]

It is important to note that meeting safety requirements has a significant impact on the provision of insurance coverage. Namely, in part 4 "Conditions, Exclusions, Limitations and Warranties", Rule 29 "Classification and Statutory Requirements" of the NorthStandard P&I Rule Books (2023-2024)[106] it is prescribed that

---

[101] According to the provisions of the Art. 30(1) of the Collective Agreement from 2023, to cover damage caused by the death or disability of a seafarer, which may occur during the term of the employment contract, the employer is obliged to take out appropriate insurance and in the event of the insured event of disability or loss of life of a seafarer - is obliged to pay compensation to the seafarer or his heirs in the minimum amount of 23,000.00 euros (for death due to an accident); 8,000.00 euros (for death due to illness) or 23,000.00 euros for permanent 100% disability.

[102] See more: Petrinović, R.; Lovrić, I.; Perkušić, T., *Role of P&I Insurance in Implementing Amendments to Maritime Labour Convention 2014*, Transactions on Maritime Science – TOMS, Pomorski fakultet Split, Vol. 6, No.1, 2017, p. 42.

[103] Art. 743(3) of the CMC. See more Pavić D., *Ugovorno pravo osiguranja*, Tectus, Zagreb, 2009, pp. 621-625.

[104] See more Vio, I., *op. cit.,* note 3, p. 407.

[105] Petrinović; Lovrić; Perkušić, *op. cit.,* note 102, p. 46.

[106] *NorthStandard P&I Rule Books (2023-2024),* available at: [https://www.nepia.com/latest/all-publications/rule-books-and-recommended- clauses/], Accessed 15 January 2025.

a member shall not be entitled to any recovery from P&I Club in respect of any claim arising in respect of the Entered Ship during a period when that Member is not complying with or has not complied with: a) all statutory requirements of the flag state of the Ship relating to the manning, construction, adaptation, condition, fitment and equipment of the Entered Ship; b) all statutory certificates as are issued by or on behalf of the flag state of the Ship in relation to such requirements and in relation to safety management systems and maritime security.[107] The objectives of the safe management and operation of the ship prescribed by the ISM Code are the criteria by which the court or arbitration will assess the responsibility of the shipowner in the implementation of the ISM Code, and any failure of the shipowner in this regard may have a negative effect on issues of liability for damage, exercising rights from marine insurance.[108]

We can conclude that although the requirements according to the ISM Code represent obligatory requirements, it is important to point out that according to *Hodges*, a company which has for whatever reason failed to obtain the necessary documents (Document of Compliance - DOC and Safety Management Certificate - SMC) would commit a breach of the ISM Code and may be penalised by the relevant authority with whatever sanction the law of the flag State may deem fit to impose.[109] But, even if the documentary demands of the ISM Code are complied with, in that the ship has been issued with the necessary certificates, certification alone is not in itself proof that the ship is in actual fact safely managed and operated.[110] In that case, it will be necessary to determine whether all prescribed procedures according to the ISM Code have been established and, if so, what was the reason for not implementing them in daily work.

3. CONCLUSION

Pointing to the system of liability and insurance in cases of death of passengers (in the case of the maritime accident of the passenger ship "Estonia") as well as for damage caused to the ship's crew members - physical injury or death of the crew members (in the case of the maritime accident of the passenger ship "Lastovo"), the authors pointed to decisive issues that include determining the ship's seaworthiness, i.e. fulfilling the requirements according to the ISM Code. It is

---

107 Rule 29(b)(i) of the *NorthStandard P&I Rule Books (2023-2024).*

108 Pavić, D., *Pravni učinci primjene ISM kodeksa na ograničenje odgovornosti brodara, op. cit.,* p. 68.

109 Hodges, S., *The ISM Code and the Law of Marine Insurance*, p. 6, available at: [http://www.nadr.co.uk/articles/published/shipping/ISMMarineInsurance.pdf], Accessed 15 January 2025.

110 *Ibid*.

unquestionable that ensuring maritime safety, safe operation on ship and safety of people on board (prevention of injury or loss of life - passengers and crew members) are objectives of the ISM Code. The authors of the paper indicate to what extent the 30-year period between two maritime accidents ("Estonia" in 1994 and "Lastovo" in 2004") have influenced changes in international and European maritime safety regulations, which include the improvement of existing legal norms (SOLAS Convention, ISM Code) and the formation of new ones (Council Regulation (EC) No 3051/95, Regulation (EC) No 336/2006, Council Directive 98/18/EC, Directive 1999/35/EC, Directive (EU) 2017/2110, Protocol of 2002 to the Athens Convention, MLC). These are legal provisions that improve the safety of maritime navigation (including the safety of passengers and their better legal position in view of the stricter system of liability of the maritime carrier for damages that may arise from the death or bodily injury of passengers, i.e. the introduction of the obligatory insurance of the maritime carrier in relation to the aforementioned damages) by introducing more international standards in terms of ship management. Analysing the national legal framework and the provisions on liability for damage caused to crew members of the passenger ship "Lastovo", the authors pointed out to the specifics of the labour law status of seafarers (with regard to the decisions of the MLC, CMC and Collective Agreement from 2023), the importance of conducting a safety and administrative investigation of a maritime accident (according to the Regulation, Ordinance), shipowners' responsibility for safe working environment (MLC, CMC), shipowners' liability for injury or death of crew members (CMC) and questions on specifics of the insurance cover for these types of damages (MLC, CMC) including the right to direct action (CMC). Considering the extremely wide scope of operational safety standards and standards on safe management which are set in the ISM Code, and the fulfilment or non-fulfilment of which will be taken into account when determining the circumstances and causes of a maritime accident, the authors analysed the issues of application/non-application of the procedures prescribed by the ISM Code (complying with ISM Code) with regard to determining liability for damage caused to ship crew members, but also a significant factor in obtaining insurance coverage for shipowners according to the provisions of the P&I Clubs Rules.

REFERENCES

BOOKS AND ARTICLES

1. Anderson, C. B., *Shipping and the environment law and practice*, Informa, London, 2009, p. 1029
2. Bolanča, D., *Prometno pravo Republike Hrvatske*, Pravni fakultet u Splitu, Split, 2016
3. Bolanča, D., *Hrvatsko plovidbeno upravno pravo*, Pravni fakultet u Splitu, Split, 2015

4. Bolanča, D.; Amižić Jelovčić, P.: *Pomorsko pravo*, Pravni fakultet u Splitu, Split, 2023, pp. 287-289
5. Bolanča, D.; Barun, M., *Neke novosti na području usklađivanja hrvatskog pomorskog upravnog prava sa pravnom stečevinom Europske unije*, Zbornik Pravnog fakulteta u Splitu, Split, No. 4, 2008, pp. 747-752
6. Bolanča, D.; Primorac, Ž., *Sigurnost plovidbe u Zakonu o izmjenama i dopunama Pomorskog zakonika iz 2007. godine*, Naše more, Dubrovnik, No. 3-4, 2008, pp. 148-151
7. Bulum, B., Pomorski promet, in: *Europsko prometno pravo*, Pravni fakultet u Zagrebu, Zagreb, 2011
8. Capar, R., *Pomorsko upravno pravo*, Školska knjiga, Zagreb, 1987, pp. 60-77
9. Dhillon, B. S., *Transportation Systems Reliability and Safety*, CRC Press, Boca Raton, 2016
10. Grabovac, I., *Pomorsko pravo*, knjiga prva, Visoka pomorska škola u Splitu, Split, 2001, pp. 62-64
11. Grabovac, I., *Plovidbeno pravo Republike Hrvatske*, Književni krug, Split, 2003
12. Grabovac, I., *Suvremeno hrvatsko pomorsko pravo*, Književni krug, Split, 2005
13. Grabovac, I.; Perlain, J., *Prava i dužnosti pomoraca*, Školska knjiga, Zagreb, 1978
14. Heit, L., *ALIZE 1954 AND CMA CGM SA v ALLIANZ ELEMENTARY VERSICHERUNGS AG & ORS [2021] UKSC 51*, Australian and New Zealand Maritime Law Journal, Vol. 35, No. 1, 2021
15. Herdzik, J., *ISM Code on Vessels With or Without Impact on a Number of Incidents Threats*, Journal of KONES Powertrain and Transport, vol. 26, no. 2, 2019, pp. 54-58
16. Hess, M.; Kos, S.; Njegovan, M., *Procjena i kontrola operativnih rizika na brodu u skladu s ISM Pravilnikom*, Pomorstvo, Rijeka, No. 2, 2011, pp. 405-416
17. Hlača, V., *Hrvatsko pomorsko pravo*, Pravni fakultet u Rijeci, 2001, p. 229
18. Jenisch, U., *The European Union as an Actor in the Law of the Sea: The Emergence of Regionalism in Maritime Safety, Transportation and Ports*, German Yearbook of International Law, Vol. 58, 2005
19. Karakasnaki, M.; Vlachopoulos, P.; Pantouvakis, A.; Bouranta, N., *ISM Code implementation: an investigation of safety issues in the shipping industry*, WMU Journal of Maritime Affairs, Vol. 17, 2018
20. Kiperaš, Ž., *ISM Kodeks – primjena od strane države zastave*, Uporedno pomorsko pravo, Vol. 38, No. 149-152, 1996
21. Klingbeil, D.; Klinger, C.; Kinder, J.; Baer, W., *Investigations for indications of deliberate blasting on the front bulkhead of the ro-ro ferry MV ESTONIA*, Engineering Failure Analysis, Vol. 43, 2014, pp. 186-197
22. Kragić, P.; Jerolimov, D., *Odgovornost za smrt i tjelesne ozljede člana posade – razvoj hrvatskih pravnih rješenja*, Poredbeno pomorsko pravo, Vol. 54, No. 169, 2015
23. Luttenberger, A., *Pomorsko upravno pravo*, Pomorski fakultet u Rijeci, Rijeka, 2008, pp. 110-116
24. Marin, J., *Odgovornost prijevoznika za plovidbenu sposobnost broda*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 58, No. 1-2, 2008, pp. 489-507

25. Marin, J., *Međunarodne konvencije i protokoli kao izvori hrvatskog pomorskog prava*, Poredbeno pomorsko pravo, Vol. 46, No. 161, 2007
26. Milošević-Pujo, B., *Pravna priroda ugovora o prijevozu putnika – posebno o odgovornosti brodara za fizički integritet putnika*, Naše more, Dubrovnik, No. 5-6, 2003
27. Milošević-Pujo, B., *Pomorsko pravo – Odabrane teme po STCW konvenciji*, Sveučilište u Dubrovniku, 2006
28. Nwokedi, T. C., *Sustainable Compensation Strategies for Ship Owners Liability for Occupational Injury and Death Costs Affecting Seafarers in Nigeria*, Journal of ETA Maritime Science, Vol.11, No.1, 2023
29. Pavić, D., *Pomorsko osiguranje pravo i praksa*, Književni krug, Split, 2012
30. Pavić D., *Ugovorno pravo osiguranja*, Tectus, Zagreb, 2009, pp. 621-625
31. Pavić, D., *Pravni učinci primjene ISM kodeksa na ograničenje odgovornosti brodara*, Poredbeno pomorsko pravo, Zagreb, No. 155, 2001, pp. 57-70
32. Petrinović, R.; Lovrić, I., *Novo pravo o pravu pomoraca za slučaj napuštanja i repatrijacije*, Book of Proceedings - 1st International Scientific Conference „Modern Challenges of Marine Navigation", Split, 2016
33. Petrinović, R.; Lovrić, I.; Perkušić, T., *Role of P&I Insurance in Implementing Amendments to Maritime Labour Convention 2014*, Transactions on Maritime Science – TOMS, Pomorski fakultet Split, Vol. 6, No.1, 2017
34. Polić-Ćurčić, V., *Uloga i odgovornost klasifikacijskih društava*, Uporedno pomorsko pravo, Vol. 37, No. 1-4, 1995
35. Pospišil, M., *Protecting & Indemnity (P&I) osiguranje i obvezno osiguranje prema međunarodnim pomorskim konvencijama*, vlastita naklada, Crikvenica, 2021
36. Pospišil, M., *The impact of CMA CGM LIBRA on the allocation of risk in a maritime adventure*, Poredbeno pomorsko pravo, Vol.61, No.176, 2022
37. Pospišil-Miler, M., *Novi sustav odgovornosti za smrt i tjelesne ozljede putnika u pomorskom prijevozu*, Pravni fakultet Sveučilišta u Rijeci, Rijeka, 2014, pp. 195-198
38. Prentiss Pskowski, R., *No Country for Old Ships?: Emerging Liabilities for Ship Recycling Stakeholders*, Tulane Maritime Law Journal, Vol. 45, No. 61, 2020
39. Primorac, Ž., *Obvezno osiguranje od odgovornosti prijevoznika za smrt i tjelesne ozljede putnika prema odredbama protokola Atenske konvencije iz 2002.god.*, Pravni vjesnik, Osijek, Vol. 37, No. 3-4, 2011, pp. 257-274
40. Rong, P., *Liability in Criminal and Private Law Regarding Maritime Safety*, Journal of Maritime Law & Commerce, Vol. 48, No. 1, 2007
41. Rozić, I.; Vuković, T., *Analiza radnopravnog statusa pomoraca u Bosni i Hercegovini i Republici Hrvatskoj*, Zbornik radova „Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse", No. 21, 2024
42. Rukavina, B.; Luttenberger, A., *Investigations of Maritime Accidents Involving Passengers Ships in the Republic of Croatia*, Poredbeno pomorsko pravo, No. 175, 2021
43. Soyer, B.; Leloudas, G., *Carriage of Passengers by Sea: A Critical Analysis of the International Regime*, Michigan State International Law Review, Vol. 26, No. 3, 2018

44. Størkersen, K. V.; Antonsen, S.; Kongsvik, T., *One size fits all? Safety management regulation of ship accidents and personal injuries*, Journal of Risk Research, Vol. 20, No. 9
45. Szymonski, M., *Safety Management on ro-ro Passenger Ships*, TransNav, International Journal on Marine Navigation and Safety of Sea Transportation, Vol. 18, No. 2, 2024, pp. 281-285
46. Šimac, S., *Naknada štete zbog tjelesne ozljede ili smrti člana posade broda*, magistarski rad, Pravni fakultet u Splitu, 1999
47. Tiberg, H., *International Update: Swedeish Maritime Law 1999*, Tulane Maritime Law Journal, vol. 24, 2000
48. Tiberg, H., *Why Cover the Wreck of a Sunken Ship?,* Scandinavian Studies in Law, Vol. 39, 2000
49. Učur, M. Đ., *Radnopravni status pomoraca*, Pravni fakultet Sveučilišta u Rijeci, Rijeka, 2003
50. Vatankhan, S., *EU-Regulations on Inquiries into Maritime Casualties*, Ehlers, P.; Lagoni, R. (ed.), Enforcement of International and EU Law in Maritime Affairs, LIT Verlag, Münster, 2008
51. Vio, I., *Pravni okvir odgovornosti brodara za smrt i tjelesne ozljede člana posade u angloameričkom pomorskom zakonodavstvu*, Poredbeno pomorsko pravo, Vol. 61, No. 176
52. Wang. H. C.; Wu, C. H., *A Scenario Simulation-Evaluating Evacuation Analysis for ro-ro Passenger Ship in MV Tai Hwa*, Journal of ship production and design, Vol. 36, No. 4, 2020, pp. 240-249
53. Whittingham, R., *The Blame Machine: Why Human Error Caouses Accidents*, Routledge, London, 2004
54. Yang, Z.; Wang, J., *Ship Formal Safety Assessment*, Talley, W. K. (ed.), Maritime Safety, Security and Piracy, Informa Law from Routledge, London, 2009

NATIONAL LAW, EU LAW, INTERNATIONAL CONVENTION AND PROTOCOLS

1. Act on the Croatian Register of Shipping Official Gazette, No. 81/1996, 76/2013, 62/2020
2. Act on Jadroliniji, Rijeka Official Gazette, No. 11/1996, 33/2006
3. Act on the Transport in Liner and Occasional Coastline Shipping Official Gazette, No. 19/2022
4. Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea (1974)
5. Collective Agreement for Seafarers on Ships in Coastal Liner Maritime Tranport from 2023 Official Gazette, No. 93/2023
6. Council Directive 98/18/EC of 17 March 1998 on safety rules and standards for passenger ships, [1998] OJ L144/1-110
7. Council Directive 1999/35/EC of 29 April 1999 on a system of mandatory surveys for the safe operation of regular ro-ro ferry and high-speed passenger craft services, [1999] OJ L138/1-19
8. Council Regulation (EC) No 3051/95 of 8 December 1995 on the safety management of roll-on/roll-off passenger ferries (ro-ro ferries), [1995] OJ L320/14-24

9. Croatian Civil Obligations Act Official Gazette, No. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018, 126/2011, 114/2022, 156/2022, 155/2023
10. Croatian Maritime Code Official Gazette, No. 181/2004, 76/2007, 146/2008, 61/2011, 56/2013, 26/2015, 17/2019
11. Decision on the extension of the application of the Collective Agreement for seafarers on ships engaged in liner coastal maritime transport (Official Gazette, No. 138/2023)
12. Directive (EU) 2017/2110 of the European Parliament and of the Council of 15 November 2017 on a system of inspections for the safe operation of ro-ro passenger ships and high-speed passenger craft in regular service and amending Directive 2009/16/EC and repealing Council Directive 1999/35/EC [1999] OJ L315/61-77
13. Law on Ratification of the Maritime Labour Convention from 2006 Official Gazette, No., International Agreements, No. 11/2009
14. Maritime Labour Convention from 2006
15. Ordinance on Technical and Safety Standards in Public Liner and International Maritime Transport Official Gazette, No. 47/2023
16. Ordinance on the Methods, Requirements and Powers for Conducting Administrative Investigation of Marine Casualties Official Gazette, No. 69/2016
17. Ordinance on the implementation of the Maritime Labour Convention 2006 Official Gazette, No. 122/2016, 42/2019
18. Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and Their Laggage by Sea
19. Regulation on the manner and conditions of conducting safety investigation of marine casualties and incidents Official Gazette, No. 122/2015
20. Regulation (EC) No 336/2006 of the European Parliament and of the Council of 15 February 2006 on the implementation of the International Safety Management Code within the Community and repealing Council Regulation (EC) No 3051/95, [2006] OJ L64/1-36
21. Rules for Statutory Certification of Passenger Ships in National Navigation Official Gazette, No. 106/2021

CASE LAW

1. Admiralty Court Judgement - Queen's Bench Division, [2019] EWHC 481 [http://www.bailii.org/ew/cases/EWHC/Admlty/2019/481.html], Accessed 8 June 2025
2. England and Wales Court of Appeal (Civil Division), [2020] EWCA Civ 293 [https://www.bailii.org/ew/cases/EWCA/Civ/2020/293.html], Accessed 8 June 2025
3. Judgment of the Supreme Court of the Republic of Croatia VSRH Revt 365/2016-2, 25 October 2016
4. Supreme Court Judgement, [2021] UKSC 51, point 127 [https://supremecourt.uk/uploads/uksc_2020_0071_judgment_772c8b5f47.pdf], Accessed 8 June 2025

WEBSITE REFERENCES

1. Agencija za istraživanje nesreća u zračnom, pomorskom i željezničkom prometu - Odjel za istrage nesreća u pomorskom prometu, *Završno izvješće vrlo ozbiljne pomorske nesreće ro-ro putničkog broda „Lastovo“,* Mali Lošinj, 11 August 2024, available at: [https://ain.hr/wp-content/uploads/2025/02/342-27_24-01_07_zavrsno_izvjesce.pdf], Accessed 17 February 2025
2. *Estonia shipwreck claimants have low hopes for compensation hearing*, 2019, available at: [https://www.france24.com/en/20190412-estonia-shipwreck-claimants-have-low-hopes-compensation-hearing], Accessed 2 March 2025
3. Hodges, S., *The ISM Code and the Law of Marine Insurance*, p. 6, [http://www.nadr.co.uk/articles/published/shipping/ISMMarineInsurance.pdf], Accessed 15 January 2025
4. International Labour Organization, Maritime Labour Convention, 2006 as amended [https://www.ilo.org/sites/default/files/2024-10/NORMES_MLC%20Amendments-EN_2022_Web_1.pdf], Accessed 6 March 2025
5. International Maritime Organization, *The International Safety Management (ISM) Code*, [https://www.imo.org/en/ourwork/humanelement/pages/ISMCode.aspx], Accessed 2 March 2025
6. Jacobs, K., *Safety of ro-ro passenger ships – Stability requirements*, European Parliament, July 2023, p. 2, available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733616/EPRS_BRI(2022)733616_EN.pdf], Accessed 10 February 2025
7. *NorthStandard P&I Rule Books (2023-2024)*, available at: [https://www.nepia.com/latest/all-publications/rule-books-and-recommended-clauses/], Accessed 15 January 2025
8. Solvang, T., *The relationship between nautical fault and initial unseaworthiness under the Hague-Visby Rules*, Marius Scandinavian Institue of Maritime Law, SIMPLY 2020, available at: [https://www.sjorettsfondet.no/journal/2022/565/mc-05/Selected_topics_of_causation_between_nautical_fault_and_initial_unseaworthiness_under_the_Hague-Visby_Rules_a_comparative_analysis], Accessed 8 June 2025
9. *Sweden Closes Case of MV Estonia Sinking*, The Maritime Executive, available at: [https://maritime-executive.com/article/sweden-closes-case-of-mv-estonia-sinking], Accessed 21 February 2025
10. Tezuka, S., *The "CMA CGM LIBRA" – Analysis of the impact on technical management practice of the UK Supreme Court's decision that a defective passage plan may make a ship unseaworthy*, April 2022, available at: [https://www.piclub.or.jp/en/news/9999999902], Accessed 8 June 2025
11. The Supreme Court of the United Kingdom, *Press summary – Alize 1954 and another (Appellants) v. Allianz Elementar Versicherungs AG and others (Respondents)*, [2021] UKSC 51, 10 November 2021, available at: [https://supremecourt.uk/uploads/uksc_2020_0071_press_summary_b9b4e30e01.pdf], Accessed 8 June 2025

AUTOMATED DECISION-MAKING AND THE ROLE OF ARTIFICIAL INTELLIGENCE IN RESOLVING DISPUTES OVER ILLEGAL CONTENT ON DIGITAL PLATFORMS

Regina Hučková, PhD, Judr., Associate Professor
P. J. Šafárik University in Košice, Faculty of Law
Kováčska 26, 040 01 Košice, Slovakia
regina.huckova@upjs.sk

ABSTRACT

The increasing volume of digital content in the virtual world of digital platforms and its potential to contain illegal elements creates significant challenges for moderation and the resolution of related disputes. Automated decision-making, supported by artificial intelligence (AI), is becoming a key tool in the initial identification and processing of illegal content. In particular, this article explores the legal aspects of using AI in this context, with an emphasis on its role in the first stage of the decision-making process. Peripherally, the author also touches on technical aspects.

The article will analyse the legal framework of the European Union, in particular the new Digital Services Regulations (DSA). We will focus our investigation on the extent to which automated decision-making is compatible with the requirements of transparency, fairness and the protection of users' fundamental rights.

The paper also offers insights into redress mechanisms that allow users to challenge AI decisions and possibly escalate disputes to a higher level, where human moderators or independent entities adjudicate them. Finally, we propose recommendations for legislation and digital platforms to harmonise the use of AI in content moderation, considering the need to protect fundamental rights, the efficiency, and transparency of the entire process.

The ambition of this article is to contribute to the ongoing debate on the balance between automation and human intervention in content moderation and dispute resolution, identifying the opportunities and risks associated with the use of AI on digital platforms.

Keywords*: artificial intelligence, automation, dispute settlement, digitisation, online platforms*

1. INTRODUCTION

In the current era of diversity and variety of legal relationships and legally relevant communications between humans that transcend national dimensions, the age-old problem of the so-called "enforceability" of the law is re-emerging in a new

social context. The concept of the enforceability of law has now taken on a sophisticated form. It has already become a kind of fetish. The opposite of this concept is the 'unenforceability' of the law. The relationship between enforceability and unenforceability is flexible.

At one time, enforceability dominates; at another, and more often, the unenforceability of the right (legal obligations, claims) prevails, even though the entitled persons involved in the legal procedures for enforcing rights apply standard methods and forms. However, they are not always successful.

The centre of our interest in this study is to present considerations concerning the issue of applying and enforcing rights through a specific system of methods, the common denominator of which is that they are an alternative to the court system. These methods, which to some extent compete with and yet complement judicial adjudication and which, if used appropriately and effectively, could contribute to relieving the burden on state courts, face many challenges, as do judicial proceedings. One of the most significant challenges today is the impact of technological advances. In this article, we will address the issue of dispute resolution on digital platforms. Digital services and digital platforms, such as marketplaces, social networks, app stores, and online platforms for travelling and accommodation, play an increasingly important role in various business contractual relationships. In addition to the indisputable benefits, their use is associated with spreading misinformation and other illegal and harmful activities. Harmful activities and content can be, and currently are, blocked in terms of the Digital Services Act, which gives rise to various disputes that can be effectively resolved in an alternative dispute resolution.

In this article, the analysis will proceed from the general to the specific, as the issue under study arises from the broader framework of out-of-court dispute resolution based on the contractual delegation of decision-making power to other bodies. In this article, we will mainly use the methods of analysis and deduction. We plan to analyse the new legislation in the context of the existing legal environment. In this article, we follow the development of methods of out-of-court dispute resolution. Particular attention will be given to disputes arising in the digital environment of online platforms, which currently represents a significant setting for the diverse activities of many individuals and groups. The article highlights and analyses the challenges associated with adjudicating disputes in the digital environment on these platforms. These disputes affect the content published within the digital platform environment.

Methods that rank among the alternatives to traditional court proceedings have a much longer history of use than dispute resolution through the state apparatus.

Disputes have arisen since the beginning of human society. Disputes and conflicts are inherent to coexistence within certain social groups. Naturally, each social unit member protects their rights and legitimate interests in different ways. Society was not immune to conflict even before the formation of the first state units, the creation of the state apparatus and the related state enforcement of specific behaviour or performance. It was necessary to resolve disputes in more acceptable ways, based on mutual communication and mediation by a third party, who did not, however, possess coercion in today's sense through the state authorities, but exerted his personality on the parties by the force of his authority and led them to settle the conflict (resolve the dispute).

Recently, we have been closely following the trend of resurgence and promotion of these communication and dispute resolution methods. Forms and methods of dispute resolution that lack the authority of state coercion are emerging. Disputants who are faced with an existing dispute are encouraged to try to settle the dispute themselves, i.e., to resolve it with the assistance of an independent third party. Only at the end, i.e., behind these methods, should dispute resolution be handled by professionals in the service of the state, such as judges.

The enumeration of methods that qualify as alternatives to judicial proceedings varies from one jurisdiction to another. Anglo-American legal culture, especially American law, is a source of alternative dispute resolution techniques that are not yet well known in our conditions. The extent to which these methods of dispute resolution are used also differs. In the context of American legal culture, they are widely recognised and used and are generally preferred over dispute resolution before state courts. The Federal ADR Act of 1998 also requires every federal court to make some form of alternative dispute resolution available. In the European context, depending on the country, the ADR system is only slowly gaining traction and is gradually displacing the state judiciary from its previously unchallenged position. However, there is undoubtedly a distinction between the various European countries. The United Kingdom, for example, has a long-established tradition of out-of-court dispute resolution. 1990 the Centre for Dispute Resolution (CEDR) was established in the United Kingdom, representing the country's philosophy of Alternative Dispute Resolution (ADR).

The concept of alternative dispute resolution encompasses methods of dispute resolution that differ from litigation based on specific criteria. The essential characteristic that distinguishes these methods is the voluntary submission of the parties, or those already in dispute, to the form of dispute resolution in question. Parties interested in resolving their disputes through a more moderate method can use arbitration and mediation in Slovak conditions. These forms of out-of-court dispute resolution are legally regulated in the Slovak legal order.

2. DISPUTE RESOLUTION THROUGH THE PRISM OF DIGITALISATION

Naturally, digitalisation will also affect decision-making to some extent. The aforementioned degree is decisive, since, until now, decision-making has been in the hands of thinking human beings. It is questionable and extensively debated whether someone/something other than human beings can intervene in deciding the outcome of this process. The *Barysė and Sarel* study analysed how the public perceives the use of AI at different stages of the judicial process. The research showed a public inclination in favour of the use, especially in the search and information gathering phase. The public was even less in favour of using artificial intelligence in the actual decision-making, evidence analysis and decision creation phases.[1] *Jesus Dias and Satiro* present a critical perspective on the role of AI in the justice system[2]. They point to the risk of standardisation of decisions and the retreat of the individual approach in decision-making. The use of generative artificial intelligence in judicial decision-making is analysed in a study by *Socol de la Osa and Remolina*[3], including case studies from Colombia, Mexico, Peru and India. It focuses on the need for regulatory measures such as ex-ante controls, stakeholder involvement, verification processes and continuous audits. A key area that is often under scrutiny is the intervention of AI in human rights. Sartor considers the extent to which the demands of law and ethics in relation to artificial intelligence may pull in different directions, or rather overlap, and explores how they can be coordinated while remaining in productive dialectical tension. Specifically, he argues that human/foundational rights and social values are central to both ethics and law. Although they may be formulated in different ways, they can provide a useful normative reference for linking ethics and law in addressing normative issues arising in the context of artificial intelligence.[4]

The ADR field creates a more suitable environment for the application of aspects of AI than the state judiciary. One of the first ADR systems using artificial intelligence (AIDR) was developed by the RAND Corporation in the 1970s and 1980s to support the settlement of product liability disputes in California. This system modelled human and insurer actions and decision-making processes for a series of

---

1 Barysė, D.; Sarel, R., *Algorithms in the court: does it matter which part of the judicial decision-making is automated?*, Artif Intell Law 32, 117–146, 2024, https://doi.org/10.1007/s10506-022-09343-6.

2 Jesus Dias, S.A.; Sátiro, Máximo, R. *Artificial inteligence in the judiciary: A critical vie,* Futures 164, 2024, https://doi.org/10.1016/j.futures.2024.103493.

3 Socol de la Osa DU; Remolina, N., *Artificial intelligence at the bench: Legal and ethical challenges of informing – or misinforming – judicial decision-making through generative AI*, Data & Policy. 2024, 6:e59.

4 Sartor, G., *Artificial intelligence and human rights: Between law and ethics*, Maastricht Journal of European and Comparative Law, 27(6), 2020, pp.705-719, https://doi.org/10.1177/1023263X20981566.

hypothetical disputes.[5] *Tan, Westermann et al*. investigated whether large language models are capable of acting as a mediator. Specifically, they looked at whether they are able to analyse the conversation in a dispute, select the appropriate type of intervention, and generate appropriate intervention responses as a mediator.[6] As part of their research, Westermann and team even introduced an experimental platform, LLMediator: the GPT-4 Assisted Online Dispute Resolution.[7] The use of AI in arbitration is advocated by Broyde and Mei, emphasising the importance of respecting contractual autonomy and creating an environment that allows the full potential of AI to be exploited.[8] In particular, they argue that the Federal Arbitration Act (FAA) almost uniquely among federal laws allows such unconventional adjudication methods, provided both disputants agree by contract to use AI as their preferred method for resolving disputes.

European legislation has long focused on out-of-court methods for settling disputes. In 2013, Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes (ADR Directive) was adopted to ensure that EU consumers can access high-quality, independent, impartial, transparent, efficient, and swift out-of-court dispute resolution procedures. The same year, Regulation 524/2013 on online dispute resolution (ODR Regulation) was adopted to create a European online platform for resolving disputes between consumers and traders arising from online purchases. In November 2024, the European Council adopted a regulation to shut down the European Online Dispute Resolution Platform (ODR platform) and eliminate the associated obligations for administrations and online businesses. In line with the Commission's proposal, the Council believes that the performance level of the existing ODR platform does not justify the public and private costs required for its maintenance. Regulation 2024/3228 swiftly abolishes the European ODR platform. The ADR Directive and the ODR Regulation provided a reference framework for out-of-court online dispute resolution for consumer disputes in the EU. However, both proved to be less effective and successful than intended. The relationship between the Directive and the Regulation is also influenced by the fact that only certified ADR bodies could be included in the ODR system established by the Regulation. High-quality ADR entities are essential for the ef-

---

5 Abbot, R.; Elliott, B.S., *Putting the Artificial Intelligence in Alternative Dispute Resolution: How AI Rules Will Become ADR Rules. Amicus Curiae*, Series 2, Vol. 4. No 3, 2023, pp. 685-706, https://doi.org/10.14296/ac.v4i3.5627.

6 Tan, J. *et al. "Robots in the Middle: Evaluating LLMs in Dispute Resolution."*, *ArXiv* abs/2410.07053 (2024): n. pag.

7 Westermann, H.; Savelka, J.; Benyekhlef, K. LLMediator: GPT-4 Assisted Online Dispute Resolution. ."*ArXiv* arXiv:2307.16732, (2023): n.pag.

8 Broyde, M.J.; Mei, Y., *Don´t Kill the Baby! The Case for AI In Arbitration*, Journal of Law & Business, Vol. 21, No.1 (2024). 119-173.

fective functioning of other instruments closely linked to ADR, particularly the ODR platform.[9]

The catalogue of national (Slovak) legislation regulating dispute resolution methods beyond traditional forms has been enhanced by the Act on Alternative Dispute Resolution for Consumer Disputes, adopted in November 2015 and coming into force on 1 January 2016. This legislation transposes the directive on alternative dispute resolution for consumer disputes and implements the regulation on online dispute resolution for consumer disputes into the Slovak legal framework. It was enacted to ensure a high level of consumer protection while contributing to the effective functioning of the internal market by guaranteeing that consumers can, in the event of a dispute with a seller, approach an alternative dispute resolution body that conducts independent, impartial, transparent, adequate, rapid, and fair procedures for resolving consumer disputes.

The settled out-of-court methods of dispute settlement are supplemented by the Act on Alternative Dispute Resolution with another alternative method, namely, alternative dispute resolution. Following the approach of the ADR Directive, the Act uses this term for the dispute settlement process. However, in the foreign literature,[10] alternative dispute resolution refers to the entire range of out-of-court dispute resolution methods. Mediation and arbitration are considered the cornerstones of alternative out-of-court dispute resolution. For the purposes of the Act in question, alternative dispute resolution for consumer disputes is deemed to be a specific procedure of an ADR entity aimed at reaching an amicable settlement of a dispute between the parties to the dispute. The consumer is the only person legitimised to bring a dispute resolution claim through this new method. The seller is not entitled to initiate proceedings under this law. The Act confers jurisdiction in the field of alternative dispute resolution on so-called alternative dispute resolution entities. ADR entities are ADR bodies and authorised legal persons. ADR entities are public authorities which are obliged by law to resolve disputes depending on their subject matter competence. These bodies became ADR entities ex lege, having been entered in the list of entities maintained by the Ministry of Economy of the Slovak Republic as of 1 January 2016.

The ADR bodies are: (i) the Regulatory Office for Network Industries, (ii) the Regulatory Authority for Electronic Communications and Postal Services, (iii) Slovak Trade Inspection.

---

9 Biard, A., *"Monitoring Consumer ADR in the EU: a Critical Perspective."*, European Review of Private Law 2, 2018, pp. 171–96.

10 Born, G.B. International Commercial Arbitration, London. Kluwer Law International, 2001; Fouchard, P., Gaillard, E., Goldman, B., On International Commercial Arbitration, London: Kluwer law International, 1999.

3. DIGITAL SERVICES ACT AND ITS IMPACT ON DISPUTE RESOLUTION

The digital environment has become a space for various activities for individuals and groups. Nowadays, we can hardly imagine our personal and professional activities without the Internet and the possibilities it offers. Naturally, this space has gradually become subject to regulation, leading to stricter conditions for conducting activities. One of the most recent major adjustments at the European level includes two regulations: the Digital Markets Act (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) and the Digital Services Act (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). The Digital Services Act and Digital Markets Act aim to create a safer digital space where users' fundamental rights are protected and to establish a level playing field for businesses.[11]

The European Commission has presented a proposal for a Digital Services Act under the priority "A Europe fit for the digital age" and a Digital Markets Act proposal in December 2020. Since 17.02.2024, the DSA has been effective and fully applicable. Until the adoption of the DSA, the defined area was mainly regulated by Directive 2000/31/EC on electronic commerce. The Digital Services Act was adopted as an EU-wide regulation of internet content to provide intermediary services to limit illegal and harmful internet activities and spread misinformation and hoaxes. Joint action by Member States is expected to have a greater impact than individual interventions by all States.[12] DSA strengthens the protection of users of digital platforms and their fundamental rights in the digital environment by introducing transparent and proportionate rules. It balances the position of actors, i.e. users, digital platforms and public authorities in the digital environment in a way consistent with European values. It puts users and the rigorous protection of their fundamental rights at the centre.

The DSA provisions provide a comprehensive mechanism for resolving disputes relating to content published on digital platforms. DSA introduces a structured and transparent mechanism allowing users to contest content moderation decisions made by online platforms. In Article 20, DSA provides an internal complaint–handling system as the first level of the dispute settlement. According to

---

[11] European Commission, *The Digital Services Act package* [https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package], Accessed 23 April 2025.

[12] Husovec, M., *Principles of the Digital Services Act,* Oxford University Press, 2024.

this Article, providers of online platforms shall provide service recipients with access to an effective internal complaint-handling system that enables them to lodge complaints, electronically and free of charge, against the decisions taken by the online platform providers. The recipient should be able to defend against decisions made by the provider of the online platform on the grounds that the information provided by the recipient constitutes illegal content or is incompatible with its terms and conditions. Providers usually make decisions against recipients' actions on the digital platforms. These decisions are:

(a) Whether or not to remove or disable access to or restrict visibility of the information,

(b) Whether or not to suspend or terminate the provision of the service, in whole or in part, to the recipients,

(c) Whether or not to suspend or terminate the recipient´s account,

(d) Whether or not to suspend, terminate or otherwise restrict the ability to monetise information provided by the recipients.

Internal complaint-handling systems should be easy to access, user-friendly and enable and facilitate the submission of sufficiently precise and adequately substantiated complaints. They must operate in a timely, non-discriminatory, diligent and non-arbitrary manner. The vast majority of moderation decisions potentially subject to Article 20 complaints are fully automated[13] – the only feasible way of monitoring content across online platforms with millions or billions of users.[14] A crucial question is, therefore, whether Article 20 requires complaints to be reviewed by human moderators. The answer not only implies potentially enormous investments of labour time and resources, but also has important implications for the overall effectiveness of the DSA.[15] In this context, the wording of Article 20 (6) is important. It states, *„Providers of online platforms shall ensure that the decisions, referred to in paragraph 5, are taken under the supervision of appropriately qualified staff, and not solely on the basis of automated means.*". What it means to make decisions under the supervision of appropriately qualified staff should be clarified. Does it mean that a human should supervise each decision? Such an interpretation would undoubtedly represent a significant complication of the essential mecha-

[13] Google Transparency Report, [https://transparencyreport.google.com/youtube-policy/removals?hl=en&total_removed_videos=period:2023Q2;exclude_automated:all&lu=total_removed_videos], Accessed 16 April 2025 .

[14] Griffin, R.; Stallman, E., A Systemic Approach to Implementing the DSA´s Human-in-the-Loop Requirement. Online: [https://verfassungsblog.de/a-systemic-approach-to-implementing-the-dsas-human-in-the-loop-requirement/],Accessed 16 April 2025; Duić, D.; Rošić, M., *Interoperability between the EU information systems – From an idea to the realisation*, Policija i Sigurnost, 31(2), 2022, pp. 118–148.

[15] *Ibid.*

nisms of the functioning of digital platforms. Article 20 should be interpreted in the broader context of other provisions of the DSA, e.g. Article 56 of Preamble according to which recipients of the services should be able to easily and effectively contest certain decisions of providers of online platforms concerning the illegality of content or its incompatibility with the terms and conditions that negatively affect them. Therefore, providers of online platforms should be required to provide for an internal complaint-handling system which meets certain conditions that aim to ensure that the systems are easily accessible and lead to swift, non-discriminatory, non-arbitrary and fair outcomes, and are subject to human review where automated means are used. Such systems should enable all recipients of the service to lodge a complaint and should not set formal requirements, such as referral to specific, relevant provisions or elaborate legal explanations. The grammatical construction „are subject to human review where automated means are used" is linked with the internal complaint-handling system. In our opinion, it means that the internal complaint-handling system should be under human control. Not each decision.

Article 21 systematically builds on the previous provision and introduces dispute settlement through an external out-of-court system.

Article 21 foresees the establishment of certified out-of-court dispute settlement bodies. Alternative dispute resolution must comply with the requirements of speed, efficiency, and cost-effectiveness in at least one of the official languages of the Union institutions, and the procedural rules governing the certified body should be easily and publicly accessible.

The coordinator of digital services in the Slovak Republic is the Council for Media Services.[16] In Croatia, it is the Croatian Regulatory Authority for the Network Industry[17]. It is also the certification authority authorised to certify, for a maximum period of 5 years, an entity fulfilling the conditions contained in Article 21(3)(a) to (f) of the DSA, which include in particular the requirements of complete impartiality and independence from the providers of online platforms and from the recipients of the services provided by the providers of online platforms, including individuals or entities that may submit notifications, have sufficient knowledge and expertise in the area of illegal content and the area of application and enforcement of the terms and conditions of online platforms. At the same time, it should be ensured that the remuneration of the members of the body is independent of

[16] Overview of Digital Services Coordinators in EU: https://www.interface-eu.org/publications/overview-digital-services-coordinators-europe], Accessed 26 April 2025.

[17] Hrvatska regulatorna agencija za mrežne djelatnosti, [https://www.hakom.hr/], Accessed 26 April 2025.

the outcome of the proceedings, while the out-of-court dispute resolution offered by the certified body is to be easily accessible through electronic communication technologies and provides the possibility to initiate the settlement of disputes and to submit the necessary supporting documents online.

4. CONCLUSION

DSA introduces a structured and transparent mechanism that allows users to contest content moderation decisions made by online platforms. It encompasses a multilevel process that includes an internal complaint-handling system and an out-of-court dispute settlement system. Some consider the DSA to be the most procedurally detailed intermediary liability law after the US Digital Millennium Copyright Act. This mechanism grants users the right to receive a clear and reasoned explanation for moderation actions. Simultaneously, there is the possibility of challenging the decision through an effective internal complaint-handling system. The platform's internal complaint-handling system serves as the first level for users to protect their rights. Additionally, users can protect their rights through external independent online dispute settlement bodies certified by national certification authorities under the DSA. Six online dispute settlement bodies are certified in EU member countries (Malta, Ireland, Italy, Hungary, Austria, and Germany). Nevertheless, active discussions and actions in this area are ongoing in other member states.

This paper specifically addresses the issue of artificial intelligence's impact on decisions regarding people's entitlements. As a modern phenomenon, artificial intelligence introduces numerous uncertainties and questions, particularly in the realm of online platforms. Various aspects of artificial intelligence play a significant role in content moderation processes on these platforms. In this article, we explore whether AI tools in content moderation are entirely free from human control and what the wording in Article 20 of the DSA implies. We contend 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. Nonetheless, human influence and judgment remain substantial, especially during the development phase of the AI itself, its input parameters for subsequent decision-making, and, as we indicate in our article, during the control phase over the AI's decision-making system.

REFERENCES

BOOKS AND ARTICLES

1. Abbot, R.; Elliott, B.S., *Putting the Artificial Intelligence in Alternative Dispute Resolution: How AI Rules Will Become ADR Rules. Amicus Curiae*, Series 2, Vol. 4. No 3, 2023, pp. 685-706, https://doi.org/10.14296/ac.v4i3.5627
2. Barysė, D.; Sarel, R., *Algorithms in the court: does it matter which part of the judicial decision-making is automated?,* Artif Intell Law 32, 117–146, 2024, https://doi.org/10.1007/s10506-022-09343-6.Biard, A. (2018). Monitoring consumer ADR in the EU: A critical perspective. *European Review of Private Law, 2*, 171–196.
3. Biard, A., *"Monitoring Consumer ADR in the EU: a Critical Perspective."*, European Review of Private Law 2, 2018, pp. 171–96
4. Born, G.B., *International Commercial Arbitration*, London. Kluwer Law International, 2001
5. Broyde, M. J.; Mei, Y., *Don't kill the baby! The case for AI in arbitration*, *Journal of Law & Business, 21(*1), pp. 119–173
6. Duić, D.; Rošić, M., *Interoperability between the EU information systems – From an idea to the realisation, Policija i Sigurnost, 31*(2), 2022, pp. 118–148
7. Fouchard, P.; Gaillard, E.; Goldman, B., On International Commercial Arbitration, London: Kluwer law International, 1999
8. Griffin, R.; Stallman, E. (n.d.). *A systemic approach to implementing the DSA's human-in-the-loop requirement*, *Verfassungsblog,* [https://verfassungsblog.de/a-systemic-approach-to-implementing-the-dsas-human-in-the-loop-requirement/], Accessed 26 April 2025
9. Husovec, M. (2024). *Principles of the Digital Services Act*. Oxford University Press.
10. Jesus Dias, S. A.; Sátiro, M. R., *Artificial intelligence in the judiciary: A critical view*. *Futures, 164,* 103493, [https://doi.org/10.1016/j.futures.2024.103493]
11. Rudohradská, S.; Treščáková, D., *Proposals for the Digital Markets Act and Digital Services Act – Broader considerations in the context of online platforms*, in: *EU 2021 – The future of the EU in and after the pandemic: International Scientific Conference, Book of Proceedings*, Sveučilište Josipa Jurja Strossmayera u Osijeku, 2021, pp. 487–500
12. Sartor, G., *Artificial intelligence and human rights: Between law and ethics*, *Maastricht Journal of European and Comparative Law, 27*(6), 2020, pp. 705–719, [https://doi.org/10.1177/1023263X20981566]
13. Socol de la Osa Du, D.; Remolina, N., *Artificial intelligence at the bench: Legal and ethical challenges of informing – or misinforming – judicial decision-making through generative AI, Data & Policy, 6,* e59. [https://doi.org/10.1017/dap.2024.53]
14. Tan, J., *et al.*, *Robots in the middle: Evaluating LLMs in dispute resolution*, *arXiv Preprint,* [https://arxiv.org/abs/2410.07053], Accessed 25 April 2025
15. Westermann, H.; Savelka, J.; Benyekhlef, K. LLMediator: GPT-4 Assisted Online Dispute Resolution.." *ArXiv* arXiv:2307.16732, (2023): n.pag.

EU LAW

1. European Commission, The Digital Services Act package [https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package], Accessed 23 April 2025

WEBSITE REFERENCES

1. Google Transparency Report, [https://transparencyreport.google.com/youtube-policy/removals?hl=en&total_removed_videos=period:2023Q2;exclude_automated:all&lu=total_removed_videos], Accessed 16 April 2025
2. Hrvatska regulatorna agencija za mrežne djelatnosti, [https://www.hakom.hr/], Accessed 26 April 2025
3. Overview of Digital Services Coordinators in EU: [https://www.interface-eu.org/publications/overview-digital-services-coordinators-europe], Accessed 26 April 2025
4. Zeybek, B.; van Hoboken, J.; Buri, I., *Redressing infringements of individuals' rights under the Digital Services Act, DSA Observatory,* 2020, [https://dsa-observatory.eu/2022/05/04/redressing-infringements-of-individuals-rights-under-the-digital-services-act/], Accessed 25 April 2025

Original scientific paper

LIABILITY IN A DIGITALIZED WORKPLACE: THE ROLE OF THE EU'S NEW AI FRAMEWORK BETWEEN INNOVATION AND SECURITY*

Šime Jozipović, PhD, Assistant Professor
University of Split, Faculty of Economy
Cvite Fiskovića 5, 21000 Split, Croatia
sjozipov@efst.hr

Trpimir Perkušić, PhD, Assistant Professor
University of Split, Faculty of Law
Domovinskog rata 8, Split, Croatia
trpimir.perkusic@pravst.hr

ABSTRACT

The AI Act, adopted by EU lawmakers in 2024, marks a major step in harmonizing AI regulation across Europe by introducing a risk-based framework for AI system oversight. However, it does not directly address civil liability related to the implementation of AI based systems and technologies. To bridge this gap, the EU has taken steps by updating the Product Liability Directive (PLD) and negotiating the proposed Artificial Intelligence Liability Directive (AILD). The PLD now covers damages caused by products that use AI-systems, while the AILD is still under discussion. Despite these efforts, liability rules remain fragmented, particularly in workplace settings.

This paper explores how emerging EU legislation affects liability for AI-related damages at work, where clear rules are essential to ensure accountability and build trust in automation. It addresses challenges such as AI opacity, causation, and the balance between innovation and legal responsibility. Using examples like medical diagnostics and autonomous machines, the paper highlights the difficulties of assigning liability among employers, employees, and AI developers. It focuses on the intersection of contractual distribution of responsibilities, requirements under the AI act and special obligations of employers towards their employees.

Croatia's legal framework on contractual liability serves as a case study, focusing on how EU regulations intersect with national law and worker protection rules. The analysis reveals gaps in liability allocation, shows how guidelines for AI use will increase in importance and suggests how national and EU laws must adapt to support safe and lawful AI use in the workplace.

Keywords: *AI Act, damages, liability, workplace*

* This paper is a product of work that has been fully supported by the Faculty of Law, University of Split, under the project nr. 3. "Challenges of modern labor law - de lege lata and de lege ferenda (IMRP).

1. INTRODUCTION

The introduction of the European Union's Artificial Intelligence Regulation (AI Act) in 2024[1] marked a pivotal moment in AI regulation. As part of the EU's broader AI framework, this legislation seeks to harmonize rules governing the development, deployment, and accountability of AI systems. The Act introduces a layered, risk-based approach, categorizing AI systems based on their potential risks to safety and fundamental rights, and establishing compliance obligations proportionate to those risks.[2]. However, it does not directly address civil liability, which still remains fragmented in the European Union.[3] To close this gap, the European legislator has modernized the Product Liability Directive (PLD)[4] and had proposed the Artificial Intelligence Liability Directive (AILD).[5] The PLD now covers damages caused by products that use AI systems, while the AILD was withdrawn in early 2025 due to a lack of consensus among stakeholders. As a result, efforts to create a harmonized fault-based liability regime for AI have stalled, leaving gaps, especially in workplace settings.

Establishing clear liability frameworks among stakeholders is critical to fostering trust in AI technology, especially in workplaces integrating automation and robotics[6]. Employers as AI deployers must understand their roles and obligations for AI-based systems to be seamlessly integrated. This paper examines how evolving regulations shape liability distribution in the workplace.

It begins by analysing the EU's legislative efforts to balance innovation with accountability and security. Key challenges are identified, including the opacity of AI decision-making, difficulties in establishing causation, and competing interests

---

1 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 (in the following text AI Act).

2 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 4, No. 4, 2021, p. 593 f, 603.

3 Montagnani, M. L.; Najjar, M. C.; Davola, A., *The EU Regulatory approach(es) to AI liability, and its Application to the financial services market*, Computer Law & Security Review, Volume 53, 2024, p. 6; European Commission: Directorate-General for Justice and Consumers, Liability for artificial intelligence and other emerging digital technologies, Publications Office, 2019, available at: [https://data.europa.eu/doi/10.2838/573689], Accessed 1 April 2025, p. 15.

4 Proposal for a Directive of the European Parliament and of the Council on liability for defective products, COM/2022/495 final, adopted through Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products [2024] OJ L, 2024/2853.

5 European Commission, "Proposal for a Directive of the European Parliament and of the Council on Adapting Non-Contractual Civil Liability Rules to Artificial Intelligence", Brussels, 28.9.2022 COM/2022/496 final.

6 Ebers *et al.*, *op. cit.*, note 3, p. 594 f.

among AI developers, employers, their clients and employees. The tension between protecting intellectual property and the need for transparency in liability claims is also explored. Workplace-specific legal challenges, such as those involving machine learning based predictive models, autonomous vehicles and industrial robots, are examined to illustrate the complexities of assigning responsibility among employees, employers, and third-party providers.

The paper then uses Croatia's workplace liability framework to demonstrate how the new EU legislation impacts AI-related damages in the workplace. The analysis highlights Croatia's employer-employee liability rules, obligations under worker protection laws, and general civil law principles in AI-driven scenarios. It focuses on contractual damages and scenarios involving employers as the central node between their AI providers, clients and employees. By situating Croatia's legal framework within the broader EU context, the paper identifies regulatory gaps and offers insights into how liability laws may evolve to support both technological innovation and legal certainty in an increasingly digital workplace.

2. THE EUROPEAN UNION'S LEGAL FRAMEWORK FOR ARTIFICIAL INTELLIGENCE

Regulating new technologies is inherently difficult. Legal norms concerning new technology are frequently created at a time when the technology is still evolving, often before its full implications are known or specific issues can be clearly anticipated. However, when a new technology has a strong economic or social impact, it is reasonable to approach regulation even in this early phase, in order to create legal certainty and mitigate risks.[7] This is also in line with consultations which have shown a strong support for the establishment of clear regulations that ensure liability in cases where intangible products used to operate hardware are defective and cause physical/property damage.[8]

In this context, AI regulation is important, but in fact poses an even greater challenge than the regulation of other new technologies. AI technology is not only rapidly advancing, but AI systems are also capable of learning, adapting, and mak-

---

7 Arcila, B. B., *AI liability in Europe: How does it complement risk regulation and deal with the problem of human oversight?*, Computer Law & Security Review, Volume 54, 2024, p. 2.

8 European Commission Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DGGROW)Directorate-General for Justice and Consumers (DG JUST): Adapting Civil Liability Rules to the Digital Age and Artificial Intelligence - Factual summary report on public consultation, Ref. Ares (2022)2620305 - 06/04/2022, Available at: [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12979-Civil-liability-adapting-liability-rules-to-the-digital-age-and-artificial-intelligence/public-consultation], Accessed: 1 April 2025 p. 3.

ing decisions in ways that may be opaque even to their developers. This dynamic and autonomous nature of AI complicates traditional legal approaches based on clear accountability and predictability. An important issue the EU legislators faced when designing the new AI framework was balancing between security and innovation. In this context an especially challenging but crucial aspect of regulation concerns the question of responsibility for damages caused by an AI-operated device or service. In the case that the producer of an AI was free of accountability, there might be no incentive to provide good product or service and it could damage people's trust in the technology. However, overly strict liability could prevent innovative solutions to emerge.[9]

2.1. THE AI ACT

As a result of the increasing relevance of artificial intelligence in business and society, the European Commission has worked on the implementation of a comprehensive AI framework. The cornerstone of the new AI framework was the proposal of the Regulation Laying Down Harmonized Rules On Artificial Intelligence[10], which later entered into force in July of 2024 as the already mentioned AI Act. At its core the Act establishes a risk-based regulatory regime for AI systems, imposing stringent *ex ante* obligations on AI developers and users with the aim to ensure a safe, transparent and individual rights oriented use and application of AI.[11] It however does not establish a civil liability regime for AI-related damages[12]. If an AI system malfunctions or produces a harmful outcome – for instance, an autonomous robot injuring a factory employee, an AI medical tool giving a fatal recommendation, or an algorithm unlawfully denying someone employment – compensation regimes for damages are governed by existing liability laws like tort law, product liability law, or contract law.

The AI Act defines key actors in the AI space, namely:[13]

---

9 Artificial intelligence: threats and opportunities, available at: [https://www.europarl.europa.eu/topics/en/article/20200918STO87404/artificial-intelligence-threats-and-opportunities], Accessed 1 April 2025.

10 Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, COM(2021) 206 final, Brussels, 21 April 2021. This proposal was subsequently adopted as 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, and (EU) No 168/2013 (Artificial Intelligence Act), OJ L 168, 30 June 2024., p. 1–152 – the so called AI act.

11 Montagnani *et al., op. cit.,* note 4, p. 8; Ebers e*t al.*, *op. cit.*, note 3, p. 595.

12 Ebers *et al., op. cit.*, note 3, p. 599.

13 Art. 3 para. 1 nr. 3 – 7 AI Act.

- AI provider –any person or body – public or private that develops an AI system or a general-purpose AI model or that has an AI system or a general-purpose AI model developed and places it on the market or puts the AI system into service under its own name or trademark, whether for payment or free of charge;
- AI deployer –any person or body – public or private that uses an AI system under its authority except where the AI system is used in the course of a personal non-professional activity;
- AI related authorised representative - any natural or legal person located or established in the Union who has received and accepted a written mandate from a provider of an AI system or a general-purpose AI model to, respectively, perform and carry out on its behalf the obligations and procedures established by this Regulation;
- AI importer –any natural or legal person located or established in the Union that places on the market an AI system that bears the name or trademark of a natural or legal person established in a third country;
- AI distributor –any natural or legal person in the supply chain, other than the provider or the importer, that makes an AI system available on the Union market;

It is important to note, that multiple entities can have the status of AI provider. If for example a deployer makes substantial modification to the system or embeds the system in a larger product, he assumes provider responsibilities.[14] Thus it is important to assess if a deployer primarily uses AI systems, or substantially modifies them, in order to determine their status, and thus obligations under the AI act. This is especially important, as the AI act determines EU wide standards for the aforementioned actors, and thus can provide a benchmark of proper care, that can then be used under proposed European or domestic AI liability law. In the context of this paper, it is especially important to note that under the AI Act, employers can qualify as AI deployers when they use AI systems in the context of their professional activities but also as providers if they significantly alter existing systems. Employees, on the other hand cannot be considered deployers. They can have a dual role: they can be affected persons when subject to decisions or evaluations made by AI systems, and they can be the human operators who directly interact with or oversee AI systems as part of their work obligations.

[14] See explanation in rec. 84 f. AI Act.

2.2. AI SYSTEM RISK CATEGORIES

In order to understand the obligations of each group of actors, it is necessary to understand how AI related risks are defined under the Regulation. The AI act aims to establish extensive regulation on those types of AI systems that pose a concrete risk, and avoids putting an additional regulatory burden on low/no risk AI systems.[15] Under the AI Act, two types of AI systems are explicitly defined: Prohibited AI systems and High-risk AI systems.

Prohibited AI systems include all AI systems that are applied in a manner that is considered to be individual rights to an extent that is considered unacceptable in the EU. Examples include social scoring mechanisms, the use of AI to manipulate individuals and vulnerable groups etc.[16] In the context of AI-related damages and the employer-employee relationship, it is important to note that the use of such prohibited systems already constitutes a legal violation—and if this use results in harm, it may form the basis for a claim by the injured party. However, the focus of this paper is not on cases where AI systems are used unlawfully per se, but rather on situations where legally permitted AI systems malfunction, are misused, or produce harmful outcomes, raising questions of liability, responsibility, and redress within the employment context. Therefore, the category of high-risk AI systems in contrast to other legal AI systems is especially important.

Under the term high-risk AI systems fall all AI systems that are related to sensitive sectors, services or products that require an enhanced level of regulatory compliance. This applies both for situations where the AI is the product, or where it is a part of the product that is related to the product's safety aspects[17]. The category of high-risk AI system especially covers those AI systems that could have an impact on the health, safety or fundamental rights of natural persons, including by not materially influencing the outcome of decision making.[18] Examples include the use of AI in biometrics, critical infrastructure, essential services or law enforcement[19]. However, in the context of employment law it also includes hiring and workers' management. High-risk systems in this context are those systems that are intended to be used for the recruitment or selection of natural persons, in particular to place targeted job advertisements, to analyse and filter job applications, and to evaluate candidates. The same applies to AI systems intended to be used to make decisions affecting terms of work-related relationships, the promotion or termination of work-related

15 Recital 46 AI Act.

16 Art. 5 AI Act; Ebers *et al.*, *op. cit.*, note 3, p. 591 f.

17 Art. 6 para. 1-2 in relation to Annex I, Annex III AI Act.

18 Art. 6 para. 3 AI Act.

19 Annex III AI Act.

contractual relationships, to allocate tasks based on individual behaviour or personal traits or characteristics or to monitor and evaluate the performance and behaviour of persons in such relationships.[20] However, if workers use AI systems as part of their work, this doesn't automatically qualify them as separate high-risk systems. Thus it is important to consider each system under the general rules of the AI act.

It is important to note that general purpose AI systems with extensive capacities have a specific position within the AI act. While these systems may not be directly aimed at any high risk activity, they could be used for high-risk activities due to their versatility. This could happen either directly, or through significant adjustments. Therefore the AI act requires that under any potentially significant change, a re-assessment of the risk level is conducted.[21] This solution, while putting an additional administrative burden on actors that make changes to an AI-system, was considered a necessary counterbalance to limiting strict regulation to high-risk systems, ensuring a layered approach.[22] Besides prohibited AI systems and high-risk AI systems, a specific third category exists. Namely AI systems that directly interact with natural persons and which are considered to be a limited-risk and need to fulfil various disclosure requirements.[23] These systems aren't considered to be seriously harmful as long as it is made clear that they are being used.[24]

2.3. OBLIGATIONS OF AI PROVIDERS UNDER THE NEW AI FRAMEWORK

The AI act aims at putting the main responsibility concerning AI systems on AI providers. These actors are working on developing the AI systems and thus are closest to its structure and programming. Therefore, they have the most direct insights into the workings of the system and are best suited to test, adapt and upgrade the system. As a result, it is their role under the AI Act to ensure AI systems are trustworthy before and during deployment.[25] The majority of responsibilities of AI providers are connected to high-risk AI systems, and they include: 1) Risk assessment and risk management, 2) Data Governance and Technical Documentation, 3) Transparency and Human Oversight Measures, 4) Post-Market Monitoring and Incident Reporting.

---

20 Nr. 4 Annex III AI Act.

21 Ebers *et al.*, *op. cit.,* note 3, p. 594.

22 Philipp, H., T*he European AI liability directives – Critique of a half-hearted approach and lessons for the future*, Computer Law & Security Review, Volume 51, 2023, p. 10.

23 Art. 50 AI Act.

24 Another notworthy but less relevant category for this paper are so called general-purpose AI models which due to their capacities present a systemic risk. See: Art 51 f. AI Act.

25 Ebers *et al.*, *op. cit.,* note 3, p. 597 f.

Providers have the duty to establish a rigorous risk management system throughout the AI's lifecycle. This means that they have the obligation to extensively test the system before it enters the market and from that point onwards to ensure continuous processes to identify, evaluate, and mitigate risks of harm or discrimination.[26] Safety measures must be adequate and proportionate, taking into account the specific risks of the system and the state of the art safety, accuracy, robustness, and cybersecurity requirements.[27]

Providers furthermore have to ensure a high level of training and input data that is sufficiently representative and as far as possible free of errors or bias to minimize risks to fundamental rights[28]. While it is practically impossible to provide perfect data to a model, in academia it is considered that the benchmark should be that data has to be collected and provided with a reasonable level of care.[29]

In the context of this paper, it is especially important to note that providers must also maintain extensive technical documentation and logs detailing the AI system's design, testing, and performance metrics.[30] This documentation can serve as evidence of due diligence and must be supplied to regulators or courts if needed. AI models are heavily reliant on the data imputed by the operator, as even high quality models cannot provide reliable results if they are based on faulty information.[31] Therefore, documentation will play a crucial role in the process of allocating responsibility.

A further important requirement is that AI providers have to ensure that the system is built with appropriate human oversight mechanisms which can effectively be used by deployers, for whom providers must make available clear instructions for use.[32] This is especially important in an employment context, as employees must receive clear instructions and sufficient training to operate AI systems. In academia, it has however been questioned if it is even possible to provide effective human oversight for very complex AI systems that are hard to fully comprehend.[33] Therefore, it remains to be seen to which extent the broad requirements of human oversight will work in practice, and in particular concerning the distribution of responsibility in liability cases. For example, if a provider fails to include a necessary human override and injury results, that omission may be deemed negligent

26 Art. 8,9 AI Act.

27 Art. 15 AI Act.

28 Art. 10 AI Act.

29 Ebers *et al.*, *op. cit.,* note 3, p. 595 f.

30 Art. 10, 11 AI Act.

31 Montagnani *et al.*, *op. cit.,* note 4, p. 3.

32 Art. 14 AI Act.

33 Ebers *et al.*, *op. cit.,* note 3, p. 596.

or render the AI "unsafe". An AI deployer could in contrast be liable if despite of clear instructions and a functioning human oversight mechanism, no actions have been taken to prevent damages. But it is to be expected that for most cases in practice the distribution of fault will not be this clear.

After deployment, providers must monitor the AI system's performance any incident that leads to death or serious harm to health, significant property damage, or serious disruption of critical services (serious incident). If such an incident occurs, the provider must inform regulators within 15 days and investigate the root cause.[34] This mirrors obligations in sectoral safety laws and creates a paper trail that could be vital in civil litigation. For example, if an autonomous AI medical device caused injury, the incident report would document the failure and provide useful evidence for an injured patient's claim. Notably, compliance with these duties does not automatically exempt a provider from liability; but non-compliance can trigger regulatory sanctions and bolster a victim's case that the provider fell below expected standards.

2.4. THE RESPONSIBILITY OF AI DEPLOYERS UNDER THE AI ACT

As mentioned above, the term "deployers" includes businesses using commercially available AI tools and systems, but not directly employees who are natural person operators[35] of the system under the mandate of their employers. Deployers of high-risk AI systems have clear obligations under the AI Act, which complement the provider's duties and aim to ensure safe and lawful use of AI in context. Key obligations on deployers include:[36] a) using the systems in accordance with instructions, b) assigning human oversight and monitoring, c) ensuring input data quality, d) record-keeping, e) transparency to affected persons and f) special obligations for employers who deploy AI systems.

While AI providers must provide deployers with clear instructions for use of AI systems, it is the responsibility of deployers to follow the provider's instructions and only use the system for its intended purpose and within the conditions the provider envisaged. They are required to take appropriate technical and organizational measures to ensure compliance with the usage guidelines.[37] This means that the use of an AI system has to be in line with its intended purpose. For example, if the provider specifies that an AI-powered diagnostic tool is only validated for adult patients, a deployer (hospital) should not use it for children without further

34 Art. 73 AI Act.

35 Art. 26 para. 2 AI Act.

36 Art. 26 AI Act.

37 Art. 26 para. 1, 3 f. AI Act.

validation. Failure to heed instructions could not only violate the regulation but also amount to negligence if harm results. However, it also determines certain aspects of the relationship between deployer and natural persons who use AI systems on their behalf like it is the case in employer-employee relations.

An especially relevant requirement for employer-employee relations is the obligation that every deployer of a high-risk AI must assign natural persons to exercise human oversight over the AI's operation[38]. These human overseers should have appropriate competence, training, and authority to interpret the system's outputs and intervene when necessary. The deployer is responsible for ensuring these individuals (e.g. operators, employees) understand the AI's limitations and can effectively supervise it. In addition, deployers are required to monitor the AI system's performance during actual use and suspend its use if it behaves anomalously or poses a significant risk.[39] It is the duty of the deployer (employer) to ensure that a competent natural person is assigned a task. Thus education and training responsibilities fall on the deployer. If the AI's use leads to a serious incident or malfunctions in a way that risks harm, the deployer must inform the provider or distributor without undue delay and even notify authorities if the provider cannot be reached.

An important aspect of AI systems is their use of new data. Thus in cases where the deployer inserts data into the AI system, the Act requires that input data be relevant, correct and representative of the intended use. A deployer cannot, for instance, use biased or incoherent data with a high-risk AI without potentially skewing its results. Doing so would violate the Act and likely be considered negligent if it causes harm. Even a well-built AI can produce harmful outcomes if supplied with flawed data. It is likely that especially in this aspect many questions concerning the factual responsibility for harmful outcomes will come from. Namely, AI system providers could defend their position by claiming faulty data being the reason for a harmful outcome, while deployers could either challenge this position or consider the fault of the natural person imputing the data (for example a negligent employee).

In order to identify faults and resolve potential dispute like those presented in the previous paragraph, deployers must keep logs generated by the AI system, to the extent those are under their control, for a period at least six months or longer if required by other law.[40] This obligation aims at ensuring a multi-level responsibility on creating sufficient evidence and complements the obligation of deployers of AI systems.

[38] Art. 26 para. 2 AI Act.

[39] Art. 26 para. 5 AI Act.

[40] Art. 26 para. 6 AI Act.

When deployers are employers using high-risk AI in the workplace, the AI Act requires that employers inform and consult their workers or their representatives before putting a high-risk AI system into use that will impact worker. This could cover AI systems for monitoring productivity, automated scheduling, or decisions to establish or end an employment contract. The deployer must notify individuals that an AI system is involved in decision-making and provide understandable information about the AI's intended purpose and how it affects them, especially in an employment context[41]. For example, if an employer uses an AI tool to screen job applicants or an AI system rates employees' performance, the applicants or employees should be informed of this automated processing and its logic in general terms. EU employment law already obliges employers to consult works councils or staff on significant technological changes[42] while the European Court of Human Rights has made clear that employee monitoring activities need to be disclosed to employees[43]. Therefore the AI act obligations create only an additional protection for employee rights without prejudice to existing measures.

2.5. CLASSIFYING AI USED IN THE WORKPLACE UNDER THE NEW AI BASED RISK CATEGORIES

As has been described above, the roles and obligations of the different actors in the AI space vary significantly based on the risk level of an AI system. Thus, it makes sense, first to give clear examples of AI systems commonly used in the workplace, and their classification. Here we can first differentiate between AI systems that are software products or part of software products and AI-systems integrated into hardware. AI software products can be used for various tasks like data analysis, optimization of processes, diagnostics, generating of various outputs like text, pictures, videos, reports etc. However, for the purposes of this paper it makes most sense to cover a number of key examples of AI systems, namely those used for: 1) low risk tasks like warehouse logistics, 2) assessment software related to work performance and employee tasks, 3) expert tasks like medical diagnostics or 4) generative tasks like the creation of graphic design elements. Simultaneously, we can consider cases of integrated AI systems in hardware like 5) self-driving vehicles, 6) autonomous industrial robots and 7) adaptable heavy industrial machines.

---

41 Art 26 para. 7, recital 57,92 AI Act.

42 See Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, particularly Article 4(2)(e), which includes consultation on decisions likely to lead to substantial changes in work organisation or contractual relations, including the introduction of new technologies.

43 See: *López Ribalda and Others v. Spain* [2019] ECHR 752, Applications Nos. 1874/13 and 8567/13, Grand Chamber Judgment of 17 October 2019.

Warehouse logistics optimization software is in general considered low risk. For example, if in a large distribution centre, an AI-driven system dynamically plans pick-and-pack routes for warehouse staff based on real-time inventory levels and order priorities, it doesn't affect fundamental rights. It also doesn't fall within one of the activities listed in Annex III of the AI Act; it merely optimizes internal processes without direct safety or rights implications. However, as it significantly affects the way employees will complete their work processes, it still would require the employer to discuss the implementation of such a system with the employee representatives and inform employees about the implementation. Furthermore, in case that it delegates tasks based on employee performance, the classification would be considerably different;

Especially in the context of this paper, an important type of AI system is related to employee performance evaluation software. This type of software can for example be used to score the time effectiveness of warehouse workers or sales agents' email response times and customer-satisfaction metrics to inform bonus allocations. As HR decision-making and employee evaluation software directly affects employees' rights and is directly mentioned under Annex III to the AI Act, it falls in the category of high risk software.[44]

In contrast to the previously mentioned tasks, assessment and prediction software can be a type of high risk software, for example when used to execute highly regulated expert tasks with a strong impact on individual rights, like it is the case in the medical sector. For instance, if a radiology department uses an AI model to analyse chest X-rays and flag potential pulmonary nodules for a clinician's review, the AI model would be considered high risk, as it is simultaneously strongly impacts individual rights and is used for medical device purposes which are explicitly covered by Annex I to the AI act.[45]

Generative graphic design software is generally not considered high risk. However, it can be linked to additional obligations on the deplorer's side, in order to prevent creating misleading content. For example, in cases where a marketing team uses an AI tool to generate layout suggestions, pictures of consumers using a product and visual assets for social-media campaigns, with designers refining the outputs. Such a system is not high risk *per se* but it must comply with transparency obligations (disclosure that content is AI-generated).[46]

[44] Art. 6 para. 1 and Annex III para. 4.

[45] Art. 6 para. 1 and Annex I nr. 13 AI Act.

[46] Art. 50 AI Act.

Many hardware products are more complex as they combine regular software, sensors, AI systems and simple hardware elements.[47] Therefore, their regulation will often be based on multiple legal sources. For example, (self-driving) vehicles are by themselves highly regulated.[48] Furthermore, a key component of AI used in these products is aimed at safety and security of passengers and third parties. Thus, AI systems used in these products fall clearly under the category of high-risk AI systems. Workers will for example use self-driving cars either as a passenger or in an oversight role / backup driver. They however also might use them to automatically transport equipment from one location to another, without themselves being a passenger. In all these cases, the AI operating these vehicles is considered a high-risk AI system.

Similar, when AI systems are designed to operate industrial robots or heavy machinery they will likely fall within the category of high-risk system due to these hardware products likely being covered under Annex I and the role of the AI system being directly linked to operations, and thus product safety.[49]

3. THE AMENDMENT TO THE PRODUCT LIABILITY DIRECTIVE

Civil law compensation for damages in the EU has largely not been harmonized with the exception of specific areas of law relevant to the single market[50] like product liability[51] or infringements to data protection law[52] and competition law.[53] While the PLD does not directly regulate workplace related damages, it is important to under-

47 It is however also worth noting the Motor Insurance Directive (MID). This directive does not directly impact the distribution of liability, but provides rules concerning the liability insurance cover and thus have to be considered together with national tort law and thus would be an additional element of regulation. See: Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5 December 2014, p. 1–19; European Commission, *op. cit.*, note 4, p. 16.

48 Annex I nr. 14, 18 AI Act.

49 Annex I Nr. 1 AI Act.

50 European Commission, *op. cit.*, note 4, p. 16.

51 Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products (recast) [2024] OJ L, 2024/2853.

52 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), OJ L 119, 4 May 2016., p. 1.

53 Directive 2014/ 104/ EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5 December 2014, p. 1.

stand how the role of AI related damages for defect products are regulated, in order to understand the responsibilities and obligations of all parties involved.

The AI act mentions explicitly the Product Liability Directive in its recitals, as these two legal sources are meant to complement each other[54]. However, the PLD represents an independent improvement on existing product liability regulation which now includes AI related products[55]. If an AI system meets the broad definition of "product" the PLD is applicable and the revised PLD, includes software and by extension AI systems. Under the revised PLD, a person injured by a defective product can sue the producer without fault. It is thus essential for the injured party to establish that the original product was defective. Here the AI act plays an important role, because non-compliance with the standards set forth in the AI act, imply a lack of compliance with safety requirements. This in turn would trigger a presumption of defectiveness.

An important aspect of the updated PLD is the acknowledgment of an important trait of AI systems, namely that they often aren't static by nature and that multiple parties contribute to their development. For instance, if a deployer substantially modified an AI or a company integrated an AI component into a final product, that company is treated as a provider (hence as a producer for liability). [56] However, this is also considered in relation to defects based on developments of a AI-system that occur when a product is used by an end-user. Under the PLD a product is considered defective if it fails to provide the level of safety that the public is entitled to expect[57]. The directive acknowledges that consumers have a legitimate expectation that AI products will be designed in a way that limits the emergence of hazardous autonomous behaviour[58]. The ability to evolve autonomously is thus not treated as a neutral technical feature, but as a risk factor that producers are expected to anticipate and control.

That said, the "state of the art" defence remains available to producers[59]. This defence allows manufacturers to avoid liability if they can prove that the defect could not have been discovered given the scientific and technical knowledge available at the time the product was placed on the market. However, this defence is interpreted narrowly and will especially take into account the fulfilment of the standards set forth in the AI Act.

---

54 Recital 9 AI Act.

55 Hacker, *op. cit.,* note 23, p. 3.

56 Montagnani *et al.*, *op. cit.*, note 4 , p. 11 f.

57 Art. 7 PLD.

58 Recitals 3, 30 PLD.

59 Art. 11 para. 1 lit. e PLD.

3.1. ARTIFICIAL INTELLIGENCE LIABILITY DIRECTIVE

While the PLD has been passed and is currently in the process to be adopted by the member states, the same hasn't happened for the AILD. This directive hasn't been passed in its current form, amongst others because it could cause confusion within the AI legal framework, due to its potential overlap with the PLD[60]. Therefore, it will only be discussed briefly in the following text.

While the PLD is centered around the concept of a defective product, the Liability Directive proposal was based on fault based liability[61]. This means that in order for an injured party to have a right to claim compensation for damages, it is amongst others necessary to prove fault. This in turn usually requires the proof of a certain level of negligence or intent on the injuring party[62]. The duties set out in the AI Act could have served as objective standards of care for various actors when it comes to AILD related claims. If a provider or deployer violates an AI Act obligation and harm occurs, that violation will likely be compelling evidence in a negligence claim. This fault based regime could have been more appropriate both in order to support innovation, as well as to consider the role of the human operator who also has to show an adequate level of care[63]. However, the AILD proposal also contained additional mechanisms to protect injured parties. While the PLD only requires the defectiveness of a product, without fault, the AILD proposal contained mechanisms to ease the burden of proof through two mechanisms: injured parties have a right to compel evidence disclosure from AI system providers or users, and a rebuttable presumptions of causation in complex AI cases. In addition, if deployers fail to keep logs as required by the AI Act and the victim can't otherwise prove how the harm was caused, a court could have presumed a causal link between the AI's failure and the deployer's fault.

3.2. WORKPLACE RELATED EUROPEAN SAFETY STANDARDS

Safety standards in the workplace, similar to general AI safety standards set forth in the AI act do not regulate civil law claims for damages per se, but they will indirectly shape the framework of responsibilities and standards of care. Therefore it is important to mention European safety standards in regard to AI, as the

---

60 Hacker, *op. cit.,* note 23, p. 6 f.

61 Claudio, N. *et al.*, *Generative AI in EU law: Liability, privacy, intellectual property, and cybersecurity*, Computer Law & Security Review, Volume 55, 2024, p. 3.

62 Hacker, *op. cit.,* note 23, p. 13.

63 For a comprehensie review with further references see: Arcila, *op. cit.*, note 8, p. 6; European Commission, *op. cit.,* note 4, p. 33; Nissenbaum, H., *Accountability in a computerized society*, Science and engineering Ethics, Vol. 2, No. 1. p. 26.

deployment of AI systems in the workplace must also comply with the European Union's foundational framework for occupational safety and health, most notably the Framework Directive on Safety and Health of Workers ("OSH Framework Directive").[64] Employers are obliged to ensure the safety and health of workers in every aspect related to their work.[65] This duty is non-delegable and encompasses not only the physical environment but also the introduction of new work processes and tools, including digital and automated systems.[66] Employers must take necessary measures for the safety and health protection of workers, including prevention of occupational risks, provision of information and training, and the implementation of means to carry out these measures. It is within the responsibilities of employers to adapt to technical progress, give clear instructions and develop a coherent overall prevention policy that covers technology, organisation of work, working conditions, and social relationships.[67]

Moreover, the OSH Framework Directive requires worker consultation and participation, which includes the right of employees or their representatives to be informed and consulted on all matters affecting health and safety.[68] This obligation overlaps with Article 29 of the AI Act, which mandates information and consultation before the deployment of high-risk AI systems impacting workers. For example, introducing an AI system that monitors productivity or allocates tasks based on behavioural patterns would trigger both sets of obligations. Failure to consult workers in such scenarios could constitute a violation of both EU labour law and AI-specific regulatory requirements.

In addition, numerous sector specific sources have to be considered. For example, where AI systems are integrated into machinery or form part of intelligent robotic equipment, Directive 2006/42/EC on machinery requires that machines, including those with embedded AI components, comply with essential health and safety requirements. Similar rules apply in numerous other segments. Therefore, the AI Act has to be considered as part of the broader worker safety regulation.

---

64 Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (89/391/EEC).

65 Art. 5 para. 1 OSH Framework Directive.

66 Art. 6 para. 1 OSH Framework Directive.

67 Art. 6 para. 2 OSH Framework Directive.

68 Art. 11 OSH Framework Directive.

4. RESPONSIBILITY DISTRIBUTION IN WORKPLACE ENVIRONMENTS: EMPLOYER OBLIGATIONS UNDER CROATIAN LAW

While the previous chapter has presented the obligations of various actors in the AI space under EU law, and through this established benchmarks for the duties of key parties, it is left to national law to determine the rights of injured parties to damages. Therefore, the following section outlines the general contractual damages regime in Croatia, and show how special rules governing liability allocation between employer and employee impact the obligations of employers.

In the following text we first discuss the legal relations between relevant parties and then consider two key constellations within the general requirements of a claim for damages: 1) cases in which an AI system used by the employer causes harm to the employee and 2) cases in which an AI system used by employees in work processes causes harm to a third party. While claims can exist based on a variety of grounds including contractual damages, torts, liability for dangerous activities or defective products etc.[69], we will limit our analysis to some key cases which best illustrate the role of the new AI framework in employment law, with the employer as central actor between AI system provider, employee and client[70]. In this context we will refer to the above mentioned examples of AI systems and look at the following constellations of contractual damages: damages caused by AI-operated heavy machinery to employees, damages caused by work-process optimization software to employees or third parties and damages caused by generative software as well as specialized diagnostic software to third parties.

4.1. THE INVOLVED PARTIES AND RESPECTIVE LIABILITY REGIMES

As stated above, the following analysis focuses on key constellations of liability distribution relevant to the employer's position in AI-integrated workplace environments. Three relational axes are of particular interest, namely: 1) between the employer and AI providers or distributors, 2) between the employer and third parties who may suffer harm and 3) between the employer and the employee.

---

69 Perkušić, T., *Odgovornost za štete kod privremenog zapošljavanja*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 58, 2/2021, pp. 633-655, p. 641 f.

70 Even more complex cases could be presented with tort related obligations under Art. 1045 f. of the Croatian obligations act. However, for simplicity reasons, the authors focused on contract related claims which can be jointly presented in the following text.

In the first two constellations liability is typically governed by contractual arrangements and the general principles of fault-based liability under Croatian civil law. Between commercial parties or in relation to the employers clients, these obligations are usually determined through contracts, with liability arising in cases of non-performance or breach. In addition to this regime, various other relevant regimes exist like delict liability or liability for defective products. While these layers are legally relevant, a detailed treatment of strict product deficit liability and delict liability regimes falls outside the scope of this paper, which seeks to remain focused on employment-related implications and would otherwise require significantly broader analysis.

The relationship between employer and employee introduces additional complexity. On one hand, employers may be subject to strict liability for harm suffered by employees if such harm results from violations of workplace safety standards or the failure to provide adequate training, in line with the presented OSH standards. On the other hand, employees bear only limited liability towards their employer, and are generally liable for damages caused in the course of employment only in cases of gross negligence or intentional misconduct. This framework becomes particularly complex in cases where an employee, acting as part of the employment duties[71] or in relation to their employment relationship[72], causes harm to a third party, for example, by misusing or incorrectly operating an AI system in a way that leads to contractual damages. In such cases, the employer is liable based on presumed fault but can be exempted by proving that the employee acted with due care and in accordance with professional standards under the given circumstances.[73]

To examine these issues, the following analysis is structured according to the general requirements for contractual liability, with specific elements emphasized where relevant: (1) the existence of a breach of a contractual or statutory obligation arising from the employment relationship; (2) the occurrence of damage, whether material or non-material; (3) a causal link between the breach and the damage, assessed based on the principle of adequate causation and (4) the presence of fault on the part of the breaching party, unless the law provides otherwise, for example in the case of strict (objective) liability.[74]

---

71 See on the position of the Supreme Court of the Republic of Croatia, VSRH, Revr – 986/17 from 11 July 2018.

72 Vera, B. *et al.*, Veliki komentar novog Zakona o radu, Vaša knjiga, Zagreb, 2010, p. 153.

73 Art. 1061 para. 1 Obligations Act.

74 In detail about the development of these requirments see for example: Laleta, S., *Neka pitanja odgovornosti za štetu koju prouzroči posloprimac pri izvršavanju činidbe rada prema austrijskom pravu*, 1016 Zb. Prav. fak. Sveuč. Rij., 1991, Vol. 27, No. 2, pp. 1005-1031; Perkušić, T., *Zaštita i odgovornost za*

4.2. BREACH OF CONTRACT

Employers will usually enter into contractual relationships with AI providers or distributers in order to use AI systems. Thus contracts between Employers (in the role of AI deployers) on one side and AI providers or distributers will usually determine key aspects of their obligations. As mentioned above, actors like AI system providers cannot contractually transfer obligations that they have under the AI Act to other parties and through this relieve their responsibilities under the act itself. Commercial subjects are however free to distribute responsibilities on commercial law matters amongst themselves. Thus contractually agreeing on a higher burden on the operator under contract law is generally possible. However, such a transfer is limited by art. 345 para. 1 of the Croatian obligations act, which prevents contracting parties to exculpate a party in advance for gross negligence or intent. As the AI act clearly defines the legal obligations of a AI system provider, this standard cannot be decreased. However, contractually the obligations of the AI deployer can be increased in a manner that the deployer supports the fulfilment of the obligations of the AI provider, thus shifting part of the obligations to the deployer. For example, in the aforementioned case of AI-systems used to operate industrial robots, it is possible that the AI Provider agreed with the deployer to provide daily reports and ensure daily testing of the industrial robot. This standard could go beyond the minimum requirement in the AI Act for deployers, but a violation would shift at least part of the responsibility to the deployer.

Employers will furthermore have to enter into contractual relationships with employees.[75] Under Croatian employment law, including the integrated EU acquis, employers have numerous obligations, including the above already mentioned requirements to ensure employee safety, give clear instructions and adequate training.[76] Furthermore, employers are responsible for damages under general civil law principles towards their employees[77], while employees have an *ex lege* limitation only for gross negligence and intent.[78] Thus, in cases where an employee doesn't operate an AI-system in line with provided standards, and this causes damages, it would have to be established both under domestic employment law and the AI act, if the employee has sufficiently been trained for the use of the system, and even if this was the case, if he acted grossly negligent. It is thus clear that in cases

štetu od mobinga na radu i u vezi s radom, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 42, No. 3, 2021, pp. 853-872.

75 Art. 10 para. 1 Croatian Employment Act, Offical Gazette No. 93/14, 127/17, 98/19, 151/22, 46/23, 64/23.

76 Art 3 f. Croatian Workplace safety act, Offical Gazette No. 71/14, 118/14, 154/14, 94/18, 96/18.

77 Art. 111 Croatian Employment Act.

78 Art. 107 Croatian Employment Act.

where damages to an employee are caused by autonomous robots, autonomous vehicles or other comparable machinery, the employee will usually have a claim against the employer directly. The EU legal framework here is much more relevant for the recourse rights of the employer to the manufacturer or seller of the defective technology.[79] Simultaneously, the employer is not able extent the contractual obligations of their employees in a comparable manner to what AI providers or distributers can through commercial contracts with them.

In this context, it can furthermore be considered what constitutes a breach of contract. In general this is non-fulfilment of an obligation or sub-par fulfilment. However, especially when it comes to AI-systems, it is important to consider the benchmark of fulfilment. A good example of this are AI systems that outperform humans. Some AI systems can exhibit performance beyond human capabilities and thus show significantly superior results to average comparable individuals (average individuals acting with reasonable care or experts acting with expert knowledge and care in a specific field). Here, the assessment benchmark first needs to be established, as an AI-system in this case should not be assessed against human capabilities alone, nor should their exceptional output automatically exempt AI system providers or deployers from liability. The mere fact that an AI performs beyond typical human standards does not justify lowering safety or accountability thresholds. For example, a medical diagnostic tool that significantly outperforms medical professionals in lung cancer diagnosis, cannot simply be considered to be working properly just because it has a higher accuracy rate than medical experts. This is only logical, as many tools and software solutions have served to improve on human behaviour, and have set new standards. For example, the standard for functioning telecommunications isn't the distance that humans can naturally communicate, and the standard for a search engine isn't how fast an individual can conduct library research on a topic.

At the same time, setting the industry's top-performing system as the baseline for non-defectiveness would create unrealistic expectations and discourage healthy competition, potentially leading to market concentration and innovation stagnation. Instead, some authors propose that the evaluation of such systems should be based on principled criteria: whether the system's design reflects a reasonable balance of risks and benefits, whether it serves a legitimate and socially beneficial purpose, and whether users are properly informed about any unavoidable limitations or risks. This

[79] Andrea, B., *Artificial Intelligence and Civil Liability, Study for the Policy Department for Citizens' Rights and Constitutional Affairs*, Directorate-General for Internal Policies, PE 621.926 - July 2020, p. 105, available at:
[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/621926/IPOL_STU(2020)621926_EN.pdf], Accessed 1 April 2025.

ensures that technological excellence does not come at the expense of user protection or legal clarity, while still promoting ongoing innovation in high-performance AI.[80]

4.3. DAMAGE

While AI Systems become increasingly advanced and simultaneously more beneficial for commercial use, many employers still avoid implementing more complex AI systems. Liability for damages caused by AI systems are considered one of the key reasons why corporations avoid implementing these technologies[81]. In relation to contractual damages, the general principle is that the creditor is entitled to compensation for ordinary damage and loss of profit, as well as equitable compensation for non-material damage, which the debtor must have foreseen at the time of the conclusion of the contract as possible consequences of the breach of contract, considering the facts that were known or ought to have been known to him at that time[82]. For example, in relation to logistics software, the AI system provider must have been aware that a fault in the system can cause delays to third parties and thus damage production chains. However, if the system hasn't had a component that grades employee performance and the employer hasn't notified the provider of planned changes or integrations to the system, the system provider could not have expected potential damages to employees caused by these systems. In contrast, AI systems that are initially categorized as high-risk imply a broader understanding of expected risks. So for example an AI provider will have to consider in advance all types of potential damages that can be caused in relation to medical diagnostics AI or heavy machinery.

4.4. CAUSAL LINK

The public consultation preceding proposals for the regulations on AI liability has shown that there is a strong support for harmonization in this area. Specific issues that were raised were challenges concerning the burden of proof and access to information important to assess the role of AI in causing damages, as well as the relationship between clear compensation rights and trust in the use of AI[83].

---

80 Hacker, *op. cit.,* note 23, p. 17.

81 European Commission, Directorate-General for Communications Networks, Content, and Technology, European enterprise survey on the use of technologies based on artificial intelligence: final report, Publications Office, 2020. The survey refers to the broader category of natural language processing models, p. 71 f.

82 Art. 346 para. 1 ZOO.

83 European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DGGROW)Directorate-General for Justice and Consumers (DG JUST): Adapting Civil Lia-

In general, it is necessary to prove that a contract violation has caused damages. In practice, this can be very challenging concerning AI systems which are adaptable, continuously developing and often highly complex[84]. A causal link under the *condition sine qua non* principle can be established both with the developer as well as the operator of an AI-system. For example, faulty inputs of an operator that affected the machine learning process of an AI-system of an industrial robot, can impact the actions of a robot which in turn can cause serious damage.[85] Here the question would be if the provider has given clear instructions and established sufficient safety mechanisms and if the deployer has followed these instructions. It would furthermore have to be considered to what extent the employer as deployer of the AI has conducted sufficient training and given clear instructions towards the employees as natural persons who work with the AI system. While these considerations are already complex, it has also to be considered that AI-systems will increasingly be integrated with other systems, including various other AI-systems, which will only make it more difficult to identify the cause of a harmful event.[86]

The responsibility of commercial users of AI driven robots towards their employees is strongly influenced through the employers obligations under worker protection laws in the EU and member states[87]. While the AI directive aims primarily at the AI System provider, actually a majority of the risks concerning the use of new technologies will likely contractually be shifted towards the employer. Further-

---

bility Rules to the Digital Age and Artificial Intelligence - Factual summary report on public consultation, Ref. Ares (2022)2620305 - 06/04/2022, p. 7 f. Available at: [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12979-Civil-liability-adapting-liability-rules-to-the-digital-age-and-artificial-intelligence/public-consultation_en], Accessed 1 April 2025.

84 European Commission, *op. cit.*, note 4. p. 20.

85 See Cauffman, C., *Robo-liability: The European Union in search of the best way to deal with liability for damage caused by artificial intelligence*, Maastricht Journal of European and Comparative Law, Vol. 25, No. 5, 2018, pp. 527-532.

86 European Commission, *op. cit.*, note 4, p. 22.

87 Bertolini, *op. cit.*, note 82, p. 104 with further references: in this respect see: (i) Directive 2006/42/EC of the European Parliament and of the Council of 17 May 2006 on machinery, and amending Directive 95/16/EC, OJ L 157, 9 June 2006; (ii) Regulation (EU) 2016/425 of the European Parliament and of the Council of 9 March 2016 on personal protective equipment and repealing Council Directive 89/686/EEC, in OJ L 81, of March 31st, 2016; (iii) Council Directive 89/686/EEC of 21 December 1989 on the approximation of the laws of the Member States relating to personal protective equipment, OJ L 399, 30 December1989; (iii) Directive 2009/104/EC of the European Parliament and of the Council of 16 September 2009 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directiv within the meaning of Article 16(1) of Directive 89/391/EEC), in OJ L 260, of October 3rd, 2009; and (iv) Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace (first individual directive within the meaning of Article 16 (1) of Directive 89/391/EEC), in OJ L 393, 30 December 1989.

more, employers will have to cover most damages caused in relation to mistakes made by their employees. Studies have shown that with AI based systems and robots becoming more autonomous, the blame for errors is shifted towards them instead of the co-worker operating them[88]. Especially when considering special worker protection regulation in the EU and the particular liability distribution between employer and employee, it is valid to question whether current civil law is fit to regulate work accidents related to AI.[89] A helpful aspect in this regard is already existing legislation on specific AI related systems. For example, Germany has determined that a driver up to autonomy level 4 is responsible to supervise the driving task and resume control when this is required. If the driver does not act under these rules, an accident would usually be considered human error. In the case that an accident still occurred, even though the driver did not violate his obligations, the liability would fall to the owner, while it would be questionable against whom in the value-chain of the self-driving car the owner would have potential recourse claims.[90]

Furthermore, AI transparency is a topic that is central to the consideration of liability distribution amongst all parties in workplace related accidents[91]. In order to determine whether an accident was the result of human error, a mistake in the AI or an unforeseen event, it will often be necessary to analyse the decision-making process of the AI[92]. This can be complex in many cases of complex products, or expert products like diagnostic software. This is especially the case if the AI is provided by third parties through a business model like artificial intelligence as a service (AIaaS) where the creator of the AI holds all intellectual property rights and will not be inclined to share confident data on the AI model or data set with other parties.[93] It is especially problematic, that AIaaS can regularly be updated and thus previously reliable AI solutions might contain errors and thus cause dam-

---

88 Furlough, C.; Stokes, T.; Gillan D. J., *Attributing Blame to Robots: I The Influence of Robot Autonomy,* Human Factors, 2019.

89 Taes, S., *Robotisation and Labour Law: The Dark Factory: the Dark Side of Work?* in Artificial Intelligence and the Law, Intersentia, 2021; Study of the European Parliamentary Research Service, Panel for the Future of Science and Technology: AI and digital tools in workplace management and evaluation An assessment of the EU's legal framework, PE 729.516 – May 2022 EN, p. 5, available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/729516/EPRS_STU(2022)729516_EN.pdf], Accessed 1 April 2025.

90 Bertolini, *op. cit.,* note 82, p. 109.

91 Matthews, J., *Patterns and Antipatterns, Principles, and Pitfalls: Accountability and Transparency in Artificial Intelligence*, AI Magazine, 2020, p. 86 f.

92 European Parliament, "Resolution with recommendations to the Commission on a civil liability regime for artificial intelligence", Brussels, 20 October 2020. 2020/2014(INL), p. 6, available at: [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.html], Accessed 1 April 2025.

93 European Parliamentary Research Service, *op. cit.*, note 92.

ages.[94] While the data collection requirements under the AI act will be helpful to ensure that adequate data exists on deployer and provider levels, the extent to which such data will be provided in civil procedures to the counter party, will have to be determined in practice, based on the legitimate interests to protect business secrets and the obligation to provide transparent services and defend the position under contractual damages.

For purposes of comparison, it makes sense to mention the AILD in this context. The AILD would have created a presumption of casual link in cases where a violation of the obligations of the AI act can be proven and a reasonable case can be made for causation under tort law.[95] Under the AILD the injured party would have only hade to provide plausible evidence related to damages caused by a high-risk AI system, while the respective actor would have had to disclose relevant information that can contribute to the proof of damages and causation. In case that such information is not provided, this would constitute a rebuttable presumption of a breach of duty of care.[96]

4.5 FAULT

To which level fault has to be determined depends on the type of contractual relationship. Under Croatian contract liability law, the injured party usually only has to prove a breach of contract, while ordinary negligence is assumed and for most cases sufficient to represent a valid basis for a claim for damages. The debtor can be released from liability for damages if they prove that they could not fulfil their obligation, or that the delay in fulfilment was due to external, extraordinary, and unforeseeable circumstances arising after the conclusion of the contract, which they could not have prevented, eliminated, or avoided.[97] This general principle has wide reaching consequences when employees cause harm due to their actions. As already mentioned above, employers bear the commercial risk of their activities[98] and thus employees are only liable in cases of their gross negligence. However, as

---

94 Study of the European Parliamentary Research Service, Panel for the Future of Science and Technology: AI and digital tools in workplace management and evaluation An assessment of the EU's legal framework, PE 729.516 – May 2022 EN, p. 32, available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/729516/EPRS_STU(2022)729516_EN.pdf], Accessed 1 April 2025.

95 Tambiama, M., *Artificial Intelligence Liability Directive*, European Parliamentary Research Service, PE 739.342 (Feb. 2023), available at: [https://courses.ilac.eu/wp-content/uploads/2023/03/AI-DIRECTIVE.pdf], Accessed: 1 April 2025.

96 Novelli *et al.*, *op. cit.*, note 62, p. 2.

97 Art. 343 Croatian obligations act.

98 Supreme Court of the Republic of Croatia - VSRH, Revr – 150/17 from 3 July 2019.

only ordinary negligence is assumed on the side of the party that caused damages, employers do not just have to prove a breach of contract when harm to them or to third parties is caused by employees. In order to have a claim for damages or regress against their employees[99], they must prove the specific level of gross negligence on part of their employees.[100]

Furthermore, in relation between employer and AI system provider, it can be complex to prove who is at fault. This prof becomes even more complex if an AI system damaged a third party. For example, a generative AI system created a deep fake based on available images provided by an employee. It could be questionable, if the AI system didn't have enough safeguards in place or the instructions to deployers were unclear (fault of deployer), if the instructions were not clearly communicated to the employee, or the employee wasn't sufficiently trained to use the system (fault of the employer/deployer), or the employee disregarded safety standards in order to simplify the completion of a task, and used unauthorized images of clients (fault of the employee due to gross negligence or intent).[101]

In general, it is likely that the employer will be in a difficult spot due to their obligation to compensate for damages for incorrect use of AI systems by their employees, strict contractual obligations through which AI system providers and distributers will try to protect themselves, and the protected position of employees. Not just that employers have the obligation to provide adequate training and instructions on often very complex systems[102], employee liability is also limited to gross negligence and intent, which is particularly important in connection to AI systems for numerous reasons. On one hand, automation bias causes users to over-rely on systems even when they are incorrect; on the other, algorithmic aversion leads users to distrust accurate systems and override them unnecessarily. These conflicting tendencies, combined with reduced vigilance and insufficiently designed interfaces or oversight, make it difficult to ensure effective collaboration between operator and AI.[103]

Furthermore, these issues will only be more intense in highly complex environments. Especially in the field of diagnostic software and medical devices, human

---

99 Tintić, N., *Radno i socijalno pravo, knjiga prva: Radni odnosi (I)*, Narodne novine, p. 658.

100 See for example Supreme Court of the Republic of Croatia, Revr – 1504/16 od 15 May 2018.

101 Gross negligence of employees under Croatian law requires a clear breach of duty like the insuficient fulfilment of a duty within the description of their position, see Supreme Court of the Republic of Croatia VSRH, Rev – 834/05 from 5 October 2005.

102 Bertolini, *op. cit.,* note 82, p. 105.

103 For a comprehensie review with further references see: Arcila, *op. cit.,* note 8, p. 4.

oversight plays a crucial role.[104] An important distinction is weather AI based solutions support the medical practitioner or are able to operate autonomously. If an error occurs with a fully autonomous system, this would point to a liability of the manufacturer, but it is unlikely that such fully automated systems will be integrated soon.[105] It is much more likely that AI will serve as support for medical practitioners. Medical practitioners will thus be in a difficult position in cases where AI provides a diagnosis or proposes a procedure that has a very high likelihood of being accurate, but is still under 100%. In these cases, it is questionable to what extent a medical practitioner would be liable if he decides to accept the AI suggestion without additional tests, but it turns out to be false, or in the opposite situation decides against it, but his decision turns out to be false.[106] Simply conducting numerous additional tests as if there was no AI suggestion is however not a universal solution for this problem, as this is time consuming, resource intensive and would directly contradict the purpose of the AI system. Specialized and expert areas like medicine or law will in particular rely on sector specific standards in order to determine how to operate AI-systems.[107] Thus it will require adequate standards guided by current medical best practices.[108] In conclusion, it can thus be expected that AI implementation will require an increase in new working standards, particularly in more specialized fields.

5. CONCLUSIONS

The integration of AI systems into the workplace presents a complex legal landscape, which is especially challenging for employers who often find themselves at the crossroads of competing obligations. The EU's AI Act, the updated PLD, as well as the proposed AILD aim to establish a coherent regulatory framework. However, especially due to the abandoning of the AILD significant gaps remain, particularly in the realm of civil liability within employment contexts.

Employers, as AI deployers, have significant responsibilities under the AI Act, including compliance with safety standards, ensuring proper oversight, and safeguarding employee rights. At the same time, it can be expected that commercial contracts with AI providers will often shift an additional burden onto employers by imposing heightened obligations and indirectly limiting the provider's own li-

---

104 Onitiu, D., *The limits of explainability & human oversight in the EU Commission's proposal for the regulation on AI—a critical approach focusing on medical diagnostic systems*, *Inf Commun Technol Law*, 2023, Vol. 32, No. 2, pp. 170–188.

105 Bertolini, *op. cit.*, note 82, p. 111.

106 Bertolini, *op. cit.*, note 82, p. 113.

107 Onitiu, *op. cit.,* note 105, p. 187 f.

108 Bertolini, *op. cit.*, note 82, p. 113.

ability. These agreements, while sometimes permissible under commercial law, risk placing the employer in a disproportionately vulnerable legal position, especially given that providers retain intellectual property rights and may have a better overview over data relevant to assess liability early.

Simultaneously, employers must fulfil their duties to employees under national labour laws and EU workplace safety directives, which mandate safe working conditions, adequate training, and clear communication regarding new technologies. This duty of care is not mitigated by the increasing autonomy of AI systems; instead, it intensifies the employer's role as both operator and intermediary between the provider and the employee. Furthermore, while employers can potentially seek redress from AI providers or distributors, they are often the first point of liability.

This triangulated legal pressure, between contractual liability to providers, regulatory obligations to employees, and civil liability towards third parties, places employers in a uniquely precarious legal position. They are expected to manage AI systems they may not fully control or understand while ensuring both technical compliance and human safety.

Given this complexity, it can be expected that there will be a growing emphasis on developing clear best practices and technical standards, particularly in highly complex fields and areas where serious damages can occur. Such standards are essential not only for ensuring safe AI deployment but also for enhancing legal certainty. For employers in particular, these evolving norms will be crucial in helping to delineate reasonable expectations, clarify liability boundaries, and foster trust in AI technologies within the workplace.

REFERENCES

BOOKS AND ARTICLES

1. Babić, V.; Crnić, I.; Cvitanović, I.; Gotovac, V.; Gašpar Lukić, M.; Milković, D.; Tadić, I., Zuber, M.; Žic, I., Veliki komentar novog Zakona o radu, Vaša knjiga, Zagreb 2010.
2. Arcila, B. B., *AI liability in Europe: How does it complement risk regulation and deal with the problem of human oversight?*, Computer Law & Security Review, Volume 54, 2024
3. Cauffman, C., *Robo-liability: The European Union in search of the best way to deal with liability for damage caused by artificial intelligence*, Maastricht Journal of European and Comparative Law, Vol. 25, No. 5, 2018, pp. 527–532.
4. Ebers, M.; Hoch, V.; Rosenkranz, F.; Ruschemeier, H.; Steinrötter B, *The European Commission's Proposal for an Artificial Intelligence Act— A Critical Assessment by Members of the Robotics And Ai Law Society* (RAILS), J 4, No. 4, 2021, pp. 589–603.
5. Furlough, C.; Stokes, T.; Gillan D. J., *Attributing Blame to Robots: I The Influence of Robot Autonomy,* Human Factors, 2019.

6. Hacker, P.; Philipp, H., T*he European AI liability directives – Critique of a half-hearted approach and lessons for the future*, Computer Law & Security Review, Volume 51, 2023
7. Matthews, J., *Patterns and Antipatterns, Principles, and Pitfalls: Accountability and Transparency in Artificial Intelligence*, AI Magazine, 2020
8. Montagnani, M. L.; Najjar, M. C.; Davola, A., *The EU Regulatory approach(es) to AI liability, and its Application to the financial services market*, Computer Law & Security Review, Volume 53, 2024
9. Nissenbaum, H., *Accountability in a computerized society*, Science and engineering Ethics, Vol. 2, No. 1.
10. Novelli, C.; Casolari, F.; Hacker, P.; Spedicato, G.; Floridi, L., *Generative AI in EU law: Liability, privacy, intellectual property, and cybersecurity*, Computer Law & Security Review, Volume 55, 2024., pp. 1–16.
11. Onitiu, D., *The limits of explainability & human oversight in the EU Commission's proposal for the regulation on AI—a critical approach focusing on medical diagnostic systems*, *Inf Commun Technol Law*, 2023, Vol. 32, No. 2, pp. 170–188.
12. Perkušić, T., *Odgovornost za štete kod privremenog zapošljavanja*, Zbornik radova Pravnog fakulteta u Splitu, god. 58, 2/2021, pp. 633-655.
13. Perkušić, T., *Zaštita i odgovornost za štetu od mobinga na radu i u vezi s radom*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 42, No. 3, 2021, pp. 853-872.
14. Laleta, S., *Neka pitanja odgovornosti za štetu koju prouzroči posloprimac pri izvršavanju činidbe rada prema austrijskom pravu*, 1016 Zb. Prav. fak. Sveuč. Rij., 1991, Vol. 27, No. 2, pp. 1005-1031.
15. Taes, S., *Robotisation and Labour Law: The Dark Factory: the Dark Side of Work?* in Artificial Intelligence and the Law, Intersentia, 2021
16. Tintić, N., *Radno i socijalno pravo, knjiga prva: Radni odnosi (I)*, Narodne novine, 1969.

REGULATIONS AND DOCUMENTS

1. Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, COM(2021) 206 final, Brussels, 21 April 2021
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) No 167/2013 and (EU) No 168/2013 (Artificial Intelligence Act) [2024] OJ L168/1
3. Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community [2002] OJ L80/29
4. Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products (recast) [2024] OJ L[vol]/2024/2853
5. 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 (General Data Protection Regulation) [2016] OJ L119/1

6. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1
7. Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1
8. Zakon o radu [Croatian Employment Act], Narodne novine, No. 93/14, 127/17, 98/19, 151/22, 46/23, 64/23
9. Zakon o zaštiti na radu [Croatian Workplace Safety Act], Narodne novine, No. 71/14, 118/14, 154/14, 94/18, 96/18
10. Directive 2006/42/EC of the European Parliament and of the Council of 17 May 2006 on machinery, and amending Directive 95/16/EC [2006] OJ L157/24
11. Regulation (EU) 2016/425 of the European Parliament and of the Council of 9 March 2016 on personal protective equipment and repealing Council Directive 89/686/EEC [2016] OJ L81/51
12. Council Directive 89/686/EEC of 21 December 1989 on the approximation of the laws of the Member States relating to personal protective equipment [1989] OJ L399/18
13. Directive 2009/104/EC of the European Parliament and of the Council of 16 September 2009 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual directive within the meaning of Article 16(1) of Directive 89/391/EEC) [2009] OJ L260/5
14. Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace (first individual directive within the meaning of Article 16(1) of Directive 89/391/EEC) [1989] OJ L393/1
15. European Parliament, Resolution with recommendations to the Commission on a civil liability regime for artificial intelligence, 2020/2014(INL), 20 October 2020, 6 https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.html [accessed 1 April 2025]

JUDGMENTS AND OTHER DECISIONS

1. Supreme Court of the Republic of Croatia (VSRH) Revr 150/17, 3 July 2019
2. Supreme Court of the Republic of Croatia (VSRH) Rev 834/05, 5 October 2005
3. Supreme Court of the Republic of Croatia (VSRH) Revr 986/17, 11 July 2018
4. López Ribalda and Others v Spain [2019] ECHR 752, Applications Nos 1874/13 and 8567/13 (GC, 17 October 2019)

INTERNET SOURCES

1. Andrea Bertolini, *Artificial Intelligence and Civil Liability*, Study for the Policy Department for Citizens' Rights and Constitutional Affairs, DG Internal Policies, PE621.926 (European Parliament, July 2020) , available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/621926/IPOL_STU(2020)621926_EN.pdf], Accessed 1 April 2025.

2. European Commission, *Adapting Civil Liability Rules to the Digital Age and Artificial Intelligence – Factual Summary Report on Public Consultation*, Ref Ares(2022)2620305 (Publications Office, 2022), available at:
[https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12979-Civil-liability-adapting-liability-rules-to-the-digital-age-and-artificial-intelligence/public-consultation_en], Accessed 1 April 2025.
3. European Parliament, *Artificial intelligence: threats and opportunities* (2020) [https://www.europarl.europa.eu/topics/en/article/20200918STO87404/artificial-intelligence-threats-and-opportunities], Accessed 1 April 2025.
4. European Commission, *Liability for Artificial Intelligence and Other Emerging Digital Technologies* (Publications Office, 2019) 20
[https://data.europa.eu/doi/10.2838/573689], Accessed 1 April 2025.
5. European Parliamentary Research Service, *AI and Digital Tools in Workplace Management and Evaluation: An Assessment of the EU's Legal Framework*, PE729.516 (Panel for the Future of Science and Technology, 2022), available at:
[https://www.europarl.europa.eu/RegData/etudes/STUD/2022/729516/EPRS_STU(2022)729516_EN.pdf], Accessed 1 April 2025.
6. Tibor Madiega, *'Artificial Intelligence Liability Directive'*, PE739.342 (European Parliamentary Research Service, February 2023), available at:
[https://courses.ilac.eu/wp-content/uploads/2023/03/AI-DIRECTIVE.pdf], Accessed 1 April 2025

PRACTICAL APPLICATION OF THE DIGITAL SERVICES ACT - THE CASE OF THE SLOVAK REPUBLIC*

Simona Rudohradská, PhD
University of Pavol Jozef Šafárik in Košice, Faculty of Law
Kováčska 26, 040 75 Košice, Slovakia
simona.rudohradska@upjs.sk

ABSTRACT

The Digital Services Act is currently receiving significant attention not only from experts but also from the general public. As stated in Article 93 of the DSA, the regulation will be fully applicable from February 17, 2024. Member States were required to incorporate its provisions into their national legal systems and begin its practical implementation. The submitted paper addresses the issues associated with implementation of the Digital Services Act into the legal system of the Slovak Republic, which adopted DSA through amendment of the law, No. 264/2022 Coll., on media services. In the context of the Slovak Republic, we are currently witnessing the first decisions of the Council for Media Services, which imposed an obligation to remove illegal content. The objective of this paper is to examine the process of implementation and application of the Digital Services Act and analyse the relevant decisions of the Council for Media Services, focusing on comparison of the concept of illegal content under national Slovak law and European Union law.

Keywords: *application of Digital Services Act, Council for Media Services, Digital Services Act, illegal content, obligation to remove content*

1. INTRODUCTION

The proposals for Digital Services Act, along with the proposal for Digital Markets Act, were presented as drafts of regulations in December 2020. Extensive discussions were held regarding the final text of the relevant regulations, aimed at integrating the views and feedback of relevant stakeholders. The adoption of legally binding legislation in the form of a regulation was preceded by several initiatives, one of which can be identified as the European Commission's Communication

* This contribution was processed as partial output of the projects ALTAML 09I05-03-V02-00049 - Automation of legal text analysis based on machine learning.

"Tackling Illegal Content Online and Increasing the Responsibility of Online Platforms" from 2017.[1] This document already introduces the central idea, which is also incorporated as a principle in the Digital Services Act, namely—what is illegal offline is also illegal online.

In the process of implementing the Digital Services Act, relevant provisions were incorporated into the legal order of the Slovak Republic through Act No. 264/2022 Coll. on Media Services and Amendments to Certain Laws. This law not only incorporates the relevant provisions but also addresses the issue of an independent national regulatory body, which in the context of Slovakia is the Media Services Council. The Media Services Council serves as the coordinator of digital services, empowered to properly enforce the regulation at the national level. The role of the digital services coordinator also entails the responsibility of the Media Services Council for the proper implementation of the regulation at the national level and serving as the national coordinator in relation to other member states, the European Commission, intermediaries, service recipients, and other entities as outlined in the regulation. An essential criterion for the exercise of the digital services coordinator's role was the strict requirement for the independence of this body from both public and private entities.

In the preliminary definition of the issue to be examined in this paper, we found through an initial review of the research conducted on the subject of illegal content in the context of the DSA that this topic resonates significantly in the professional field. A wealth of resources is available on the subject of the Digital Services Act in general. A key question was therefore how to contribute most effectively and from which perspective this issue should be approached. In this regard, we have determined that a valuable contribution to this debate and topic would be to address the practical application of this regulation at the national level, with the aim of clarifying the national regulation and the position of the national authority authorized to enforce the relevant provisions of the regulation.

From a methodological perspective are used primarily methods of analysis, comparative analysis, qualitative research, synthesis and case studies. Within the framework of clarifying the use of methods, each method was used as follows: a) analysis and qualitative research—of the relevant legal texts in the form of applicable legislation or judicial and administrative decisions, b) comparison of the selected parts of Digital Services Act with national law governing the relevant area at the national level, c) synthesis of key general conclusions, and d) case studies of first

[1] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions. Tackling Illegal Content Online Towards an enhanced responsibility of online platforms, COM/2017/0555 final.

publicly available decisions of Slovak national digital services coordinator. The aim of this contribution is not only to examine the implementation and practical application of the Digital Services Act, but also to compare the concept of illegal content under national Slovak law and European Union law. Given the scope of the main objective of this paper and its partial goals, the implementation process in other Member States of the European Union will not be subject to comparison, as it would exceed the defined framework.

2. DIGITAL SERVICES ACT IN GENERAL

2.1. SCOPE AND APPLICABILITY

According to the Article 1(1) the aim of Digital Services Act is to contribute to the proper functioning of the internal market for intermediary services by 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. As can be inferred from the definition of the objective of the Digital Services Act, its application is aimed at providers of intermediary services on the internal market. The European legislator further divides the regulation in Article 1 (2) of DSA into three main areas, which are as follows: a) a framework for the conditional exemption from liability of providers of intermediary services; b) rules on specific due diligence obligations tailored to certain specific categories of providers of intermediary services; c) rules on the implementation and enforcement of this Regulation, including as regards the cooperation of and coordination between the competent authorities. Intermediary services are further defined in Article 3 (g) as information society services, specifically a) a mere conduit services, a caching service and hosting service.

The normative part of the DSA, Articles 2(1) and 2(2) of the DSA stipulate that "this regulation applies to intermediary services offered to service recipients who are established in the Union or are located therein, regardless of where the providers of such intermediary services are established. This regulation does not apply to any service that is not an intermediary service, nor to any requirements imposed in connection with such a service, irrespective of whether the service is provided through an intermediary service." Therefore, in determining the specific entities to which the Digital Services Act will apply, the location of their registered office, or in the terminology of the Digital Services Act—the place of establishment—is not decisive. Instead, the key indicator can be considered as the place of establishment of the recipients of these intermediary services (*the user base*), which should be in the territory of the Union. The individuals who can be understood as service recipients are defined in Article 3(b) of the Digital Services Act, where it specifies

that any natural or legal person who uses an intermediary service, particularly for the purposes of searching for or making information accessible, is considered a service recipient. These natural and legal persons thus constitute the user base of intermediary services, encompassing both the consumer spectrum of service recipients as well as commercial users. Within the scope of the regulation, the normative text excludes from its scope all services that are not intermediary services.[2]

2.2. CATEGORIES OF DUTIES AND BRIEFLY ABOUT THE LIABILITY REGIME OF ONLINE PLATFORMS

The obligations of the addressees of the Digital Services Act, i.e., providers of intermediary services, are primarily concentrated in Chapters II and III of the DSA. These chapters are further subdivided into sections. The systematization of specific obligations is organized according to the status of the providers of intermediary services. Chapter II is dedicated to the liability of providers of intermediary services and includes provisions on horizontal liability exemptions, which were previously applied through the Electronic Commerce Directive (E-Commerce Directive).[3] Prior to the adoption of the Digital Services Act, the original legal framework regulating the liability of online platforms was primarily governed by the E-Commerce Directive. This directive laid the foundation for the regulation of information society services, the prohibition of a general monitoring obligation, and the horizontal framework for conditional exceptions from liability. At first glance, it might appear that with the initial trends towards stricter regulation in the form of a new regulation, the regulation would intervene more significantly in the concept of liability. However, this assertion would not be entirely accurate. The relationship between the Digital Services Act and the E-Commerce Directive is characterized by Article 2(3) of the Digital Services Act, which stipulates that the regulation does not affect the application of the E-Commerce Directive. Therefore, the role of the Digital Services Act is not to replace or substitute the E-Commerce Directive. By comparing Articles 12 to 15 of the Digital Services Act with Articles 3 to 9 of the E-Commerce Directive, there are no significant changes in the liability regime for providers of intermediary services, as confirmed by other relevant scholarly literature.[4] In order to maintain the legal certainty provided to providers of intermediary services by the horizontal framework of conditional liability exemptions set out by

[2] Article 2 (2) of Digital Services Act.

[3] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('E-Commerce Directive'), OJ L 178, 17 July 2000, pp. 1–16.

[4] Cauffman, C.; Goanta, C., *A new order: The digital services act and consumer protection*, European Journal of Risk Regulation, Volume 12, Issue 4, 2021, p. 763.

the Electronic Commerce Directive, this framework facilitated the emergence and expansion of many new services across the internal market. For these reasons, this legal framework has been preserved.[5] Frosio and Geiger in this regard state that, past frameworks, such as the ECD, have established limited liability regimes that included exemptions for DSPs, offering robust safeguards for users' fundamental rights. Recent modifications to this paradigm have been introduced through the C-DSM Directive. In this evolving landscape, the DSA deserves praises for its careful effort to preserve the ECD long-standing balance of fundamental rights. Rather than disrupting this equilibrium, the DSA accentuates the importance of fundamental rights online, taking very seriously the task of safeguarding the fundamental rights of users, platforms, and other affected parties.[6]

In addition to the aforementioned exemptions, Chapter II also contains a provision that emphasizes that proactive measures aimed at detecting, identifying, and removing illegal content do not result in providers of such intermediary services being excluded from or ineligible for liability exemptions (Article 7). The user interface differs from one platform to another; however, each platform has its own system for addressing issues related to illegal content or posts—this includes the method and format of reporting such content, the procedural steps taken by the platform, and ultimately the assessment and resolution of the reported case. In this context, a platform's proactivity may also be reflected in the use of filters or algorithms designed to detect and intercept manifestly inappropriate content before it becomes publicly accessible to the wider user base of the platform. At the same time, there is also a prohibition on a general monitoring obligation or an active duty to investigate facts (Article 8), which, according to established literature, protects content creators and gatekeepers of user-generated content, similar to how media privileges protect journalists and news organizations when they publish editorial content.[7]

The categorization of obligations for service providers under the DSA is outlined in Chapter III, which is divided into individual sections. Section 1 is dedicated to provisions applicable to all providers of intermediary services, Section 2 summarizes additional provisions applicable to providers of hosting services, including online platforms, Section 3 focuses on additional provisions applicable to providers of online platforms. Section 4 establishes provisions applicable to providers of online platforms enabling consumers to enter into distance contracts with traders. Section 5 regulates additional obligations for providers of very large online plat-

5 Point 16 of Preamble of Digital Services Act.

6 Frosio, G.; Geiger, C., *Taking Fundamental Rights Seriously in the Digital Services Act's Platform Liability Regime*, European Law Journal, Volume 29, Issue 1-2, 2023, p. 75.

7 Husovec, M., *Principles of the Digital Services Act*. Oxford: Oxford University Press, 2024, ISBN 978-0-19-288245-5, p. 67.

forms and very large internet search engines to manage systemic risks. Finally, the last Section 6 governs other provisions concerning due diligence obligations. The obligations, status, and competencies of the authorities responsible for the enforcement and application of the relevant provisions of the DSA are concentrated in Chapter IV. This area will be addressed in more detail in the section focused on Digital Services Coordinators.

3. NATIONAL IMPLEMENTATION CONTEXT

Prior to the entry into force of the Digital Services Act and its implementation into national law, the regulation of digital services in Slovakia was not governed by a unified framework. The principal legal act governing digital services, or more precisely, information society services, was Act No. 22/2004 Coll. on Electronic Commerce, which was based on the E-Commerce Directive. It is also important to mention that the first version of Act No. 264/2022 Coll. regulated selected digital services, particularly video-sharing platforms. In the context of data collection concerning users of digital platforms, reference must also be made to Act No. 18/2018 Coll. on the Protection of Personal Data. All of the aforementioned laws have remained in force and effect even after the implementation of the Digital Services Act into the Slovak legal order. The most significant amendments, however, were made to Act No. 264/2022 Coll. on Media Services.

As mentioned in several parts of this contribution, the Digital Services Act was adopted in the form of a regulation. According to Article 288 TFEU, a regulation has general applicability, is binding in its entirety, and is directly applicable in all Member States. Given the chosen form of the legal act, it can be deduced that the aim was to unify respectively highly harmonize the regulated area. For the purposes of mapping the process of applying the DSA Regulation, we will analyse the explanatory report published during the adoption process of Act No. 264/2022 Coll. on Media Services. In the general section of this explanatory report, the Slovak national legislator states that the objective of the national implementation through the draft law is to ensure the enforceability of the rights and obligations arising from Regulation (EU) 2022/2065.[8] Furthermore, the explanatory report notes that the DSA introduces new harmonized rules for providers of intermediary services, including social networks, online marketplaces, internet search engines, web hosting and cloud services, online travel and accommodation platforms, app stores, and other types of online platforms. It is emphasized that the regulation will also apply

[8] National Council of the Slovak republic. Explanatory Report to the Draft Act on Amendments to Act No. 264/2022 Coll. on Media Services., available at: [https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=547911], pp. 1-3, Accessed 14 April 2025

to providers from third countries if they offer services to users in the EU. In addition to regulating intermediary services, the DSA also aims at more effective action against illegal content disseminated through online intermediary services and introduces new obligations for providers of these services, differentiated by the size and type of provider. The proposed pan-European supervisory framework, which is to be based on intensive cooperation between digital service coordinators and the European Commission, is designed to ensure a safe, predictable, and trustworthy online environment.[9] The Slovak Republic initiated the implementation process only after repeated calls from the European Commission, which launched infringement proceedings against it pursuant to Article 258 of the TFEU.[10]

Another crucial aspect of the implementation process is the designation of the so-called Digital Services Coordinator, who is responsible for the proper enforcement of the DSA Regulation at the national level. This authority shall act as the national point of coordination in relation to other Member States, the European Commission, providers of intermediary services, recipients of such services, and other relevant entities as defined by the Regulation. A key requirement for the exercise of the Digital Services Coordinator's role is strict independence from both public and private entities. In the context of the Slovak Republic, the Council for Media Services has been identified as the most suitable candidate for assuming this coordinating role.[11] This institution may build on its existing competences concerning content-sharing platforms and video-sharing platforms under the current Act No. 264/2022 Coll. on Media Services. Furthermore, it is stipulated that the DSA requires that the Coordinator should be provided with sufficient technical, financial, and human resources to enable the impartial, transparent, and timely exercise of oversight in the online environment.[12]

Interestingly, in the course of implementing the DSA, the national legislator also decided to incorporate Regulation (EU) 2019/1150[13] of the European Parliament

---

9 *Ibid.,* p. 1.

10 According to the information contained in the explanatory report to the Act on Media Services, infringement proceedings against the Slovak republic were conducted under the reference number INFR(2024)2042, with a Letter of Formal Notice issued by the European Commission under the number C(2024)2188 final.

11 National Council of the Slovak republic. Explanatory Report to the Draft Act on Amendments to Act No. 264/2022 Coll. on Media Services, available at: [https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=547911], p. 1, Accessed 14 April 2025.

12 This follows primarily from Article 50 of Digital Services Act, but it is also emphasized in the preamble of Digital Services Act, point 111.

13 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11 June 2019, pp. 57–79.

and of the Council into the Act on Media Services, which, pursuant to Article 19(2) thereof, has been applicable since 12 July 2020. Busch and Mak state that Regulation 2019/1150 served as a significant model for the Digital Services Act.[14] It is commonly referred to as the P2B Regulation and applies to providers of online intermediation services and online search engines—particularly online marketplaces, app stores, social media platforms for businesses, price comparison tools, and general online search engines—through which traders established in the EU offer goods or services to consumers within the EU. The aim of this Regulation is to enhance fairness and transparency in the online business environment, thereby enabling businesses to operate across borders within the EU internal market. Regulation (EU) 2019/1150 introduces a range of obligations for online intermediation services and online search engines designed to prevent unfair commercial practices by platforms towards business users, which may otherwise restrict domestic and cross-border online sales and negatively affect consumers in the EU. To date, the enforcement of Regulation (EU) 2019/1150 in the Slovak Republic has fallen within the competence of judicial authorities. However, no increased interest in the assertion of rights under this Regulation has been observed, and no publicly available court decisions applying the Regulation have been identified. In this context, it should also be noted that the European Commission has initiated infringement proceedings against the Slovak Republic under Article 258 of the TFEU for failing to ensure sufficiently appropriate and effective enforcement of this Regulation.[15]

4. THE CONCEPT OF ILLEGAL CONTENT

4.1. ILLEGAL CONTENT IN EUROPEAN LAW

The issue of illegal content was addressed in the European Commission's Communication from 2017, but since it was a legal act with no binding force, it had more of a recommendation character.[16] The European Commission regards the issue of illegal content as an urgent matter that must be addressed. Through this Communication, online platforms were "urged" to intensify efforts to tackle this problem

---

[14] Busch, C.; Mak, V., *Putting the Digital Services Act into Context: Bridging the Gap between EU Consumer Law and Platform Regulation,* Journal of European Consumer and Market Law (EuCML), Issue 3, 2021, p. 109.

[15] National Council of the Slovak Republic. Explanatory Report to the Draft Act on Amendments to Act No. 264/2022 Coll. on Media Services, available at: [https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=547911], p. 1-2, Accessed 14 April 2025.

[16] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions tackling Illegal Content Online Towards an enhanced responsibility of online platforms, COM/2017/0555 final.

in relation to the responsibility arising from their central role in society. In the context of detecting and reporting illegal content, the European Commission outlined various ways in which online platforms may become aware of the existence of illegal content, primarily highlighting: a) court orders or administrative decisions; b) notifications from competent authorities (such as law enforcement agencies), c) specialized "trusted flaggers," intellectual property rights holders, or ordinary users; or the platform's own investigation or knowledge.[17]

The purpose of the European Commission's Communication was not to harmonize the definition of illegal content, as it states that "what is illegal is determined by specific legal provisions at the EU level, as well as national legislation."[18] Prior to the adoption of the DSA, this area was regulated by the E-Commerce Directive. The E-Commerce Directive included the so-called notice and takedown model, whereas the DSA regulates the so-called notice and action model.[19] The DSA similarly approaches the definition of illegal content. Article 3(1)(h) of the Digital Services Act defines illegal content as any information that, either by itself or by referring to any activity, including the sale of products or the provision of services, is not in accordance with the laws of the Union or any Member State, regardless of the specific subject or nature of those laws. Interpreting this definition leads to the conclusion that illegal content can essentially be considered anything that is in conflict with the legal provisions of Member States or the legal provisions of individual Member States.

At first glance, it might seem that illegal content primarily refers to content that conflicts with criminal law. However, such an understanding of illegal content cannot be considered correct and, for the purposes of regulating digital services, it would be highly restrictive. According to the wording of the DSA, the term "illegal content" should be defined broadly to encompass information related to illegal content, products, services, and activities. Specifically, this term should be understood to refer to information that, regardless of its form, is considered illegal under applicable laws, either by being inherently illegal - such as illegal hate speech, terrorist content, or illegal discriminatory content - or because the applicable rules are illegal due to their relation to unlawful activities.[20]

---

17 Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions tackling Illegal Content Online Towards an enhanced responsibility of online platforms, COM/2017/0555 final.

18 *Ibid.,* p. 6.

19 Rojszczak, M., *The Digital Services Act and the Problem of Preventive Blocking of (Clearly) Illegal Content*, Institutiones Administrationis-Journal of Administrative Sciences, Vol. 3, No. 2, 2023, p. 46.

20 Point 12 of Preamble of Digital Services Act.

Illustrative examples of illegal content include the sharing of child sexual abuse material, the unlawful distribution of private images without consent, online harassment, the sale of unsafe or counterfeit products, the offering of goods or services in violation of consumer protection laws, the unauthorised use of copyrighted content, the illegal offering of accommodation services, or the unlawful sale of live animals. Conversely, a video recording by an eyewitness of a potential crime should not be considered illegal content solely on the grounds that it depicts an unlawful act, provided that the recording or public dissemination of such footage is not prohibited under national law or Union law.[21] As follows directly from the operative part of the definition of illegal content, in conjunction with the recitals of the DSA, the objective is to encompass a broader range of illegal content, with due regard to multiple areas of law, including but not limited to intellectual property law, consumer protection law, unfair competition law, privacy law, and others.

According to Wilman, with regard to certain specific forms of illegal content, those other instruments include for instance the Regulation on combating terrorist content online ('TCO Regulation') and the Directive on copyright in the digital single market ('CDSM Directive').[22] It can also be deduced from the above that the concept of illegal content goes beyond the criminal law understanding of this term. In the section devoted to general remarks and implications at national level, Wilman raises an important question: whether the aim of the DSA is to combat the dissemination of illegal content by users through intermediary services, or rather to protect users from over-removal of their information and other practices detrimental to their interests by the providers of such services. He argues that the DSA essentially seeks to pursue both objectives, though it places greater emphasis on the *protective* rather than the *repressive* dimension - one that reflects a form of "consumer-like" protection.[23] At the same time, Wilman links the scope of the DSA to its "sister" regulation, the Digital Markets Act (DMA), noting that moreover, if the DMA succeeds in strengthening competition in the online services sector, it will be easier for users – also thanks to the transparency achieved under the DSA – to choose another provider if they do not like, for example, the content moderation or the recommender system of their current provider. Better functioning of the market can therefore also bring about the necessary improvements.[24] Pursuant to Khan the broad definition of illegal content provides uncertainty for

21 Point 12 of Preamble of Digital Services Act.

22 Wilman, F., *The Digital Services Act (DSA) – An Overview*, [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4304586], p. 2, Accessed 14 April 2025.

23 *Ibid.,* pp. 16-18.

24 *Ibid*, p. 18.

implementation of specific mechanisms. The act adequately suggests there is a difference between non – illegal harmful content and illegal content.[25]

4.2. ILLEGAL CONTENT IN SLOVAK NATIONAL LAW

As it is stated by Husovec, the DSA does not harmonise what content or behaviour counts as illegal (Article 3(h)). The DSA basically refers to the entire legal system of its Member States to express what is illegal for the purpose of the DSA. In some areas, such laws can be harmonised, but this remains an exception.[26]According to Švec and coll. definition should encompass not only the content itself but also any associated information related to illegal content, products, services, and activities. Specifically, "illegal content" should include, regardless of its form, information that is illegal in itself or connected to unlawful activities under applicable law. This includes, but is not limited to, hate speech, terrorist content, discriminatory material, images depicting sexual abuse of children, and online harassment.[27] Act No. 264/2022 Coll. on Media Services defines illegal content for the purposes of the Act in § 151(2) as content that a) meets the criteria of child pornography or extremist material, b) incites conduct that constitutes any of the criminal offenses related to terrorism, c) approves conduct that constitutes any of the criminal offenses related to terrorism, d) or constitutes the criminal offense of denying or approving the holocaust, crimes of political regimes, and crimes against humanity, the criminal offense of defamation of a nation, race, and belief, or the criminal offense of incitement to national, racial, and ethnic hatred.[28] From the above citation, it is clear that the Slovak legislator, for the purposes of the Media Services Act, has defined illegal content by focusing on what are arguably the most serious manifestations of illegal content in the online space with the regard to the criminal law. *Argumentum a contrario*, if the content does not pertain to the enumerated categories of criminal offenses under Section 151(2)(a) to (d) of the Media Services Act, the affected entity would not be able to refer its complaint to the Digital

---

25 Khan, F., *Does the Digital Services Act achieve a balance between regulating deepfakes and protecting the fundamental right to freedom of expression?*, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4868290], p. 10, Accessed 14 April 2025

26 Husovec, M., *Principles of the Digital Services Act*. Oxford: Oxford University Press, 2024. ISBN 978-0-19-288245-5, p. 31.

27 Švec, M.; Madleňák, A.; Hladíková, V.; A Mészáros, P., *Slovak Mimicry of Online Content Moderation on Digital Platforms as a Result of the Adoption of the European Digital Services Act,* Media Literacy and Academic Research, Vol. 7, No. 2, 2024, p. 91.

28 Act No. 264/2022 Coll. on Media Services and on Amendments and Additions to Certain Acts. English version of this Act is available from: [https://www.culture.gov.sk/wp-content/uploads/2019/12/Act-No.-264_2022-Coll.-on-media-services-and-amending-certain-acts-Media-Services-Act-1.pdf].

Services Coordinator. In such a case, for example, if intellectual property rights were violated, the affected entity would have to use other means of legal protection. In the illustrated case, an effective remedy could be, for instance, a lawsuit filed with the competent court, primarily aiming at injunctions and reparative claims regarding the rights of the injured party.

For the purposes of a more in-depth analysis of the concept of illegal content, we examined the relevant section of the explanatory memorandum adopted in connection with the amendment of Act No. 264/2022 Coll. on Media Services.[29] As previously noted, the definition of illegal content for the purposes of the Media Services Act is contained in Section 151(2)(a) to (d) of Act No. 264/2022 Coll. on Media Services. Upon reviewing the relevant part of the explanatory memorandum (p. 55 et seq.), it may be stated that the legislator does not further elaborate or substantiate the underlying concept of illegal content. Instead, the memorandum merely asserts that, in the case of the specified categories of illegal content, it is desirable that complaints concerning such content be addressed without undue delay.[30] Another relevant source in this context appears to be the form through which a complaint may be submitted to the Council for Media Services. This form is available in template format on the official website of the Council for Media Services.[31] For the purposes of analysing which specific attributes are addressed in the Media Services Council's form submission as part of the assessment of the targeting procedure, in the next section we will focus on the specific text of the form submission, which is publicly available on the Media Services Council's website.[32]

From a practical perspective, the complaint form contains fields identifying the complainant and includes a notice stating that, if the Council for Media Services is not materially competent to assess the complaint, the complainant consents to the forwarding of their submission, including all annexes, to the competent authority, including an institution established in a Member State in which the relevant intermediary service is established- consent does not apply in the case of referral of a complaint based on the law.[33] The complainant is further required to specify the

---

29 National Council of the Slovak republic. Draft Act amending and supplementing Act No. 264/2022 Coll. on Media Services and on Amendments to Certain Acts, 2024, available at: [https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=547911], Accessed 26 June 2025

30 *Ibid.,* p. 55.

31 Council for Media Services, Complaints regarding online intermediation services and internet search engines under the DSA, 2024, available at: [https://rpms.sk/sites/default/files/2024-09/podnet_DSA.pdf], Accessed 8 April 2025.

32 The procedure for submitting a complaint is available at the following link: [https://rpms.sk/podanie-podnetu-na-preverenie-tykajuceho-sa-sprostredkovatelskej-sluzby].

33 Council for Media Services. Complaints regarding online intermediation services and internet search engines under the DS, available at:

grounds for the complaint by selecting relevant checkboxes - namely, whether the service provider has failed to designate or provide a single point of contact; whether such a contact point is difficult to locate or not up to date; whether the service provider cannot be contacted electronically; or whether the service provider only offers communication via automated means (e.g. a chatbot).[34] An "Other" option is also provided, in accordance with Article 12 of the DSA. Another section of the form is dedicated to matters governed by Article 14 of the DSA, which concerns the requirements applicable to terms and conditions.[35] The complainant may refer to elements they believe the provider has omitted or, alternatively, may specify the reasons for which they consider the terms and conditions to be incompatible with the relevant provisions of the DSA. Subsequently, the complainant may refer a matter to the Council on the grounds that the service provider has failed to publish a transparency report as required, which ought to be easily accessible, available in a machine-readable format, and include information regarding content moderation activities carried out during the relevant period.[36] A crucial part of the form, particularly in the context of illegal content, relates to the notification mechanism under Article 16 of the DSA.[37] The form lists seven primary grounds -presented as checkboxes - on the basis of which a complainant may contact the Council. These include: the absence of a mechanism in the provider's interface for reporting illegal content; the reporting mechanism not being easily accessible; the mechanism being user-unfriendly or not operable exclusively through electronic means; failure by the provider to issue an acknowledgement of receipt despite the user providing electronic contact details; failure to inform the user of the outcome of the complaint or failure to do so within a reasonable time; the decision not including information on available redress mechanisms; and failure of the notification to result in the removal of the illegal content. An open-ended "Other" category is also provided.[38] The final section of the form contains items relating to internal complaint-handling systems (Article 20 DSA), out-of-court dispute settlement (Article 21 DSA), measures and safeguards against misuse (Article 23 DSA), design and organisation of the online interface (Article 25 DSA), advertising (Article 26 DSA), and the transparency of recommender systems (Article 27 DSA).[39]

[/https://rpms.sk/sites/default/files/2024-09/podnet_DSA.pdf], p. 1., Accessed 8 April 2025.

34 *Ibid*., p. 1.

35 *Ibid*, p. 2.

36 *Ibid,* p. 2.

37 *Ibid,* p. 3.

38 *Ibid*, p. 3.

39 *Ibid,* pp. 4-7.

5. MECHANISM FOR EXERCISING RIGHTS

In addition to the strict requirement to respect the fundamental rights of affected parties, the online environment also reveals tendencies whereby shared content may not necessarily be illegal or infringing upon anyone's rights. Nonetheless, due to frequent reporting by other users without legitimate grounds, or as a result of erroneous assessments made by the platform's algorithms, individuals who have not violated either national law or European Union law may still be deprived of their freedom of expression in a targeted and biased manner. In such cases, platforms should carefully assess any restriction of a user's ability to access or use their account. This concern is directly addressed in Article 16 of the DSA, which imposes an obligation on providers of hosting services to implement mechanisms for the reporting of illegal content. These mechanisms must be easily accessible, user-friendly, and must allow submission of notifications exclusively through electronic means.[40] Among the requirements for a valid and reasoned notice, as outlined in Article 16(2)(a) to (d) of the DSA, particular emphasis is placed on point (d), which requires a declaration by the individual or entity submitting the notice that they act in good faith, believing the information contained in the notice to be accurate and complete. Such a notice should provide the platform with actual knowledge of the illegal content in question, without requiring any detailed legal analysis (Article 16(3) of the DSA). When deciding on reported illegal content, service providers may make use of automated means, provided that users are duly informed of such use. Furthermore, the handling of notices by hosting service providers must be timely, diligent, non-arbitrary, and objective (Article 16(6) of the DSA).

Article 18 of the Digital Services Act (DSA) governs the obligations of hosting service providers in cases where there is a suspicion of criminal offences. Specifically, when a provider becomes aware of any information giving rise to a suspicion that a criminal offence has occurred, is occurring, or is likely to occur—particularly where such offence poses a threat to the life or safety of a person—it shall, without undue delay, inform the law enforcement or judicial authorities of the relevant Member State.[41] Article 53 of DSA regulates situations in which a recipient of the service—or another entity, such as a body or organisation—is entitled to submit a complaint to the Digital Services Coordinator. The right to lodge such a complaint arises where the provider of the intermediary service has committed an infringement of the provisions of the DSA.[42]

40 Article 16 (2) (a) to (d) of Digital Services Act.

41 Article 18 (1) of Digital Services Act.

42 Article 53 of Digital Services Act.

5.1. AUTHORITY RESPONSIBLE FOR NATIONAL ENFORCEMENT OF THE DSA AND ITS COMPETENCES – DIGITAL SERVICES COORDINATORS

5.1.1. Legal framework within the meaning of the DSA

In several parts of this contribution, we refer to the fact that, under the legal framework of the Slovak Republic, the Digital Services Coordinator within the meaning of the DSA is the Council for Media Services. Each Member State is obliged to designate such an authority and equip it with the necessary powers. The list of designated authorities is published by the European Commission.[43] Within the framework of the DSA, the status and competences of Digital Services Coordinators are primarily set out in Articles 49, 50, and 51 of DSA. However, this enumeration is merely illustrative, as the powers of the Digital Services Coordinators extend beyond these provisions, and their tasks are "dispersed" throughout the Regulation.[44] The designated Digital Services Coordinator is responsible for all matters relating to the supervision and enforcement of the DSA within the respective Member State, unless such tasks have been assigned to other authorities. Its role also includes contributing to the effective and consistent enforcement of the Regulation. The requirements laid down in Article 50 DSA emphasise that Digital Services Coordinators must carry out their tasks impartially, transparently, and in a timely manner.[45] It remains the responsibility of the Member States to ensure that these authorities are equipped to effectively exercise their competences.[46] The scope of competences and powers of Digital Services Coordinators in relation to providers of intermediary services is set out in Article 51 DSA, which includes the power to request information from such providers, to conduct on-site inspections, or when necessary, to request the judiciary or other public authorities in their Member State to examine, seize, make copies, or otherwise obtain access to relevant information suspected of being linked to an infringement. The Coordinator is also entitled to request any employee or representative of the provider to supply relevant explanations.[47] In the area of law enforcement, Digital Services Coordi-

---

43 European Commission, Digital Services Coordinators. Brussels: European Commission, 2024, available at:
[https://digital-strategy.ec.europa.eu/en/policies/dsa-dscs], Accessed 14 April 2025

44 For instance, the power of the Digital Services Coordinator to request, in cases of a well-founded suspicion of a violation of the DSA that negatively affects service recipients, the adoption of necessary measures by the Digital Services Coordinator of the Member State of establishment of the provider of the intermediary service, pursuant to Article 58 of the DSA, as well as various other related powers.

45 Article 50 (1) of Digital Services Act.

46 Article 50 (1) of Digital Services Act.

47 Article 51 (1)(a) to (c) of Digital Services Act.

nators are empowered to accept commitments offered by providers in connection with their compliance with the DSA. They also have the authority to order the cessation of infringements of legal obligations, impose remedial measures proportionate to the infringement, issue fines, impose periodic penalty payments, adopt interim measures, or request the competent judicial authority to do so.[48]

5.1.2. Legal framework within the meaning of the national media services law

Under Slovak national law, specifically Act No. 264/2022 Coll. on Media Services, the Council for Media Services is referred to as a "regulator" (§ 1(c)). However, its responsibilities are not limited to the implementation of the DSA, it also holds competences in the field of broadcasting and retransmission.[49] As a comprehensive overview of all powers and competences of the Council for Media Services within the legal framework of the Slovak Republic would exceed the scope of this contribution, the focus here is restricted to a selected area and the related provisions.

With regard to the competences exercised under the DSA, the relevant provisions are found in § 150-153 of the Media Services Act. These articles regulate the submission and handling of notices requesting review (§150 of Media Services Act), filing a complaint regarding illegal content (§151 of Media Services Act), the procedure for preventing the dissemination of illegal content (§152 of Media Services Act), and the issuance of decisions on such prevention (§153 of Media Services Act). Several of these provisions have been discussed throughout this contribution, particularly in the context of the national legislator's approach to defining illegal content. The Senate of the Council examines the substance of notices concerning illegal content and must discuss the notice at a meeting held no later than 45 days from the date of registration of the respective submission.[50] The Council may also initiate proceedings *ex officio*, if it becomes aware -either on its own initiative or from external sources -of the existence of illegal content and if the matter is urgent.[51] It is the duty of the Council to inform the provider of content services about the initiation of proceedings aimed at preventing the dissemination of illegal content (in accordance with the Administrative Procedure

48 Article 51(2)(a) to (e) of Digital Services Act.

49 The competence of the Council for Media Services, not only in the area of regulating providers of intermediary services, is defined by § 110 of Act No. 264/2022 Coll. on Media Services within the framework of national legislation.

50 § 152(1) of Media Services Act.

51 § 152(3) of Media Services Act.

Code No. 71/1967 Coll.),[52] including a description of the content in question and the reasoning as to why the content may be considered illegal.[53]

The Council shall also inform the notifier of the outcome of the proceedings.[54] A content-sharing platform may remove content on its own initiative if it considers the content to be illegal, in such cases, the regulator is authorised to review the removal in the course of the proceedings. If it is found that the content is not illegal, the Council issues a decision to that effect.[55] A decision on the prevention of the dissemination of illegal content must include sufficient information to identify the content concerned - a justification as to why the content is deemed illegal, a statement explaining why the dissemination of such content threatens the public interest or significantly interferes with individual rights or legitimate interests of a person, and a time limit within which the provider must remove the illegal content.[56] Any person who believes that the effects of such a decision infringe their rights may submit an objection. However, the objection has no suspensive effect and the provisions of the Administrative Procedure Code do not apply to it.[57] Given the short period of application of the relevant provisions of the Digital Services Act, and taking into account the limited number of proceedings conducted under the DSA within the legal framework of the Slovak Republic, it would be premature to assess the application of the DSA or the Act on Media Services in the national context of the Slovak Republic and its potential effect on EU level.

6. CASE STUDIES

6.1. IN GENERAL ON DECISIONS APPLYING THE DIGITAL SERVICES ACT

Through the examination of decisions published thus far on the official website of the Council for Media Services, several recurring elements can be identified. These decisions are partially issued in both Slovak and English language. This bilingual format is justified by the need to address the removal order directly to the platform hosting the illegal content. Both decisions reference not only national legislation but also the DSA and the E-Commerce Directive.

---

52 § 152(4) of Media Services Act.

53 § 152(4) (a) to (b) of Media Services Act.

54 § 152(5) of Media Services Act.

55 § 152(7) of Media Services Act.

56 § 153(2) (a) to (d) of Media Services Act.

57 § 153(4) of Media Services Act.

The decisions further engage with the application of the so-called country-of-origin principle under Article 3 of the E-Commerce Directive, according to which providers of information society services are subject to the jurisdiction of the Member State in which they are established. This principle is further clarified by Recital 38 of the DSA, which states that "orders to act against illegal content and to provide information are subject to the rules protecting the jurisdiction of the Member State in which the provider concerned is established, and in certain cases to the rules laying down possible exceptions to that jurisdiction set out in Article 3 of Directive 2000/31/EC, but only if the conditions of that Article are fulfilled. As such orders relate to specific items of illegal content and information, if they are addressed to providers of intermediary services established in another Member State, they do not in principle limit the freedom of those providers to provide services across borders. Therefore, such orders do not fall within the rules laid down in Article 3 of Directive 2000/31/EC, including the rules requiring justification of any measures derogating from the jurisdiction of the Member State of establishment by certain specific reasons and the rules on notification of such measures."

As a result, where an order is issued to remove a specific item of illegal content hosted on a content-sharing platform by one of its users, there is no need to apply the country-of-origin principle under Article 3(2) of the E-Commerce Directive. Consequently, it is not necessary to follow the procedural framework set out in Article 3(4) and (5) of the E-Commerce Directive, or in § 3(5) and (6) of Act No. 22/2004 Coll. on Electronic Commerce, which provide for derogation from that principle.

6.2. DECISION ON THE OBLIGATION TO REMOVE ILLEGAL CONTENT – SOCIAL NETWORK X

For the purposes of analysing the decision-making activity of the Digital Services Coordinator, we examined the database of decisions published by the Council for Media Services.[58] At the time of preparing this contribution, two decisions were available on the Council's official website concerning the obligation to remove illegal content under the DSA. The first decision in the legal context of the Slovak Republic applying the DSA is Decision No. RNO/1/2024 of the Council for Media Services, which concerns the removal of illegal content from the social network X (formerly Twitter).[59] This decision serves as a practical example of applying the rules arising

[58] Council for Media Services, Decisions regarding the content of broadcast and provided services: Case No. RNO/1/2024, available at: [https://rpms.sk/sites/default/files/2024-10/RNO_1_2024.pdf], Accessed 12 April 2025.

[59] Council for Media Services, Decisions regarding the content of broadcast and provided services: Case No. RNO/1/2024, [https://rpms.sk/sites/default/files/2024-10/RNO_1_2024.pdf], Accessed 12 April 2025.

from Regulation (EU) 2022/2065 within a national administrative procedure. The Council ordered the platform X to remove a specific user post that had been assessed as illegal under Slovak law. The territorial scope of the decision extended across the entire European Union, with the exception of the Slovak Republic (since, upon verification, the content was no longer available at the relevant URL and the administrative proceedings were therefore discontinued). However, the post remained accessible in other Member States of the EU. The decision was thus qualified as an order to act against illegal content within the meaning of Article 9 of the DSA.

The decision clearly indicates that the DSA does not provide a standalone legal basis for issuing removal orders and it rather operates as a procedural and enforcement framework, harmonising formal requirements for decisions with cross-border effects. The Council's legal authority was based on § 153(1) of the Slovak Media Services Act, while the DSA served to ensure compatibility with EU rules, particularly regarding the content, delivery, and territorial scope of the order. In line with Article 9(2) of the DSA, the decision included a reference to the legal basis, justification of the illegality of the content, precise identification and location data (URL), as well as information on remedies available to affected parties.

A key element of the decision was its cross-border application, as the obligation to remove the content applied only in the territory of other EU Member States. This aspect aligns with Recital 31 of the DSA, which emphasises the need for effective and harmonised implementation of national decisions with cross-border impact. The Council correctly noted that the DSA merely codifies and develops existing practices, previously defined for example by the case-law of the Court of Justice of the European Union (C-18/18, Glawischnig-Piesczek).[60] The decision also addresses the issue of the temporal applicability of the DSA, as the administrative proceedings were initiated before the Regulation's full applicability (17 February 2024). In this regard, the Council relied on settled case-law of the CJEU, which holds that procedural rules apply to pending proceedings once they have entered into force (referring to C-293/04, Beemsterboer).[61]

It follows from the decision that the DSA does not establish new substantive obligations for providers in the area of content removal, but rather standardises and enhances the procedural aspects of the enforcement of such obligations. The case also demonstrates how the DSA can be effectively integrated into the national regulatory framework, contributing to the balance between the protection of fun-

[60] Case C-18/18, *Eva Glawischnig-Piesczek v. Facebook Ireland Limited* [2019] Court of Justice of the European Union, ECLI:EU:C:2019:821.

[61] Case C-293/04, *Beemsterboer Coldstore Services BV v. Inspecteur der Belastingdienst/Douane Zuid* [2006] Court of Justice of the European union ECLI:EU:C:2006:162.

damental rights and the public interest on the one hand, and the freedom of expression on the other.

6.3. DECISION ON THE OBLIGATION TO REMOVE ILLEGAL CONTENT - SOCIAL NETWORK *FACEBOOK*

Decision No. RNO/2/2024 of the Council for Media Services[62] dated 18 December 2024, represents, according to publicly available sources, the second decision of the application of the DSA within the legal framework of the Slovak Republic. The subject of the proceedings concerned the dissemination of user comments on the Facebook platform (Meta Platforms Ireland Ltd.), which the Council for Media Services classified as illegal content within the meaning of Slovak criminal law. Specifically, the posts were considered to potentially meet the elements of criminal offences pursuant to § 423(1)(a) of Act No. 300/2005 Coll., the Criminal Code -namely, the offence of defamation of a nation, race or belief -and § 424(1) of the Criminal Code, i.e., incitement to violence against a group of persons or an individual based on their actual or perceived affiliation with a particular race, nation, nationality or ethnic group. For this reason, the content in question could be qualified as illegal content under § 151(2)(a) and (d) of the Media Services Act. The decision further addresses the application of relevant provisions of the Criminal Code to the specific factual circumstances of the case, assessing the comments posted by users of the social network in response to a public post. In its reasoning, the Council for Media Services cites national scholarly literature as well as key case law of the European Court of Human Rights, including the judgment in Perinçek v. Switzerland, in which the ECtHR held that it is necessary to examine "whether the statements, interpreted and viewed in their immediate or wider context, can be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance," adding that "in assessing this issue, the Court has shown particular sensitivity to sweeping statements attacking or casting a negative light on entire ethnic, religious or other groups."[63] Similarly, reference was made to the judgment in Sanchez v. France, in which the Court held that "hate speech is not always openly expressed. It can take various forms, including not only clearly aggressive and offensive statements that deliberately undermine the values of tolerance, social peace and non-discrimination, but also implicit statements which, even if cautiously worded or presented in hypothetical terms,

---

62 Council for Media Services, Decisions regarding the content of broadcast and provided services: Case No. RNO/2/2024, available at: [https://rpms.sk/sites/default/files/2025-02/RNO_2_2024.pdf], Accessed 12 April 2025.

63 Judgement *Perinçek v. Switzerland* (2015) European Court of Human Rights, Application No. 27150/08, point 206.

may nonetheless amount to hate speech."[64] The content was also assessed as illegal within the meaning of Article 3(h) of the DSA, which enabled its removal from the digital environment.

The Council issued a binding order to the platform Meta, requiring the removal of thirteen specific user comments and the prevention of their further dissemination. The territorial scope of the decision was limited exclusively to the territory of the Slovak Republic. The decision was qualified as an order to act against illegal content within the meaning of Article 9 of the Digital Services Act (DSA). It included a legal basis in national legislation (§ 153 of Act No. 264/2022 Coll.), a justification of the illegality of the content in question, precise identification of the comments including their location data (URLs), information on available remedies, as well as the territorial scope of the order. The order was served on Meta electronically via the established single point of contact, in accordance with Article 11 of the DSA, and its relevant parts were also provided in English, thereby fulfilling the requirement of linguistic clarity and accessibility. The decision also referred to Article 6 of the DSA, which regulates the liability exemption for hosting service providers. This exemption does not apply if the provider fails to remove illegal content after being informed of its existence by a public authority. Therefore, the Council rightly concluded that failure to comply with the order could lead to liability on the part of the platform for breaching the DSA.

7. CONCLUSION

The modernisation of the legal framework governing online platforms in a broad sense -including the adoption of both the Digital Markets Act (DMA) and the Digital Services Act (DSA) - has been a necessary step to ensure a safer and more transparent online environment. Due to the nature of the substantive obligations and the creation of new procedural frameworks introduced by the DSA, Member States have been assigned more responsibilities in its implementation compared to the DMA. The competences of national competition authorities are significantly limited under the DMA, as its enforcement is primarily entrusted to the European Commission. In contrast, the DSA envisages a considerably more active role for Member States, as evidenced by the establishment of Digital Services Coordinators and the definition of the scope and structure of their competences. The DSA also foresees intensive cooperation not only among the Digital Services Coordinators across the Member States but also between them and the European Commission, as well as other relevant national authorities. In the legal context

[64] Judgement *Sanchez v. France* (2023) European Court of Human Rights, Application No. 45581/15, point 157.

of the Slovak Republic, the role of Digital Services Coordinator is carried out by the Council for Media Services, whose powers in the field of digital services are defined by Act No. 264/2022 Coll. on Media Services. According to the existing decision-making practice of the Slovak Digital Services Coordinator, two decisions have so far been issued concerning the obligation to remove illegal content from online platforms. At the European level, the concept of illegal content can be considered extensive, encompassing violations of intellectual property rights, consumer protection rules, and aspects of unfair competition. The European Union's broad interpretation of the term *illegal content*, which defines it as any information that, by itself or by reference to an activity, is not in compliance with Union law or the law of a Member State, allows for the specific characteristics of individual Member States to be taken into account when determining the scope of this concept. This allows for the interpretation and application of illegal content removal to reflect the specificities of the legal systems of individual Member States, taking into account the diversity of legal cultures and sociological perspectives. In contrast, the national understanding of illegal content under the Slovak Media Services Act is more narrowly defined, limited exclusively to a selection of criminal offences considered to be of the most serious nature. An overly narrow interpretation of the term *illegal content* may hinder the ability of affected parties to enforce their rights, particularly if the notion is understood solely through the lens of criminal law, as reflected in the Media Services Act. If the term were to include other domains, such as unfair commercial practices or intellectual property law, affected parties could similarly seek the removal of such content by submitting a complaint to the Council for Media Services. Naturally, in cases involving complex conduct -such as infringements of intellectual property rights or fraudulent accommodation offers - more extensive and demanding evidentiary procedures may be required. However, in certain situations, the interference with legal rights is manifest and readily identifiable. In such instances, the swift removal of content that infringes upon the rights of a legitimate rights holder (i.e. illegal content in the broader sense adopted by the Digital Services Act) could contribute to more effective enforcement of claims and prevent further harm from occurring.

REFERENCES

BOOKS AND ARTICLES

1. Busch, C.; Mak, V., *Putting the Digital Services Act into Context: Bridging the Gap between EU Consumer Law and Platform Regulation*, Journal of European Consumer and Market Law (EuCML), Issue 3, 2021
2. Cauffman, C.; Goanta, C., *A new order: The digital services act and consumer protection*, European Journal of Risk Regulation, Volume 12, Issue 4, 2021

3. Frosio, G.; Geiger, C., *Taking Fundamental Rights Seriously in the Digital Services Act's Platform Liability Regime*, European Law Journal, Volume 29, Issue 1-2, 2023,
4. Husovec, M. *Principles of the Digital Services Act*. Oxford: Oxford University Press, 2024, ISBN 978-0-19-288245-5
5. Khan, F., *Does the Digital Services Act achieve a balance between regulating deepfakes and protecting the fundamental right to freedom of expression?* [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4868290], Accessed 14 April 2025
6. Rojszczak, M., *The Digital Services Act and the Problem of Preventive Blocking of (Clearly) Illegal Content*, Institutiones Administrationis-Journal of Administrative Sciences, 2023, Vol. 3, No. 2
7. Švec, M.; Madleňák, A.; Hladíková, V.; A Mészáros, P., *Slovak Mimicry of Online Content Moderation on Digital Platforms as a Result of the Adoption of the European Digital Services Act,* Media Literacy and Academic Research, 2024, Vol. 7, No. 2
8. Wilman, F., *The Digital Services Act (DSA) – An Overview*, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4304586], p. 2, Accessed 14 April 2025

COURT OF JUSTICE OF THE EUROPEAN UNION

1. Case C-18/18, *Eva Glawischnig-Piesczek v. Facebook Ireland Limited* [2019] Court of Justice of the European Union, ECLI:EU:C:2019:821
2. Case C-293/04, *Beemsterboer Coldstore Services BV v. Inspecteur der Belastingdienst/Douane Zuid* [2006] Court of Justice of the European union ECLI:EU:C:2006:162

ECHR

1. Judgement *Perinçek v. Switzerland* (2015) European Court of Human Rights, Application No. 27150/08
2. Judgement *Sanchez v. France* (2023) European Court of Human Rights, Application No. 45581/15

EU LAW

1. Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions. Tackling Illegal Content Online Towards an enhanced responsibility of online platforms, COM/2017/0555 final
2. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 17 July 2000
3. 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

4. Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11 July 2019
5. Treaty on the Functioning of the European Union, OJ C 326, 26 October 2012
6. 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, 12 October 2022

LIST OF NATIONAL REGULATIONS, ACTS AND COURT DECISIONS

1. Council for Media Services, Complaints regarding online intermediation services and internet search engines under the DSA, 2024, available at: [https://rpms.sk/sites/default/files/2024-09/podnet_DSA.pdf], Accessed 8 April 2025
2. Council for Media Services, Decisions regarding the content of broadcast and provided services: Case No. RNO/1/2024, available at: [https://rpms.sk/sites/default/files/2024-10/RNO_1_2024.pdf], Accessed 12 April 2025
3. Council for Media Services, Decisions regarding the content of broadcast and provided services: Case No. RNO/2/2024, available at: [https://rpms.sk/sites/default/files/2025-02/RNO_2_2024.pdf], Accessed 12 April 2025
4. National Council of the Slovak republic. Draft Act amending and supplementing Act No. 264/2022 Coll. on Media Services and on Amendments to Certain Acts, 2024, available at: [https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=547911], Accessed 26 June 2025
5. National Council of the Slovak republic. Explanatory Report to the Draft Act on Amendments to Act No. 264/2022 Coll. on Media Services. Available at. [https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=547911], Accessed 14 April 2025
6. Act No. 264/2022 Coll. on Media Services and on Amendments and Additions to Certain Acts, Collection of Laws of the Slovak Republic. 2022
7. Act No. 18/2018 Coll. on the Protection of Personal Data and on the amendment and supplementation of certain acts, as amended, Collection of Laws of the Slovak Republic, 2018
8. Act No. 22/2004 Coll. on Electronic Commerce and on amendment and supplementation of Act No. 128/2002 Coll. on State Control of the Internal Market in Consumer Protection Matters and on amendment of certain acts, as amended, Collection of Laws of the Slovak Republic, 2004

WEBSITE REFERENCES

1. European Commission, 2025. Digital Services Coordinators. [online]. Brussels: European Commission, Available from: [https://digital-strategy.ec.europa.eu/en/policies/dsa-dscs], Accessed 14 April 2025

Original scientific paper

AI SYSTEMS AND PRODUCT LIABILITY IN THE EU: A PRIVATE INTERNATIONAL LAW ANALYSIS

Curzio Fossati, Post-doctoral researcher
University of Cagliari, Department of Political and Social Sciences
Via Sant'Ignazio da Laconi, 78, 09123 Cagliari (CA), Italy
curzio.fossati@unica.it

ABSTRACT

The paper analyses liability for defective AI systems from a private international law perspective.

It begins with a brief analysis of the main reasons for the adoption of the new Directive 2024/2853 of 23 October 2024 on liability for defective products and the role of this Directive in the new EU legal framework on artificial intelligence, examining in particular its interplay with Regulation 2024/1689 of 13 June 2024 laying down harmonised rules on artificial intelligence (AI Act).

The paper then focuses on the lack of a specific regulation of private international law issues in the above-mentioned legal framework and the consequent need to consider other sources of law to address these issues. To this end, it first examines the relevant provisions of Regulation 1215/2012 (Brussels I bis), in particular the special forum for torts (Article 7 (No. 2)), and its interpretation by the CJEU in cases of defective products. It also deals with the conflict-of-laws rules of Regulation 864/2007 (Rome II) - especially Article 5, on damages caused by a product - and their coordination with the 1973 Hague Convention on the Law Applicable to Products Liability.

The aim of the paper is to examine the results of the application of the current rules on jurisdiction and applicable law to cases of defective AI systems, and to highlight their main critical issues and possible solutions. The author proposes the introduction of new heads of jurisdiction and conflict-of-law rules that would strike a fairer balance between the interests at stake: protecting people from the serious harm that AI systems could cause, and promoting the free movement of these systems in the EU market.

***Key words**: Applicable Law, Artificial Intelligence, EU Law, Non-contractual obligations, Jurisdiction, Product liability*

1. INTRODUCTION

As the European Commission pointed out in its White Paper of 19 February 2020, artificial intelligence is developing rapidly, changing our lives and bringing economic, social and environmental benefits, such as improving prevision and

optimising resource allocation and operations.[1] At the same time, however, the use of AI systems carries the risk of undermining both public interests in terms of health and safety and fundamental human rights, as it can be a source of physical, psychological, social or economic harm to users (loss of life, infringement of privacy, damage to property, etc.).[2] For this reason, the EU institutions have taken the initiative to outline a regulatory framework for artificial intelligence, with the dual aim of promoting the adoption of these technologies and protecting people from the potential risks they pose.

This framework mainly consists of: (i) the new Regulation 2024/1689/EU of 13 June 2024 laying down harmonised rules on artificial intelligence (AI Act);[3] (ii) the new directive 2024/2853/EU of 23 October 2024 on liability for defective products. [4]

The first act sets out harmonised rules for the placing on the market, putting into service and use of artificial intelligence systems ("AI systems")[5] in the European Union, following a "risk-based approach": the more the AI system poses potential risks to the health, safety or fundamental rights of users, the stricter the requirements are.[6]

The second one amends the regime of liability for defective products laid down in the previous Directive 85/374[7] in order to reduce the burden of proof on injured parties in all cases where it is particularly difficult to demonstrate the existence of the defect and the causal link between that defect and the damage, in particular because of the technological nature of the defective product.[8]

---

1 White Paper on Artificial Intelligence - A European approach to excellence and trust, COM(2020) 65 final.

2 *Ibid*.

3 European Parliament and Council Regulation 2024/1689/EU laying down harmonised rules on artificial intelligence and amending Regulations 300/2008/EC, 167/2013/EU, 168/2013/EU, 2018/858/EU, 2018/1139/EU and 2019/2144/EU and Directives 2014/90/EU, 2016/797/EU and 2020/1828/EU [2024] OJ L1689/1 (Artificial Intelligence Act).

4 European Parliament and Council Directive 2024/2853/EU on liability for defective products and repealing Council Directive 85/374/EEC [2024] OJ L2853/1 (Product Liability Directive).

5 Article 3 (No. 1) of the AI Act defines AI system as 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".

6 See AI Act, recital 26 and art. 5 (on prohibited AI practices), art. 6 (on classification rules for high-risk AI systems) and art. 50 (on transparency obligations for providers and deployers of certain AI systems).

7 Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210/29.

8 The EU legal framework on artificial intelligence is completed by the European Parliament and Council Regulation 2023/988/EU on general product safety [2023] OJ L135/1, and the European Parliament and Council Regulation 2023/1230/EU on machinery [2023] OJ L1653/1. These acts set out

The legal framework on artificial intelligence should have included aspects of civil liability for damage caused by AI systems. In fact, on 28 September 2022, the European Commission published a proposal for a Directive on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive).[9] However, as indicated in the Commission Work Programme 2025, published in February 2025, the proposal was withdrawn due to the lack of foreseeable agreement.[10] The Commission stated that it would assess whether another proposal should be made or whether a different approach should be chosen.

Instead, private international law issues seem to be completely neglected in the overall regulatory intervention. This may be surprising as AI systems typically operate in a cross-border context: on the one hand, it is likely that the different operators in the chain of production and marketing of such systems, as well as the users and, more generally, the persons involved, are often located in different States; on the other hand, the use of these systems is usually via the Internet, and the damages therefore occurs in a virtual space, rather than on the territory of a specific country.[11] It is therefore necessary to consider other legal sources to resolve the private international law issues of cases involving artificial intelligence.

This paper will focus on cases of liability for defective AI systems with cross-border elements and will seek to identify the regulation of such cases by coordinating the new EU regulatory framework on artificial intelligence and pre-existing sources of private international law. To this end, it will first analyse Directive 85/374/EEC on product liability and the main issues it has raised in cases of damage caused by defective AI systems (para. 2.1). Then, it will examine the new Directive 2024/2853/EU (para. 2.2.) and its interplay with the AI Act and with a possible EU regime on AI liability (para. 2.3). The article then turns to private international law issues (para. 3), starting with the relevant rules of the Regulation 1215/2012/EU

---

new rules on product conformity (outside the scope of the AI Regulation) and rules on the safety of machinery, considering the new risks posed by emerging digital technologies, including artificial intelligence.

9 Proposal for a European Parliament and Council directive on adapting non-contractual civil liability rules to artificial intelligence, COM(2022) 496 final (AI Liability Directive). It is worth noting that the proposal followed the European Parliament's resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)).

10 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Commission work programme 2025, COM(2025) 45 final, Annex IV, p. 26.

11 See: Ho-Dac, M., *The EU AI Act and Private International Law: A First Look Developments in PIL, EU Legislation, Normative Texts, Views and Comments*, 2024, available at: [https://eapil.org/2024/10/21/the-eu-ai-act-and-private-international-law-a-first-look/], Accessed 5 March 2025; Henckel, K., *Issues of conflicting laws–a closer look at the EU's approach to artificial intelligence*, Nederlands Internationaal Privaatrecht, No. 2, 2023, p. 199.

on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I bis)[12] and the related case law of the CJEU (para. 3.1), followed by the conflict-of-law rules of the Hague Convention of 2 October 1973 on the law applicable to product liability[13] and Regulation 864/2007/EC on the law applicable to non-contractual obligations (Rome II)[14] (para. 3.2). Finally, it will make some concluding remarks on the critical aspects of the current legal framework and possible alternative solutions (para. 4).

2. THE NEW PRODUCT LIABILITY DIRECTIVE AND ITS INTERPLY WITH OTHER INSTRUMENTS OF THE EU LEGAL FRAMEWORK ON AI

2.1. DIRECTIVE 85/374/EEC AND THE AI CHALLENGES

Cases of defective AI systems have some specific elements that distinguish them from general cases of defective products. Two examples may better illustrate these peculiarities. A self-driving car crashed and seriously injured the driver: the accident was caused by a defect in the car's AI-based camera, which failed to detect an obstacle on the road and stop the car. Artificial intelligent software used in a hospital misdiagnosed a patient's disease: doctors suggested the wrong treatment and the patient died.

Such cases have raised several questions for practitioners and academics.

Firstly, it has been discussed whether the EU product liability regime could apply due to the specific nature of AI systems. This regime was originally established by Directive 85/374/EEC, which harmonised the Member States' rules on liability for damage caused by a defective product, defining the cases in which the product could be considered defective (Article 6), setting out the allocation of the burden of proof between the injured party and the producer (Articles 4 and 7), and establishing the three-year limitation period for bringing an action for damages (Article 10). Article 2 of the Directive defines "product" as all movables, except for primary agricultural products and games, even if incorporated into another movable or immovable good. This definition has led some scholars to argue that the Directive only applies when the damage is caused by AI systems embedded

[12] European Parliament and Council Regulation 1215/2012/EU on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.

[13] The Hague Conference of Private International Law Convention of 2 October 1973 on the Law Applicable to Products Liability.

[14] European Parliament and Council Regulation 864/2007/EC on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

in hardware, as it does not apply to intangible and immaterial goods such as software and other digital products.[15] Furthermore, Article 9 of the Directive defines the damage caused by defective products to which it applies, i.e. death, personal injury, damage to or destruction of property other than the product itself. Some authors have therefore doubted that the Directive could apply to AI systems, as it is uncertain whether they would be able to cause such damage: again, the doubts concern artificial intelligence systems that are not embedded in hardware.[16]

On the other hand, it has also been debated whether the regime provided by the Directive 85/374 would be appropriate in cases of defective AI systems. Indeed, according to Article 4 of the Directive, the injured party bears the burden of proving the damage, the defect of the product and the causal link between the defect and the damage.[17] However, the complexity, "opacity" and unpredictability of the outputs of AI systems make it quite difficult for the injured party to shift the burden of proof, especially on the causal link.[18]

2.2. THE NEW PRODUCT LIABILITY DIRECTIVE AND DAMAGES CAUSED BY DEFECTIVE AI SYSTEMS

These reasons contributed to the EU legislator's decision to amend the regime of the Directive 85/374.[19] In particular, as stated in the Explanatory Memorandum of the proposal for the new Product Liability Directive, it was legally unclear how

---

15 Cappiello, B., AI-Systems and non-contractual liability: a european private international law analysis, Giappichelli, Torino, 2022, p. 68; Bruggemeier, G., *Tort Law of the European Union*, Kluwer Law International, Alphen aan del Rijin, 2015, p. 293; Wuyts, D., *The product liability directive more than two decades of defective products in Europe*, Journal of European Tort Law, Vol. 5, No. 1, 2014, p. 1.

16 Bussani, M.; Palmer, V.V., *The liability regimes of Europe – their fracades and interiores*, in: Bussani, M.; Palmer, V.V. (eds.), Pure economic loss in Europe, Cambridge University Press, Cambridge, 2011, p. 3; Tutt, A., *An FDA for Algorithms*, Administrative Law Review, Vol. 69, No. 1, 2017, p. 83.

17 Pursuant to Article 6 (1) of the Directive 85/374 "a product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including: (a) the presentation of the product; (b) the use to which it could reasonably be expected that the product would be put; (c) the time when the product was put into circulation", and pursuant to Article 6 (2) "a product shall not be considered defective for the sole reason that a better product is subsequently put into circulation". According to Article 7, the producer could be exempted from liability by proving special circumstances, such as the fact that the product was not put into circulation or that the defect causing the damage was probably not present at the time when the product was put into circulation.

18 Cappiello, *op. cit.*, note 15, p. 68; Zech, H., *Liability for AI: public policy considerations*, ERA Forum, Vol. 22, No. 1, 2021, p. 147. The term "opacity" appears frequently in the EU legal framework on AI and in the preparatory work. It refers to the so-called "black box effect" of AI systems, i.e. the impossibility of understanding the decision-making process of AI systems based on algorithms.

19 See *inter alia* Karanikić Mirić, M., *Product Liability Reform in EU*, Eu and Comparative Law Issues and Challenges Series (ECLIC), Vol. 7, 2023, p. 387.

to apply the definitions of Directive 85/374 to "products in the modern digital and circular economy (e.g. software and products that need software or digital services to function, such as smart devices and autonomous vehicles)"; furthermore, "the burden of proof […] was challenging for injured persons in complex cases (e.g. those involving […] AI-enabled products)".[20]

In order to address these challenges, the new Directive 2024/2853 introduces two important changes. Firstly, it provides a new definition of product as "movable property, even if integrated into, or connected to another movable or immovable", included "electricity, digital manufacturing files, raw materials and software".[21] Secondly, the new Directive maintains the same rule on the injured party's burden of proof as in Article 6 of Directive 85/374, but adds significant (rebuttable) presumptions in favor of the victim, in certain cases.[22]

These new provisions have two important implications. First, it is now clear that the EU product liability regime covers damage caused by AI systems, whether or not they are embedded in hardware, since the new definition of products includes immaterial and intangible goods. Secondly, the new presumptions set out in Article 10 lighten the burden of proof for persons injured by defective AI systems. In particular, Article 10 (3) provides that the defectiveness of the product or the causal link between its defectiveness and the damage, or both, shall be presumed where: "(a) the claimant faces excessive difficulties, in particular due to technical or scientific complexity, in proving the defectiveness of the product or the causal link between its defectiveness and the damage, or both; and (b) the claimant demonstrates that it is likely that the product is defective or that there is a causal link between the defectiveness of the product and the damage, or both".[23]

2.3. THE INTERPLAY BETWEEN THE NEW PRODUCT LIABILITY DIRECTIVE, THE AI ACT AND A POSSIBLE AI LIABILITY REGIME

There are strong links between the new Product Liability Directive and the AI Act as they could be seen as complementary.[24] The AI Act sets out specific standards that an AI system should meet before being placed on the EU market. The

---

20 Proposal for a European Parliament and Council Directive on liability for defective products, Explanatory memorandum, COM(2022) 495 final, pp. 1-2.

21 New Product Liability Directive, art. 4 (a).

22 New Product Liability Directive, art. 10.

23 New Product Liability Directive, art. 10 (4).

24 See Poesen, M., *Jigsaw Pieces Falling into Place: Do the Territorial Scopes of the AI Act and the Revised Product Liability Directive Dovetail?*, 2025, available at:

New Directive ensures, among other things, that if AI systems are defective (also because they do not meet the requirements laid down in the AI Act) and cause damage, the victim can claim compensation from the manufacturer.[25] The complementarity between the two instruments is clear from Article 10 (2) (b) of the new Product Liability Directive. According to this provision, the product is presumed to be defective if the claimant proves that "the product does not comply with mandatory product safety requirements laid down in Union or national law that intended to protect against the risk of the damage suffered by the injured person". This provision could clearly be interpreted to mean that if an AI system is involved, the defect of that system will be presumed if the claimant proves that it does not comply with the requirements laid down in the AI Act.[26]

Furthermore, even the withdrawn proposal for the AI Liability Directive would have been complementary to both the AI Act and the Product Liability Directive. In fact, this proposal was based on two main provisions: (i) the power of national courts to order providers to disclose evidence of high-risk AI systems suspected of causing damage (Article 3); (ii) a rebuttable presumption of the existence of a causal link between the defendant's fault and the output of the AI system in certain cases, some of which related to the failure to comply with the requirements and obligations under the AI Act (Article 4). In addition, Article 1 (3) (c) of the proposal stated that the AI Liability Directive would not affect any rights recognized to an injured person by national provisions enacting the Product Liability Directive.

It is worth noting, however, that despite the withdrawal of the proposal, any AI liability regime that might be introduced would be complementary to the Product Liability Directive. Indeed, Article 2 (4) (b) of the latter states that this Directive is without prejudice to the rights which an injured person may have under national provisions on contractual or non-contractual liability for causes other than the defectiveness of a product, including national provisions implementing Union law. Therefore, in cases of damage caused by AI, any AI liability regime that might be adopted would be complementary to the Product Liability Directive: The latter regime would apply in cases where the victim claims to have suffered damage caused by a defect of an AI system, whereas the former regime would apply where the victim claims damages for a reason other than the defect of the system, such as damage caused intentionally by the use of a tool based on artificial intelligence.[27]

[https://eapil.org/2025/01/29/jigsaw-pieces-falling-into-place-do-the-territorial-scopes-of-the-ai-act-and-the-revised-product-liability-directive-dovetail/], Accessed 5 March 2025.

25 See the proposal for the new Directive on liability for defective products, Explanatory memorandum, p. 4 and Directive 2024/2853, recital 13.

26 See Poesen, *op. cit.*, note 24.

27 An example of damage deliberately caused by using AI could be a machine learning algorithm that has been programmed to transfer money from a bank account to the operator's bank account (see Lein,

3. PRIVATE INTERNATIONAL LAW ISSUES IN CASES OF DAMAGE CAUSED BY DEFECTIVE AI SYSTEMS

While the instruments that compose the EU legal framework on AI are complementary, they are not consistent in terms of their respective territorial scope.[28] The AI Act provides a specific rule on its territorial scope (Article 2), which states that the Act applies not only to operators of AI systems established or located in the EU, but also to providers and deployers established or located in a third country, where the AI system is placed on the EU market or where its output is used in the EU.[29] Instead, the New Product Liability Directive does not contain a provision on its territorial scope in international cases, neither in the form of a unilateral scope rule nor in the form of a bilateral conflict-of-law rule.

From a private international law perspective, these inconsistencies may raise the following issues in cross-border cases of liability for defective AI systems. First, in the absence of specific rules on jurisdiction in the new EU legal framework on artificial intelligence, jurisdiction for cases of damage caused by a defective AI system that does not comply with the requirements of the AI Act should be governed by the general rules on jurisdiction set out in the Brussels I bis Regulation. However, these rules only apply if the defendant (i.e. the operator of the defective AI system) is established in a Member State, due to the territorial scope of application of Brussels I bis.[30] If the defendant is established in a Third country, the national rules of the Member States apply to determine jurisdiction. Second, the regime of the AI Act (which sets out the requirements that operators must comply with) applies automatically by virtue of Article 2 of the Act,[31] whereas the regime of the Product Liability Directive should only apply where general rules of private international law refer to the law of a Member State (which enacted the Directive).[32] It is therefore necessary to take into account different sources of law and to try to coordinate them with the new legal framework on IA in order to

E.; Migliorini, S.; Bonzé, C., *Study on the Rome II Regulation (EC) 864/2007 on the law applicable to non-contractual obligations*, British Institute of International and Comparative Law, 2021, p. 66).

28 See Poesen, *op. cit.*, note 24.

29 AI Act, art. 2 (1).

30 Brussels I bis Regulation, art. 6.

31 See: Henckel, *op cit.*, note 11, p. 207, who argues that "Article 2 of the AI Act provides an express unilateral scope rule with extraterritorial effect" which displaces "the traditional – multilateral – conflict of laws reference"; Cappiello, *op. cit.*, note 15, pp. 201-202, who argues that the provisions of the AI Act are also intended "to ensure the protection of EU crucial interest and fundamental values", so that they should be applied "via art. 16 Rome II, as overriding mandatory rules, this discarding the application of less protective foreign regulations".

32 See Poesen, *op. cit.*, note 24.

determine the heads of jurisdiction and the conflict-of-law rules applicable in the cases under consideration.

3.1. JURISDICTION

Under the Brussels I bis Regulation, the most relevant rules for determining jurisdiction in cases of damage caused by defective AI systems - apart from the rules on prorogation of jurisdiction (Articles 24 and 25)[33] - are the general rule (Article 4 (1)) and the special rule for torts (Article 7 (No. 2)). These provisions give the plaintiff the choice of bringing the claim before the courts of the Member State in which he is domiciled (the general *forum*) or before the court of the place where the harmful event occurred or is likely to occur (the special *forum delicti*). As the CJEU has held since the well-known judgment in the Case *Bier v Mines de potasse d'Alsace*, the special rule on jurisdiction in matters of torts and delicts allows the plaintiff to bring proceedings both in the court of the place of the event giving rise to the damage and in the court of the place where the damage occurred.[34]

Concerning disputes over defective products, in the Case *Zuid-Chemie v Philippo's Mineralenfabriek* the CJEU has held that the place where the harmful event occurred, i.e. where the event causing the damage produces its harmful effects, is "the place where the initial damage occurred as a result of the normal use of the product for the purpose for which was intended".[35] Furthermore, in the Case *Kainz v Pantherwerke* the Court of Justice clarified that the place of the event giving rise to the damage is the place where the defective product was manufactured.[36] More recently, in the Case *Verein für Konsumenteninformation v Volkswagen* the CJEU held that, when the damage consists of the sale of a car unlawfully equipped by the manufacturer with software that manipulates data relating to exhaust emissions, the harmful consequences of the event giving rise to the damage occur at the place where the car is purchased.[37]

---

33 Article 25 Brussels I bis confers jurisdiction on the court designated in an agreement between the parties to settle disputes which have arisen or which may arise in connection with a particular legal relationship, while Article 26 confers jurisdiction on the court of a Member State before which a defendant enters an appearance.

34 Case C-21/76 *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA* [1976] *ECR 01735, par. 19. For the so-called "ubiquity theory" adopted by the Court since this judgment, see:* Carrascosa González, J., *Distance Torts: The Mines de Potasse Decision Forty Years On*, Yearbook of Private International Law, Vol. 18, 2016/2017, pp. 19-38; Mankowski, P., *Art. 7*, in: Magnus U.; Mankowski, P. (eds.), Brussels Ibis Regulation – Commentary, Dr. Otto Schmidt KG, Köln, 2022, p. 108 ff.

35 Case C-189/08 *Zuid-Chemie BV v Philippo's Mineralenfabriek NV/SA* [2009] ECR I-06917, par. 32.

36 Case C-45/13 *Andreas Kainz v Pantherwerke AG* [2014] ECLI:EU:C:2014:7, par. 29.

37 Case C-343/19 *Verein für Konsumenteninformation v Volkswagen Ag* [2020] ECLI:EU:C:2020:534, par. 35. It is worth noting that the principles laid down in *Volkswagen* and *Zuid-Chemie* are not in-

The application of both general and special *forum* to cases of damage caused by defective AI systems may raise some critical issues.

Regarding article 4 (1), it may be difficult to determine the domicile of the defendant, given the virtual nature of the services under consideration.[38] Furthermore, if multiple entities are involved in the production chain of the AI system, the general forum could lead to the jurisdiction of the courts of each Member State where these entities are domiciled (i.e. established), which could discourage the victim from starting any action in that forum.[39]

The main issues related to the special rule of jurisdiction concern the identification of the place where the product was manufactured and the place where the harmful consequences occurred. In fact, the latter may coincide with several places: the place where the algorithm on which the system is based was developed, the place where the software that uses the system was produced and, in the case of software incorporated into a hardware, the place where it was assembled.[40] All of them could be adopted as heads of jurisdiction.[41] Furthermore, it is difficult to determine the place where the harmful consequences occurred, especially in cases where the AI system is not embedded in hardware. On the one hand, it may not

compatible: in the latter case, the CJEU held that the damage consisting in the impossibility of using the defective product for the purpose for which it was intended occurred at the place where it was first used, whereas in *Volkswagen* the Court pointed out that the specific harmful consequence of the damage in question – i.e. the purchase of a vehicle at a price higher than its real value – occurred at the place of purchase, see Eichmüller P.; Lehmann, M., *A Further Twist to Emissions Scandal Litigation: Jurisdiction in Case of Self-Imported Cars*, 2021, availabe at: [https://eapil.org/2021/06/08/a-further-twist-to-emissions-scandal-litigation-jurisdiction-in-case-of-self-imported-cars/], Accessed 5 March 2025.

38 It may be useful to bear in mind that in the Case C-523/10 *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH* [2012] ECLI:EU:C:2012:220, par. 34, the CJEU held that, in cases of damage caused by internet activity consisting in the online display of advertisements infringing a trademark, the advertiser's establishment is in the place where the decision to activate the display process is taken. This criterion could also be useful for determining the domicile of the defendant in cases of defective AI systems.

39 It should be noted that in cases of multiple defendants, pursuant to Art. 8 (1) Brussels I bis Regulation the plaintiff may sue all the defendants "in the courts for the place where any one of them is domiciled, provided that the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings".

40 See Cappiello, *op. cit.*, note 15, p. 176.

41 It is worth noting that recital 13 of the new Product Liability Directive states that "a developer or producer of software, including providers of AI systems within the meaning of Regulation (EU) 2024/1689 of the European Parliament and of the Council, should be treated as a manufacturer". Based on this statement, it could be argued that the place where the defective AI system is manufactured is the place of establishment of the provider of the system, i.e. the entity that develops the system and places it on the market or puts it into service under its own name or trademark, whether in return for payment or free of charge, see AI Act, art. 3, No. 3.

be easy to find the place where the defective product was first used (in accordance with the principle laid down in *Zuid-Chemie*): the output of the AI system causing the damage is usually transmitted to the user via the Internet, and it may not be possible to trace the specific place where the user accessed the service offered by the system.[42] On the other hand, the criterion of the place of purchase (set out in *Volkswagen*) could be troubling in cases where the AI system is free (e.g., a chatbot freely downloadable from a smartphone's app store) or embedded in another product (e.g., an AI-based software installed in a self-driving car).[43]

3.2. APPLICABLE LAW

The applicable law in cases of damage caused by defective products shall be determined by the Rome II Regulation and, in certain cases, by the 1973 Hague Convention.

Indeed, Article 28 Rome II states that the Regulation shall not prejudice the application of international conventions to which one or more Member States are parties (at the time of the adoption of the Regulation) and which lay down conflict-of-law rules relating to non-contractual obligations. The 1973 Hague Convention on the law applicable to product liability therefore prevails over the Rome II Regulation for the seven Member States bound by the Convention (Croatia, Finland, France, Luxembourg, Netherlands, Slovenia and Spain).

It is worth noting, however, that the applicability of the Convention to cases of damage caused by a defective AI system is uncertain. Indeed, its material scope of application includes liability for damage caused by a product, which is defined as including "natural and industrial products, whether raw or manufactured and whether movable or immovable".[44] As this definition makes no reference to intangible products such as software, it is questionable whether it includes AI systems.[45]

---

42 See Lutzi, T., *Private international law online: internet regulation and civil liability in the EU*, Oxford University Press, Oxford, 2020, p. 102; De Miguel Asensio, P., *Conflict of Laws and the Internet*, Edward Elgar Publishing, Cheltenham, 2020, p. 100.

43 See Cappiello, *op. cit.,* note 15, p. 176, who argues that in the cases under consideration, the place where the harmful consequences occur is the palace of the purchase of the hardware in which the AI system is embedded, or the place where the software based on AI is downloaded by the user.

44 See the 1973 Hague Convention, art. 2 and art. 3.

45 See Henckel, *op cit.*, note 11, p. 215, who recalls that the Convention, as stated in its Explanatory Memorandum, covers damage caused by "all products made or in any way altered by the hand of man". This broad scope shall therefore include damage caused by defective AI systems, since these systems are still created by humans.

If we argue that the Convention does apply in these cases, the applicable law is the internal law of the State in which the damage occurs, if in that State there is the habitual residence of the injured person, or the principal place of business of the person claimed to be liable, or the place where the product was acquired (Article 4). However, if the injured person is habitually resident in the State where the producer has the principal place of business or where the product was acquired, the law of that State applies (Article 5).[46] Furthermore Article 7 contains a clause guaranteeing the defendant's foreseeability of the applicable law: neither the law of the State of the place of injury nor the law of the State of the habitual residence of the injured person shall apply if the defendant proves that he could not reasonably have foreseen that the product would be made available through commercial channels in those States.

In cases that do not fall within the scope of the Convention, the Rome II Regulation will apply. Under Rome II, the law chosen by the parties by virtue of Article 14 applies in the first instance. Otherwise, the law must be determined in accordance with the special rule laid down in Article 5, on product liability.[47] This rule lists three applicable laws in a subsidiary order: (i) the law of the country where the injured person had his/her habitual residence when the damage occurred, (ii) the law of the country where the product was purchased, and finally (iii) the law of the country where the damage occurred. Each of these laws applies only if the product was marketed in the respective country. However, other applicable laws take precedence. Firstly, the law of the country of the common habitual residence of the injured party and the person claimed to be liable.[48] Secondly, the law of the country of the habitual residence of the latter, if he could not reasonably foresee that the product would be marketed in one of the countries designated by the first

[46] Pursuant to Article 6 of the Convention, if it is not possible to determine the law in accordance with either Article 4 or Article 5, the internal law of the country in which the person claimed to be liable has the principal place of business shall apply, unless the claimant bases the claim on the internal law of the country where the damage occurred.

[47] It is worth noting that the scope of Article 5 is uncertain, as the Regulation does not provide a definition of product. Some scholars argue that the scope of the provision is consistent with that of the Directive 85/374/EEC (see: Marenghi, C., *Responsabilità del produttore e giurisdizione nel regolamento "Bruxelles I": il forum commissi delicti tra esigenze di coerenza e limiti all'interpretazione intertestuale alla luce di una recente sentenza della Corte di giustizia*, Diritto del commercio internazionale, No. 4, 2014, p. 1123; Palao Moreno, G., *Product liability: jurisdiction and applicable law in cross-border cases in the European Union*, ERA Forum, Vol. 11, No. 1, 2010, p. 55). Otherwise it could be argued that Article 5 applies to all damage caused by products, whether defective or not (see Franzina, P., *Il regolamento n. 864/2007/CE sulla legge applicabile alle obbligazioni extracontrattuali ("Roma II")*, Le Nuove Leggi Civili Commentate, No. 5, 2008, p. 1004). Anyway, after the adoption of the new Product Liability Directive and its new broad definition of product, it can be argued that Article 5 also covers damage caused by defective AI systems.

[48] In fact, Article 5 (1) Rome II states that Article 4 (2) shall not be prejudiced.

paragraph. Finally, the law of the country with which the case is manifestly more closely connected, pursuant to the escape clause (Article 5, para. 2).

The application of these conflict-of-laws rules in cases involving artificial intelligence raises several difficulties.

Firstly, it may be difficult to locate where the damage occurred and where the AI system was purchased. According to Article 5, the place of the damage shall be interpreted, in coherence with Article 4, as the place of the direct harmful consequences of the damage (irrespective of the place of the event giving rise to the damage and of the indirect consequences). Determining this place, therefore, raises the same problems as those discussed above regarding jurisdiction. Even the criterion of the place of purchase of the product could raise the same issues in the area of applicable law as in that of jurisdiction, related to the virtual nature of the place where these systems are usually acquired by users (i.e. online marketplace).

The main problem arising from the application of Article 5 (1) Rome II to cases of damage caused by a defective AI system concerns the requirement of "marketing". The Regulation does not define the term "marketed" used in this provision. Scholars have argued that this should be interpreted broadly, as the activity of simply placing a product in the stream of the market and offering it to the public for use, and not requiring specific efforts such as advertising or targeting.[49] Two main issues arise in cases involving artificial intelligence. First, when the damage is caused by defective AI-based software that can be downloaded from the Internet by users around the world, that product can be considered to be marketed in any country, and the manufacturer (i.e. the producer/developer of the software) would hardly be able to argue that he/she could not foresee that the product would be marketed in one country.[50] Second, in cases involving an AI system that is embedded in another product, it is unclear whether the marketing requirement has to be determined only with regard to the hardware or also with regard to the artificial intelligence software on which the latter is based.

---

[49] See Dickinson, A., *The Rome II Regulation*, Oxford University Press, Oxford, 2010, p. 363; Huber, P.; Illmer, M., *International product liability. A Commentary on Article 5 of The Rome II Regulation,* Yearbook of Private International Law, Vol. 9, 2007, p. 31. It is worth noting that the definitions offered by the AI Act - assuming that they could also be used to interpret the Rome II Regulation in cases involving AI - are not so clarifying. Indeed, Article 3 (9) and (10) of the AI Act define "placing on the market" as the first making available of an AI system on the Union market, and "making available on the market" as the supply of an AI system for distribution or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge.

[50] See Henckel, *op. cit.*, note 11, p. 223. The same observation applies to the "foreseeability clause" in Article 7 of the 1973 Hague Convention.

Finally, two general observations on the conflict-of-law rules of the Rome II Regulation applicable to the cases under consideration must be made. First, in most cases of damage caused by the defectiveness of an online service based on artificial intelligence, the applicable law will be the law of the State of the habitual residence of the injured person, due to the fact that it is the first in the cascade list of Article 5 and - as we have observed above - the producer/developer of the AI system offering it online will hardly be able to prove that he did not foresee the marketing of the system in a particular country. This result is particularly favorable to the injured party, but it could discourage operators of AI systems from marketing them online. Second, due to the universal application of Rome II Regulation,[51] the applicable law designated by Article 5 could also be the law of a Third country, which could be disadvantageous for producers and developers of AI systems established in a EU Member State. Indeed, if the injured party is habitually resident in a Third country, liability should be assessed according to the law of that country and the regime laid down in the Product Liability Directive would not apply.

4. CONCLUSION

The new legal framework on artificial intelligence aims to strike the right balance between protecting users of AI systems from the potential harm they can cause and ensuring the free movement of AI-based goods and services across borders, facilitating the development, marketing and use of these systems. However, the gap in the regulation of private international law issues in the new EU legal framework on artificial intelligence risks undermining this aim.

The lack of a special head of jurisdiction for cases of liability for defective AI systems and the inconsistency between the territorial scope of the AI Act and the new Product Liability Directive lead to a difficult coordination between different legal sources, in particular between the Brussels I bis Regulation and national rules on jurisdiction. Furthermore, the heads of jurisdiction of that Regulation and the related criteria established by the CJEU are not easily applicable to cases involving AI systems. Several doubts and uncertainties therefore remain about the right localisation of the elements on which these rules are based (in particular, *locus damni* and *locus acti*). These criticisms undermine the predictability of the competent court, to the detriment of producers and developers of AI systems. The conflict-of-law rules of the 1973 Hague Convention and the Rome II Regulation are also unsuitable for determining the applicable law in cases of damage caused by defective AI systems. These rules are too favorable to the injured party because

[51] See Article 3 Rome II Regulation.

of the priority given to the criterion of his/her habitual residence and the difficulty of applying the foreseeability clauses in cases of AI systems marketed online.

New head of jurisdiction and conflict of laws rules which foster a fairer balance between the position of the parties and their interests should therefore be adopted.[52]

A possible solution could be to base these new rules on a single objective criterion, more flexible than the *locus commissi delicti* and inspired by the proximity principle, such as the criterion of "the most significant impact of the damage".[53] This criterion could confer jurisdiction on a single court – avoiding the uncertainties created by the CJEU's ubiquity principle – and could determine a single applicable law. However, it could be criticized for giving too much discretion to the judge in assessing jurisdiction and applicable law, thereby jeopardizing their predictability.

Alternatively, the new special rules could be based on subjective criteria, such as the place of establishment of the person claimed to be liable or the place of habitual residence of the injured party. The adoption of one or the other criterion is extremely delicate, since it presupposes a choice between two opposing approaches: one that is more favorable to the operators of AI systems and, more generally, to the free movement of these systems, and one aimed at protecting the victim.

The latter solution seems preferable as it is more consistent with the EU regime on liability for defective products. In addition, the criterion of the habitual residence of the victim would determine a single competent court and a single applicable law, as opposed to the place of establishment of the person alleged to be liable. Indeed, in the case of damage caused by a defective AI system, more than one person involved in the chain of production and marketing of this system could be held liable, so that this criterion could lead to the designation of different places.

---

[52] It is worth noting that in Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II Regulation), COM(2025) 20 final, of 31 January 2025, the Commission stated that while "the ongoing development of the technology and the legal landscape in terms of substantive rules governing the use of AI will shape the issues relating to the application of Rome II to AI cases in the future […] it is difficult to assess whether and to what extent specific rules may be needed in Rome II, as the identification of approaches to address the complexities associated with the expanding use of AI is still emerging". The Commission therefore concluded that "the time may not yet be ripe to consider possible amendments to Rome II to introduce AI-specific rules". This conclusion is not very satisfactory, because as the EU legislator has just introduced a new legal framework for AI, a regulation of private international law issues in line with this framework is urgently needed.

[53] In favor of the application of this criterion for all cyber delicts see El Hage, Y., *How to locate a cyber torts*, Yearbook of Private International Law, Vol. 24, 2022/2023, p. 463.

However, in order not to undermine excessively the position of producers/developers of AI systems, the rules based on this criterion should be both accompanied by new foreseeability clauses, relying on the intention to market criterion. According to this possible clause, the law of the country of the allegedly liable person (i.e. the developer or producer of the AI system) will apply if he/she proves that he/she did not intend to market the product in the country of the injured party's habitual residence. In order to assess this intention, the criteria set out by the CJEU in the Case *Pammer and Hotel Alpenhof* could be considered, including the language, the currency, the telephone number and the top-level domain name used in the website through which the AI system is marketed.[54] Furthermore, in order to avoid the problematic consequences of the application of the law of the Third country where the injured person has his/her habitual residence, the national rules enacting the Product Liability Directive and those of the AI Act should be considered as overriding mandatory provisions, as long as they aim to protect core EU values such as public health and safety and fundamental human rights, as the right to life and to the integrity of the person.[55]

REFERENCES

BOOKS AND ARTICLES

1. Bruggemeier, G., *Tort Law of the European Union*, Kluwer Law International, Alphen aan del Rijin, 2015
2. Bussani, M.; Palmer V.V., *The liability regimes of Europe – their fracades and interiores*, in: Bussani, M.; Palmer, V.V. (eds.), Pure economic loss in Europe, Cambridge University Press, Cambridge, 2011, pp. 120-159.
3. Cappiello, B., *AI-Systems and non contractual liability: a european private international law analysis*, Giappichelli, Torino, 2022
4. Carrascosa González, J., *Distance Torts: The Mines de Potasse Decision Forty Years On*, Yearbook of Private International Law, Vol. 18, 2016/2017, pp. 19-38.
5. De Miguel Asensio, P., *Conflict of Laws and the Internet*, Edward Elgar Publishing, Cheltenham, 2020
6. Dickinson, A., *The Rome II Regulation*, Oxford University Press, Oxford, 2010

[54] C-585/08 and C-144/09, *Pammer and Hotel Alpenhof* [2010] ECLI:EU:C:2010:740, parr. 93-94. It's worth recalling that the above criteria were laid down by Article 17 (1) (c) Brussels I bis, which limits the application of the special rules on jurisdiction in Section 4 of the Regulation to cases of consumer contracts "concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities".

[55] It is worth remembering that this solution is followed by Article 29 (7) of European Parliament and Council Directive 2024/1760/EU on corporate sustainability due diligence and amending Directive 2019/1937/EU and Regulation 2023/2859/EU [2024] EC L1760/1.

7. El Hage, Y., *How to locate a cyber torts*, Yearbook of Private International Law, Vol. 24, 2022/2023, pp. 455-466.
8. Franzina, P., *Il regolamento n. 864/2007/CE sulla legge applicabile alle obbligazioni extracontrattuali ("Roma II")*, Le Nuove Leggi Civili Commentate, Issue 5, 2008, pp. 971-1044.
9. Henckel, K., *Issues of conflicting laws–a closer look at the EU's approach to artificial intelligence*, Nederlands Internationaal Privaatrecht, Issue 2, 2023, pp. 199-226.
10. Huber, P.; Illmer, M., *International product liability. A Commentary on Article 5 of The Rome II Regulation,* Yearbook of Private International Law, Vol. 9, 2007, pp. 31-49.
11. Karanikić Mirić, M., *Product Liability Reform in EU*, Eu and Comparative Law Issues and Challenges Series (ECLIC), Vol. 7, 2023, pp. 383-413.
12. Lein, E.; Migliorini S.; Bonzé, C., *Study on the Rome II Regulation (EC) 864/2007 on the law applicable to non-contractual obligations*, British Institute of International and Comparative Law, 2021
13. Lutzi, T., *Private international law online: internet regulation and civil liability in the EU*, Oxford University Press, Oxford, 2020
14. Mankowski, P., *Art. 7*, in: Magnus U.; Mankowski P., Brussels Ibis Regulation – Commentary, Dr. Otto Schmidt KG, Köln, 2022
15. Marenghi, C., *Responsabilità del produttore e giurisdizione nel regolamento "Bruxelles I": il forum commissi delicti tra esigenze di coerenza e limiti all'interpretazione intertestuale alla luce di una recente sentenza della Corte di giustizia*, Diritto del commercio internazionale, Issue 4, 2014, pp. 1107-1124.
16. Palao Moreno, G., *Product liability: jurisdiction and applicable law in cross-border cases in the European Union*, ERA Forum, Vol. 11, Issue 1, 2010, pp. 45-65
17. Tutt, A., *An FDA for Algorithms*, Administrative Law Review, Vol. 69, Issue 1, 2017, pp. 83-123.
18. Wuyts, D., *The product liability directive more than two decades of defective products in Europe*, Journal of European Tort Law, Vol. 5, Issue 1, 2014, pp. 1-34.
19. Zech, H., *Liability for AI: public policy considerations*, ERA Forum, Vol. 22, Issue 1, 2021, pp. 147-158.

EU LAW

1. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Commission work programme 2025, COM(2025) 45 final
2. Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210/29
3. European Parliament and Council Directive 2024/1760/EU on corporate sustainability due diligence and amending Directive 2019/1937/EU and Regulation 2023/2859/EU [2024] EC L1760/1

4. European Parliament and Council Directive 2024/2853/EU on liability for defective products and repealing Council Directive 85/374/EEC [2024] OJ L2853 (Product liability directive)
5. European Parliament and Council Directive on liability for defective products, Explanatory memorandum, COM(2022) 495 final
6. European Parliament and Council Regulation 1215/2012/EU on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1
7. European Parliament and Council Regulation 2023/1230/EU on machinery [2023] OJ L1653/1
8. European Parliament and Council Regulation 2023/988/EU on general product safety [2023] OJ L135/1
9. European Parliament and Council Regulation 864/2007/EC on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40
10. European Parliament and of the Council Regulation 2024/1689/EU laying down harmonised rules on artificial intelligence and amending Regulations 300/2008/EC, 167/2013/EU, 168/2013/EU, 2018/858/EU, 2018/1139/EU and 2019/2144/EU and Directives 2014/90/EU, 2016/797/EU and 2020/1828/EU [2024] OJ L1689/1 (Artificial Intelligence Act)
11. Proposal for a European parliament and Council directive on adapting non-contractual civil liability rules to artificial intelligence, COM(2022) 496 final (AI Liability Directive)
12. Report from the Commission to the European parliament, the Council and the European economic and social committee on the application of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II Regulation), COM(2025) 20 final
13. Resolution of the European Parliament with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)
14. White Paper On Artificial Intelligence - A European approach to excellence and trust, COM(2020) 65 final

INTERNATIONAL CONVENTIONS

1. The Hague Conference of Private International Law Convention of 2 October 1973 on the Law Applicable to Products Liability

COURT OF JUSTICE OF THE EUROPEAN UNION

1. Case C-189/08 Zuid-Chemie BV v Philippo's Mineralenfabriek NV/SA [2009] ECR I-06917
2. Case C-21/76 Handelskwekerij G. J. Bier BV v Mines de Potasse d'Alsace SA [1976] *ECR 01735*
3. Case C-343/19 Verein für Konsumenteninformation v Volkswagen AG [2020] ECLI:EU:C:2020:534
4. Case C-45/13 Andreas Kainz v Pantherwerke AG [2014] OJ C 85/10

5. Case C-523/10 Wintersteiger AG v Products 4U Sondermaschinenbau GmbH [2012] ECLI:EU:C:2012:220
6. Case C-585/08 and C-144/09 Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v Oliver Heller [2010] ECLI:EU:C:2010:740

WEBSITES REFERENCES

1. Eichmüller P.; Lehmann, M., *A Further Twist to Emissions Scandal Litigation: Jurisdiction in Case of Self-Imported Cars*, 2021, available at: [https://eapil.org/2021/06/08/a-further-twist-to-emissions-scandal-litigation-jurisdiction-in-case-of-self-imported-cars/], Accessed 5 March 2025
2. Ho-Dac, M., *The EU AI Act and Private International Law: A First Look Developments in PIL, EU Legislation, Normative Texts, Views and Comments*, 2024, availabe at: [https://eapil.org/2024/10/21/the-eu-ai-act-and-private-international-law-a-first-look/], Accessed 5 March 2025
3. Poesen, M., *Jigsaw Pieces Falling into Place: Do the Territorial Scopes of the AI Act and the Revised Product Liability Directive Dovetail?*, 2025, avaialbe at: [https://eapil.org/2025/01/29/jigsaw-pieces-falling-into-place-do-the-territorial-scopes-of-the-ai-act-and-the-revised-product-liability-directive-dovetail/], Accessed 5 March 2025

Chapter 5

Preliminary communication

THE IMPACT OF LAND CONSOLIDATION ON AGRICULTURE AND RURAL DEVELOPMENT

Boris Ljubanović, PhD, Full Professor
Josip Juraj Strossmayer University of Osijek, Faculty of Law
Stjepana Radića 13, 31000 Osijek, Croatia
ljubanovic.boris@pravos.hr

Josip Plišo, LLM, Teaching Assistant
Josip Juraj Strossmayer University of Osijek, Faculty of Law
Stjepana Radića 13, 31000 Osijek, Croatia
jpliso@pravos.hr

ABSTRACT

In the paper, the authors analyse the significant impacts of implementing the land consolidation procedure, that is, the analysis of the impact of land consolidation on land that is largely used for agricultural purposes, and how the land consolidation process contributes to the rural development of a specific municipality or village. The said analysis is carried out on the basis of national, but also European legal regulations, considering that land consolidation as a legal institute is closely connected with the objectives of the Common Agricultural Policy, which encourages increased land usability. In the context of European Union law, the Habitats Directive and the Strategic Environmental Assessment Directive will certainly be of importance, as well as the Regulation on the bodies within the system of management and control over the use of the European Agricultural Fund for Rural Development.

The impact of land consolidation on rural development is of great importance, and EU funds, especially the European Agricultural Fund for Rural Development (EAFRD), play an important role in its development, by directly or indirectly influencing the implementation of the land consolidation procedure. The relevance of the topic is reflected in the fact that, from 1991 until today, not a single land consolidation procedure has been carried out in the territory of the Republic of Croatia. The implementation of land consolidation would significantly improve the economic usability of agricultural land and would encourage the renewal and development of rural areas whose existence and growth are based on agriculture as the primary activity of the rural population.

Keywords*: agricultural land, agricultural policy, land consolidation, local self-government units, rural development*

1. INTRODUCTION

The mechanism of land consolidation (lat. *commasare*, meaning "to gather into a mass or block") in the Republic of Croatia is one of the most important legal, agrarian and administrative measures through which agricultural land in the areas of one or more cadastral municipalities, fragmented into cadastral plots of small area and irregular shape, is consolidated into larger cadastral plots, thus creating more favorable conditions for agricultural production, regulating road and canal networks, as well as regulating ownership and other property relations that exist on the land.[1] As Staničić states, "land consolidation is carried out in such a way that each participant in the land consolidation receives new land for the land included in the land consolidation in as few plots as possible, of equal value, with a deduction of the value of the land for general needs and common needs of the settlement, i.e. the participants in the land consolidation, preferably in the location of the predominant part of their land and with as much of the same use as the land they brought into the land consolidation block."[2] In the Republic of Croatia, the mechanism of land consolidation has not been developed scientifically, and there is a lack of appropriate literature, which is mostly outdated. The importance of the topic itself lies in the fragmentation of the analysis of the aforementioned institute and in the fact that the topic has not been the subject of more detailed research in the recent period.

This paper consists of five chapters. In the first chapter, the authors refer to the historical origins and analysis of the mechanism of land consolidation, as well as the influence of the first forms of land consolidation on the mechanism of land consolidation as it is known in the Republic of Croatia today. In the second and third chapters, the authors analyze the impact of land consolidation on agricultural development through the reduction of the number of irregular and fragmented plots, the impact of technological achievements on specific examples of agricultural land use for the purpose of planting agricultural crops, and the impact of land consolidation on rural development in the context of diversification that occurs as a positive consequence of land consolidation. Given that the land consolidation process is primarily aimed at increasing agricultural productivity through the systematic arrangement of agricultural land, especially in the lowland parts of the Republic of Croatia, it would be useful to investigate how land consolidation affects the profitability of agricultural farms, how it contributes to the application of modern technologies when using agricultural land, how it af-

[1] Art. 1 of the Law on Land Consolidation of Agricultural Land, Official Gazette No. 44/22.

[2] Staničić, F., *Novi zakon o komasaciji poljoprivrednog zemljišta*, in: Barbić, J. (ed.), Pravna zašita tla, Hrvatska akademija znanosti i umjetnosti, Zagreb, 2016, pp. 77-112, p. 94 – 95.

fects soil conservation (the importance of biotopes that exist on agricultural land included in the land consolidation) and environmental protection, and how it affects demography and quality of life in rural areas. The aim of this paper is to analyze the impact of consolidation on agriculture and rural development, with a special emphasis on the ecological and economic aspects achieved by a successfully implemented consolidation process. The goal is also to investigate how the systematic implementation of land consolidation can contribute to increasing the usability of agricultural land and modernizing rural infrastructure for the purpose of revitalizing the Croatian countryside.

2. DEFINING LAND CONSOLIDATION

The mechanism of land consolidation as a kind of agrarian legal measure of public law restriction of ownership rights is not new in the Croatian legal system. Land consolidation as an agrarian legal measure appeared as early as 1737, when the Urban Act was passed which initially prohibited the splitting of arable land, and subsequent reforms introduced the mechanism of land consolidation. Given that the Republic of Croatia as we know it today was in the past part of the Habsburg Monarchy, and later Austria-Hungary, it is important to say that the consolidation activity was first regulated in the territory of the Republic of Croatia (then the Kingdom of Croatia and Slavonia) by the Land Consolidation Act from 1891.[3] At the beginning of the 20th century, the Croatian Parliament passed the Land Consolidation Act, and as Ivković states, this law contained provisions on the procedure for implementing land consolidation based on the experiences of other countries that had previously legally standardized the mentioned mechanism[4] (the first among them was Denmark in the 18th century).[5]

Among the most important laws that regulated land consolidation in the past are those passed during the period when the present-day Republic of Croatia was part of the Federal People's Republic of Yugoslavia (FPRY), and after the 1963

---

[3] Staničić, F., *Neka javnopravna ograničenja prava vlasništva u Kraljevni Hrvatskoj i Slavoniji u razdoblju od 1852. do 1918*., Zbornik Pravnog fakulteta u Zagrebu, Vol. 64, No. 5 - 6, 2013, pp. 1119 – 1142, p. 128.
Staničić states that "land consolidation was not a complete unknown even before 1981. In the territory of the Kingdom of Croatia and Slavonia, several laws and orders on urban land consolidation were passed. As stated by professor Staničić, PhD, these were the Urban Act of 1836, Article VI, the Imperial Patent of 17 May 1857, the Order of the Ministry of the Interior and Justice of 11 November 1859 on the procedure for the land consolidation of noble co-ownership, and Article V of the Act: 1870 of the Parliament of the Kingdoms of Dalmatia, Croatia and Slavonia of 1870.

[4] Ivković, M.; Barković, Đ.; Baćani, S., *Komasacija i ruralni razvoj*, Geodetski fakultet Sveučilišta u Zagrebu, Geodetski list, Vol. 64 (87), No. 4, 2010, pp. 297 – 312, p. 300.

[5] Staničić, F., *op. cit*., note 1, p. 1127.

Constitution, part of the Socialist Federal Republic of Yugoslavia (SFRY). The Land Consolidation Act of 1954[6] defined the subject of land consolidation activities, their purpose, participants, and the bodies that make decisions in the land consolidation process. Although regulations on land consolidation have changed throughout history, its purpose has remained the same (creating larger and more regular plots for more economical cultivation and achieving greater efficiency of agricultural land).[7] Later, the 1979 Land Consolidation Act,[8] the 1984 Act on Amendments to the Land Consolidation Act,[9] and the 1987 Act on Amendments to the Land Consolidation Act were passed.[10] The mentioned amendments to the Land Consolidation Act included the parties (participants in the land consolidation) and the bodies leading the process (although there were often changes regarding material rights, such as compensation to the owners of agricultural land included in the land consolidation block),[11] i.e. most of the provisions related to procedural issues. After the Croatian Parliament adopted the Constitutional Decision on the independence (sovereignty and autonomy) of the Republic of Croatia[12] from the Socialist Federal Republic of Yugoslavia on 25 June 1991, there was a practical need to revise regulations (including regulations on land consolidation) given that the Republic of Croatia, upon gaining independence, *ipso iure*, took over the regulations of the predecessor state. The proposal for the adoption of a new Land Consolidation Act was based on the provisions of the 1979 Land Consolidation Act, and the amendments of 1984 and 1987.[13] In 2015, the Agri-

---

6 Land Consolidation Act, Official Gazette of the FPRY, No. 60/54.

7 Gatarić, Đ., *Upravno pravo – posebni dio*, Drugo izmijenjeno i dopunjeno izdanje, Savremena administracija, 1988, p. 191.

8 Land Consolidation Act, Official Gazette of the SFRY, No. 10/79.

9 Law on Amendments and Supplements to the Land Consolidation Act, Official Gazette of the SFRY, No. 21/84.

10 Law on Amendments to the Land Consolidation Act, Official Gazette of the SFRY, No. 5/87.

11 Art. 9 of the Law on Land Consolidation of Agricultural Land, Official Gazette No. 44/22.

According to the currently valid Agricultural Land Consolidation Act, Art. 9 stipulates the following: During land consolidation, if this is necessary in order to achieve the purpose of consolidation, the relocation or demolition of a simple structure, residential or commercial building can be determined, with the proviso that the owner is entitled to compensation for the relocation or demolition of an existing simple structure or building, as well as for the removal of simple and other structures and works carried out in accordance with the regulation governing the designation of simple and other structures and works, i.e. for plantation grubbings.

12 Constitutional Decision on the Sovereignty and Independence of the Republic of Croatia, Official Gazette No. 31/91.

13 See: Malenica, I., *Novo uređenje komasacije poljoprivrednog zemljišta u Hrvatskoj*, Zagrebačka pravna revija, Vol. 4, No. 3, 2015, pp. 363-391, p. 37. "The proposal of the new law was based on the provisions of the 1979 Act, with modifications referring to the bodies that participated in the land consolidation procedure. The motion to institute the land consolidation procedure would be brought before the county land consolidation commission, which would institute the procedure based on that, with the

cultural Land Consolidation Act was adopted,[14] significantly changing the provisions related to the state bodies responsible for the process. The part that decides on the initiation of land consolidation was centralized, while the part responsible for carrying out the consolidation in the field was decentralized.[15]

Although the 2015 Agricultural Land Consolidation Act was passed and has been in force for almost eight years, not a single land consolidation procedure has been carried out. The reason for this stems from the prejudices that exist regarding the financing of the land consolidation process by potential participants and parties, and the existence of nomotechnical errors, as before. The questions raised in this paper cannot be fully answered here, but they certainly leave room for the development of other studies that would tackle these issues in greater depth. After almost eight years since the enactment of the 2015 Agricultural Land Consolidation Act, the Agricultural Land Consolidation Act was adopted in 2022 (Official Gazette, No. 46/22). The main reason for adopting the new Agricultural Land Consolidation Act was justified by the Government of the Republic of Croatia with the fact that not a single land consolidation procedure was carried out based on the 2015 Agricultural Land Consolidation Act.[16] One of the most important reasons cited is the rationalization, i.e. simplification of access to funds for financing the costs of the land consolidation process.[17] The 2022 Agricultural Land Consolidation Act defined new terms that were not part of the 2015 Agricultural Land Consolidation Act. The Agricultural Land Consolidation Program, the land consolidation authority, the commission, the decision-maker, the parties to the consolidation and participants in the consolidation, as well as land for public purposes and land for common needs, represent new concepts regulated by the

consent of the Croatian Government. The performance of works and the construction of investment structures is carried out based on a contract entered into by the committee of land consolidation participants with the authorized contractor. The bodies participating in the land consolidation procedure are the county land consolidation commission, the assembly of participants, the committee of land consolidation participants and the land assessment comission."

14 Law on Land Consolidation of Agricultural Land, Official Gazette No. 15/15.

15 Malenica, I., *op. cit*., note 13, p. 371.

16 Bulka, Z., *Što donosi novi Zakon o komasaciji poljoprivrednog zemljišta*, Pravo i porezi, Vol. 31, No. 11, 2022, pp. 74 – 77, p. 75. Bulka also states that the failure to implement the land consolidation process greatly affects the general inefficiency of agricultural land use, given the fragmentation of the land and the large number of small land plots. It is also stated that the adoption of the Agricultural Land Consolidation Act should achieve effective implementation of the agricultural land consolidation, which would consolidate cadastral plots into larger and more regular plots. This would in turn have an impact on increasing agricultural production, creating greater added value in agricultural production and putting neglected agricultural land into use. It is stated, therefore, that in order to enable the optimization of the shape of cadastral plots and agricultural land areas, better conditions for cultivating agricultural land would be created through the development of roads, utility infrastructure, and more.

17 *Ibid.*

new law on land consolidation activities.[18] The 2022 Agricultural Land Consolidation Act introduced two new features: the first concerns the role of the land consolidation management information system, and the second the role of local government units in land consolidation procedures, which represent new features compared to the 2015 Agricultural Land Consolidation Act.[19]

Authors throughout different historical periods have defined land consolidation in a similar way (depending on the circumstances of the time in which they lived, the legal system, their professions, and their understanding of the concepts of private and public ownership, etc.). For example, according to Borković, "land consolidation is an agrarian legal measure carried out through a formal procedure with the aim of grouping land into larger and more regular plots, in order to enable more efficient use, create better conditions for the development of agricultural settlements, and allow for the establishment and construction of agricultural roads and other transport routes, water management structures and systems, as well as the execution of other land improvement works."[20] On the other hand, Gatarić defines land consolidation as "grouping of fragmented land plots[21] to create larger and more regular plots, to allow for the economical cultivation of agricultural land and to create more favorable conditions for the development of agricultural settlements."[22] Even though land consolidation as a mechanism of administrative law is given varying definitions by the said authors, there is evident similarity in the purpose and goal for which the land consolidation activity is carried out. Thus, the purpose of land consolidation in contemporary Croatian administrative law is to create more favorable conditions for the development of agriculture in accordance with the current legal system and definition.

3. LAND CONSOLIDATION IN AGRICULTURE

3.1. Environmental aspects of agricultural activities

Agricultural activity has always been important for rural areas and the population living there. The geographical position of the Republic of Croatia, especially

---

18 *Ibid.*

19 See: Chapter 5, Bulka, *op. cit.,* note 8 p. 77.

20 Borković, I., *VII. Izmijenjeno i dopunjeno izdanje, Upravno pravo*, Narodne novine, Zagreb, 2022, p. 616.

21 Veršinskas, T., *et. al., Legal guide on land consolidation*, „Food and Agriculture Organization of the United Nations (FAO), Rome, 2020, p.3 FAO concluded that "Excessive fragmentation or economically unsustainable small holdings can prevent farmers from making the best use of their time or applying modern production methods, such as mechanization."

22 Gatarić, *op. cit*., note 4, p. 191.

its eastern part, has always been synonymous with the richness and abundance of agricultural products[23] (cereals, fruits, vegetables) as well as meat and dairy products as a result of a large number of livestock farms. The Republic of Croatia, although belonging to the middle European countries in terms of size, can "boast" of three geographical regions: Pannonian, mountainous and Mediterranean, within which subregions occur.[24] The Pannonian region represented the most favorable agricultural region (suitable for cereals, viticulture and cattle breeding), while the mountainous region was more suitable for livestock breeding for the purpose of milk production, with cereal cultivation largely absent – similar to the Mediterranean region, which was instead suitable for the cultivation of olive groves and, in some areas, lavender. The use of agricultural land for various purposes (livestock farming, viticulture, olive growing, etc.) creates an agricultural landscape,[25] which is different in each country in relation to the way agricultural land is used. The influence of man on the exploitation of agricultural land by using light and heavy machinery contributes to the loss of natural ecosystems of the agrarian landscape.[26] Some negative consequences of the destruction of the agrarian landscape are: reduction of the number of wild species of flora and fauna, impoverishment of the landscape image, change of soil fertility, appearance of erosion, heavy metal pollution, introduction of pesticides into the soil, etc.[27] The negative consequences of the disturbance of the agrarian landscape can be eliminated by the land consolidation process. Although land consolidation has never been implemented in modern-day Republic of Croatia, and it is certainly fair to say that there is a lack of knowledge regarding the concrete implementation of measures to combat the loss of agrarian landscapes, in theoretical terms, the land consolidation process significantly mitigates such loss. According to Gostović, land consolidation contributes to the preservation, improvement and formation of new biotopes, the networking of ecologically valuable elements into complete biotope systems, the greening and ecological improvement of belts along roads and canals, etc.,

---

23 During the 18th and 19th centuries, the population living in the area of present-day Slavonia and Baranja was considered "rich", and wealth was represented by food, the number of livestock and the amount of arable agricultural land, which made the owner who possessed such things extremely influential in their social environment.

24 Cetl, V.; Prosen, A, *Uređenje poljoprivrednog zemljišta kao čimbenik razvoja poljoprivrede,* Geodetski list, Vol. 55 (78) No. 4, 2001, pp. 289 – 298, p. 290.

25 Gostović, M., *Poljoprivreda, biotopi, zaštita čovekove okoline i komasacija,* Geodetski list, Vol. 45 (68) No. 4–6, 1991, pp. 187-196, p. 188. According to Gostović, the agrarian landscape consists of agrarian and economic systems, such as grain fields, created consciously for the purpose of intensive agricultural production, and semi-natural ecosystems, such as pastures, meadows, etc., which were not created consciously, but by human action.

26 *Ibid.*

27 *Ibid.*

the planting of plants and the creation of biotopes on areas that are no longer used for agricultural production, and the separation of ecologically valuable areas from intensive agricultural exploitation.[28] In addition to national legal regulations governing the protection of nature and the human environment (Environmental Protection Act,[29] Nature Protection Act,[30] Agricultural Land Act[31]), one of the most important European legal regulations governing environmental protection issues in the context of agricultural land protection is the Council Directive[32] on the conservation of natural habitats and of wild flora and fauna.

The objective of the Directive is to contribute to ensuring biological diversity through the conservation of natural habitats and wild fauna and flora in the European territory of the Member States to which the Treaty applies.[33] Natural habitat types of community interest whose preservation requires the designation of special conservation areas in the context of agricultural production in the Republic of Croatia are freshwater habitats and streams.[34] The survival of freshwater habitats and streams is of utmost importance for biodiversity and the rational use of natural resources by humans. Agricultural areas used by the population in rural parts of the Republic of Croatia for the purpose of agricultural production are often associated with the presence of running or still waters,[35] which represent important ecological systems and may limit the use of such land. Given that the land consolidation process involves the conversion and change of the surface area of agricultural plots over which the land consolidation is carried out, it is crucial to ensure their protection in order to prevent disruption of the natural balance and degradation of the aquatic ecosystem.

3.2. Land consolidation as a prerequisite for agricultural development

Agriculture has always been the main economic activity of the rural population in Croatian villages, with land consolidation serving as a tool that enabled more

---

28 *Ibid*.

29 Environmental Protection Act, Official Gazette No. 80/2013, 153/2013, 78/2015, 12/2018, 118/2018.

30 Nature Protection Act, Official Gazette, No. 80/2013, 15/2018, 14/2019, 127/2019, 155/2023.

31 Agricultural Land Act, Official Gazette, No. 20/2018, 115/2018, 98/2019, 57/2022.

32 Council Directive 92/1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, Official Journal of the European Union, L 206, 22 July 1992.

33 Art. 2 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild flora and fauna, Official Journal of the European Union, L 206, 22 July 1992.

34 *Ibid.*

35 See: Art. 2 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild flora and fauna, Official Journal of the European Union, L 206, 22 July 1992.

economical and productive use of agricultural land (such as the cultivation of cereals, orchards, vineyards, or conversion into pastures and meadows). In 2016, there were approximately 134,459 registered agricultural holdings in the Republic of Croatia. Land consolidation is, by nature, similar to the voluntary exchange of land, but it is usually carried out on a larger scale, with a more systematic approach, and the process is generally managed by experts from fields such as law, agribiotechnical sciences, geodesy, and others.[36] As stated by Cetl and Prosen, agricultural areas are regulated through various types of agrarian and legal measures.[37] Land consolidation and land adjustment were the most extensive agrarian legal and administrative measures implemented on agricultural land.[38] The term land adjustment is defined as the reorganization of land holdings through the incorporation of smaller land plots into larger estates, with appropriate compensation provided to the owners of the smaller plots.[39] The purpose of land adjustment, as opposed to land consolidation, is to create more favorable conditions for cultivating agricultural land, enable the construction of economic farmyards, and support the establishment of perennial crops and the development of fishponds.[40]

However, land consolidation as an agrarian measure was more suitable for implementation in situations where it was necessary to regulate ownership and other real property rights, as well as property-law relations, concerning a specific agricultural land area.[41] The 2022 Agricultural Land Consolidation Act contains provisions on the initiation of the land consolidation process, implementation of land consolidation, costs and administrative supervision based on the regulations governing land consolidation activity in the member states of the European Union with the aim of achieving a common agricultural policy. A positive prerequisite for the development of agriculture is the successful implementation of the land consolidation process, which is evident from the definition itself. By establishing larger and more regular cadastral plots, favorable conditions are created for acquiring a larger area of agricultural land, which, depending on the area, can be used for planting one or more crops (or converted into pastures), and whose products will later be competitive on the market, as their yield and quality will increase. The direct effect of land consolidation on the development of agriculture is visible

---

36 Louwsma, M.. *et. al., The Fundamentals to Guide Practice*, FIG Commission 8 - Spatial Planning and Development, International Federation of Surveyors (FIG), No. 79, 2022, p. 17.

37 Cetl, V.; Prosen, A., *op. cit.*, note 24, p. 293

38 *Ibid.*

39 *Ibid.*

40 Borković, I., *op. cit.*, note 12, p. 615.

41 Belaj, V., *Pravo vlasništva na poljoprivrednom zemljištu*, in: Kačer, B., (ed.), Zakon o vlasništvu i drugim stvarnim pravima i Zakon o zemljišnim knjigama – 1997. – 2017. hrvatsko stvarno pravo de lege lata i de lege ferenda, Inženjerski biro, Zagreb, 2017, pp. 74 – 96, p. 92.

in the above example.[42] Namely, participants in the land consolidation process, after the published Public Call for Land Consolidation according to the financial framework of the program pursuant to Article 18 of the Agricultural Land Consolidation Act and the Opinion and Approval of the Conceptual Design, and after a meeting of land owners, enter the agricultural land in their ownership into the land consolidation block in accordance with the agricultural land consolidation program. At the meeting of land owners, which is regulated by Art. 20 of the 2022 Agricultural Land Consolidation Act, land owners have the opportunity to present proposals and comments regarding the planned consolidation procedure. A landowner who has contributed a certain area of agricultural land to the land consolidation block can express their opinion on the previous use of the agricultural land and request that, after the consolidation process, the agricultural land allocated to them retains the same or approximately the same soil properties, which would allow for the continuation of agricultural use in the same manner as before the land consolidation process.

A legitimate question can be raised about how land consolidation specifically contributes to increasing the products derived from agricultural activities and their competitiveness according to market competition rules (whether it concerns cereals, milk, cheese, wine, olive oil, etc.). By allocating agricultural land proportionally to the area of land contributed to the land consolidation block, the owner of the newly consolidated agricultural land receives a contiguous (not separated by roads, canals, or forests) agricultural area[43] that can then be maximally utilized for the production of agricultural products. This is something that, due to fragmentation of agricultural land, unregulated ownership relations, natural barriers, and unfavorable positioning (for example, through water management, which removes excess water from agricultural land, thus significantly improving the land's value),[44] the owner was previously able to produce in much smaller quantities before the land consolidation process was carried out. Special assistance to agricultural land owners is provided by the Croatian Agency for Agriculture and Food

---

42 Ministarstvo poljoprivrede, šumarstva i ribarstva, [https://poljoprivreda.gov.hr/istaknute-teme/poljoprivreda-173/poljoprivredno-zemljiste/komasacija-poljoprivrednog-zemljista/6441], Accessed 13 March 2025.

43 According to the 2022 Agricultural Land Consolidation Act, the executive body of the local government unit or the City of Zagreb, i.e. the Ministry, issues a decision on land consolidation. Following this, after the consolidation procedure is completed, the owners of agricultural land included in the consolidation block are proportionally returned the same land or agriculturally similar land (of a more regular shape, with organized road and drainage networks, and sorted ownership and other property rights).

44 Bebek, I.; Škergo, R., *Komasacija zemljišta i njen doprinos proizvodnji hrane*, Sociologija i prostor : časopis za istraživanje prostornoga i sociokulturnog razvoja, No. 61-62, 1978, pp. 56-68, p. 64.

(hereinafter: CAAF) which, in accordance with its activities, provides assistance to owners in cultivating agricultural land and agricultural production. For example, it is of great importance for the landowner to monitor and have expert supervision over seed crops, planting material for fruit trees, grapevines, analyzing plant protection products in circulation (post-registration control) for inspection purposes, determining the condition of agricultural land damage, marking domestic animals, etc. All of these services are provided by CAAF.[45] In addition to agricultural land owners interested in the land consolidation process, there are also those owners who are skeptical about the land consolidation process, or who are unsure about the entire process. A major challenge for state administration bodies implementing the land consolidation process is to find an appropriate way to motivate agricultural land owners to participate in the land consolidation process. The last land consolidation in the Republic of Croatia was carried out while the Republic of Croatia was part of the SFRY, and more than thirty years have passed since then. Staničić states that "for the most part, farmers do not even know what land consolidation is and what its advantages are." Therefore, the Agricultural Land Agency, as well as the Advisory Service of the Ministry of Agriculture, should initiate education of agricultural land owners to make it easier for them to accept the implementation of land consolidation."[46] The previously stated claim is accurate, given the time that has passed since the last land consolidation and the lack of awareness among the local population about the land consolidation process and other agrarian legal measures. This undoubtedly does not contribute to the revival and recovery of land consolidation in Croatian villages.

However, the previous statement was a consequence of the analysis of the 2015 Agricultural Land Consolidation Act, and certain bodies that were regulated by the previous law were deleted from the aforementioned law under the new 2022 Agricultural Land Consolidation Act (e.g. Agricultural Land Agency). Accordingly, the statement made by Staničić is not incorrect. However, given the circumstances (the adoption of a new law regulating land consolidation activities), the bodies involved in the process (such as the Ministry of Agriculture, Forestry and Fisheries, the Consolidation Commission, the State Geodetic Administration, etc.), as outlined in the applicable 2022 Agricultural Land Consolidation Act, should be involved in informing and educating the local population. These bodies provide relevant information about the consolidation process to interested citizens through consultations, as prescribed by the same Act. For example, the Rules of

---

45 Art. 1 of the Law on the Croatian Agency for Agriculture and Food, Official Gazette No. 111/18.

46 Staničić, F., *Problemi u provođenju komasacije prema Zakonu o komasaciji poljoprivrednog zemljišta*, Informator, Vol. 65, No. 6498, 2017, pp. 1-5, p. 4.

Procedure of the Consolidation Commission[47] state that the commission receives comments from participants in the consolidation process on the published draft decision, along with other activities in accordance with the authority and scope of the Commission's responsibilities. Given that the Regulations on the work of the Land Consolidation Commission (Official Gazette, No. 46/22) do not specify in more detail the obligations of the body in providing advisory assistance and information, we are of the opinion that the Rules of Procedure of the Consolidation Commission should regulate the competence and scope of the work of the commission in more detail, taking into account the advisory character that the Land Consolidation Commission should have in its work.[48]

Although there are no common European regulations on land consolidation, it is important to say that the European Commission supports initiatives by EU member states aimed at more efficient use of agricultural land and thereby improving agriculture as the primary activity of most member states. The European Commission has positively assessed the 2022 Agricultural Land Consolidation Act, with the aim of consolidating at least 18 thousand hectares of agricultural land by the end of the first quarter of 2026.[49] The Ministry of Agriculture, Forestry and Fisheries has published a Public Call for the selection of a specific area for the implementation of land consolidation in accordance with the Agricultural Land Consolidation Program until 2026, through the reform measure C1.5 R2 "Improving the agricultural land restructuring and consolidation systems" from the National Recovery and Resilience Plan. [50] Based on a public call on the territory of the Republic of Croatia, the land consolidation process began in three

---

47 Art. 3 of the Rules of the Land Consolidation Commission, Official Gazette, No. 46/22.

48 Art. 9 of the Regulation on the Implementation of Land Consolidation in the Area of the Municipal Location Plan, Official Gazette, No. 110/02, 8/03 – ispr. i 58/03 – ZZK-1…For instance, Pravilnik o izvedbi komasacije zemljišč na območju občinskega lokacijskega načrta (Uradni list RS, št. 21/04 in 199/21 – ZUreP-3) prescribes in its Article 9 that one of the tasks in the scope and purview of the expert commission is the counseling, assistance and cooperation with the participants of land consolidation (slovenski: svetovanje, pomoč in sodelovanje s komasacijskimi udeleženci).

49 Poljoprivredno zemljište u Hrvatskoj je najjeftinije u EU, a od 2023. moći će ga kupovati strani ulagači. Može li zakon na koji agronomi imaju ozbiljne zamjerke spriječiti rasprodaju, [https://www.tportal.hr/biznis/clanak/poljoprivredno-zemljiste-u-hrvatskoj-je-najjeftinije-u-eu-a-od-2023-moci-ce-ga-kupovati-strani-ulagaci-moze-li-zakon-na-koji-agronomi-imaju-ozbiljne-zamjerke-sprijeciti-rasprodaju-foto-20220120?meta_refresh=1], Accessed 17 March 2025 ; Poljoprivredno zemljište u Hrvatskoj i u 2023. najjeftinije u EU, [https://www.poslovni.hr/hrvatska/poljoprivredno-zemljiste-u-hrvatskoj-i-u-2023-najjeftinije-u-eu-4471714], Accessed 17 March 2025.

50 Ministry of Agriculture, Forestry and Fisheries [https://poljoprivreda.gov.hr/objavljen-javni-poziv-za-odabir-odredjenog-podrucja-za-provodjenje-komasacije-u-skladu-s-programom-komasacije-poljoprivrednog-zemljista-do-2026-godine-kroz-reformsku-mjeru-c1-5-r2-unaprjedjenje/5880] Accessed 18 March 2025

local government units, in the municipalities of Konavle, Mali Bukovec and the city of Novska, as of 24 November 2024.[51] Given that the aforementioned local government units are implementing land consolidation in the Republic of Croatia for the first time in 30 years, the results of the land consolidation in these cases will certainly serve as an example that could be used by other municipalities and cities facing the problem of fragmented agricultural areas, irregular shapes, and unsettled ownership and other property relations.

4. LAND CONSOLIDATION AND RURAL DEVELOPMENT

The problem of the development and survival of the Croatian countryside was visible even when the Republic of Croatia was still part of socialist Yugoslavia. The inherited problems were not resolved and remained one of the most important issues when it comes to the unfavorable demographic picture of the Republic of Croatia. As Ivković states, "90% of the mainland of Croatia lives in rural areas, as well as around 47% of the total population."[52] In Croatian villages, especially those in Slavonia, but also in Lika and Gorski Kotar, there is a prevailing negative trend of leaving rural areas (smaller local government units), or migration from smaller local government units (villages) to larger local (regional) government units (cities and counties).[53] The reason for this, as stated by Klempić Bogadi and others, is that "the dominant orientation towards industry in the economic development of socialist Croatia led to a social and economic crisis in rural areas",[54] and consequently, the population turned to migration to cities, where the center of industry was, in search of employment and better living conditions than those offered by agricultural activities. The young population, on the other hand, mostly left to pursue education, which in most cases was not available in smaller villages, and after completing their education, they found employment in the city where they completed their education.[55] Thus, the villages are mostly inhabited by elderly and middle-aged people who are unable to run farms due to their age and lack of labor.

Considering the above fact, it can be said that older residents, according to their age structure, are the owners of unused and neglected wealth that should be used for the development of agriculture and villages.[56] An important question is how smaller local government units can effectively stimulate rural development, and

---

51 *Ibid.*

52 Ivković, M.; Barković, Đ.; Baćani, S.*, op. cit.*, note 4, p. 298.

53 Ibid.

54 Klempić Bogadi, S., *et al., Hrvatsko selo na početku 21. stoljeća – studija slučaja općina Gornja Rijeka*, Sociologija i prostor, vol. 53, No. 2 (202), 2015, pp. 139-161, p. 140.

55 *Ibid*.

56 Ivković, M.; Barković, Đ.; Baćani, S., *op. cit.*, note 4, p. 298.

consequently sustainable economic growth. Starting from national legal regulations, it is important to mention Article 29 of the Regional Development Act,[57] which states that local self-government units may establish local development agencies as public institutions or companies for the purpose of effective coordination and promotion of local development of one or more local self-government units.[58] The tasks of a development agency include coordinating the drafting of development strategies for local self-government units, coordinating the creation of action plans for the implementation of these strategies, monitoring their implementation, and participating in the development of projects and strategic initiatives for the regional development of the statistical region, etc.[59] In addition to these tasks, land consolidation is of exceptional importance for the survival and development of rural areas in the Republic of Croatia. The majority of the population living in rural areas engages in some form of agricultural activity in their daily lives. "In the Republic of Croatia, family farms have an average size of 2.7 ha, and are fragmented into an average of 5.3 separate plots. Compared to most EU countries, agricultural holdings in the Republic of Croatia are six times smaller than the average size of agricultural land in those countries."[60] The structure of agricultural holdings in Croatia today is characterized by a large number of small and fragmented family farms and relatively few large corporate farms.[61]

For a certain number of residents, agriculture is their primary activity and they earn income from self-employment, thereby acquiring rights and obligations in the areas of labor, social and health protection. If the agriculturally active working population does not have favorable conditions for cultivating agricultural land due to small and irregular cadastral plots, unsettled ownership relations, an unregulated road and canal network, etc., some of them will shut down their agricultural holdings, and there is a high likelihood that they will leave their local communities, thereby further damaging the already fragile demographic situation

---

57 Law on Regional Development of the Republic of Croatia, Official Gazette, No. 147/14, 123/17, 118/18

58 Art. 29. of the Law on Regional Development of the Republic of Croatia, Official Gazette, No. 147/14, 123/17, 118/18.

59 *Ibid*.

60 Ivković, M.; Barković, Đ.; Baćani, S.*, op. cit.,* note 4, p. 298.

61 Hartvigsen, M.*, Experiences with land consolidation and land banking in Central and Eastern Europe after 1989*, Food and Agriculture Organization of the United Nations (FAO), No. 26, 2015, p. 64… The structure of agricultural holdings in Croatia today is characterized by a large number of small and fragmented family farms and a relatively low number of large corporate farms. In 2009, the average size of commercial farms (including rented land) was 8.5 ha, while the average for all farms was only 2.9 ha. According to the agricultural census conducted in 2003, there were a total of 448,000 family farms in Croatia with an average area of 1.9 ha, divided into eight plots. Abandoned agricultural land is a widespread phenomenon, and it is estimated that more than a third of agricultural land is unused.

of Croatian villages. Precisely for the above reasons, it is important to provide farmers with favorable working conditions through the land consolidation process and thus contribute to the development of agriculture, increase the number of farmers in the villages and thus increase the number of inhabitants in rural areas. It is important to define the ways in which land consolidation activity contributes to rural development and the benefits for the local population by carrying it out. As Kranjčević and Prosen see it, "in order for the land consolidation process to contribute to the development of rural areas, it is important to respect all those who use a particular area, as well as the agritechnical, landscape, natural, transportation and other conditions of spatial planning, renewal and development of villages."[62] In addition to reducing the fragmentation of a particular agricultural area and more regular organization of cadastral plots on which agricultural area is located, land consolidation also modernizes rural (village) infrastructure. Land consolidation includes the construction and renovation of unclassified roads and paths used for transporting heavier machinery, which improves the connectivity between multiple villages and, ultimately, nearby towns. Better land quality is also insured through land improvement measures such as drainage, irrigation, and erosion control.[63] Agricultural lands that have been returned to the owners after land consolidation, who in turn contributed them to the land consolidation block – now with larger areas and settled ownership – are suitable for the development of agritourism, rural farms, and organic production, while the unused portions can be repurposed for cycling paths, recreational zones, and more. The above measures, especially the transport infrastructure,[64] improve living and working conditions in rural areas, motivating the young population to remain in the villages.

The Treaty on the Functioning of the European Union [65] is extremely important when it comes to revitalizing the Croatian countryside, or rather improving the

---

62 Kranjčević, J., *et. al., Komasacija: doprinos održivom razvitku ruralnog prostora u srednjoj i istočnoj Europi u novom tisućljeću*, Sociologija i prostor : časopis za istraživanje prostornoga i sociokulturnog razvoja, Vol. 41, No. 1/2 (159/160), 2003, pp. 119-130, p. 122.

63 An agricultural measure to improve the quality of arable soil through drainage, irrigation, protection from erosion, etc.

64 Kranjčević*, et. al., op. cit*., note 48, p. 121….According to the latest method of resolution, the land consolidation procedure, i.e. the rural development procedure, includes all partial projects, from the construction of roads to motorways, from the location of individual agricultural holdings to the reservation of land for housing and other construction in the settlement, ecological and landscape planning, etc. Thus, agricultural space acquires a multifunctional meaning. With the redevelopment of the area, other important activities are also developing, such as tourism and recreation.

65 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

living standards of the rural population. Namely, the objectives of the Common Agricultural Policy are: increasing agricultural productivity by promoting technical progress and ensuring the rational development of agricultural production, as well as the optimal use of production factors, particularly labor; stabilizing the market and ensuring the availability of supply. This in turn leads to and improved standard of living for the rural population[66] (through increased purchasing power), which directly results in the purchase of machinery (tractors, seeders, plows, so-called "platform trailers", etc.) necessary for the cultivation of agricultural land. The EAFRD – European Agricultural Fund for Rural Development, an instrument of the EU's Common Agricultural Policy (CAP) aimed at addressing the specific challenges of rural areas, is also important for the land consolidation process.[67] In the period from 2021 to 2024, the EAFRD provided EUR 26.9 billion and an additional EUR 8.1 billion.[68] The key goals of the Common Agricultural Policy (CAP) for 2023–2027 include ensuring fair earnings for farmers, increasing competitiveness, re-aligning the strength of the food chain, activities related to climate change, environmental care, landscape and biodiversity preservation, support for generational renewal, vibrant rural areas, and the protection of food quality and health.[69] Regulation (EU) No. 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006[70] is relevant when it comes to the use

---

which adopted the Treaty of Lisbon, signed on 13 December 2007 Tables of equivalences, Official Journal of the European Union, 2016/C 202/01.

66 Art. 39. of 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 Tables of equivalences, Official Journal of the European Union, 2016/C 202/01.

67 EAFRD - European Agricultural Fund for Rural Development, [https://eu-mayors.ec.europa.eu/hr/node/29] Accessed 19 March 2024.

68 *Ibid.*

69 *Ibid.*

70 Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries

of funds from the European Agricultural Fund and is of particular importance, as it normatively regulates the five European Structural and Investment Funds (ESI Funds): the five European Structural and Investment Funds (ESI Funds) form the basis of the EU's cohesion policy, each of which has a specific role. The European Regional Development Fund (ERDF) aims to reduce regional disparities through investments in infrastructure, innovation, digitalization and environmental projects. The European Social Fund (ESF) + focuses on employment, social inclusion and education, financing programs for the younger working-age unemployed population. The Cohesion Fund includes the decommissioning or construction of nuclear power plants, airport infrastructure (except in the outermost regions) and some waste management operations (e.g. landfills).[71] The European Agricultural Fund for Rural Development (EAFRD) encourages sustainable agriculture and the development of rural areas through the modernization of agriculture, organic production and land consolidation. The European Maritime and Fisheries Fund (EMFF) is focused on the sustainable development of fisheries and the protection of marine organisms, as well as financing the maintenance of the entire ecosystem. The regulation itself does not mention the land consolidation procedure as an independent agrarian measure.[72]

The regulation focuses on standardizing the general mechanisms of financing, control of funds, and management, while specific measures (such as land consolidation and land adjustment) are usually regulated within sectoral policies. Land consolidation and land adjustment, as well as other agrarian legal measures are most often regulated at the level of national implementation programs (various forms of pilot projects). It appears that each member state has the discretion to decide on the initiation, conduct and completion of the land consolidation process. However, if financial support is used to finance the land consolidation process through EAFRD (European Agricultural Fund for Rural Development), then the beneficiary Member State is required to comply with the guidelines prescribed by the EAFRO and Regulation (EU) No. 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European

Fund and repealing Council Regulation (EC) No 1083/2006, Official Journal of the European Union, L 347, 20 December 2013.

71 Informativni članci o Europskoj uniji, [https://www.europarl.europa.eu/factsheets/hr/sheet/96/kohezijski-fond], Accessed 17 March 2025.

72 Ministarstvo regionalnog razvoja i fondova europske unije, [https://razvoj.gov.hr/eu-fondovi/fondovi/ipa-program/ipa-v/europski-poljoprivredni-fondovi/292], Accessed 20 March 2025.

Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006,[73] as well as other European legal provisions (indirectly) regulating the matter of land consolidation. It is clear from the above that the land consolidation process is not regulated by Regulation 1303/2013, which implies that the European Parliament, when determining the common goals of each of the mentioned funds, should explicitly regulate land consolidation through the aforementioned regulation, as well as other regulations[74] governing European agricultural policy. This would help limit the arbitrariness of individual member states in their decision-making processes regarding the implementation of land consolidation procedures.

5. CONCLUSION

Although the land consolidation process has not been implemented in the Republic of Croatia so far, based on available literature, the impact of the same mechanism on agriculture and its development throughout history is evident, particularly during the time when the present-day Republic of Croatia was part of socialist Yugoslavia. Hope for the revival of the land consolidation process in the Republic of Croatia was provided by the 2015 and 2022 Agricultural Land Consolidation Acts. However, despite these laws, land consolidation has not been carried out even once. Nevertheless, through the Public Call for selecting specific areas for land consolidation in accordance with the Agricultural Land Consolidation Program until 2026, under the reform measure C1.5 R2, efforts are being

[73] Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, Official Journal of the European Union, L 347, 20, 2013.

[74] Like threads: Regulation (EU) No 1308/2013 of The European Parliament and of the Council of 17 December 2013 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, Official Journal of the European Union, L 347, 2013, Regulation (EU) 2020/2220 of the European Parliament and of the Council of 23 December 2020 laying down certain transitional provisions for support from the European Agricultural Fund for Rural Development (EAFRD) and from the European Agricultural Guarantee Fund (EAGF) in the years 2021 and 2022 and amending Regulations (EU) No 1305/2013, (EU) No 1306/2013 and (EU) No 1307/2013 as regards resources and application in the years 2021 and 2022 and Regulation (EU) No 1308/2013 as regards resources and the distribution of such support in respect of the years 2021 and 2022, , Official Journal of the European Union, L 437, 2020.

made to engage local and regional (district) self-government units to participate in the land consolidation process.

Through an analysis of the impact of land consolidation on agriculture, it is concluded that land consolidation has multiple benefits when using agricultural land, particularly reflected in the increase in productivity, more economical use of agricultural land, reduction in the fragmentation of cadastral plots, and easier application of modern agricultural technologies. The paper also presents the view that the Rules of Procedure for the Land Consolidation Commission should provide a more detailed regulation of the commission's authority and scope of work, considering the advisory role that the Land Consolidation Commission should have in its operations.

In relation to land consolidation, the importance of the Treaty on the Functioning of the European Union and the financing of the land consolidation process by the European Union, particularly the European Agricultural Fund for Rural Development (EAFRD), is also emphasized. The mentioned fund enables the financing of land consolidation projects in member states. However, there is currently no unified European regulation that obligates member states to implement land consolidation, unless they have received financial support from the European Union for the purpose of carrying out the land consolidation process in the country. As part of the National Recovery and Resilience Plan, Croatia has announced concrete steps in the implementation of land consolidation, and the first local self-government units are already included in the pilot projects. In this context, it will be interesting to see how the mentioned local government units will implement the land consolidation process through the pilot project.

REFERENCES

BOOKS AND ARTICLES

1. Bebek, I.; Škergo, R., *Komasacija zemljišta i njen doprinos proizvodnji hrane*, Sociologija i prostor : časopis za istraživanje prostornoga i sociokulturnog razvoja, No. 61-62, 1978, pp. 56 – 68
2. Belaj, V., *Pravo vlasništva na poljoprivrednom zemljištu*, in: Kačer, B., (Ed.), Zakon o vlasništvu i drugim stvarnim pravima i Zakon o zemljišnim knjigama – 1997. – 2017. hrvatsko stvarno pravo de lege lata i de lege ferenda, Inženjerski biro, Zagreb, 2017, pp. 74-96
3. Borković, I., *VII. Izmijenjeno i dopunjeno izdanje, Upravno pravo*, Narodne novine, Zagreb, 2022
4. Bulka, Z., Što donosi novi Zakon o komasaciji poljoprivrednog zemljišta, Pravo i porezi, Vol. 31, No. 11, 2022, pp. 74 – 77

5. Cetl, V.; Prosen, A., *Uređenje poljoprivrednog zemljišta kao čimbenik razvoja poljoprivrede*, Geodetski list, Vol. 55 (78) No. 4, 2021, pp. 289 – 298
6. Gatarić, Đ., *Upravno pravo – posebni dio*, Drugo izmijenjeno i dopunjeno izdanje, Savremena administracija, 1988
7. Gostović, M., *Poljoprivreda, biotopi, zaštita čovekove okoline i komasacija*, Geodetski list, Vol. 45 (68) No. 4–6, 1991, pp. 187 – 196
8. Hartvigsen, M., *Experiences with land consolidation and land banking in Central and Eastern Europe after 1989*, Food and Agriculture Organization of the United Nations (FAO), No. 26, 201
9. Ivković, M.; Barković, Đ.; Baćani, S., *Komasacija zemljišta i ruralni razvoj*, Geodetski list, vol. 64 (87), No. 4, 2010, pp. 297 – 312
10. Kranjčević, J.; Prosen, A., *Komasacija: doprinos održivom razvitku ruralnog prostora u srednjoj i istočnoj Europi u novom tisućljeću*, Sociologija i prostor : časopis za istraživanje prostornoga i sociokulturnog razvoja, Vol. 41, No. 1/2 (159/160), 2003, pp. 119 – 130
11. Klempić Bogadi, S.; Podgorelec S., *Hrvatsko selo na početku 21. stoljeća – studija slučaja općina Gornja Rijeka*, Sociologija i prostor, vol. 53, No. 2 (202), 2015, pp. 139 – 161
12. Louwsma, M.; Vries, W.; Hartvigsen, M., *The Fundamentals to Guide Practice, FIG Commission 8 - Spatial Planning and Development*, International Federation of Surveyors (FIG), No. 79, 2022
13. Malenica, I., *Novo uređenje komasacije poljoprivrednog zemljišta u Hrvatskoj*, Zagrebačka pravna revija, Vol. 4, No. 3, 2015, pp. 363-391
14. Staničić, F., *Novi zakon o komasaciji poljoprivrednog zemljišta*, in: Barbić, J. (Ed.), Pravna zašita tla, Hrvatska akademija znanosti i umjetnosti, Zagreb, 2016, pp. 77 – 112
15. Staničić, F., *Neka javnopravna ograničenja prava vlasništva u Kraljevni Hrvatskoj i Slavoniji u razdoblju od 1852. do 1918.*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 64, No. 5 - 6, 2013, pp. 1119 – 1142
16. Staničić, F., *Problemi u provođenju komasacije prema Zakonu o komasaciji poljoprivrednog zemljišta*, Informator, Vol. 65. No. 6498, 2017, pp. 1-5
17. Veršinskas, T., Vidar, M., Hartvigsen, M., Mitic Arsova, K., Holst, F., Gorgan, M., *Legal guide on land consolidation*, „Food and Agriculture Organization of the United Nations (FAO), Rome, 2020.

EU LAW

1. 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 Tables of equivalences, Official Journal of the European Union, 2016/C 202/01
2. Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild flora and fauna, Official Journal of the European Union, L 206, 22 July 1992

3. Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, Official Journal of the European Union, L 347, 20 December 2013
4. Regulation (EU) No 1308/2013 of The European Parliament and of the Council of 17 December 2013 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, Official Journal of the European Union, L 347, 17 December 2013
5. Regulation (EU) 2020/2220 of the European Parliament and of the Council of 23 December 2020 laying down certain transitional provisions for support from the European Agricultural Fund for Rural Development (EAFRD) and from the European Agricultural Guarantee Fund (EAGF) in the years 2021 and 2022 and amending Regulations (EU) No 1305/2013, (EU) No 1306/2013 and (EU) No 1307/2013 as regards resources and application in the years 2021 and 2022 and Regulation (EU) No 1308/2013 as regards resources and the distribution of such support in respect of the years 2021 and 2022, , Official Journal of the European Union, L 437, 23 December 2020

LIST OF NATIONAL REGULATIONS, ACTS AND COURT DECISIONS

1. Constitutional Decision on the Sovereignty and Independence of the Republic of Croatia, Official Gazette No. 31/91
2. Law on Land Consolidation of Agricultural Land, Official Gazette No. 44/22
3. Law on Land Consolidation of Agricultural Land, Official Gazette No. 51/15
4. Land Consolidation Act, Official Gazette of the FPRY, No. 60/54 (Invalid regulation)
5. Land Consolidation Act, Official Gazette of the SFRY, No. 10/79 (Invalid regulation)
6. Law on Amendments and Supplements to the Land Consolidation Act, Official Gazette of the SFRY, No. 21/84 (Invalid Regulation)
7. Law on Amendments to the Land Consolidation Act, Official Gazette of the SFRY, No. 5/87 (Invalid Regulation)
8. Law on the Croatian Agency for Agriculture and Food, Official Gazette No. 111/18
9. Law on Regional Development of the Republic of Croatia, Official Gazette, No. 147/14, 123/17, 118/18
10. Rulebook on the work of the consolidation commission, Official Gazette, No. 46/22
11. Regulation on the Implementation of Land Consolidation in the Area of the Municipal Location Plan, Official Gazette, No. 110/02, 8/03, 58/03
12. Regulations on the Implementation of Land Consolidation in the Area of the Municipal Location Plan, Official Gazette, No. 21/04 in 199/21 – ZUreP-3

WEBSITE REFERENCES

1. Ministry of Agriculture, Forestry and Fisheries, [https://poljoprivreda.gov.hr/objavljen-javni-poziv-za-odabir-odredjenog-podrucja-za-provodjenje-komasacije-u-skladu-s-programom-komasacije-poljoprivrednog-zemljista-do-2026-godine-kroz-reformsku-mjeru-c1-5-r2-unaprjedjenje/5880], Accessed 18 March 2025
2. EAFRD - Europski poljoprivredni fond za ruralni razvoj, [https://eu-mayors.ec.europa.eu/hr/node/29], Accessed 19 March 2024
3. Ministarstvo regionalnog razvoja i fondova europske unije, [https://razvoj.gov.hr/eu-fondovi/fondovi/ipa-program/ipa-v/europski-poljoprivredni-fondovi/292], Accessed 20 March 2025
4. Ministry of Agriculture, Forestry and Fisheries [https://poljoprivreda.gov.hr/istaknute-teme/poljoprivreda-173/poljoprivredno-zemljiste/komasacija-poljoprivrednog-zemljista/6441], Accessed 13 March 2025
5. Poljoprivredno zemljište u Hrvatskoj je najjeftinije u EU, a od 2023. moći će ga kupovati strani ulagači. Može li zakon na koji agronomi imaju ozbiljne zamjerke spriječiti rasprodaju, [https://www.tportal.hr/biznis/clanak/poljoprivredno-zemljiste-u-hrvatskoj-je-najjeftinije-u-eu-a-od-2023-moci-ce-ga-kupovati-strani-ulagaci-moze-li-zakon-na-koji-agronomi-imaju-ozbiljne-zamjerke-sprijeciti-rasprodaju-foto-20220120?meta_refresh=1], Accessed 17 March 2025
6. Poljoprivredno zemljište u Hrvatskoj i u 2023. najjeftinije u EU, [https://www.poslovni.hr/hrvatska/poljoprivredno-zemljiste-u-hrvatskoj-i-u-2023-najjeftinije-u-eu-4471714], Accessed 17 March 2025
7. Informativni članci o Europskoj uniji, [https://www.europarl.europa.eu/factsheets/hr/sheet/96/kohezijski-fond], Accessed 17 March 2025

Original scientific paper

CITIZENS' ATTITUDE TOWARDS LOCAL OFFICIALS - FREQUENCY, PREVENTIVE MEASURES AND CONSEQUENCES OF AGGRESSIVE BEHAVIOUR

Jelena Dujmović Bocka, PhD, Associate Professor
Josip Juraj Strossmayer University of Osijek, Faculty of Law
Stjepana Radića 13, 31000 Osijek, Croatia
jdujmovi@pravos.hr

Danijela Romić, PhD, Senior Lecturer
University of Applied Sciences „Lavoslav Ružička" in Vukovar
Blage Zadre 2, 32000 Vukovar, Croatia
dromic@vevu.hr

Željka Vajda Halak, LLM, Senior Lecturer
University of Applied Sciences „Lavoslav Ružička" in Vukovar
Blage Zadre 2, 32000 Vukovar, Croatia
zeljka.vajda@vevu.hr

ABSTRACT

A safe working environment is one of the fundamental rights of workers, regardless of the type of job or employer. All previous research on workplace aggression has primarily focused on intra-organizational forms, while aggressive behaviour from external stakeholders (such as users or citizens) has been studied far less frequently, particularly in relation to public officials. Research findings indicate that citizen aggression significantly affects employees' overall well-being and health, their organizational commitment and performance. Public officials work in the public interest, follow the rules and cannot always meet citizens' demands and needs. Under the influence of New Public Management, officials are expected to do more with fewer resources, leading to overwork, stress, and potentially declining service quality and trust in public administration. At the same time, citizens are becoming more demanding and better informed, while trust in public services is declining. Along with other classic predictors, these factors may contribute to increased citizen aggression toward public officials.

In this paper, the focus of research is on officials in local government units in Osijek-Baranja and Vukovar-Srijem counties. The questions posed in the research are: how frequently do citizens exhibit aggressive behaviour toward officials in local government units, what are the consequences of such behaviour for officials and what preventive measures have been implemented to prevent aggression?

To collect data, a survey questionnaire was created using Google Forms, containing seventeen questions, and was sent to respondents in October 2024. The collected data underwent qualitative and quantitative analysis using classical statistical methods. Relations were made between independent variables (such as gender, type and size of the local government unit, length of service, and job type) and dependent variables.
The results align with comparative research. The respondents report a high frequency of citizen aggression toward officials in local government units, with verbal aggression being the most common form. This type of aggression causes officials to feel moderately to highly distressed, yet a significant number of incidents go unreported. Additionally, many reported incidents receive no response. The most commonly cited preventive measure is the presence of security cameras.
Following the introduction, which highlights the importance of officials' sense of security for organizational efficiency, the second part of the paper analyses the existing legal framework based on Council Directive 76/207/EEC, Directive 2002/73/EC of the European Parliament and of the Council, and other documents of European social partners. Furthermore, the results of comparative research on the frequency and consequences of citizen aggression toward officials, their well-being and work performance in the member states of the European Union are presented. The third part of paper explains the research methodology, while the fourth presents and analyses the results. In the conclusion, the authors emphasize the need for further research on this phenomenon in order to reduce and prevent its harmful effects on officials and the local government units in which they work.
The scientific contribution of this paper is reflected in initiating a comprehensive discussion—previously non-existent in Croatia—on the causes and consequences of citizen aggression toward local officials. The practical implications include raising awareness of this phenomenon, which should lead to a more frequent reporting of citizen aggression and more appropriate organizational responses to these challenges.

***Keywords**: local officials, prevention, stress, violence, workplace aggression*

1. INTRODUCTION

Over the last thirty years within a wider concept of workplace safety significant attention of professional and academic community, international organisations and legislators has been oriented towards safety of public officials at their workplace. One of its key indicators is the absence of any undesirable behaviour exhibited by the coworkers, employers, users of public services or wider public in general (citizens). Undesirable interaction can be expressed either by words or behaviour, or actual physical threats and violence. Special emphasis is placed on the importance of prevention of discrimination, female inequality and sexual harassment of women. The research conducted so far have mostly been oriented towards intra-organisational conflicts (among employees and employers), whereas significantly less focus has been placed on citizens themselves even though it has been proved that the largest number of affective behaviour originates from that group.[1] Research

[1] Grandey, A. A., *Affective States and Traits in the Workplace: Diary and Survey Dana from Young Workers*, Motivation and Emotion, Vol. 26, No.1, 2002, pp. 31 - 55; Barling, J. Dupre; K. E., Kelloway, K., *Predicting Workplace Aggression and Violence*, Annual Review of Psychology, Vol. 60, 2009, pp. 671 - 692;

has shown that aggressive workplace behaviour (regardless who it is exhibited by) considerably influences the workers well-being, increases the risk of burn-out,[2] lowers work motivation, leads to emotional distraught and stress,[3] causes tension, anxiety and low levels of work satisfaction,[4] creates worry for personal safety.[5] Even if the individual has not directly been the object of aggression, but has merely seen or witnessed it on others, the consequences remain the same. [6] On the organisational level, the consequences are visible in low morale and work ethics, more frequent absence from work, high turnout rates[7] as well as poor quality of service providing[8] as a result of officials` sceptical attitude and loss of confidence in citizens.[9] When officials experience any kind of negative behaviour, they lose their

---

Liegat, M. C.; Hensel, D.; Vogel, D.; Vogel, R., *Aggressions and associations: How workplace violence affect what public empoloyees think of citizens*, Public Administration, Vol. 102, Iss. 1, 2022, pp. 222 – 248.

2 Borst, R. T.; Knies, E., *Well-Being of Public Servants Under Pressure: The Role of Job Demands and Personality Traits in the Health-Impairment Process*, Review of Public Personnel Administration, Vol. 43 No. 1, 2023, pp. 159 – 184; Papavasilopoulou, K., *Dutch Local Government Employees at risk: The effects of public initiated aggression on local government employees' well-being. Do aggression practices and transformational leadership help?* 2023, available at: [https://studenttheses.uu.nl/bitstream/handle/20.500.12932/45154/Research%20Project-%20Thesis%20-%20Konstantina%20Papavasilopoulou.pdf?sequence=1&isAllowed=y], Accessed 10 December 2024.

3 Enosh, G.; Tzafrir, S. S.; Gur, A., *Client Aggression Toward Social Workers and Social Services in Israel – A Qualitative Analysis,* Journal of Interpersonal Violence, Vol. 28, No. 6, 2013, pp. 1123 – 1142.

4 Schablon, A.; Wendeler, D.; Kozak, A.; Nienhaus, A.; Steinke, S., *Prevalence and Consequences of Aggression and Violence towards Nursing and Care Staff in Germany – A Survey*, International Journal of Environmental Research and Public Health, 15, 2018, pp. 1 – 18.

5 Hershcovis, S.; Barling, J., *Towards a multi-foci approach to workplace aggression: A meta-analytic review of outcomes from different perpetrators*, Journal of Organizational Behavior, Vol. 31, No. 1, 2009, pp. 24-44; Liegat *et al., op. cit.*, note 1, p. 235; Ngwimba, V. Y.; Chinyamurindi, W.; Dywili, M., *The role of incivility aggression on decent work: A local government sector case*, Journal of Local Govrnment Research and Innovation, Vol. 5, 2024, available at: [https://jolgri.org/index.php/jolgri/article/view/197/423], Accessed 10 December 2024.

6 Dupre, K. E.; Barling, J., Dawe, K. A., *Harm to Those Who Serve: Effects of Direct and Vicarious Customer-Initiated Workplace Aggression*, Journal of Interpersonal Violence, Vol. 29 (13), 2014, pp. 1 – 23.

7 Enosh *et al., op. cit.*, note 3, p. 1132; Hershcovis, S., *„Incivility, social underminig, bullying…Oh My!": A call to reconcile constructs within workplace aggression research*, Journal of Organizational Behavior, Vol. 32, 2011, pp. 499 – 519.

8 Lee, K. J.; Youm, J., *Effect of Citizen incivility on Self-sacrifice of Public service Motivation and Turnover Intention of Street-level Bureaucrats: Mediating Effect of Emotional Exhaustion*, Public Performance & Management Review, Vol. 47(6), 2024, pp. 1376 – 1398.

9 Moyson, S.; Van de Walle, S.; Groeneveld, S., *What do public officials think about citizens? The role of public officials' trust and their perceptions of citizens' trustworthiness in interactive governance*, in: Edelenbos, J.; Van Meerkerk, I. (eds.), Critical Reflections on Interactive Governance. Cheltenham: Edward Elgar.

motivation and desire to assist others which is the core of any public service.[10] The attention of the academic community has lately also been focusing on forms of deviant behaviour which cannot be identified as violence or disturbance due to their low intensity. This refers to any type of impolite and rude behaviour towards others, behaviour that breaks the rules of the standard social and/or workplace norms for which the term incivility is used. The term is more difficult to define since intra-organisational behaviours can be perceived as acceptable to one organisation whereas be regarded as completely unacceptable to the other.[11] Different forms of inappropriate low intensity behaviours of citizens towards the officials can also be referred to as mistreatment.[12] Research has shown that less intense unwanted behaviours identically affect the personal outcomes (have the same consequences on individuals) as do the more intense behaviours indicating they should therefore be prevented.[13] The majority of the so far conducted research has been focusing on specific services, which are considered high risk services, such as police, social services, healthcare and similar whereas very little research has so far been oriented on officials working in the units of local self-government.[14] In addition, in Croatia there have been records of research of frequency of aggression towards police officers and its consequences,[15] however, not a single paper has yet been published focusing on frequency and occurrence of citizens` aggression towards officials working in the units of local self-government. Thus, the primary motive of this paper is to initiate a scientific and professional discussion about the issue. Finally, it is to be added, that scientific researchers have proved that a significant percentage of participants has experienced at least some type of aggression, verbal attack being most frequent. Fischer et al. discovered that 50% of local officials in the Netherlands had experienced violence, *Liegat et al.* reported that only 13% of participants had not experienced any type of aggression, whereas *Schablon et al.* established that 94% of their participants had been exposed to verbal abuse in the

---

10 Guerrero, S.; Lapalme, M. E.; Bentein, K., *Employees' Reactions to a Citizen Incivility Climate: A Multilevel Multisource Study*, Review of Public Personel Administration, Vol. 44, No. 4, 2024, pp. 821 – 841.

11 Andersson, L. M.; Pearson, C. M., *Tit for Tat? The Spiraling Effect of Incivility in the Workplace*, The Academy of Management Review, Vol. 24, No. 3, 1999, pp. 452 – 471.

12 Kozjek, T.; Brezovar, N., *Citizens Mistreatment Among Public Servants in Social Public Services*, Danube, Vol. 13, No. 2, 2022, pp. 82 – 106.

13 Hershcovis, *op. cit*., note 6, p. 507; Lee; Youm, *op. cit*., note 8.

14 In this paper, the term „officials" refers to individuals who perform the administrative and professional tasks from the scope of activity of the bodies they work for within the local self-goverment units.

15 See in: Kovčo Vukadin, I., *Napadi na policijske službenike: pregled aktualnih spoznaja*, Policijska sigurnost, No. 3, 2011, pp. 273 - 305; Capan, M.; Sindik, J., *Sociodemografska obilježja i viktimizacija kod policijskih službenika,* Časopis za kriminalistiku, kriminologiju i sigurnosne studije, No. 3-4, 2015, pp. 21 - 36; Borovec, K., Balgač, I., Gluščić, S., *Doprinos institucionalne podrške u smanjenju rizika radnog mjesta zadovoljstvu poslom policijskih službenika*, Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 27., No. 2, 2020, pp. 819 – 855.

year prior to research.[16] It is especially important to highlight that the source of these affective behaviours originates from third parties.

Following the introduction, the second part of the paper provides insight into the legal framework which creates the foundation for normative organisation of protection and prevention against the citizens` aggressive behaviour towards the officials. In addition, it introduces comparative research analysing the citizens and users` aggression towards the officials. Moreover, in this part of the paper various forms of unwanted citizens` behaviours have been described and defined. The central part of the paper clarifies the methodology used in the conducted research, defines its aim and analyses the obtained results. The authors have used the final part of the paper to compare the research results with comparative research as well as to offer suggestions for future research and possible solutions of the issues.

2. LEGAL FRAMEWORK OF PROTECTION AGAINST AGGRESSIVE AND VIOLENT BEHAVIOUR OF CITIZENS (THIRD-PARTY VIOLENCE)

2.1. INTERNATIONAL AND EU LEGAL FRAMEWORK

Awareness of possible forms of aggression of citizens` towards the officials has been developed only recently, within the concept of protection against harassment, violence and discrimination. The beginning of legal regulation is found in several European Parliament Directives referring generally to harassment and discrimination.[17] Based on these Directives, social partners BUSSINESEUROPE, UEAPME, CEEP and ETUC signed in 2007 the Framework Agreement on Harassment and Violence at Work (hereinafter: the Framework). Partners signed the agreement in full awareness of the facts that violence and aggression can have rather unfavourable consequences for workers, that there is a necessity of raising awareness of all the stakeholders about this issue as well as the need to offer the common

[16] Fischer, T.; Van Reemst, L.; De Jong, J., *Workplace aggression toward local government employees: target characteristics*, International Journal of Public Sector Management, Vol. 29, Issue 1, 2016, pp. 30 - 53; Liegat *et al., op. cit.*, note 1, p. 230; Schablon *et al., op. cit.*, note 4, p. 1.

[17] Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180, Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303, Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [2002] OJ L269 and Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183. Subsequently, the Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204.

framework for finding suitable solutions to the issue at hand.[18] The aims of the document are focused on developing awareness of all the stakeholders (employers, employees and their representatives) about the issue of violence and harassment at work and offering precise framework for activities focusing on prevention and management of the discussed issues. The Framework defines violence and harassment as unacceptable behaviours of an individual or a group of individuals from which some can be identified and recognized more easily than the others depending on the form they occur in. It is clearly stated that the work environment itself affects the level of a person`s exposure to violence and harassment. The concept of harassment is defined as a situation in which one or more workers or managers, are repeatedly and intentionally harassed, are under the threat or humiliated referring to the work-related circumstances. Violence is present in case these persons are attacked in work-related circumstances. It is important to emphasize that this document refers exclusively to intra-organisational harassment and violence. The importance of the document lies, however, in its clearly set demands for employers who are thereby obligated to promote zero tolerance for these types of behaviour. Not soon after, in 2010, third-party violence and harassment (e.g. customers, clients, patients and members of the public in general) against the persons performing their duties at their workplace gains its attention among the European social partners[19] who mutually concur on common guidelines "Multi-sectoral guidelines to tackle third-party violence and harassment related to work" (hereinafter: the Guidelines 2010). In 2018, the Guidelines 2010 were additionally signed by two social partners representing the public administration sector[20] which implied that the scope of the Guidelines 2010 now referred to all the persons who could be harassed or violated on a work-related basis. Even though the Guidelines 2010 are not a legally binding act, the document still carries great significance due to its clearly defined terms and aims that focus on raising awareness of all the stakeholders about the importance of preventing harassment and violence as well as about the necessary prevention mechanisms. The Guidelines 2010 stipulates that

---

18 Framework Agreement on Harassment and Violence at Work, UEAPME – ETUC/CES, 2007, available at:
[https://drive.google.com/file/d/0B9RTV08-rjErYURTckhMZzFETEk/view?resourcekey=0-buzTanzA3dlfJHzVf4TmmQ], Accessed 2 January 2025.

19 The Guidelines 2010 was signed by two European trade union federations – the European Federation of Public Service Unions (EPSU) and UNI Europa – and six EU employer organisations, namely the European Trade Union Committee for Education (ETUCE), the European Hospital and Healthcare Employers' Association (HOSPEEM), the Council of European Municipalities and Regions (CEMR), the European Federation of Education Employers (EFEE), EuroCommerce and the Confederation of European Security Services (CoESS).

20 Trade Unions' National and European Administration Delegation (TUNED) and European Public Administration Employers (EUPAE).

both employers and employees are obliged to ensure their own safety and as well as the safety of others within the work environment. It places particular emphasis on the fact that third-party violence and harassment (hereinafter: TPVH) pose a serious threat to the health and dignity of individuals, while also producing significant economic consequences for society, including increased absenteeism due to medical leave, diminished employee morale, and higher turnover rates. The Guidelines 2010 indicate that violence and harassment can take many forms, such as mental, psychological and verbal; they can occur as individual cases or repeated behaviours; they can vary from disrespect to physical assault; they can be caused by mental issues or be motivated by emotional reasons; they can strongly affect victim`s personality, dignity and integrity; they can occur at or outside work and they can be inflicted through modern information-communication technologies.[21] The aim of the Guidelines 2010 is to support all the activities of employers, employees and their representatives regarding prevention, diminishment and mitigation of third-party violence and its consequences. Social partners are aware of the fact that practical measures for prevention and management of work-related violence and harassment are yet to be developed. They emphasise that the measures should focus on three segments:

- raising awareness and understanding of third-party violence;
- expressing dedication of social partners for common work and development of good practice oriented towards prevention and management of these issues in order to diminish their consequences on health and well-being
- presenting the Guidelines 2010 to all stakeholders on all levels with the aim of identifying, preventing and coping with issues of work-related harassment and violence.[22]

In addition, in 2019 the International Labor Organisation brought the Violence and Harassment Convention (No. 190) (hereinafter: the Convention No. 190)[23] in order to further regulate this issue. The Convention No. 190 is the first international treaty acknowledging the right of everyone to a world of work free from violence and harassment. Article 1 of the Convention No. 190 offers the first international definition of violence and harassment in the world of work by stating that "violence and harassment" in the world of work refers to "a range of unacceptable behaviours

---

21 Multi-sectoral guidelines to tackle third-party violence and harassment related to work, available at: [https://www.epsu.org/sites/default/files/article/files/TUNED%20EUPAE%20sign%20off%20guidelines%2017%20Dec%202018%20with%20signatures.pdf], Accessed 11 November 2024.

22 Guidelines 2010, *op. cit.*, note 19.

23 Violence and Harassment Convention (No. 190), [https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190], Accessed 15 February 2025.

and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment". The Convention No. 190 emphasizes that it applies to all sectors, as well as to violence and harassment perpetrated by third parties. The member states are obligated to explicitly forbid violence and harassment; to adopt comprehensive strategies for implementing the measures necessary for prevention and violence management; to secure adequate tracking and sanctioning mechanisms; to ensure victim support and to develop appropriate tools for training of all the stakeholders on coping with harassment and violence. The European Parliament expressed their approval of the draft of the Council`s decision through which the member states are encouraged to ratify the Convention No. 190 whereby emphasizing that the European Union should promote ratification of all international conventions while at the same time taking further steps to ensure protection of employees in every environment including the digital.[24] The Convention has so far been ratified by 47 countries in total, 18 of which are European, the Republic of Croatia excluded.[25]

European public administration network designed a document (e-News) about the presence of threats, harassment and violence against civil servants. 26 European countries (including the Republic of Croatia) participated in its creation. According to the accessible data, these types of behaviour were most frequently reported (in order of frequency) in healthcare, police, justice department, working with illegal immigrants, correctional institutions system, social services, education and tax services. A considerable number of countries have no records at all about the issue, however the most frequent form is verbal violence. Models of assistance and prevention include various educations (risk management), education and tracking of the persons who have been exposed to violence, e-desks to prevent direct contact with users and protective equipment (alarm systems). Interestingly, not a single state has identified the presence of security personnel as a preventive measure. Several countries claim that according to their legislation, an attack on officials is regarded as a serious offence.[26]

---

[24] European Parliament, 2020/0011(NLE) Violence and Harassment Convention, 2019 (No. 190) of the International Labour Organization (ILO): inviting Member States ti ratify it, [https://oeil.secure.europarl.europa.eu/oeil/en/procedure-file?reference=2020/0011(NLE)], Accessed 15 February 2025.

[25] International Labour Organization, Ratifications of C190 – Violence and Harassment Convention, [https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:3999810:NO], Accessed 15 November 2024.

[26] European public administration network, eNews, available at: [https://www.eupan.eu/wp-content/uploads/2023/05/EUPAN-eNews-threats-and-violence-against-civil-servants.pdf], 13 December 2024.

According to the research of the European Services Workers Union, 85% of the victims of violence and harassment are female, while 64% claim that their sector has seriously or very seriously been affected by TPVH. Psychological violence and verbal threats are considered as the most frequent forms of violence, while physical violence occurs in 14% of the cases.[27] This document proposes several measures oriented towards prevention of unwanted behaviour including: dissemination of TPVH ban by placing written "no TPVH" signs within the spaces visited by third parties, reducing the number of situations in which an official is alone and isolated at work, professional training to avoid and cope with conflict, ensuring the process of reporting, anonymity of the process and similar.

During the period of observation of efficiency and implementation of the Guidelines 2010 among social partners, it was established that 80% of the participants believe that TPVH is an extreme and a rather serious issue, 42% that it has a very big or big influence on the quality of services while 70% of the participants had no idea that the Guidelines 2010 even existed. Similarly to previous research, this one has also demonstrated that women are more frequently exposed to TVPH than men, whereby evidence was found to support the existence of casual link between TVPH and the occurrence of type 2 diabetes and cardiovascular diseases.[28]

2.2. LEGAL FRAMEWORK IN THE REPUBLIC OF CROATIA

The issue of workplace violence and harassment, especially if originating from third parties, does not receive adequate attention in the Republic of Croatia neither from the legislators nor from the academic community.

The Labour Act, regulates a general obligation of the employer to organise work in a manner that guarantees the protection of life and health of workers in accordance with special laws and other regulations.[29] Article 5 of the Occupational Health and Safety Act states that life, health and preservation of working capacity are values of particular social interest in the Republic of Croatia, and that occupational health and safety, as an organized and systematic activity, is a matter of

---

27 EU Cross-Sectoral Guidelines on Violence and Harassment at Work, VS/2021/0041, [https://www.uni-europa.org/wp-content/uploads/sites/3/2023/11/EU-Cross-Sectoral-Guidelines-on-Violence-and-harassement-at-work_Official.pdf], Accessed 11 November 2024.

28 The research was conducted within the social partners project in autumn 2021 and spring 2022 invoving participants from 165 institutions and organisations according to: Pillinger, J., *The role of social partners in preventing third-party violence and harassment at work*, available in: Third-party violence and harrasment, [https://www.thirdpartyviolence.com/], Accessed 31 January 2025.

29 Article 28 of the Labour Act, Official Gazette number 93/2014, 127/2017, 98/2019, 151/2022, 64/2023.

public interest. Article 51 of the same Act proscribes that the employer is obliged to implement stress prevention at work or in relation to work in order to minimize the employee's need to overcome difficulties of long-term exposure to intense pressure and to eliminate the possibility of impairing the employee's work efficiency and of the deterioration of his condition. If there are indications of stress at work or in relation to work, the employer is obliged to pay special attention to, among other things, exposure of employees to violent behaviour.[30] These regulations are evidently quite general therefore implying questionable quality of mechanisms of prevention and protection against violence and harassment at work. The right of officials and employees in the units of local and regional self-government (hereinafter: local officials) for protection against threats is defined in Article 31 of the Act on Civil Servants and Employees in Local and Regional Self-Government.[31] Local officials are entitled to protection against threats, attacks and other forms of imperilling while performing their service or in relation to their service. The protective measures are organized by the chief of the administrative body for officials, and by the executive officer for the chief of administrative body. By introducing the Act on Amendments to the Criminal Code in 2019, our criminal legislation expanded the criminal protection of official persons working on positions of public interest or in public services (Article 315.b).[32] According to this article, whoever, by force or threat of immediate use of force, prevents an official from performing an official act falling within the scope of his authority or, by using the same means, coerces him to perform an official act shall be punished. In addition, whoever, in the course of committing the criminal offense, maltreats an official, inflicts bodily injury upon him or threatens to use a weapon shall also be punished. When applying this regulation, each individual case is to be assessed separately to determine whether the person had been performing public service or an official act within one`s authority since there are no legal definitions of the mentioned terms. Local officials should definitely be acknowledged as persons performing a service of public interest. Another disputable question refers to the fact that there are no grounds for a qualified criminal offense if the force or threat against a person is inflicted while the person is not performing their service (e.g. while having a break, in the admission rooms, in the process of arriving to or leaving from work and similar) or when there is no intent to prevent a person form

30 Occupational Health and Safety Act, Official Gazette No. 71/2014, 118/2014, 154/2014, 102/2015, 94/2018, 96/2018.

31 Official Gazette No. 86/2008, 61/2011, 4/2018, 112/2019.

32 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.

performing an act.[33] That would mean that the threat and/or physical assault on an official in their office while doing their job (object which is not related to the perpetrator) cannot be perceived as an assault against an official person, but may only be prosecuted as a general criminal offense against life and health, or against personal freedom, depending on the consequences. This is obviously not synchronized with the Guidelines 2010 where it is explicitly stated that regardless of the official`s activity at the moment of TPVH, safety at and outside work has to be ensured, as long as harassment or violence occurred due to work-related issues.

3. THEORETICAL BACKGROUND

Human aggression is every behaviour oriented towards another individual with the intent of inflicting damage to that individual. The perpetrator has to be convinced that the exhibited behaviour will damage someone, while the other person has a motive to avoid this type of behaviour.[34] This means that causing damage accidentally is not perceived as aggression. On the other hand, according to the research results obtained by Dupre et al., indirect aggression, even though not consciously oriented toward a particular individual and without the intent of damaging the same individual, has the exact same unwanted consequences. Therefore, they proposed the definition of aggression to be changed by including indirect aggression in its scope.[35] Violence is aggression in its extreme form, every violence is therefore aggression, however, not every aggression is violence.[36] Considering the aim one wishes to achieve through aggressive behaviour, aggression can be hostile or instrumental. Hostile aggression is unplanned, impulsive, a furious response to a provoking event (which does not have to be a real provocation) and the only aim is to cause damage to someone. Instrumental aggression, on the other hand, is premeditated, focused on achieving other benefits for the perpetrator, whereby the act of inflicting damage to the victim only represents the means for achieving another goal.[37]

The danger of violence and harassment is not only immediate (in inflicting damage and having consequences on the victim`s health and work) but also affects the forming of long-term behavioural patterns. In an attempt to explain the causes leading to

---

33 Maršavelski, A.; Juras, D., *Kritička analiza prijedloga pete novele Kaznenog zakona,* Hrvatski ljetopis za kaznene znanosti i praksu, vol. 26, No. 2, 2019, pp. 529 – 559.

34 Bushman, B.J.; Anderson, C.A., *Is it time to pull the plug on the hostile versus instrumental aggression dichotomy?* Psychological Review 108, 2001, pp. 273 – 279; Barling *et al., op. cit.*, note 1.

35 Dupre *et al., op. cit.*, note 6, p. 13.

36 Anderson, C. A.; Bushman, B. J., *Human Aggression*, Annual Review of Psychology, Vol. 53, No. 1, 2002, pp. 27 – 51.

37 *Ibid.*, p. 29.

aggressive behaviour, theoretics have defined five possible theories, two of which are particularly interesting to analyse - the Social Learning Theory and Social Interaction Theory. According to the first one, people acquire violent and aggressive behaviour as any other type of behaviour, by learning from direct experience or observing behaviour of others. Every violent or aggressive behaviour is thus a potential pattern leading to the same type of behaviour.[38] The research among the Dutch police officers has shown that the police officers who have experienced more aggression have less patience and apply force more frequently when compared to the police officers who have not been a target of aggressive behaviour.[39] According the Social Interaction Theory individuals display aggressive behaviour because they expect this to be the easier way of achieving the wanted effect, they consciously choose aggression since they expect it to be the means of accomplishing a desired social influence.[40] A certain number of scientific research negate the possibility of explaining aggressive behaviour through theories but rather claim that aggression primarily occurs under the influence of external factors, which means in situations individuals interpret as provoking.[41] Belonging to a certain social class with emphasis on difficult living conditions, have been analysed as possible predictors of aggressive behaviour. However, the research conducted by Chen et al. confirmed that these differences are not crucial to occurrence of aggression.[42] Discontent with the official`s performance is certainly an important trigger of aggression, even though discontent is a subjective experience and does not have to be linked to a specific situation.[43] Taking female physiological traits into consideration, it is to be expected that women are more frequently targets of aggressive behaviour.[44] However, it has also been proven that

[38] Anderson *et. al., op. cit.*, note 35, pp. 31 - 32; Dupre *et al., op. cit.*, note 6, p. 4.

[39] van Reemst, L.; Fischer, T.; Weerman, F., *Aggression Against Police Officers and Behavior Toward Citizens: Reciprocal Influence or Common Causes?* Frontiers in Psychology, Vol 13, 2022, pp. 2 – 10.

[40] Anderson *et. al., op. cit.*, note 36, pp. 31 – 32.

[41] Those factors can be emotionally motivating factors of aggression (anger), cognitive information factors (interpretation of situations and the acquired information from the environment), social factors (personality traits and characteristics of the person who is provoking) and situational factors of an aggressive response (intensity of emotional excitement at the moment of provocation), according to: Paušek, K.; Bračić, M.; Paušek, D.; Sindik, J., *Čimbenici koji djeluju na pojavu agresivne reakcije – mogućnosti prevencije?* Hrvatski časopis za javno zdravstvo, Vol. 13, No. 49, 2017, pp. 115 – 118.

[42] In the cited paper the authors list different research that have shown that persons of lower social status might be aggressive since there are real threats to their living conditions. They live in unpredictable and unorganized relations, have significantly less financial and social resources to manage conflicts at their disposal. On the other hand, some authors describe persons of higher social status as more arrogant, narcissistic and envious which leads to the possibility of showing aggression more intensely. More in: Chen, B.; Zhang, C.; Feng, F.; Xian, H.; Zhao, Y., *The association between social class and aggression: A meta-analytic review*, Social Science & Medicine, Vol. 340, 2024.

[43] Lee *et al., op. cit.*, note 8, p. 1394.

[44] Liegat *et al., op. cit.*, note 1, p. 234.

they are more likely than men to perceive certain bahavior as aggresive [45] and, as a result of the aggression they experience, may themselves exibit intolerance, even aggression, toward citizens.[46] One of the most challenging factors for public officials is the contact with citizens, officials who work in positions that do not involve direct contact with citizens are less exposed to direct aggression and physical violence.[47] Other situational risks involve night work, field work or working alone.[48] An additional consequence of the victimization of officials is the appearance of secondary victimization, as the official's actions are scrutinized and assessed, with an emphasis on determininig to what extent the officials are „responsible" for the experienced aggressive behaviour.[49]

As has been mentioned earlier, some occupations are more exposed to aggressive reactions than the others. The aim of this research is TPVH against the officials employed in units of local self-government (hereinafter: ULS). What is specific about this proffesion lies in the fact that officials work in the public interest, are required to comply with legal norms, and cannot always fully satisfy the wishes and needs of citizens or treat them as „queens and kings", as may be the case in private enterprises.[50] Due to reforms influenced by the New Public Management ideas, citizens have been losing their trust in administration, which can also be a trigger for aggressive behaviour.[51] However, for a proper implementation of principles of good management, the officials` trust in citizens is of outmost importance, however, it is on a constant decrease due to the TPVH.[52] Officials are trapped in a magic circle: attempting to deal with the consequences of the New Public Management reform they are expected to form an open and collaborative relationship with the citizens, while on the other hand, it is rather challenging to form this type of a relationship with citizens who are untrustworthy and aggressive towards the officials. In Fukuyama`s words, trust is the expectation which appears within a community and demands fair, adequate and collaborative behaviour based on

---

45 Anton, C.; Grueso - Hinestroza, M. P.; Espinosa, J. C.; Turc, M., *Workplace aggression, wellbeing, and job satisfaction: The specificity in border police organizations*, Frontiers in Psychology, Vol. 13, 2022, pp. 1 – 13.

46 van Reemst *et al., op. cit.*, note, 38, p. 8; Liegat *et al., op. cit.*, note 1, p. 234.

47 Liegat *et al., op. cit.*, note 1, p. 225; Grandey, *op. cit.*, note 1, p. 48.

48 Fischer *et al., op. cit.*, note 27, p. 32.

49 Kovčo; Vukadin, *op. cit.*, note 14, p. 274.

50 Kozjek *et al., op. cit.*, note 12, p. 83.

51 Van de Walle, S., *New Public Management: Restoring the Public Trust through Creating Distrust*? In: Christensen, T.; Laegreis, P. (eds), Ashgate Research Companion to New Public Management, Aldershot: Ashgate; Raaphorst, N., Van de Walle, S., *Trust in and by public sector*, in: Searle, R.; Nienaber, A.; Sikin, S. (eds.), Routledge Companion to Trust, London: Routledge, pp. 469-482.

52 Moyson *et al., op. cit.*, note 9, p. 4.

common norms of the community.[53] Mutual trust depends equally on everyone, officials who should interpret legal regulations in a way reflecting real life needs and the citizens who should show respect to officials.[54] The officials` job description is becoming more and more complex due to numerous external factors, more demanding citizens` requests in combination with the pressure of achieving excellent results while enforcing cost-saving measures and undergoing organizational restructure.[55] Officials have less and less authority, they are expected to do more work with less resources, whereas there are no alternative service providers in case citizens are not satisfied with their performance.[56] Local units represent the most visible level of authority to citizens and are considered to contribute sigificantly to the image and credibility of public administration. Local officials operate close to the citizens and have frequent immediate contact with them while dealing with the issues strongly affecting their well-being. According to the research conducted in the Netherlands, 52,3% of local officials has been exposed to verbal aggression, 17,3% has been threatened to and 8,5% has experienced physical violence.[57] These results show a worrying tendency and need to be thoughtfully considered. The most important thing is to make officials aware that violence and aggression are not a constituent and acceptable part of their work. Officials are required to report every such experience, an appropriate response is required.[58]

4. RESEARCH METHODOLOGY

There are various forms of aggression, however, its assessment is challenging due to it being subjectively interpreted. When assessing aggression, it is possible to rely on the following criteria - the frequency of occurrence (how frequently it occurs, most often by self-assessment method) and its severity (physical force being the most severe form)[59] both of which have been used for the purposes of this research.

---

53 Van de Walle, S.; Lahat, L., *Do Public Officials Trust Citizens? A Welfare State Perspective*, Social Policy & Administration, Vol. 51, No. 7, 2017, pp. 1450 – 1469.

54 Pečarič, M., *Be Attentive to Public Employees: They Are the Source of Mentality and Health of Public Administration*, in: Azevedo, G.; Oliveira, J.; Marques, R. P.; Ferreira, A. (eds.), Tools, Strategies, and Practices for Modern and Accountable Public Scector Management, IGI Global Scientific Publishing, pp. 1 – 40.

55 Borst *et al., op. cit.*, note 2, p. 160.

56 Tummers, L.; Brunetto, Y.; Teo, S. T. T., *Workplace aggression: Introduction to the special issue and future research directions for scholars*, International Journal of Public Sector Management, Vol. 29, No. 1, 2016, pp. 2 – 10.

57 Fischer *et al., op. cit.*, note 27, p. 47.

58 Papavasilopoulou, *op. cit*, note 2, p. 54.

59 van Reemst, L.; Jongerling, J., *Measuring and Modeling Exposure to External Workplace Aggression in Three Types of Emergency Responders*, Journal of Interpersonal Violence, Vol. 36, No. 17-18, 2021, pp. 7978-8003.

For the purposes of collecting data, an anonymous voluntary questionnaire was prepared and sent by e-mail to the participants. There were certain difficulties in the process of gathering potential participants` e-mail addresses since officials` e-mail addresses are not always publicly available. A link for filling out the Google form was sent to all the officials whose e-mail addresses were publicly available. In cases where e-mail addresses were not available, an official letter was sent to the official e-mail addresses of the ULS along with a polite request to forward the questionnaire to the officials. The data was collected during October 2024 in all the ULS in Osijek-Baranja and Vukovar-Srijem counties (there were 73 ULS, 12 cities and 61 municipalities in total). The questionnaire contained 17 mixed type questions, whereby 4 questions allowed multiple answers. The first five were general questions to identify the participants and their ULS (type (city or municipality), number of residents in the ULS, participant`s gender, length of work experience in the ULS, type of workplace, participant`s education and occupation). One question referred to reasons why citizens had been dissatisfied, two questions were about the frequency and types of the experienced aggression, one question was about the feelings triggered by the experienced aggression. Three questions referred to the frequency of reporting aggressive behaviours and the reaction of the supervisors, while four questions investigated the preventive measures against TPVH. In the final part there was an open-ended question in which participants offered their own suggestions for improvement of the officials' safety at their workplace. 106 participants answered the questions from the questionnaire, however, the participants who had not had previous experience with aggression were excluded from the second part of the questionnaire which referred to frequency and types of aggression, and the supervisors` reactions. The gathered data was processed by descriptive statistical method and qualitative and quantitative analysis was conducted along with the description of the relation between the dependent and independent variables. Independent variables were gender, size of the ULS, length of participants` work experience and type of participants` workplace.

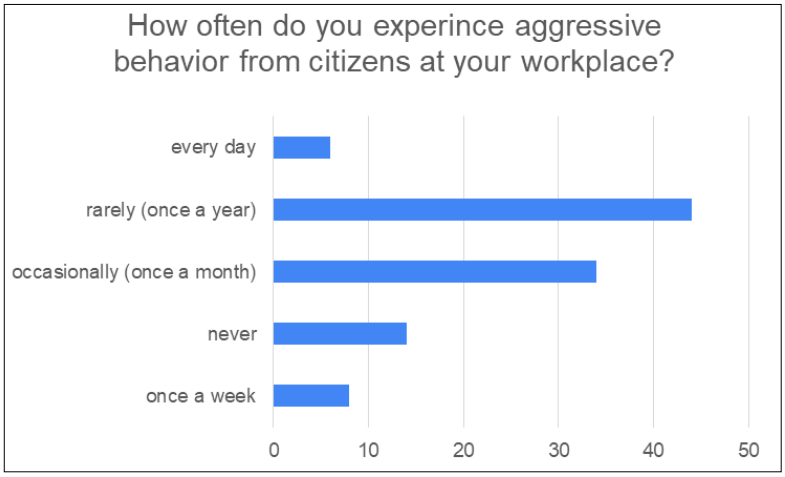
5. RESEARCH RESULTS AND ANALYSIS

Majority of participants are officials employed in cities (76,4%), even though ULS constitute only 16,4% of the sample. An approximately equal number of participants work in ULS with 5.000 to 10.000 residents (34,9%) and more than 10.000 residents (34,9%), while only 5 cities form the total of 73 ULS have more than 10.000 residents, whereas 78,38% ULS have less than 5.000 residents.[60]

[60] Source: author`s interpretation based on the data provided by the Croatian Bureau of Statistics, Census 2021, available at: [https://podaci.dzs.hr/media/bz5hplcj/gradovi-u-statistici.xlsx], Accesssed 27 January 2025.

Most of the participants are female (67%), the largest number of participants have been working in the ULS for less than 10 years (57,5%) and have university education ISCED level 7 (54,7% - five year professional study or college study), whereby chiefs of administrative bodies represent 17,9% of the total number of participants.

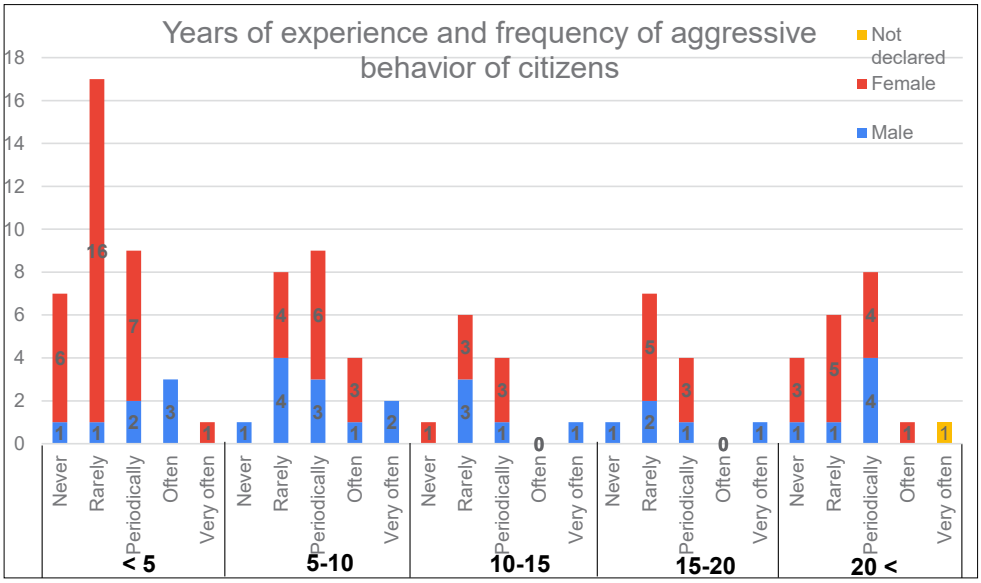
Chart 1. Frequency of citizens` aggressive behaviour



Source: authors` interpretation

The research results regarding the frequency of aggressive behaviour of citizens towards the officials in ULS are shown in Chart 1. Only 13,2% of participants have never been exposed to aggression, while the largest number of participants (41,5%) have rarely been exposed to it. Considering that comparative research indicates that women and persons with shorter work experience are likely to experience aggression more frequently, Chart 2. shows the relation between the self-assessed experience of aggression, gender and length of work experience in the ULS. The length of work experience is shown at the bottom of the table presented in five-year spans (e.g. <5 – less than 5 years).

Chart 2. Relation between work experience, gender and experienced aggression



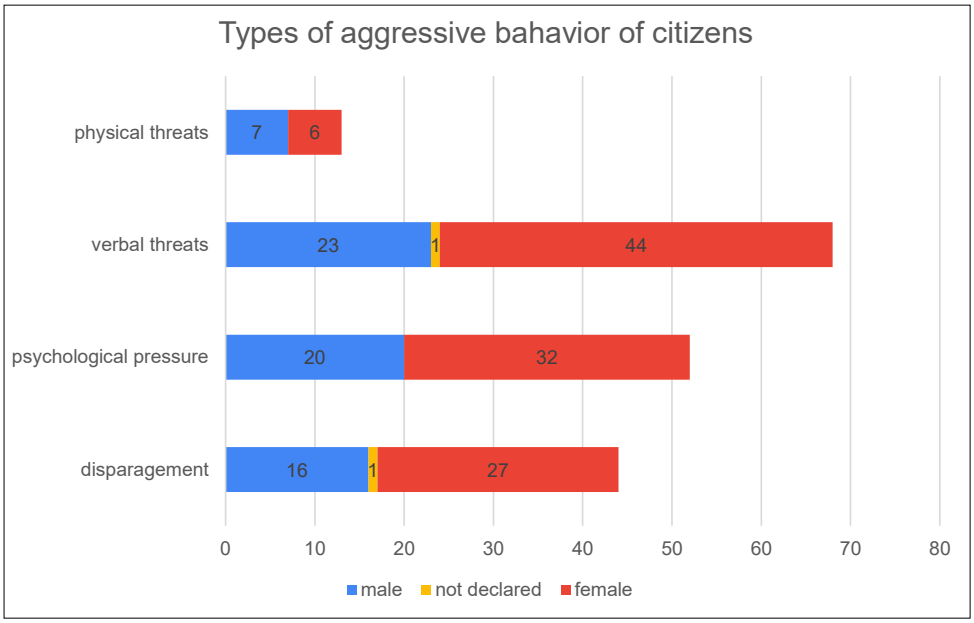
Source: authors` interp1retation

From Chart 2., we can see that the highest number of women who have been working for less than 5 years in ULS reported experiencing some form of aggression, which is expected given the general characteristics of our sample. The results, however, do not undoubtedly offer the conclusion that the experience of aggression is linked to gender or length of work experience. It is evident that an equal number of men and women working longer than 20 years claim to have on occasion experienced aggression, as is the case with persons working between 10 and 15 years who have rarely experienced aggression. Taking into consideration the fact that the number of women prevails in the participant sample, it can be concluded that the experienced aggression is not connected neither with gender nor the length of work experience in the ULS.

Participants who answered the question whether they had experienced aggression with a negative answer, did not answer the questions from the second part of the questionnaire. 92 participants answered the question about the type of aggression they had experienced. This question allowed multiple answers since one form of aggressive behaviour is frequently followed by other types as well. According to the results, a high 73,9% of participants had experienced verbal threats, 56,5% had been exposed to psychological pressure, 47,8% had been disparaged, while 14,1% had experienced physical threats. Chart 3. illustrates the distribution of answers about the types of experienced aggression considering the participants`

gender. Having in mind that most participants are female, we can conclude that men experience physical threats more frequently than women, while there are no indications of significant difference according to gender for other types of aggressive behaviour.

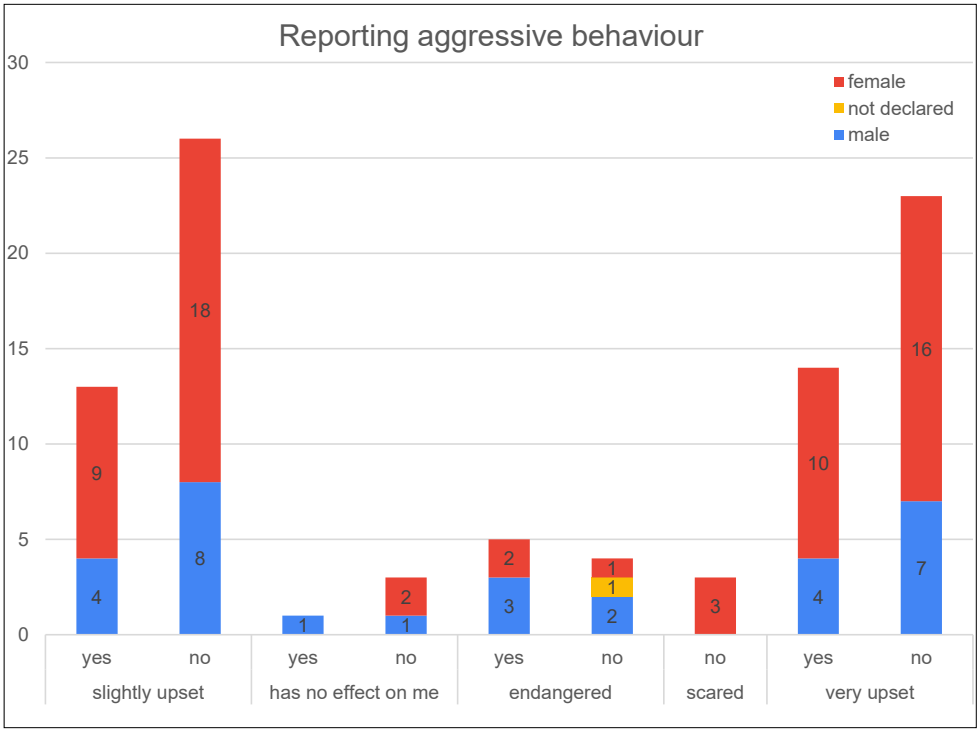
Chart 3. Illustration of types of experienced aggression based on the participants` gender



Source: authors` interpretation

Aggressive behaviour can evoke different emotional responses based on which the participants assess whether to activate the existing protective measures or not. From the total number of participants who had experienced a particular form of aggression, only 35,9% or 33 participants had reported the event to their supervisors. Chart 4. shows the emotional state of the participants after having experienced aggressive behaviour from citizens in relation to gender and the number of participants who had reported the event to their supervisors.

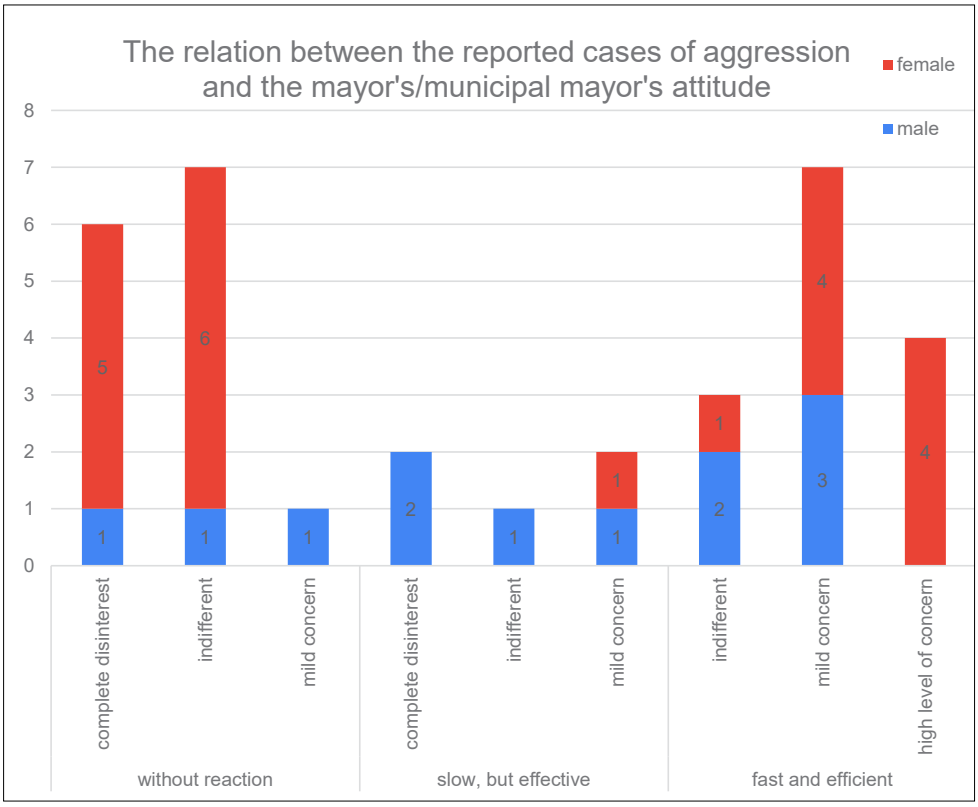
Chart 4. Emotional response after having experienced citizens` aggression in relation to gender and the frequency of reporting the events



Source: authors` interpretation

It is visible from Chart 4., more than 40% of the participants felt very upset, 42,4% felt scared, while only 4,3% claim not to have been affected by it at all. There is no significant difference in experiencing aggression based on gender. The only difference related to gender is that only women answered that they felt scared. What is worrying is the fact that most of the participants, even those who felt very upset, regardless of their gender, did not report the unwanted event to the authorities, including the women who felt scared. The sense of fear or high levels of agitation considerably affect the employees` work and health and such situations should be urgently resolved. Thus, the question arises as to why have the officials not reported the aggressive citizens` behaviours? According to our research 42,4% of the participants think that their chief/mayor is completely uninterested in such matters, while only 25% of the participants think that their chief/mayor considers their work safety important and shows concern for them. This can definitely be seen as an explanation as to why the most officials do not report citizens` aggressive behaviours.

Chart 5. The relation between the reported cases of aggression and the mayor's/ municipal mayor's attitude

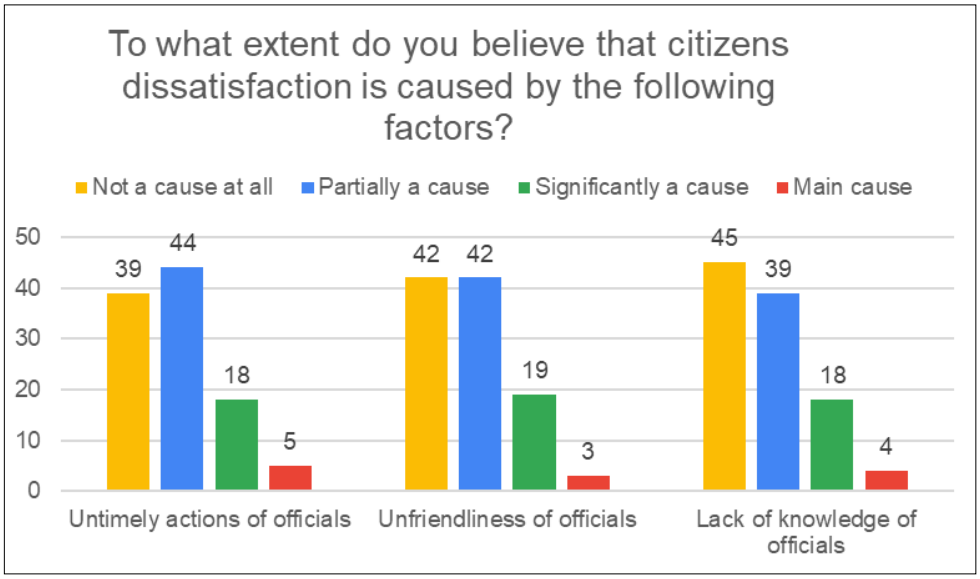


Source: authors` interpretation

Chart 5. illustrates that there had been no reactions of the supervisor in 42,42% of the reported cases, so it is no wonder that the participants think their chief officers are uninterested in the problem of citizens` aggression against the officials, regardless of the gender. 42,42% of the participants, especially women, consider that their supervisors show an appropriate level of concern due to their quick and efficient reactions. These results prove that there are mechanisms, sometimes even the supervisors` will and intention to react, but due to officials not reporting the events, nothing can officially be done. In the last question, the participants were asked to suggest certain measures their ULS could apply with the aim of lowering the frequency of citizens` aggression against the officials. 12,26% claim that education of the chiefs about the importance of this topic and their stronger support in these types of situations would be considered an appropriate measure. Moreover, 6 participants say that the problem of citizens` aggression could be handled when the justified reasons for citizens` discontent would be decreased, such as prioritiz-

ing the cases based on the connections and other forms of irregular work of officials. In addition, 4 participants think that citizens should be educated about the role and possibilities officials have at their disposal. These 10 participants indicate the problem of ULS as political organisations, clearly being themselves unsatisfied with their position and possibilities to do their work professionally and in high quality. Chart 6. illustrates the results to the question asked with the aim of gaining insight into the extent to which the participants believe the citizens` aggression is caused by internal organisational factors, in other words their performance. Participants were presented with three statements that describe possible reasons for citizens` discontent where participants needed to choose the extent to which they think the described situations trigger aggression of the citizens towards the officials. According to participants` opinions, none of the described behaviours is considered the main cause of the citizens` aggression, however, the results indicate that they greatly influence citizens. 58,49% of the participants believe that the citizens` discontent is partially or significantly caused by officials` non-systematic work and untimely actions, 57,55% think that the citizens` discontent is partially or significantly caused by officials` impoliteness and unfriendliness, while 53,77% claim it is due to officials` ignorance. Considering that the participants work as officials in ULS, the obtained results are rather indicative and worrying. It is evident that even officials are aware of the specific internal organisational issues which they alone cannot influence.

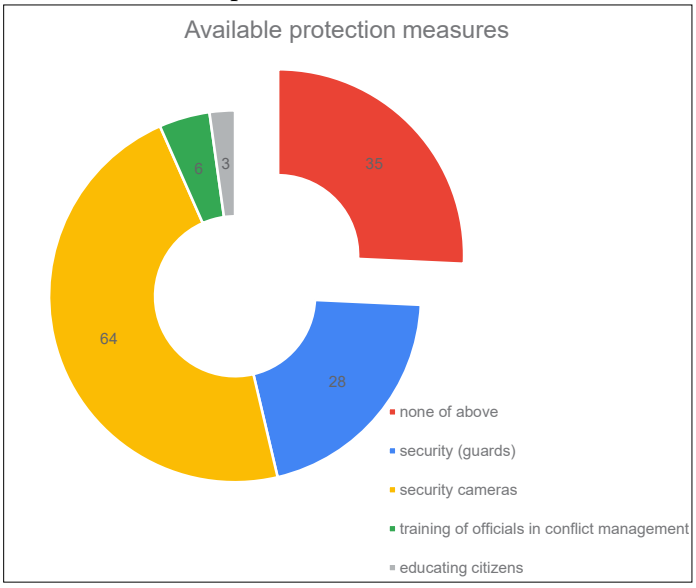
Chart 6. Reasons of citizens` discontent



Source: authors` interpretation

The questionnaire contained four questions about preventive and protection measures that are either on disposal or it would be good to have on disposal in the ULS from our sample. Chart 7. shows protection measures which ULS have on disposal where participants had the option of marking multiple answers. Most of ULS already have security cameras (60,4%), security guards are present in 26,4% of the ULS, while one third of the ULS have no protection measures at all. In only 5,7% of the cases participants marked the implementation of professional training for the officials to acquire skills necessary to resolve conflict situations. In the expert analysis and implementation supervision of the Guidelines 2010 of the European public administration network,[61] security guards are very rarely mentioned as preventive measures while on the other hand, various forms of professional training of the officials are considered a rather important tool in the process of preventing and resolving conflicts. Similar information is found in comparative research emphasizing the importance of education and professional training for empowering the officials and reducing the influence of inappropriate behaviour of the citizens on their emotions. The officials who participate in such educations, consider their organisation as just and fair.[62] 55,7% of the participants consider the existing protection measures to be insufficient, while 21,7% describe them as partially sufficient.

Chart 7. Available protection measures in ULS



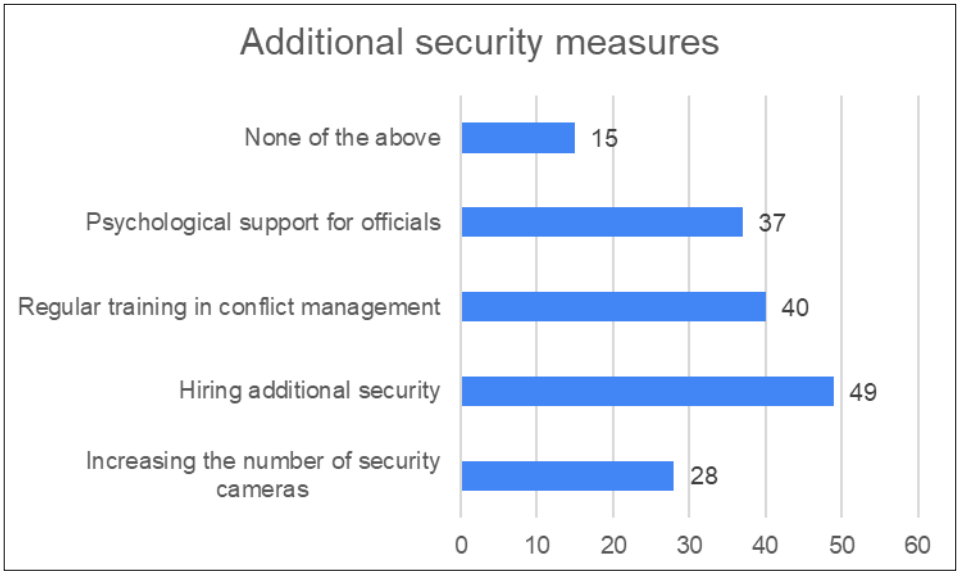
Source: authors` interpretation

[61] EUPAN eNews, *op. cit.,* note 24; Research, *op. cit.*, note 26.

[62] Kozjek *et al., op. cit.*, note 12, p. 88; Kovčo Vukadin, *op. cit.*, note 14, p. 298; Capan *et al., op. cit.*, note 14, p. 34; Schablon *et al., op. cit.*, note 4, p. 11.

With the aim of gaining insight into officials` opinions about providing them even more efficient protection, the participants were asked to mark additional security measures illustrated in Chart 8. The results indicate that the largest number of participants believe that there is a need for additional physical protection measures (security guards and security cameras 72,65%). They are, however, aware of importance to participate in professional training in conflict management and to receive psychological support for coping with the consequences of the aggressive citizens` behaviour. The emphasis on physical protection measures implies that the focus is on resolving the aggression issues once they occur rather than attempting to prevent such unwanted occurrences from happening at all. The reasons behind these attitudes are only to be speculated about and are most probably the result of mistrust in other types of preventive measures.

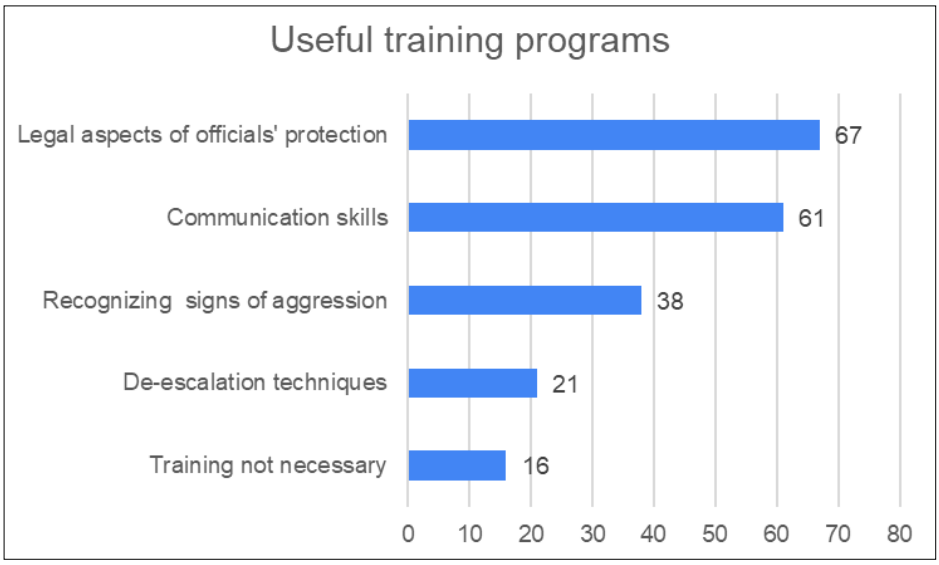
Chart 8. Additional security measures necessary according to participants` opinions



Source: authors` interpretation

Since comparative research emphasize the importance of education programs and professional training, the questionnaire contained an additional question in which the participants were asked to mark the type of training programs they think are needed.

Chart 9. Types of necessary education and training programs



Source: authors` interpretation

As can be noticed in Chart 9. 15,1% of the participants believe there is no need for any training programs whatsoever. However, most of the participants still recognize the importance of additional education and training especially highlighting the need for education in developing communication skills (57,5%) and legal aspects of officials` protection (63,2%). Additionally, some of the suggestions from the final question in the questionnaire follow the same pattern by emphasizing the importance of helping officials with reporting and processing the perpetrators. This kind of education is again oriented towards solving the existing problems, not preventing them which is specific for this research and Croatian context.

The last question from the questionnaire was an open-ended question in which the participants proposed what ULS could do for their officials in case of aggressive citizens` behaviours. Surprisingly, 62% of the participants left their comment confirming the importance of this research with regard to its current and relevant topic. The answers were coded in three key groups. The first one refers to protection measures since almost one third of the suggestions refer to employing security guards, while security cameras, male officials and self-defence classes are proposed as alternative methods. Suggestions for education and training programs of the officials regarding conflict prevention and de-escalation techniques also belong to this group. The second group of proposals focuses on better criminal legal protection, help with reporting incidents, protection after the unwanted event and better support by the executive officers. 16,66% of the collected suggestions referred

to education and training proposals and raising awareness of executive officers about the need to sensibilize the issue related to aggressive citizens. The third group of comments consisted of suggestions and comments oriented towards the citizens. The common thought of these comments focuses on the fact that citizens are unsatisfied, and they express their dissatisfaction to the officials, since they are the closest and most available to them, even though oftentimes unable to provide assistance. It is therefore of outmost importance to remove the reasons for civil discontent and build better cooperation with the citizens.

6. CONCLUSION

The occurrence of TPVH against public officials is not rare, but it has not yet raised the appropriate research interest in Croatian scientific and professional literature. The aim of the paper is to research the frequency of TPVH against the officials, its consequences and preventive measures on a sample of officials from ULS in Osijek-Baranja and Vukovar-Srijem counties. Research results indicate that the officials from the observed ULS experience aggressive behaviour equally frequent as do their European colleagues, whereby verbal harassment belongs to most frequent forms as opposed to physical violence which is the least frequent. TPVH causes considerable levels of distress among officials, which inevitably impacts the quality and effectiveness of their performance. The worrying trend of low rate of reporting TPVH can be a result of numerous factors: accepting TPVH as a constituent part of work, not being familiarized with the legal framework, fear of lack of understanding of the environment and superiors, lack of trust in protection mechanisms and similar. Even though comparative research prove that women are more frequently targets of aggressive citizens` behaviour, that assumption has not been proved in this research. The reason for that might be an uneven sample of participants, however, further statistical analysis should be conducted in order to determine statistically significant correlations between individual variables. Especially interesting are the results regarding preventive measures. This research places special emphasis on the importance of physical protection mechanisms (security cameras and security guards), while on the other hand, comparative research results highlight the importance of conducting various types of education and training to develop the officials` skills to avoid, recognize and resolve conflict without relying on physical protection.

The importance of this research is reflected in initiating a scientific and professional discussion about TPVH against the officials from ULS in Croatia as well as in obtaining the first original data regarding the occurrence of TPVH in ULS in the two observed counties. Future research should include all the ULS in Croatia with focus

on analysing the data and providing suggestions for improvement. The first step is obviously raising awareness among the stakeholders (officials, mayors/executive officers and citizens) about the fact that violence and aggression are neither acceptable nor an inherent part of the job. Implementation of these types of research is one of the ways of raising the awareness about the issues, however there are other numerous mechanisms such as promotional campaigns or public discussion about the topic. Officials should undoubtedly be educated to recognize and resolve conflict situations. In cases when TPVH does occur, there should be a clear, publicly available protocol on how to proceed and report the incidents. Therefore, ULS should conduct a self-assessment of the safety conditions of their officials and, based on the findings, establish response protocol. In particular, it should provide support to affected officials, as suggested in the Guidelines 2010. The problem of TPVH against the officials in ULS should become nationally recognisable before it escalates and results in a tragedy. Therefore, central bodies of state administration should also be included in the processes of detecting, analysing and resolving the issues since they are in a position, due to their authorities and scope, to place the TPVH issue on a high level of priorities. More intensive research, professional and scientific discussion, engagement of local officials` unions, associations in cities or municipalities and other interested parties could help to raise awareness of TPVH issue and through corresponding lobbying activities might lead to political readiness to ratify the Convention No. 190 of the International Labour Organization and by doing so enable better protection of all employees on their workplaces.

REFERENCES

BOOKS AND ARTICLES

1. Andersson, L. M.; Pearson, C. M., *Tit for Tat? The Spiraling Effect of Incivility in the Workplace*, The Academy of Management Review, Vol. 24, No. 3, 1999, pp. 452 – 471.
2. Anderson, C. A.; Bushman, B. J., *Human Aggression*, Annual Review of Psychology, Vol. 53, No. 1, 2002, pp. 27 – 51.
3. Anton, C.; Grueso-Hinestroza, M. P.; Espinosa, J. C.; Turc, M., *Workplace aggression, wellbeing, and job satisfaction: The specificity in border police organizations*, Frontiers in Psychology, October 2022, 1 – 13.
4. Barling, J.; Dupre, K. E.; Kelloway, K., *Predicting Workplace Aggression and Violence*, Annual Review of Psychology, Vol. 60, 2009, pp. 671 – 692.
5. Borovec, K.; Balgač, I.; Gluščić, S., *Doprinos institucionalne podrške u smanjenju rizika radnog mjesta zadovoljstvu poslom policijskih službenika*, Hrvatski ljetopis za kaznene znanosti i praksu, vol. 27., br.2, 2020, pp. 819 – 855.
6. Borst, R. T.; Knies, E., *Well-Being of Public Servants Under Pressure: The Role of Job Demands and Personality Traits in the Health-Impairment Process*, Review of Public Personnel Administration, Vol. 43, No. 1, 2023, pp. 159 – 184.

7. Bushman, B.J.; Anderson, C.A., *Is it time to pull the plug on the hostile versus instrumental aggression dichotomy?* Psychological Review 108, 2001, pp. 273 – 279.
8. Capan, M., Sindik, J., *Sociodemografska obilježja i viktimizacija kod policijskih službenika,* Časopis za kriminalistiku, kriminologiju i sigurnosne studije, God XV, br. 3-4, 2015, pp. 21 – 36.
9. Chen, B., Zhang, C., Feng, F., Xian, H., Zhao, Y., *The association between social class and aggression: A meta-analytic review*, Social Science & Medicine, Vol. 340, 2024
10. Dupre, K. E.; Barling, J.; Dawe, K. A., *Harm to Those Who Serve: Effects of Direct and Vicarious Customer-Initiated Workplace Aggression*, Journal of Interpersonal Violence, Vol. 29, No. 13, 2014, pp. 1 – 23.
11. Enosh, G.; Tzafrir, S. S.; Gur, A., *Client Aggression Toward Social Workers and Social Services in Israel – A Qualitative Analysis*, Journal of Interpersonal Violence, Vol. 28, No. 6, 2013, pp. 1123 – 1142.
12. Fischer, T.; Van Reemst, L.; De Jong, J., *Workplace aggression toward local government employees: target characteristics*, International Journal of Public Sector Management, Vol. 29, Issue 1, 2016, pp. 30 – 53.
13. Guerrero, S.; Lapalme, M. E.; Bentein, K., *Employees' Reactions to a Citizen Incivility Climate: A Multilevel Multisource Study*, Review of Public Personel Administration, Vol. 44, No. 4, 2024, pp. 821 – 841.
14. Grandey, A. A., *Affective States and Traits in the Workplace: Diary and Survey Data from Young Workers*, Motivation and Emotion, Vol. 26, No.1, 2002, pp. 31 – 55.
15. Hershcovis, S.; Barling, J., *Towards a multi-foci approach to workplace aggression: A meta-analytic review of outcomes from different perpetrators*, Journal of Organizational Behavior, Vol. 31, No. 1, 2009, pp. 24 – 44.
16. Hershcovis, S., *„Incivility, social underminig, bullying…Oh My!": A call to reconcile constructs within workplace aggression research*, Journal of Organizational Behavior, Vol. 32, 2011, pp. 499 – 519.
17. Kovčo Vukadin, I., *Napadi na policijske službenike: pregled aktualnih spoznaja*, Policijska sigurnost, No. 3, 2011, pp. 273 – 305.
18. Kozjek, T.; Brezovar, N., *Citizens Mistreatment Among Public Servants in Social Public Services*, Danube, Vol. 13, No. 2, 2022, pp. 82 – 106.
19. Lee, K. J.; Youm, J., *Effect of Citizen Incivility on Self-Sacrifice of Public Service Motivation and Turnover Intention of Street-Level Bureaucrats: Mediating Effect of Emotional Exhaustion*, Public Performance & Management Review, Vol. 47, No. 6, 2024, pp. 1376 – 1398.
20. Liegat, M. C.; Hensel, D.; Vogel, D.; Vogel, R., *Aggressions and associations: How workplace violence affect what public empoloyees think of citizens*, Public Administartion, Vol. 102, Issue 1, 2022, pp. 222 – 248.
21. Maršavelski, A.; Juras, D., *Kritička analiza prijedloga pete novele Kaznenog zakona*, Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 26, No. 2, 2019, pp. 529 – 559.
22. Moyson, S.; Van de Walle, S.; Groeneveld, S., *What do public officials think about citizens? The role of public officials' trust and their perceptions of citizens' trustworthiness in interactive*

governance, in: Edelenbos, J.; Van Meerkerk, I. (eds.), Critical Reflections on Interactive Governance. Cheltenham: Edward Elgar, 2016

23. Ngwimba, V. Y.; Chinyamurindi, W.; Dywili, M., *The role of incivility aggression on decent work: A local government sector case,* Journal of Local Government Research and Innovation, Vol. 5, 2024, available at:
24. [https://jolgri.org/index.php/jolgri/article/view/197/423], Accessed 10 December 2024
25. Paušek, K.; Bračić, M.; Paušek, D.; Sindik, J., Čimbenici koji djeluju na pojavu agresivne reakcije – mogućnosti prevencije? Hrvatski časopis za javno zdravstvo, Vol. 13, No. 49, 2017, pp. 115 – 118.
26. Pečarič, M., *Be Attentive to Public Employees: They Are the Source of Mentality and Health of Public Administration*, in: Azevedo, G.; Oliveira, J.; Marques, R. P.; Ferreira, A. (eds.), Tools, Strategies, and Practices for Modern and Accountable Public Scector Management, IGI Global Scientific Publishing, 2020, pp. 1 – 40.
27. Raaphorst, N.; Van de Walle, S., *Trust in and by public sector*, in: Searle, R.; Nienaber, A.; Sikin, S. (eds.), Routledge Companion to Trust, London: Routledge, 2018, pp. 469 - 482
28. Schablon, A., Wendeler, D., Kozak, A., Nienhaus, A., Steinke, S., *Prevalence and Consequences of Aggression and Violence towards Nursing and Care Staff in Germany – A Survey*, International Journal of Environmental Research and Public Health, 15, 2018, pp. 1 - 18
29. Tummers, L.; Brunetto, Y.; Teo, S. T. T., *Workplace aggression: Introduction to the special issue and future research directions for scholars*, International Journal of Public Sector Management, Vol. 29, No. 1, 2016, pp. 2 – 10.
30. Van de Walle, S., *New Public Management: Restoring the Public Trust through Creating Distrust?* in: Christensen, T.; Laegreis, P. (eds.), Ashgate Research Companion to New Public Management, Aldershot: Ashgate, 2010
31. Van de Walle; S., Lahat; L., *Do Public Officials Trust Citizens? A Welfare State Perspective*, Social Policy & Administration, Vol. 51, No. 7, 2017, pp. 1450 – 1469.
32. van Reemst, L.; Fischer, T.; Weerman, F., *Aggression Against Police Officers and Behavior Toward Citizens: Reciprocal Influence or Common Causes?* Frontiers in Psychology, Vol 13, 2022, pp. 2 – 10.
33. van Reemst, L.; Jongerling, J., *Measuring and Modeling Exposure to External Workplace Aggression in Three Types of Emergency Responders*, Journal of Interpersonal Violence, Vol. 36, No. 17-18, 2021, pp. 7978 – 8003.

WEBSITE REFERENCES

1. Croatian Bureau of Statistic, Census 2021, available at:
   [https://podaci.dzs.hr/media/bz5hplcj/gradovi-u-statistici.xlsx], Accesssed 27 January 2025
2. EU Cross-Sectoral Guidelines on Violence and Harassment at Work, VS/2021/0041, available at:
   [https://www.uni-europa.org/wp-content/uploads/sites/3/2023/11/EU-Cross-Sectoral-Guidelines-on-Violence-and-harassement-at-work_Official.pdf], Accessed 11 November 2024

3. European Parlament, Recommendation on the draft Council decision inviting Member States to ratify the Violence and Harassment Convention, 2019 (NO. 190) of the International Labour Organization, Report A9-0040/2024, [https://www.europarl.europa.eu/doceo/document/A-9-2024-0040_HR.html], Accessed 15 February 2025
4. European Parlament, 2020/0011(NLE) Violence and Harassment Convention, 2019 (No. 190) of the International Labour Organization (ILO): inviting Member States ti ratify it, [https://oeil.secure.europarl.europa.eu/oeil/en/procedure-file?reference=2020/0011(NLE)], Accessed 15 February 2025
5. European public administration network, eNews, available at: [https://www.eupan.eu/wp-content/uploads/2023/05/EUPAN-eNews-threats-and-violence-against-civil-servants.pdf], 13 December 2024
6. Framework Agreement on Harassment and Violence at Work, UEAPME – ETUC/CES, 2007, [https://drive.google.com/file/d/0B9RTV08-rjErYURTckhMZzFETEk/view?resourcekey=0-buzTanzA3dlfJHzVf4TmmQ], Accessed 2 January 2025
7. International Labour Organization, Ratifications of C190 – Violence and Harassment Convention, [https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:3999810:NO], Accessed 15 November 2024
8. Multi-sectoral guidelines to tackle third-party violence and harassment related to work, available at: [https://www.epsu.org/sites/default/files/article/files/TUNED%20EUPAE%20sign%20off%20guidelines%2017%20Dec%202018%20with%20signatures.pdf], Accessed 11 November 2024
9. Papavasilopoulou, K., *Dutch Local Government Employees at risk: The effects of public initiated aggression on local government employees' well-being. Do aggression practices and transformational leadership help?* 2024, available at: [https://studenttheses.uu.nl/bitstream/handle/20.500.12932/45154/Research%20Project-%20Thesis%20-%20Konstantina%20Papavasilopoulou.pdf?sequence=1&isAllowed=y], Accessed 10 December 2024
10. Pillinger, J., *The role of social partners in preventing third-party violence and harassment at work*, Third-party violence and harrasment, available at: [https://www.thirdpartyviolence.com/], Accessed 31 January 2025

LIST OF NATIONAL REGULATIONS, ACTS AND COURT DECISIONS

1. 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
2. Labour Act, Official Gazette No. 93/2014, 127/2017, 98/2019, 151/2022, 64/2023
3. Act on Civil Servants and Employees in Local and Regional Self-Government, Official Gazette No. 86/2008, 61/2011, 4/2018, 112/2019
4. Occupational Health and Safety Act, Official Gazette No. 71/2014, 118/2014, 154/2014, 102/2015, 94/2018, 96/2018

RESTRICTIVE MEASURES OF THE EUROPEAN UNION AND THE PROPORTIONALITY OF RESTRICTIONS ON THE FREEDOM TO CONDUCT A BUSINESS AND THE RIGHT TO PROPERTY: THE BOSPHORUS DOCTRINE AND EUROPEAN CONSTITUTIONAL PLURALISM*

Miroslav Šeparović, PhD
Judge, President of the Croatian Constitutional Court
Trg svetog Marka 4, 10000 Zagreb

Helena Majić, MSc
Legal Adviser at the Croatian Constitutional Court
Trg svetog Marka 4, 10000 Zagreb
helenamajic@yahoo.com; helena_majic@usud.hr

ABSTRACT

The primary objective of this article is to analyse and identify the essential elements of the proportionality assessment method applied by the Court of Justice of the European Union in cases concerning the restrictive measures (sanctions) adopted by the Council, which limit the freedom of entrepreneurship and the property rights guaranteed by Articles 16 and 17 of the Charter of Fundamental Rights. Since these measures amount to interferences with the right to peaceful enjoyment of property protected by Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, this article specifically aims to identify both the similarities and the contentious differences in the proportionality assessment methods used by the CJEU and the ECtHR, especially in the context of the Bosphorus doctrine and the presumption that the protection standard provided by EU law is equivalent to the standards of the Convention. Given their unprecedent character, the article particularly analyses cases of the CJEU concerning sanctions imposed following the war in Ukraine by comparing them with relevant case-law of the ECtHR under Article 1 of Protocol No. 1 to the Convention. Finally, the article provides original conclusions regarding the elements of the lawfulness and proportionality tests applied by the CJEU that should be improved in order to make its practice more consistent and clearer for national constitutional courts, which will increasingly be required to apply both the accepted Convention standards and EU law in cases concern-

* The views expressed in this paper are those of the authors and do not represent nor do they bind the Constitutional Court.

ing restrictive measures. In this regard, the article also offers conclusions on the principles that constitutional courts should follow in such cases.

Keywords: *Bosphorus doctrine, constitutional courts, freedom to conduct a business, right to property, restrictive measures*

1. INTRODUCTION

1.1. EUROPEAN HUMAN RIGHTS SYSTEM, THE BOSPHORUS DOCTRINE, AND RESTRICTIVE MEASURES

A number of studies have examined the EU's restrictive measures imposed under Article 29 TEU[1] and Article 215 TFEU.[2] The principal research subjects covered have been the institutional framework of the EU sanctions regime and its development;[3] the CJEU's[4] jurisdiction to review (under Articles 263 and 275(2) TFEU) and interpret (under Article 267 TFEU) the Council's legal acts of general applicability (decision, regulations and implementing regulations), as well as individual restrictive measures;[5] or the practice of sanctions and their (in)effectiveness in relation to the cause triggering their imposition.[6]

---

1 The consolidated version of the Treaty on European Union (the Lisbon Treaty), OJ C 202, 7 June 2016.

2 The consolidated version of the Treaty on the Functioning of the European Union (the Lisbon Treaty), OJ C 202, 7 June 2016.

3 See, for example, Gazzini, T.; Herlin-Karnell, E.; *Restrictive measures adopted by the European Union from the standpoint of international and EU law,* European Law Review, Vol. 36, Issue 6, 2011, pp. 798 - 817.; Chachko, E., *Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence*, Yale Journal of International Law, Vol. 44, Issue 1, 2019, pp. 33 – 41.; Eckes, C., *The law and practice of EU sanctions*: In Research Handbook on the EU's Common Foreign and Security Policy, Edward Elgar Publishing, 2018, pp. 206 - 229.; Lonardo, L., *Restrictive Measures: Constitutional Issues, Classification, Judicial Review*: In EU Common Foreign and Security Policy After Lisbon: Between Law and Geopolitics, Cham: Springer International Publishing, 2022, pp. 73-89.; Hofmann, R.; Moritz, M.; *Recent Trends in EU Sanctions Law*: In International Sanctions and Human Rights, Cham: Springer Nature Switzerland, 2024, pp. 53 - 77.; and the sources cited therein.

4 The Court of Justice of the European Union; in this article the abbreviation „the CJEU" refers to both the General Court and the Court.

5 See, for example, Poli, S., *The Common Foreign Security Policy after Rosneft: Still imperfect but gradually subject to the rule of law*, Common Market Law Review, Vol. 56, Issue 6, 2017, pp. 1799 – 1834.; 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, Issue 6, pp. 1731 – 1760.; Giegerich, T., *The Rule of Law, Fundamental Rights, the EU's Common Foreign and Security Policy and the ECHR: Quartet of Constant Dissonance*?, ZEuS Zeitschrift für Europarechtliche Studien, Vol. 27, Issue 4, 2024, pp. 590 - 633.; and the sources cited therein.

6 See, for example, Kreutz, J., *Hard measures by a soft power? Sanctions policy of the European Union*, Bonn: Bonn International Center for Conversion (BICC), Paper No. 45., 2005, pp. 1 – 45.; Giumelli F.; Geelhoed, W.; Vries, M. d.; Molesini, A.; *United in Diversity? A Study on the Implementation of Sanctions in the European Union*, Politics & Governance, Vol. 10, Issue 1, 2022, pp. 36 - 46.; Finelli, F., *Countering circumvention of restrictive measures: The EU response*, Common Market Law Review, Vol.

However, one sanctions case marked a turning point for all the courts of the EU in understanding the architecture of the European human rights system and the relationship between the ECHR[7] and the EU legal order - the *Bosphorus Airways* case[8], where the applicant company lodged an individual application with the ECtHR[9], complaining that its right to property (Article 1 Protocol no. 1 ECHR) had been violated by the Irish authorities' decision based on Article 8 of Council Regulation (EEC) No 990/93[10] to impound the aircraft owned by the sanctioned Yugoslav national airline but operated by the applicant company under a lease agreement.

The ECtHR established the so-called Bosphorus presumption of equivalent protection in relation to EU law. In brief, the ECHR applies to all national measures enforcing EU law, as EU membership has not absolved Member States from their obligations under Article 1 ECHR. Where a Member State cannot depart from a legal act of the EU, such as the Council regulation imposing a restrictive measure, and provided that protective mechanisms provided for by EU law (direct actions or the preliminary reference procedure) have been deployed, the presumption of equivalent protection applies. It establishes a general rule under which the ECtHR will not examine the proportionality of the impugned interference with property rights, as EU law affords protection of human rights and fundamental freedoms to standards equivalent to those of the ECHR. The ECtHR's assessment will be limited to ascertaining whether the impugned interference had a sufficient legal basis in EU law and a legitimate aim in implementing EU law. However, the presumption is rebuttable if the protective mechanisms have not been deployed, for example: if a national court failed to refer questions concerning the interpretation of EU law for a preliminary ruling;[11] or if a particular case reveals manifest deficiencies in the protection of human rights afforded by EU law. The latter, once an inconceivable situation, was realised in 2021 in *Bivolaru and Moldovan*, where the ECtHR found a violation of Article 3 ECHR in the context of the execution of a European arrest warrant.[12] Furthermore, the ECtHR has actually diluted the

60, Issue 3, 2023, pp. 733 – 762.; 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, Issue 2, 2024, pp. 192 - 233.; and the sources cited therein.

7 European Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette, International agreements, no. 18/1997, 6/1999, 14/2002, 13/2003, 9/2005, 1/2006, 2/2010.

8 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* (2010) The European Court of Human Rights [GC].

9 The European Court of Human Rights.

10 Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro), OJ 1993 L 102, p. 14.

11 *Avotiņš v Latvia* (2016) The European Court of Human Rights [GC] §121 – 122.

12 See in detail *Bivolaru and Moldovan v France* (2021) The European Court of Human Rights.

equivalent protection presumption by finding it inapplicable whenever the national authorities have even the narrowest margin of manoeuvre not to apply EU law in order to meet commitments under the ECHR, regardless of the nature of the legal act in question—whether it be a Council decision or a generally applicable regulation.[13] Also, when national courts apply EU law, they must interpret it in accordance with the ECHR. As the EU has not acceded to the ECHR, this obligation confers on national courts—especially constitutional courts—a two-fold responsibility: to apply both EU law and the ECHR directly, and then to verify which one provides the most adequate level of human rights protection in compliance with international obligations.[14]

Following the *Bosphorus* judgment, the EU's restrictive measures have not been subjected to the ECtHR's scrutiny. In fact, the seminal judgment rendered by the CJEU in *Kadi*[15], based on the fundamental rights protection as a general principle of EU law that extends the CJEU's competence to a full review of the lawfulness of a Council regulation implementing the UN Security Council resolution, later inspired the ECtHR to apply the same standards in *Nada*[16] and *Al-Dulimi*[17]with respect to the Swiss authorities' refusal to provide effective and full judicial review of the UN sanctions impeding the applicants' free movement or freezing their assets.

1.2 RESEARCH PROBLEM AND METHODOLOGY

The last case where the ECtHR dealt with sanctions imposed by the Council was the Bosphorus case which, like *Nada* and *Al-Dulimi*, does not analyse an

---

13 *M.S.S. v Belgium and Greece* (2011) The European Court of Human Rights (2011) [GC] §339-340; *Pirozzi v Belgium* (2018) The European Court of Human Rights §62; *O'Sullivan McCarthy Mussel Development Ltd v Ireland* (2018) The European Court of Human Rights, § 112.

14 *Jeunesse v the Netherlands* (2014) The European Court of Human Rights [GC] § 110.; As to other comments on the Bosphorus doctrine, see more in Rizcallah, C., *The Systemic Equivalence Test and the Presumption of Equivalent Protection in European Human Rights Law—A Critical Appraisal*, German Law Journal, Vol. 24, Issue 6, 2023, pp. 1062 - 1077.; Imamović, Š., *Post-EU Accession to the ECHR: The Argument for Why the ECtHR Should Abandon the Bosphorus Doctrine*; Utrecht Journal of International and European Law, Vol. 39, Issue 1, 2024, pp. 17 – 29.; see also Schimmelfennig, F., *Competition and community: constitutional courts, rhetorical action, and the institutionalization of human rights in the European Union*: In The Constitutionalization of the European Union, Routledge, 2013, pp. 100 – 117.

15 C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] Court of Justice of the European Union EU:C:2008:461; See more in Leanerts, K., *The Kadi Saga and the Rule of Law within the EU*, SMU Law Review, Vol. 67, Issue 4, pp. 707 – 715; and van Rossem, J. W., *Patrolling the Borders of the EU Legal Order: Constitutional Repercussions of the Kadi Judgment*, Croatian Yearbook of European Law & Policy, Vol. 5, 2009, pp. 93 – 120.

16 *Nada v Switzerland* (2012) The European Court of Human Rights [GC].

17 *Al-Dulimi and Montana Management Inc. v Switzerland* (2016) The European Court of Human Rights [GC].

autonomous sanctions regime of the EU. The EU has become increasingly autonomous and independent from the UN in imposing restrictive measures within the European values-based CFSP policy. A longitudinal study by *Giumelli et al.*, completed in 2021 (before the illegal invasion of Ukraine) shows that almost 50% of all restrictive measures imposed by the Council have targeted European countries; 44% were adopted with the aim of promoting democracy and 33% as crisis-management measures in relation to the Russia–Ukraine conflict. In terms of structure, 75% of all restrictive measures were asset freezes targeting economic interests of designated subjects.[18] This strategic change is a consequence of the 15 packages of sanctions adopted against Russia: the first ones introduced following the annexation of Crimea in 2014, were extensively upgraded by a new set of measures sanctioning the illegal invasion of Ukraine in 2022. Consequently, by targeting the Russian Government, individuals supporting the policies that undermine the territorial integrity and sovereignty of Ukraine, leading businesspersons, their family members or legal persons affiliated with the Government, or entire economic sectors or specific economic operators substantially contributing to the Russian Government, with asset freezes, import-export bans, and transaction bans, the EU intentionally inflicts the costs on Russian economy and exerts pressure on the Russian Government to cease its operations in Ukraine.[19] The EU has therefore introduced, due to the size of the targeted economy and the magnitude of restrictive measures applied, an "unprecedented" economic sanctions regime to date, as *Giumelli* observed.[20]

Such a complex system also required implementation in national legal systems to achieve effectiveness. For example, in Croatia, it is enforced through the Restrictive Measures Act, which, in turn, refers to the subsidiary application of national property and procedural laws, leaving the individual restrictive measures open to national judicial review.[21] The law in question and the courts' decisions will be scrutinised as well by the Croatian Constitutional Court which is ought to interpret the national constitution in conformity with both the ECHR and EU law.

---

18 Giumelli, F.; Hoffmann, F.; Książczaková, A.; *The when, what, where and why of European Union Sanctions*, European Security, Vol. 30, Issue 1, 2021, pp. 2 - 5., 12 – 15.

19 For the overview of the restrictive measures policy in respect of Russia see Meissner, K.; Graziani, C.; *The transformation and design of EU restrictive measures against Russia*, Journal of European Integration, Vol. 45, Issue 3, 2023, pp. 377 – 394.; Alì, A., *Assessing the legality of the EU sanctions imposed on the Russian Federation from 2022*; In The Routledge handbook of the political economy of sanctions, Routledge, 2024, pp. 330 – 338.; Silingardi, S., *The EU 11th and 12th Packages of Sanctions Against Russia: How Far is the EU Willing to Go Extraterritorially?*, Global Trade and Customs Journal, Vol. 19, Issue 7/8, 2024, pp. 1 – 9.

20 Giumelli, F., *A comprehensive approach to sanctions effectiveness: Lessons learned from sanctions on Russia*, European Journal on Criminal Policy and Research, Vol. 30, Issue 2, 2024, p. 212.

21 Official Gazette No. 133/2023.

The CJEU applies Articles 16 and 17 of the Charter[22], which guarantee the freedom to conduct a business and the right to property, in the case-law concerning economic restrictive measures. However, whether it truly protects those rights by a standard equivalent to that of Article 1 Protocol no. 1 ECHR we cannot unequivocally ascertain, as, after the Bosphorus judgment, the ECtHR has not dealt with economic restrictive measures imposed by the EU, let alone in the context of a sanctions regime as extensive as the one targeting Russian economy. It is worth noting that in *D. and Others* the ECtHR has communicated to the Finnish Government a complaint raised under Article 1 Protocol no. 1 ECHR regarding the applicants' inability to collect their pensions from Russia due to "the EU sanctions against the Russian Banks". Therefore, after the *Bivolaru* judgment which established the existence of manifest deficiencies in the protection of fundamental rights in the enforcement of a Council framework decision, doubts about the ECtHR's future approach to these restrictive measures are well founded.

A legitimate question thus arises concerning the general justifiability and proportionality of economic restrictive measures as the measures interfering with property rights protected under Article 1 Protocol no. 1. Recently, some studies have addressed the issue of proportionality of economic restrictive measures under Articles 16 and 17 of the Charter. A year ago, *Terlinden* formulated a hypothesis that "the application of the proportionality principle diminishes in significance, even in the face of fundamental rights protected by the Charter". This conclusion was reached by comparing the case-law that cites proportionality as a general principle of EU law (Article 5(4) TEU) with ordinary standards of suitability and necessity, instead of focusing on the specific guarantees of Articles 16 and 17 of the Charter in a particular context.[23] These criticisms are similar to those of *Eckes*, in respect of the *Kadi* case-law line developed under Article 47 of the Charter, where she noted that the "abstract" objective such as fight against terrorism has voided the proportionality principle of its meaning.[24] *Hofer* analysed the proportionality test in *Rosneft*[25] and she also observed that the objectives pursued by the restrictive measures against Russia have outweighed the concerns for the applicant's individual

---

22 Charter of Fundamental Rights of the European Union, OJ C 326/391, 26 October 2012, p. 39.

23 Terlinden, M., *The Quest for Proportionality in the Changing Landscape of the Unilateral Sanctions of the European Union*, Netherlands International Law Review, Vol. 71, 2024, pp. 311 – 318.; As regards the application of proportionality as a general of principle of EU law in cases concerning sanctions, see Tridimas, T., *Economic Sanctions, Procedural Rights and Judicial Scrutiny: Post-Kadi Developments*, Cambridge Yearbook of European Legal Studies, Vol. 12, 2009-2010, pp. 455-490.

24 Eckes, C., *EU restrictive measures against natural and legal persons: from counterterrorist to third country sanctions*, Common Market Law Review, Vol. 51, Issue 3, 2014, p. 896.

25 C-72/15, *Rosneft* (2017) Court of Justice of the European Union EU:C:2017:236.

situation.[26] However, these remarks have been challenged by empirical researchers, such as *Giumelli*, who argues that economic restrictive measures can only be proportionate if they actually inflict costs for the targeted behaviour.[27]

Nevertheless, no consistent studies have been published on economic restrictive measures as restrictions on the rights protected by Articles 16 and 17 of the Charter, especially from the perspective of Article 52(3) of the Charter, which compels the CJEU to interpret those provisions in accordance with the standards established by the ECtHR under Article 1 Protocol no. 1 ECHR. Therefore, the principal objective of this article is to analyse the CJEU's assessment methodology under Articles 16 and 17 of the Charter, applied exclusively to economic restrictive measures, through a comparative method that contrasts the CJEU's tests and criteria with those of the ECtHR. The article aims to give original answers to the following questions: 1. What aspects of the analysed courts' methodology should be aligned with the ECtHR's case-law?; 2. Does the proportionality test actually need to assert both the suitability and necessity criteria in the context of economic restrictive measures?; 3. How should the CJEU's case-law regarding economic restrictive measures be applied or interpreted by national constitutional courts that apply the ECHR directly?

As the current state of secondary legal sources cannot answer these questions, this research returns to the primary legal sources—namely, the judgments of the CJEU and the ECtHR. The case-law analysed predominantly concerns the Russia–Ukraine sanctions, as these unprecedented economic restrictive measures have, and will continue to, require closer judicial scrutiny. The sampled case-law is also limited exclusively to those judgments where the CJEU has applied Articles 16 and 17 of the Charter directly, while cases where the CJEU has only dealt with pleas of illegality or Article 47 of the Charter are excluded from the analysis. This is because the article does not intend to recapitulate well-established academic findings regarding the CJEU's jurisdiction to rule on actions for annulment. However, the study will cover the CJEU's approach to procedural guarantees inherent to Article 1 of Protocol No. 1 ECHR and the lawfulness test. Therefore, due to the deficient

[26] Hofer, A., *The EU's 'massive and targeted' sanctions in response to Russian aggression, a contradiction in terms*, Cambridge Yearbook of European Legal Studies, Vol. 25, 2023, pp. 30 – 31.; for a similar Rosneft case analysis see also 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. 56; and compare with Lonardo, L.;Szép, V.; *The use of sanctions to achieve EU strategic autonomy: restrictive measures, the blocking statute and the anti-coercion instrumen*t, European Foreign Affairs Review, Vol. 28, Issue 4, 2023, p. 375, where the objectives of restrictive measures have been prioritised over the proportionality *strictu sensu*.

[27] Giumelli, F*., New analytical categories for assessing EU sanctions*, The International Spectator, Vol. 45, Issue 3, 2010, pp. 131 – 144.

methodology of the CJEU, this article also scrutinises the CJEU's reasonings regarding pleas of illegality and Article 47 of the Charter, as far as they are relevant for the analysis under Articles 16 and 17 of the Charter. In light of these criteria, it should be noted that the well-commented *RT France*[28] case, in so far as it concerns the application of Article 16 of the Charter, will not be scrutinised in-depth in this study. This is because, following the ECtHR's findings in *NIT S.R.L.*[29], we fundamentally disagree with the CJEU's assessments concerning the loss of future income (profits) complaint. Furthermore, the special context of the Article 10 ECHR complaint renders this case non-representative within the sampled case-law, as the revocation of the broadcasting licence did not pursue the legitimate aims of economic restrictive measures, such as inflicting costs on the Russian Government and economy. These are all relevant questions for a separate study.

2. COMPARATIVE CASE-LAW ANALYSIS

2.1. GENERAL METHODOLOGY

Articles 16 and 17 of the Charter, which guarantee the freedom to conduct a business and the right to property, apply as a rule of law and general principles of EU law intended to confer rights on individuals.[30] Pursuant to Article 52(3) of the Charter, the CJEU's assessment methodology "imitates" the case-law of the ECtHR with respect to the classification of interferences with property rights under the three distinctive rules of Article 1 of Protocol no. 1 ECHR[31], as well as with regard to their justification. Therefore, economic restrictive measures are classified as measures amounting to the control of the use of property rather than deprivation of property,[32] even if they result in *de facto* deprivation of property (e.g., confiscation measures with punitive character).[33] As the rights guaranteed by

---

28 T-125/22, *RT France v Council* (2022) Court of Justice of the European Union EU:T:2022:483; The measure was not economic in nature, but rather targeted war propaganda, see Baade, B., *EU sanctions against propaganda for war–reflections on the General Court's Judgment in Case T-125/22 (RT France)*, Heidelberg Journal of International Law, 2023, Vol. 83, Issue 2, pp. 257 - 282.

29 *NIT S.R.L. v Moldova* (2022) The European Court of Human Rights [GC] §254.

30 C-235/17, Commission v Hungary (*Usufruct over agricultural land*) (2019) Court of Justice of the European Union EU:C:2019:432, par. 68; C-351/2022, *Neves* (2024) Court of Justice of the European Union EU:C:2024:723, par. 79.; T-305/22, *Rashnikov v Council* (2023) Court of Justice of the European Union EU:T:2023:530, par. 117.

31 C-83/20, *BPC Lux 2 and Others* (2022) Court of Justice of the European Union EU:C:2022:346, par. 38.

32 T-742/22, *Mazepin v Council* (2024) Court of Justice of the European Union EU:T:2024:433, par. 199.

33 *Neves*, par. 82.; The conclusion has been drawn from the ECtHR's cases *Agosi v the United Kingdom* (1986), § 51; *Gogitidze and Others v Georgia* (2015) The European Court of Human Rights, § 94; *Karapetyan v Georgia* (2020) The European Court of Human Rights, § 32.

Articles 16 and 17 of the Charter are not absolute in nature, they may be subject to restrictions justified by objectives of general interest pursued by the EU.[34] The question of whether a restrictive measure is compatible with EU law or justified will be answered through a four-pronged test, encompassing four conditions that must be met in accordance with Article 52(1) of the Charter: 1. The interference with property rights must be 'provided for by law' – the Council must have a legal basis for its actions; 2. It must respect the essence of property rights; 3. It must refer to an objective of general interest, recognised as such by the EU; 4. It must be proportionate.[35]

2.2. LAWFULNESS

As to the lawfulness of economic restrictive measures, the legal basis for their imposition is found in the Council's decisions, regulations, and implementing regulations adopted pursuant to Article 29 TEU and Article 215 TFEU. As established in *Pumpyanskaya*, *Moshkovich*, and *Rashnikov*, a sufficient statement of reasons and the assessment, which observes the distribution of the burden of proof and the probative value of the evidence for the initial listing of the applicant, coupled with subsequent periodic reviews of measures of general applicability, ensure respect for the lawfulness requirement and impose an obligation on the Council to constantly reassess the existence and appropriateness of the designation and listing criteria.[36]

In proceedings initiated under Article 263 TFEU, the CJEU can either intentionally separate the lawfulness requirement from the four-pronged test, or even confuse the complaints as to the unlawfulness of the interference with the proportionality test or procedural guarantees under Article 47 of the Charter.

For example, in *Pumpyanskaya*, the complaint that the proscribed designation criteria of "associated person" was vague and imprecise, thus conferring on the Council completely unfettered discretion, was addressed in a separate statement of reasons on the application of the principle of legal certainty. Furthermore, in spite of the finding under Article 17 of the Charter that the contested measure had no

[34] Cases C-10/15 and C-8/15, *Ledra Advertising and Others v Commission and ECB* (2016) Court of Justice of the European Union EU:C:2016:701, par. 69; *Neves*, par. 85.

[35] T-283/22, *Moshkovich v Council* (2023) Court of Justice of the European Union EU:T:2023:849, par. 163; T-262/15, *Kiselev v Council* (2017) Court of Justice of the European Union EU:T:2017:392, par. 69 and 84; *Mazepin*, par. 202; *Neves*, par. 86.; *Rashnikov*, par. 121.

[36] T-272/22, *Pumpyanskaya* (2023) Court of Justice of the European Union EU:T:2023:491, par. 95 ; *Moshovich*, par. 165; *Rashnikov*, par. 123 and 125; see also T-307/12 and T-408/13, *Mayaleh v Council* (2014) Court of Justice of the European Union EU:T:2014:926, par. 176.

punitive character, which was assessed as relevant with respect to the proportionality of the measure concerned in the four-pronged test, in its analysis under the legal certainty plea, the CJEU applied the standards of lawfulness under Article 7 ECHR, namely the foreseeability of criminal penalties, which was a criterion inapplicable to the administrative measure in question.[37]

The CJEU attempted to justify the application of such an unnecessarily stringent standard by stating that the restrictive measures have "a considerable impact on the rights and freedoms of the persons concerned".[38] Not only does this depart from the ECtHR's case-law, but this approach would require the CJEU to actually examine the impact and effects of the restrictive measures on the applicant's personal situation. However, it does not do so, as will be explained further in respect of the individual burden criterion under the proportionality test.

In *Igor Rotenberg*, the CJEU answered the applicant's complaints regarding the arbitrary interpretation of the proscribed designation criteria "benefitting from Russian decision-makers or from the Government of the Russian Federation" responsible for the annexation of Crimea by concluding that the "interpretation of the concept" did not go beyond what was necessary in light of the objective pursued.[39] In other words, the qualitative requirements of the lawfulness criterion, such as precision of the wording and foreseeability to be given to the legal basis by non-arbitrary judicial interpretation, were mistaken for proportionality assessment. This became even more confusing when the CJEU responded to the complaint regarding the lack of foreseeability of the contested measure in its analysis of the illegality plea under Article 267 TFEU and Article 47 of the Charter, by concluding that the applicant could have been aware of the involvement of the decision-makers from whom he had benefited in the annexation of Crimea, and that he could have expected to be targeted by the restrictive measures.[40]

As regards individual measures open to national judicial review, national courts must interpret the legal basis for the imposition of a national implementing or enforcement measure in light of secondary EU law. In *Neves*, where the individual affected contested the applicability of Article 2(2)(a) of Decision 2014/512[41] con-

---

37 Par. 98, 113 – 115; Compare, in particular, with *Garofalo and Others v Italy* (2025) The European Court of Human Rights.

38 See also T-577/22, *Nioc and Others v Council* (2015) Court of Justice of the European Union EU:T:2015:596, par. 135 – 136.

39 Par. 113 – 114.

40 Par. 60 – 67.

41 Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 229, 31 July 2014, p. 13.

cerning the brokering services provided in relation to military equipment that was never imported into the territory of a Member State, the CJEU did not deal with this question under the lawfulness test. It limited this part of the preliminary ruling to the conventional answer on the interpretation of Article 2(2)(a) of Decision 2014/512.[42] On the other hand, it appears that the scope of application of Article 2(2)(a) of Decision 2014/512 could have been discussed in light of the qualitative requirements for the lawfulness of the interference with property rights, therefore providing an answer to the question of whether the applicable Article 2(2)(a) of Decision 2014/512 was sufficiently accessible, precise, and foreseeable in its application to afford the affected individual a practical opportunity to comply with restrictive measures.[43]

To be precise, this idea does not call for a review of the validity of the EU's legal act limiting the rights guaranteed by Article 17 of the Charter. It rather recognises that judicial interpretation is inherent to the lawfulness requirement under Article 1 of Protocol No. 1 ECHR, which, in fact, invites the courts to clarify legal norms couched in vague or more general terms, but also subjects judicial interpretation to the principles of legal certainty, non-arbitrariness, and foreseeability.[44] Therefore, it should be questioned whether the CJEU could have seized an opportunity to clarify the margin of appreciation that it enjoys when interpreting CFSP legal acts under the lawfulness test, as well as the margin of appreciation afforded to national legislators or national courts when they exercise their, albeit limited, discretion in interpreting the Council's decisions or regulations when they adopt, or are called to review, the national enforcement measures.

In spite of the fact that these decisions and regulations are binding in their entirety and directly applicable in all Member States (Article 288(2) and (4) TFEU), the practice has shown that the proscribed legal nature of these legal acts does not, as such, alleviate the risks of their incorrect implementation or interpretation at the national level, especially in the context of restrictive measures, which is an issue well recognised by both the Council, its working groups, the Commission, and academia.[45]

---

42 See in detail par. 62 - 71.

43 Compare with *Sud Fondi S.r.l. and Others v Italy* (2009) The European Court of Human Rights §109; *Centro Europa 7 S.r.1. and Di Stefano v Italy* (2012) The European Court of Human Rights [GC] §143.

44 See *Yukos v Russia* (2011) The European Court of Human Rights §595 - 599; and compare with *Khodorkovskiy and Lebedev v Russia* (2013) The European Court of Human Rights §876 – 885.

45 See, for example, the Council's document *Restrictive measures (Sanctions) - Update of the EU Best Practices for the effective implementation of restrictive measures*, Brussels, 4 May 2018 (OR. en) 8519/18, available at https://data.consilium.europa.eu/doc/document/ST-8519-2018-INIT/en/pdf; *the Com-*

The shortcoming of the lawfulness test in *Neves* is even more regretful as the interpretation of the scope of application of Article 2(2)(a) of Decision 2014/512 could have ascertained the legitimate aims to be pursued by a broader interpretation of the provision in question, namely ensuring the effectiveness of the restrictive measure by preventing circumvention should the weapons and equipment be routed without passing through EU territory, and ultimately ensuring that the interpretation of EU law is consistent, giving the same definition to the term 'brokering services' in various measures relating to the CFSP.[46] Therefore, these legitimate aims could have well been invoked and included in the assessment under Article 17 of the Charter, especially in the proportionality test. For example, the ECtHR's case-law on (in)compatibility of national measures with EU law under Article 1 Protocol no. 1 ECHR would approach these legitimate aims under the proportionality test, rather than the lawfulness test, as the correct interpretation of EU law and legal obligation stemming from the EU membership primarily rests with the CJEU and national courts.[47]

2.3. LEGITIMATE AIM AND THE MARGIN OF APPRECIATION

The legitimate aim pursued by the contested restrictive measure will be determined in light of the legitimate aim set out by a Council decision imposing the economic restrictive measure. However, the existence of a legitimate aim must be reasserted whenever an applicant complains about having been maintained on the list of designated subjects despite the Council's periodic review, as in *Rashnikov*, where it was corroborated by the CJEU's finding that the triggering cause for the imposition of the impugned measure, as well as the applicant's personal situation, had remained unchanged.[48]

---

mission Opinion of 8.6.2021 on Article 2(2) of Council Regulation (EU) No 269/2014, C(2021) 4223 final, available at: [https://finance.ec.europa.eu/document/download/1cd09e4a-0187-45bc-b234-1de949933f34_en?-filename=210608-ukraine-opinion_en.pdf]; or, for critical considerations on the coordination between the Member States implementing the restrictive measures, see Giumelli F. *et al.*, *United in Diversity? A Study on the Implementation of Sanctions in the European Union*, Politics & Governance, Vol. 10, Issue 1, 2022, pp. 36 - 46.; or Lonardo, L.; Szép, V., *The Use of Sanctions to Achieve EU Strategic Autonomy: Restrictive Measures, the Blocking Statute and the Anti-Coercion Instrument*, European Foreign Affairs Review, Vol. 28, Issue 4, pp. 372 - 373.

46 Par. 68. - 70.

47 See, in detail, *S. A. Dangeville v France* (2002) The European Court of Human Rights §55 - 58; *Aon Conseil et Courtage S.A. i Christian de Clarens S.A. v France* (2007) The European Court of Human Rights §40 - 44; *Ioviţoni and Others v Romania* (2012) The European Court of Human Rights §20 - 24, 33 - 34, 45 - 50; *O'Sullivan McCarthy Mussel Development Ltd. v Ireland* (2018) The European Court of Human Rights, full text.

48 Par. 62

The legitimate aim is mostly addressed by invoking the general values of the CFSP's policies under Article 21 TEU. For example, in *Moshkovich*, a quite general legitimate aim of exerting pressure on the Russian Government to bring an end to its actions destabilising Ukraine, and reaffirming the values that inspire the CFSP policies pursuant to Article 21 TEU, sufficed to justify the contested interference. Furthermore, this case demonstrated that the CJEU would also address complaints regarding the incompatibility of the objectives pursued by the restrictive measures and CFSP policies with other general objectives of the Treaties invoked by the applicant.[49]

Economic restrictive measures, in particular, have a legitimate aim in inflicting costs for the actions triggering the sanctions regime. For example, in *Rosneft* and subsequently *Sberbank*, the CJEU found that a regulation which has introduced restrictions on investment services and financial transactions with the applicants, intended to attain the objective of increasing the costs to be borne by the Russian Federation for its actions undermining Ukraine's territorial integrity.

However, the approach in which a legitimate aim would be determined in light of the applicant's individual situation is rarely applied. For example, in *Ezubov*, the legitimate aim pursued was construed as a specific subset of a more general aim. In this case, the applicant complained of having been enlisted as a person associated with another designated subject. The CJEU determined that the "associated persons" criterion is justified by the significant danger that a person subject to restrictive measures may, in order to circumvent those measures, exploit their link with persons associated with them.[50]

The analysis in *Arkady Rotenberg* was also slightly different, given the specific context of imposing the restrictive measures set forth in Decision 2014/145 on an individual personally involved in the actions of the Russian Government following the annexation of Crimea. The CJEU deemed it appropriate to justify the contested decisions of the Council by resolutions adopted at the UN General Assembly and Article 2 of the UN Charter.[51] The Council pursues the idea of an EU autonomous sanctions regime that enforces the values of the EU enshrined in the Treaties, whereas, within the context of common European security, the Union of different nations represented in the Council acts unanimously. Therefore, the legitimisation of the EU's aims by the UN's documents seems unnecessary, particularly if we reconsider the fact that the designated subject is a citizen of a Per-

[49] Par. 168 and 175.

[50] Par. 220.

[51] T-720/14, *Arkady Rotenberg v Council* (2016) Court of Justice of the European Union EU:T:2016:689, par. 176 – 177.

manent Member of the UN Security Council, capable of blocking and hindering the enforcement of UN policies in the given context. At one point, the policies of the EU and the UN could substantially diverge.

Finally, in *Ezubov* and *Mazepin*, the CJEU set out an interpretive rule under Articles 16 and 17 of the Charter which, although rarely invoked, could define its own margin of appreciation in respect of the restrictive measures. According to this rule, property rights, as fundamental rights, "must be viewed in relation to their function in society".[52] This rule resembles the ECtHR's interpretation of the ECHR as "a living instrument". However, the CJEU's case-law has not yet shown what effects should be given to the interpretation of that rule in respect of restrictive measures.

2.4. PROPORTIONALITY

The principle of proportionality, as a general principle of EU law enshrined in Article 5(4) TEU, applies to restrictive measures. However, the standard of protection is still difficult to grasp. For example, in *Rosneft* and *VTB Bank,* the introduction of pleas under Articles 16 and 17 of the Charter, mandated that the contested measure should not be *disproportionate or intolerable* in a way that impairs *the very essence* of the rights guaranteed.[53] In *Igor Rotenberg*, *Mazepin* and *RT France*, the proportionality standard applied required that measures adopted by the Council do not exceed the limits of what is *appropriate and necessary* to attain the objectives pursued.[54]

a) The scope of interference and respect for the essence of fundamental rights

As the restrictive measures of general applicability amount to the control of the use of property, the CJEU first examines whether they "respect the essence of property rights." Due to their temporary and reversible nature, or precautionary character as observed in *Rashnikov*[55], the CJEU established in *Mazepin* and *RT France* that these measures do not impair the essence of property rights.[56] The same standard

---

52 T-741/22, *Ezubov v. Council* (2024) Court of Justice of the European Union EU:T:2024:605*,* par. 211; *Mazepin*, par. 200; see also T-202/12, *Al Assad v Council* (2014) Court of Justice of the European Union EU:T:2014:113, par. 113.

53 *Rosneft*, par. 148.; C-729/18 P, *VTB Bank PAO v Council* (2020) Court of Justice of the European Union EU:C:2020:499, par. 80.

54 T-738/22, *Igor Rotenberg v Council* (2023) Court of Justice of the European Union EU:T:2024:398, par. 105 and 106; *Mazepin*, par. 209; *RT France*, par. 168; see also T-723/20, *Prigozhin v Council* (2022) Court of Justice of the European Union EU:T:2022:317, par. 133.

55 Par. 118.

56 *Mazepin*, par. 205; *RT France*, par. 153; see also T-551/18, *Oblitas Ruzza* v *Council* (2021) Court of Justice of the European Union EU:T:2021:453, par. 96.

regarding whether "the essence of the right" was respected was also applied in *Neves* with respect to an individual confiscation (punitive) measure.[57] This proportionality element is quite confusing and shortsighted with regard to the actual content, scope, and effects of the restrictive measures. It appears to "imitate" the ECtHR's condition of whether a right guaranteed by Article 1 of Protocol No. 1 ECHR "has been infringed in a manner resulting in the impairment of the essence of ... rights." This condition was purposefully developed for the line of case-law dealing with partial reductions, as opposed to full deprivation, of pensions and social benefits[58], and was subsequently transposed into the EU austerity measures case-law, where the ECtHR had dealt with general legislative reductions of social rights[59]; wherefrom this standard "snuck in" to the CJEU's case-law.

Therefore, this somewhat misplaced criterion can lead to conclusions that are at odds with the nature of restrictive measures (the impugned interference) or the circumstances of specific cases, such as for example in *Neves*, the case which dealt with a confiscation nature that should have been defined, according to the ECtHR, as "the loss of all ability to dispose of the property".[60] Moreover, it must be noted that the prolonged freezing of assets may, in effect, render the use of one's property completely devoid of its purpose over time and may represent a *de facto* deprivation. This is why the ECtHR looks into the duration of precautionary and preliminary measures.

Furthermore, some cases disclose methodological difficulties in defining the scope of the interference complained of. For example, in *Mazepin*, where the applicant appealed against an asset freeze and complained about being designated as a leading businessperson in an economic sector providing a substantial source of revenue for the Government of the Russian Federation, he also complained of the consequential loss of professional clientele and the import ban that one of the Member States had imposed on one of his companies. In the ECtHR's case-law, both of these complaints would refer to two separate measures interfering with property rights[61], but they would be also declared inadmissible *ratione personae* as they had

---

57 *BPC Lux 2 and Others*, par. 53; *Neves*, par. 88.

58 See, amongst many, for example *Béláné Nagy v Hungary* (2016) The European Court of Human Rights [GC] §117 - 118, and the case-law cited therein; and compare, conversely, with *Stefanetti and Others v Italy* (2014) The European Court of Human Rights §59, or *Apostolakis v Greece* (2009) The European Court of Human Rights § 41.

59 E.g., *Da Silva Carvalho Rico v Portugal* (2015) The European Court of Human Rights §42.

60 *Vasilescu v Romania* (1998) The European Court of Human Rights §53.

61 In respect of legislative regulation leading to loss of market shares, cessation of contracts or business operations, see *Pannon Plakát Kft v Hungary* (2022) The European Court of Human Rights §41., 43. - 44., 53. and 55., and the case-law cited therein; whereas in respect of import bans, see *The Liquida-*

not been raised by the companies affected.[62] A similar mistake was repeated in *Moshkovich* where the applicant introduced complaints not only in respect of the business operations of his company but also on behalf of his family members for not having been able to access the frozen funds.[63] Instead of declaring them inadmissible, CJEU examined these complaints on the merits. In *Mazepin* it further unnecessarily attributed the consequences of the contested Council's measure to "Russia's decision to invade Ukraine", which was an unacceptable conclusion in the context of the obligation to determine the scope of the Council's interference with property rights in accordance with the ECHR.[64]

b) Suitability – the manifest appropriateness test

The legality of the Council's legal acts imposing restrictive measures may be questioned in terms of proportionality only if the measure is manifestly inappropriate or manifestly inordinate, having regard to the objective it seeks to pursue, the wide margin of appreciation afforded to the Council in adopting the restrictive measures, and the general effects the contested acts aim to produce.[65]

Regarding the concept of "manifest inappropriateness," which denotes the existence of a reasonable relationship between the restrictive measures of general applicability and the objectives pursued by the Council, it does lower, to some extent, the standards regarding whether such measures are *suitable to achieve the goal pursued*. It is now settled case-law that the measures must be *capable of contributing to the objective pursued*.

For example in *VTB Bank*, the restrictions on access to the EU capital market were deemed capable of contributing to the objective of increasing the costs to be borne by Russia for its actions to undermine Ukraine's territorial integrity, sovereignty, and independence, and thus were considered appropriate.[66] Regarding the special relationship between the general designation criteria, the legitimate aim pursued, and the Council's individual assessment of the designated subject, in *Mazepin* the

---

tion Estate of the Commercial Company Poljičan-Rašica d.o.o. v Croatia (2024) The European Court of Human Rights §17.

62 In respect of the admissibility of the complaints introduced by the shareholders of the companies affected by a legislative regulation, see *Albert and Others v Hungary* (2020) The European Court of Human Rights [GC] §122.

63 Par. 176 and 178.

64 *Mazepin*, par. 224 – 225.

65 *Mazepin*, par. 209; C-72/15, *Rosneft*, par. 146; C-225/17 P, *Islamic Republic of Iran Shipping Lines and Others v Council* (2019) Court of Justice of the European Union EU:C:2019:82, par. 103; *VTB Bank*, par. 61; C-348/12 P, *Council v Manufacturing Support & Procurement Kala Naft* (2013) Court of Justice of the European Union EU:C:2013:776, par. 120.

66 *VTB Bank*, par. 62 and 66.

CJEU found that the Council's decision to designate the applicant was appropriate as there was "a rational connection between the targeting of leading businesspersons operating in economic sectors providing substantial revenue to the government, in view of the importance of those sectors for the Russian economy, and the objective of the restrictive measures in the present case, which is to increase pressure on the Russian Federation as well as the costs of its actions to undermine Ukraine's territorial integrity, sovereignty and independence".[67]

As to the individual burden to be borne by the designated subject, the CJEU faces a difficult position in giving an individual assessment of the pecuniary effects produced by the imposition of the restrictive measures of general applicability, as it must accept their nature: they aim "to strike" a whole state, economic sector, or a group of economic operators without examining their culpability or factual involvement in the triggering cause[68]. At the same time, it must also refrain from examining the *de facto* effectiveness of the measures in achieving the goals pursued or producing the intended effects.[69] Therefore, some elements otherwise crucial to the assessment of the disproportionate effects of the interference with property rights must be left out: 1. The subjective element, such as the existence of good or bad faith on the part of the applicant, or determination of any responsibility for or involvement in the activities triggering sanctions[70]; 2. Any objective element of proportionality dependent on the applicant's behaviour, such as the scope of the measure, e.g. the size of the funds frozen[71]; 3. The existence of discriminatory effects of the measure complained of.[72]

For these reasons, in some aspects, the logic behind the assessment of restrictive measures of general applicability contradicts the proportionality assessment found elsewhere in case-law. Instead of focusing on the individual burden imposed on the applicant, it prioritises the effectiveness of the restrictive measure in the overall assessment.

---

67 Par. 95.

68 As to natural persons, see T-270/22, *Pumpyansky v Council* (2023) Court of Justice of the European Union EU:T:2023:490, par. 89: as to legal persons, see *VTB Bank*, par. 64.

69 See to that effect *Pumpyanskaya*, par. 108.

70 *VTB Bank*, par. 81: "Restrictive measures, by definition, have consequences which affect rights to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions".; Compare, *a contrario*, with *Džinić v Croatia* (2016) The European Court of Human Rights.

71 See to that effect in particular T-245/15, *Klymenko v Council* (2017) Court of Justice of the European Union EU:T:2017:792, par. 210 – 211.

72 See T-68/14, *Post Bank Iran v Council* (2016) Court of Justice of the European Union EU:T:2016:263, par. 135.

For example, in *VTB Bank*, the fact that the applicant had to seek alternative sources of capital due to the restriction on access to EU capital markets was evaluated as supporting the appropriateness of the impugned measure.[73] In *Sberbank*, regarding explicit complaints of financial losses sustained due to restrictions on access to capital markets, the CJEU ruled that the harm caused to the applicant was the primary objective of the contested measure, which the applicant must tolerate, regardless of the lack of personal culpability. The objective of inflicting costs on the Russian Government for its actions in Ukraine outweighed the disproportionate effects on the applicant's pecuniary interests. In this context, the CJEU even went so far as to say that the resulting damages for the applicant could lead to a bailout by the Russian Government, which in itself proved the overall effectiveness of the contested measure.[74] In *Mazepin* and *Igor Rotenberg*, the CJEU avoided examining the complaints regarding financial losses incurred by the applicants, simply overriding them by finding that a periodic review of the Council's decision to designate the applicants, coupled with the possibility of authorising the use or release of frozen funds in exceptional circumstances (to meet basic needs or certain commitments), were sufficient safeguards of the proportionality priniciple.[75] The same reasoning was employed in *Rashnikov* to dismiss the complaints about the excessive burden placed on the applicant by maintaining him on the list, despite the fact that, in his view, the objectives of the contested measure had been attained and it no longer pursued any legitimate aim.[76]

In the context of potentially discriminatory effects of the contested measures[77], in *Rosneft*, where the applicant complained that the measure had targeted only some economic operators compared to others in the Russian oil sector, the CJEU determined that these effects were irrelevant. Inflicting additional costs on those operators who, unlike the others, depend exclusively on technology imported from the EU and therefore cannot offset the effects of the measure by imports from alternative markets was necessary for the effectiveness of the restrictive economic measure, which amounted to a partial interruption or reduction of the economic relations in the sector affected.[78]

---

73 Par. 62.

74 Par. 148 – 153.

75 *Moshkovich*, par. 167, *Mazepin*, par. 215; T-738/22, *Igor Rotenberg*, par. 112; see also *Arkady Rotenberg*, par. 185.

76 Par. 126, 138 – 139.

77 See, to that effect, general principles recapitulated in T-461/16, *Kaddour v Council* (2018) Court of Justice of the European Union EU:T:2018:316, par. 152.

78 Par. 131 – 132.

Furthermore, In *Rashnikov* the CJEU responded to the applicant's complaints regarding the alleged discriminatory effects of the contested measure by explicitly excluding the concept of indirect discrimination from its assessment. The CJEU stated that "the principle of equal treatment and non-discrimination must be reconciled with the principle of legality." Therefore, the CJEU only examined whether the provisions of the contested act were formulated neutrally, regardless of the nationality of designated subjects, and whether the decision to list the applicant was based on a reasoned and non-arbitrary assessment.[79]

Instead of conducting an individual assessment of *posteriori* disproportionate effects, in the appropriateness test, the CJEU examines whether the Council had *ex ante* ascertained objective criteria (justification) for the decision to target a specific economic operator or a group of specific economic operators. In this choice, the Council enjoys a broad discretion, which can only be overruled by the CJEU if it is possible to determine that the Council has misused its powers by implementing a restrictive measure for ends other than those for which the power was conferred on the Council, or with the aim of evading a procedure prescribed by the Treaties.[80] Therefore, in *VTB Bank* it was appropriate to single out the applicant, who was a major credit institutions established in Russia with over 50% public ownership or control.[81] In *Rosneft*, the intentional harm inflicted on the overall energy sector in Russia, with a view of reducing its power to threaten the countries that depend on it for energy supplies, was assessed to fall under the permissible appreciation of the intended effects of the restrictive measure, which did not disclose any appearances as to the misuse of powers on the part of the Council.[82]

In the end, in *Arkady Rotenberg*, the only case thus far where the CJEU established the applicant's individual responsibility for the cause triggering the imposition of restrictive measures under Decision 2014/145/CFSP, by finding him to be "among those responsible for policies and actions that undermined or threatened the territorial integrity, sovereignty, and independence of Ukraine," it was stated that the objectives pursued by the contested measure outweighed the disproportionate effects complained of. This raises the question of whether the CJEU should adopt

---

79 Par. 145.; compare also with *Moshkovich*, par. 181 and 185, where the applicant complained of the Council's inconsistency in sectoral restrictive measures designation policy due to the decision not to include foreign shareholders generating higher revenues in the affected economic sector in comparison to domestic shareholders such as the applicant.

80 *Rosneft*, par. 135; T-235/22, *Russian Direct Investment Fund v Council* (2024) Court of Justice of the European Union EU:T:2024:311, par. 101; C-274/11 and C-295/11, *Spain and Italy v Council* (2013) Court of Justice of the European Union EU:C:2013:240, par. 33.

81 Par. 62, 67 – 68.

82 Par. 134 and 136.

a different proportionality standard for such cases compared to those where the applicant's personal involvement or culpability were irrelevant to its assessment.[83]

c) Necessity – less onerous alternatives

The proportionality test applicable to restrictive measures formally includes the obligation to verify the existence of alternative, less onerous measures capable of attaining the same objectives. However, the CJEU limits its assessment to the scope of powers exercised by the Council under Article 215 TFEU and the manner in which a specific restrictive measure was implemented within the broader sanctions regime, according to the reasons adduced by the Council.

For example, in *VTB Bank*, the CJEU was satisfied that the restriction on access to the EU capital market was not intended to result in a total interruption of economic and financial relations, considering that the Council had imposed the contested measure after already attempting to achieve the same objective through a series of progressive restrictive measures.[84] *In Russian Direct Investment Fund*, regarding the complaint that the asset freeze could have been more targeted and limited in scope to achieve the same objective, the CJEU was satisfied with the provisions under which contracts concluded before the legal acts came into force could be performed via exceptional prior authorisations for specific transactions.[85] Therefore, the comparison of the contested restrictive measures with other allegedly less onerous alternative measures proposed by the applicants was effectively excluded from the proportionality assessment.

Furthermore, in numerous cases, the CJEU refused to accept potentially less restrictive alternatives if they were seen to compromise the political goals it deemed legitimate. For instance, exerting pressure on Russian decision-makers responsible for the situation in Ukraine was considered a legitimate political goal. The CJEU was satisfied that less onerous alternatives, including de-listing, could be reassessed on an individual basis through the Council's periodic review.[86]

In other cases, complaints about less restrictive alternatives were dismissed if such alternatives would enable the circumvention of the restrictive measures. For example, in cases concerning asset freezes such as *Ezubov*, *Mazepin*, or *Arkady Roten-*

---

83 *Arkady Rotenberg*, par. 180 – 181; In this regard, see also similar cases T-390/08, *Bank Melli Iran v Council* (2009) Court of Justice of the European Union EU:T:2009:401, par. 71, and T-202/12, *Al Assad*, par. 116.

84 Par. 79, 82.

85 Par. 96.

86 See *Arkady Rotenberg*, par. 182 and 185; and also *Al Assad*, par. 117 and 120.

berg, the CJEU found that prior authorisation or post hoc justification of specific transfers would allow the applicants to evade the restrictive measures regime.[87]

If there had been any doubts as to the underlying reasons for the self-evident avoidance of the necessity criterion, these appear to have been resolved in *OT*, where the CJEU unequivocally asserted that the values and objectives of the CFSP policy outweigh the relative importance of individual interests.[88]

d) Procedural guarantees inherent to the lawfulness and proportionality requirements

The test applied under Articles 16 and 17 of the Charter does not include procedural guarantees of the lawfulness and proportionality of interferences with property rights. As a result, complaints regarding violations of procedural guarantees are examined as separate pleas of illegality. This stems from the CJEU's methodology, which distinguishes the guarantees of the right to effective judicial protection under Article 47 of the Charter from its substantive provisions. This is quite different from the ECtHR's position that the procedural guarantees of the right to effective judicial protection are inherent to Article 1 Protocol no. 1 ECHR, as they have been in the context of EU law, for example, in the case *S. A. Dangeville*.

It is undisputed that complaints regarding violations of procedural guarantees may be examined as stand-alone complaints, such as those in *Russian Direct Investment Fund*, where the applicant alleged violations of the right to adversarial proceedings and non-disclosure of evidence in general. These complaints were not associated with the lawfulness and proportionality of the interference with property rights. However, where such complaints are directly connected to the assessment criteria under Articles 16 and 17 of the Charter, the latter approach creates evident deficiencies in the four-pronged test under the substantive provisions.

For example, in *Arkady Rotenberg*, the applicant complained that the criteria for inclusion on the list of designated subjects were unclear and that he could not understand them, as the Council's decision was insufficiently reasoned. This clear complaint about the foreseeability of the listing criteria—and thus, the lack of procedural guarantees concerning the lawfulness of the interference with property rights—was examined under Article 47 of the Charter and Article 296 TFEU.[89] Even though the test under Article 17 of the Charter had invoked the principle

---

87 *Ezubov,* par. 222; *Arkady Rotenberg*, par. 182; *Mazepin*, par. 212.

88 T-193/22, *OT v Council* (2023) Court of Justice of the European Union EU:T:2023:716; par. 202: „…the disadvantages suffered by the applicant are not disproportionate in view of the importance of the objective pursued by the contested acts.".

89 *Arkady Rotenberg*, par. 45 and 49; see also T-307/12 and T-408/13, *Mayaleh*, par. 87.

of lawfulness of limitations on property rights[90], the analysis thereof could have been found only in the statement of reasons as to the pleas of illegality.[91] The same problem arose in the examination of pleas alleging manifest error of assessment by the Council. Also, pleas regarding the probative value of evidence used to assess the fulfilment of the designation criteria are separated from the lawfulness test under Articles 16 and 17 of the Charter. For example, in *Igor Arkady*, the question of whether the Council had interpreted the prescribed criteria arbitrarily by relying on less reliable sources of information, such as media articles, was answered separately under Article 47 of the Charter and Article 296 TFEU.[92] The cumulation of both flawed approaches to the general and broad designation criteria can also be observed in *Moshkovich*.[93]

Furthermore, the *OT* case demonstrates that this methodological flaw is intentional, and that the CJEU cannot ascertain which element of the test under Articles 16 and 17 of the Charter is applicable to conventional pleas of illegality. In the latter case, in the reasoning given under Article 17 of the Charter, the CJEU concluded that the applicant's complaint about the insufficiency of the evidence that he met the prescribed designation criteria "is a matter for the assessment of their merits and not of their proportionality." (?).[94]

Finally, the most recent *Ezubov* case reveals the actual consequences of this logical fallacy in the CJEU's methodology. While the CJEU decided to annul the contested decisions and the accompanying implementing regulations in respect of the applicant—because the Council failed to demonstrate that the applicant met the prescribed criterion of a "benefit" received from a leading businessperson associated with the Russian Government—the CJEU simultaneously established, under Article 17 of the Charter, that the interference with his property right was lawful.[95] How is it possible that, on one hand, the contested restrictive measure must be annulled in respect of an applicant when he or she does not meet the prescribed criteria to be sanctioned, but on the other hand, the restrictive measure and the interference with his property rights remain "lawful" under Article 17 of the Charter?

---

90 See to that effect T-256/11, *Ezz and Others v Council* (2014) Court of Justice of the European Union EU:T:2014:93, par. 198.

91 *Arkady Rotenberg*, par. 171 and 175; see also T-372/14, *Sberbank of Russia OAO v Council* (2018) Court of Justice of the European Union EU:T:2018:541, par. 144 referring to par. 91 – 107 as to the pleas of illegaility; likewise in *Mazepin*, par. 204, and *Rashnikov*, par. 123.

92 Par. 51 – 55.

93 Par. 34 – 50, 58 – 67.

94 Par. 204.

95 See par. 175 – 204, and compare with par. 214.

3. CONCLUSIONS

1. What aspects of the CJEU's methodology should be aligned with the ECtHR's case-law?

a) The lawfulness test is the most deficient part of the four-pronged test applied under Articles 16 and 17 of the Charter

The CJEU should first include every interpretation of the concepts and terms set forth in Council decisions and regulations, or directives, especially any designation criteria or terms regulating the conditions for individual targeting, into the lawfulness test under Articles 16 and 17 ECHR.

Once it does so, the CJEU should attach the procedural guarantees of Article 47 of the Charter to the complaints regarding the non-fulfilment of the designation criteria to avoid illogical results such as the one in the *Ezubov* case.

There should be a clear distinction between the foreseeability of the interpretation of the designation criteria, as a primary concern under the lawfulness test, and the proportionality of the interference complained of. Whether the applicant could have foreseen that he or she could be designated is primarily the qualitative criterion of the lawfulness test and not a matter for the assessment of the individual situation in which they have been placed under the proportionality test.

In the end, the application of Article 7 ECHR to these measures, if they are not punitive in nature, should be removed to validate the CJEU's broader discretion in the interpretation of the designation criteria.

b) The legitimate aim and the margin of appreciation

It is self-evident that the primary concerns under the proportionality test are related to the effectiveness of economic restrictive measures and the circumvention of any evasion.

In this context, the CJEU should further elaborate on its findings in *Ezubov* and *Mazepin* that property rights "must be viewed in relation to their function in society."

This rule on the interpretation of EU law as "a living instrument" will give legitimacy, on the one hand, to a very broad interpretation of the objectives pursued by economic restrictive measures, while on the other, it would legitimise the lower standards applied in the proportionality test.

c) Proportionality

As regards proportionality, the CJEU should, first and foremost, remove from the assessment the question of whether economic restrictive measures interfere with "the essence" of property rights. The fact that the measures in question represent the control of the use of property does not mean that they, as such, cannot impair the very essence of one's possessions. They do, even if they are implemented formally as precautionary or preliminary measures.

If the CJEU refuses to assess the individual pecuniary burden borne by the applicant as a result of the imposition of economic restrictive measures, then the question of whether "the essence" of property rights has been respected is irrelevant. The criterion is also absolutely misplaced in respect of confiscation measures which serve a punitive purpose.

Secondly, the manifest appropriateness test under the suitability criterion should be better explained by the *Ezubov* and *Mazepin* rule on the CJEU's margin of appreciation, if further elaborated, whereas the test applied in *OT* in respect of the weight attached to the objectives pursued by economic restrictive measures should explain why the individual burden borne by the applicant is excluded from the overall proportionality test.

2. Does the proportionality test actually need to assert both the suitability and necessity criteria in the context of economic restrictive measures?

Finally, we disagree with other authors who argue that the proportionality test of economic restrictive measures should include any assessment of their necessity, as this proportionality rule contradicts the very logic of any economic sanctions' regime.

Consequently, the CJEU should further develop the suitability criterion to compensate for the lack of the necessity criterion and the assessment of the effects produced by economic restrictive measures in individual cases (the individual burden test).

3. How should the CJEU's case-law regarding economic restrictive measures be applied or interpreted by national constitutional courts that apply the ECHR directly?

As regards the lawfulness criterion, it appears that national constitutional courts should make use of the preliminary reference procedure under Article 267 TFEU as often as possible. Thus because it is hardly conceivable that the interpretation of the designation criteria, or broad and general terms adopted in other correlating legal acts of the EU, should be so evident that a national court could be confident

that the same interpretation would be shared by the CJEU, in accordance with the *CILFIT* criteria.

As regards the proportionality of national measures that enforce the restrictive measures adopted by the Council, the preliminary reference procedure will be obviously obligatory to fulfil the Bosphorus doctrine conditions, as there is no case-law of the ECtHR that could be relevant for the proportionality assessment of newly adopted sanctions packages.

In the end, constitutional courts should be particularly wary of those cases in which the applicants do not complain against the enforcement of restrictive measures directed against them, but that they have been consequently and *de facto* affected by measures which had no legitimate aim in targeting them personally or their proprietary interests. This raises the question of whether the proportionality test should apply to them by the same (lower) standards developed in the case-law of the CJEU in respect of individual and economic interests that have been intentionally targeted by the CFSP legal act of general applicability.

REFERENCES

BOOKS AND ARTICLES

1. Alì, A., *Assessing the legality of the EU sanctions imposed on the Russian Federation from 2022*; In *The Routledge handbook of the political economy of sanctions*, Routledge, 2024, pp. 330 - 338.
2. Baade, B., EU sanctions against propaganda for war–reflections on the General Court's Judgment in Case T-125/22 (RT France), Heidelberg Journal of International Law, 2023, Vol. 83, Issue 2, pp. 257 - 282.
3. Chachko, E., *Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence*, Yale Journal of International Law, Vol. 44, Issue 1, 2019, pp. 33 – 41.
4. Eckes, C., *The law and practice of EU sanctions*: In Research Handbook on the EU's Common Foreign and Security Policy, Edward Elgar Publishing, 2018, pp. 206 - 229.
5. Eckes, C., *EU restrictive measures against natural and legal persons: from counterterrorist to third country sanctions*, Common Market Law Review, Vol. 51, Issue 3, 2014, pp. 869 – 906
6. Finelli, F., *Countering circumvention of restrictive measures: The EU response*, Common Market Law Review, Vol. 60, Issue 3, 2023, pp. 733 – 762.
7. Gazzini, T.; Herlin-Karnell, E., *Restrictive Measures Adopted by the European Union*, European Law Review, Vol. 36, Issue 6, 2011, pp. 798 - 817.
8. Giumelli, F.; Hoffmann, F.; & Książczaková, A., *The when, what, where and why of European Union Sanctions, European Security*, Vol. 30, Issue 1, 2021, pp. 1 – 23.
9. Giumelli, F., *A comprehensive approach to sanctions effectiveness: Lessons learned from sanctions on Russia*, European Journal on Criminal Policy and Research, Vol. 30, Issue 2, 2024, pp. 211 – 228.

10. Giumelli F.; Geelhoed, W.; Vries, M. d.; Molesini, A.; *United in Diversity? A Study on the Implementation of Sanctions in the European Union*, Politics & Governance, Vol. 10, Issue 1, 2022, pp. 36 - 46.
11. Giumelli, F., *New analytical categories for assessing EU sanctions*, The International Spectator, Vol. 45, Issue 3, 2010, pp. 131 – 144.
12. Giegerich, T., *The Rule of Law, Fundamental Rights, the EU's Common Foreign and Security Policy and the ECHR: Quartet of Constant Dissonance*? ZEuS Zeitschrift für Europarechtliche Studien, Vol. 27, Issue 4, 2024, pp. 590 - 633.
13. Hofmann, R.; Moritz, M.; *Recent Trends in EU Sanctions Law*: In International Sanctions and Human Rights, Cham: Springer Nature Switzerland, 2024, pp. 53 - 77.
14. Hofer, A., *The EU's 'massive and targeted' sanctions in response to Russian aggression, a contradiction in terms*, Cambridge Yearbook of European Legal Studies, Vol. 25, 2023, pp. 19 – 39.
15. Imamović, Š., *Post-EU Accession to the ECHR: The Argument for Why the ECtHR Should Abandon the Bosphorus Doctrine*; Utrecht Journal of International and European Law, Vol. 39, Issue 1, 2024, pp. 17 – 29.
16. 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, Issue 2, pp. 192 - 233.
17. Kreutz, J., *Hard measures by a soft power? Sanctions policy of the European Union*, Bonn: Bonn International Center for Conversion (BICC), Paper No. 45., 2025, pp. 1 – 45.
18. Leanerts, K., *The Kadi Saga and the Rule of Law within the EU*, SMU Law Review, Vol. 67, Issue 4, pp. 707 – 715
19. Lonardo, L., *Restrictive Measures: Constitutional Issues, Classification, Judicial Review*: In EU Common Foreign and Security Policy After Lisbon: Between Law and Geopolitics, Cham: Springer International Publishing, 2022, pp. 73-89.
20. Lonardo, L.;Szép, V.; *The use of sanctions to achieve EU strategic autonomy: restrictive measures, the blocking statute and the anti-coercion instrument*, European Foreign Affairs Review, Vol. 28, Issue 4, 2023, pp. 363 – 377.
21. 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, pp. 40 - 63.
22. Meissner, K.; Graziani, C.; *The transformation and design of EU restrictive measures against Russia*, Journal of European Integration, Vol. 45, Issue 3, 2023, pp. 377 – 394.
23. Poli, S., *The Common Foreign Security Policy after Rosneft: Still imperfect but gradually subject to the rule of law*, Common Market Law Review, Vol. 56, Issue 6, 2017, pp. 1799 – 1834.
24. Rizcallah, C., *The Systemic Equivalence Test and the Presumption of Equivalent Protection in European Human Rights Law—A Critical Appraisal*, German Law Journal, Vol. 24, Issue 6, 2023, pp. 1062 - 1077.
25. Schimmelfennig, F., *Competition and community: constitutional courts, rhetorical action, and the institutionalization of human rights in the European Union*: In The Constitutionalization of the European Union, Routledge, 2013, pp. 100. – 117.

26. Silingardi, S., *The EU 11th and 12th Packages of Sanctions Against Russia: How Far is the EU Willing to Go Extraterritorially*?, Global Trade and Customs Journal, Vol. 19, Issue 7/8, 2024, pp. 1 – 9.
27. Terlinden, M., *The Quest for Proportionality in the Changing Landscape of the Unilateral Sanctions of the European Union*, Netherlands International Law Review, Vol. 71, 2024, pp. 299 – 325.
28. Tridimas, T., *Economic Sanctions, Procedural Rights and Judicial Scrutiny: Post-Kadi Developments*, Cambridge Yearbook of European Legal Studies, Vol. 12, 2009-2010, pp. 455-490.
29. 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, Issue 6, pp. 1731 – 1760.
30. van Rossem, J. W., *Patrolling the Borders of the EU Legal Order: Constitutional Repercussions of the Kadi Judgment*, Croatian Yearbook of European Law & Policy, Vol. 5, 2009, pp. 93 – 120.

CJEU

1. C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* (2008) Court of Justice of the European Union EU:C:2008:461
2. T-390/08, *Bank Melli Iran v Council* (2009) Court of Justice of the European Union EU:T:2009:401
3. *Ezz and Others v Council* (2014) Court of Justice of the European Union EU:T:2014:93
4. C-274/11 and C-295/11, *Spain and Italy v Council* (2013) Court of Justice of the European Union EU:C:2013:240
5. T-202/12, *Al Assad v Council* (2014) Court of Justice of the European Union EU:T:2014:113
6. T-307/12 and T-408/13, *Mayaleh v Council* (2014) Court of Justice of the European Union EU:T:2014:926
7. C-348/12 P, *Council v Manufacturing Support & Procurement Kala Naft* (2013) Court of Justice of the European Union EU:C:2013:776
8. T-577/22, *Nioc and Others v Council* (2015) Court of Justice of the European Union EU:T:2015:596
9. T-68/14, *Post Bank Iran v Council* (2016) Court of Justice of the European Union EU:T:2016:263
10. T-372/14, *Sberbank of Russia OAO v Council* (2018) Court of Justice of the European Union EU:T:2018:541
11. T-720/14, *Arkady Rotenberg v Council* (2016) Court of Justice of the European Union EU:T:2016:689
12. C-10/15 and C-8/15, *Ledra Advertising and Others v Commission and ECB* (2016) Court of Justice of the European Union EU:C:2016:701
13. C-72/15, *Rosneft* (2017) Court of Justice of the European Union EU:C:2017:236
14. T-245/15, *Klymenko v Council* (2017) Court of Justice of the European Union EU:T:2017:792
15. T-262/15, *Kiselev v Council* (2017) Court of Justice of the European Union EU:T:2017:392

16. T-461/16, *Kaddour v Council* (2018) Court of Justice of the European Union EU:T:2018:316
17. C-225/17 P, *Islamic Republic of Iran Shipping Lines and Others v Council* (2019) Court of Justice of the European Union EU:C:2019:82
18. C-235/17, Commission v Hungary (*Usufruct over agricultural land*) (2019) Court of Justice of the European Union EU:C:2019:432
19. T-551/18, *Oblitas Ruzza* v *Council*, EU:T:2021:453
20. C-729/18 P, *VTB Bank PAO v Council* (2020) Court of Justice of the European Union EU:C:2020:499
21. C-83/20, *BPC Lux 2 and Others* (2022) EU:C:2022:346
22. *Prigozhin v Council* (2022) Court of Justice of the European Union EU:T:2022:317
23. T-125/22 *RT France v Council* (2022) Court of Justice of the European Union EU:T:2022:483
24. T-193/22, *OT v Council* (2023) Court of Justice of the European Union EU:T:2023:716
25. T-235/22, *Russian Direct Investment Fund v Council* (2024) Court of Justice of the European Union EU:T:2024:311
26. T-270/22, *Pumpyansky v Council* (2023) Court of Justice of the European Union EU:T:2023:490
27. T-272/22, *Pumpyanskaya* (2023) Court of Justice of the European Union EU:T:2023:491
28. T-283/22, *Moshkovich v Council* (2023) Court of Justice of the European Union EU:T:2023:849
29. T-305/22, *Rashnikov v Council* (2023) Court of Justice of the European Union EU:T:2023:530
30. C-351/22, *Neves* (2024) Court of Justice of the European Union EU:C:2024:723
31. T-738/22, *Igor Rotenberg v Council* (2023) Court of Justice of the European Union EU:T:2024:398
32. T-741/22, *Ezubov v. Council* (2024) Court of Justice of the European Union EU:T:2024:605
33. T-742/22, *Mazepin v Council* (2024) Court of Justice of the European Union EU:T:2024:433

ECtHR

1. *Agosi v the United Kingdom* (1986) The European Court of Human Rights
2. *Albert and Others v Hungary* (2020) The European Court of Human Rights [GC]
3. *Aon Conseil et Courtage S.A. i Christian de Clarens S.A. v France* (2007) The European Court of Human Rights
4. *Apostolakis v Greece* (2009) The European Court of Human Rights
5. *Avotiņš v Latvia* (2016) The European Court of Human Rights [GC]
6. *Béláné Nagy v Hungary* (2016) The European Court of Human Rights [GC]
7. *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* (2010) The European Court of Human Rights [GC]
8. *Bivolaru and Moldovan v France* (2021) The European Court of Human Rights
9. *Centro Europa 7 S.r.1. and Di Stefano v Italy* (2012) The European Court of Human Rights [GC]

10. *Da Silva Carvalho Rico v Portugal* (2015) The European Court of Human Rights
11. *Džinić v Croatia* (2016) The European Court of Human Rights
12. *Garofalo and Others v Italy* (2025) The European Court of Human Rights
13. *Gogitidze and Others v Georgia* (2015) The European Court of Human Rights
14. *Imeri v Croatia* (2021) The European Court of Human Rights
15. *Ioviţoni and Others v Romania* (2012) The European Court of Human Rights
16. *Jeunesse v the Netherlands* (2014) The European Court of Human Rights [GC]
17. *Karapetyan v Georgia* (2020) The European Court of Human Rights
18. *Khodorkovskiy and Lebedev v Russia* (2013) The European Court of Human Rights
19. *M.S.S. v Belgium and Greece* (2011) The European Court of Human Rights (2011) [GC]
20. *NIT S.R.L. v Moldova* (2022) The European Court of Human Rights [GC]
21. *Nada v Switzerland* (2012) The European Court of Human Rights [GC]
22. *Pannon Plakát Kft v Hungary* (2022) The European Court of Human Rights
23. *O'Sullivan McCarthy Mussel Development Ltd v Ireland* (2018) The European Court of Human Rights
24. *Pirozzi v Belgium* (2018) The European Court of Human Rights
25. *S. A. Dangeville v France* (2002) The European Court of Human Rights
26. *Stefanetti and Others v Italy* (2014) The European Court of Human Rights
27. *Sud Fondi S.r.l. and Others v Italy* (2009) The European Court of Human Rights
28. *The Liquidation Estate of the Commercial Company Poljičan-Rašica d.o.o. v Croatia* (2024) The European Court of Human Rights
29. *Vasilescu v Romania* (1998) The European Court of Human Rights
30. *Yukos v Russia* (2011) The European Court of Human Rights
31. *D. and Others v Finland*, Communication Report no. 16398/24 of 31 March 2025, The European Court of Human Rights

EU LAW

1. The consolidated version of the Treaty on European Union (the Lisbon Treaty), OJ C 202, 7 June 2016
2. The consolidated version of the Treaty on the Functioning of the European Union (the Lisbon Treaty), OJ C 202, 7 June 2016
3. Charter of Fundamental Rights of the European Union, OJ C 326/391, 26.10.2012, p. 391
4. Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro), OJ 1993 L 102
5. Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 229, 31 July2014

LIST OF NATIONAL REGULATIONS AND ACTS

1. European Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette, International agreements, no. 18/1997, 6/1999, 14/2002, 13/2003, 9/2005, 1/2006, 2/2010
2. Restrictive Measures Act, Official Gazette No. 133/2023

WEBSITE REFERENCES

1. The Council of the European Union, *Basic Principles on the Use of Restrictive Measures (Sanctions) of 7 June 2004*, document No. 10198/1/04 REV 1 PESC 450, available at: [https://data.consilium.europa.eu/doc/document/ST-10198-2004-REV-1/en/pdf]
2. The Council of the European Union, *Restrictive measures (Sanctions) - Update of the EU Best Practices for the effective implementation of restrictive measures*, Brussels, 4 May 2018 (OR. en) 8519/18, available at: [https://data.consilium.europa.eu/doc/document/ST-8519-2018-INIT/en/pdf]
3. The European Commission, *The Commission Opinion of 8.6.2021 on Article 2(2) of Council Regulation (EU) No 269/2014*, C(2021) 4223 final, available at: [https://finance.ec.europa.eu/document/download/1cd09e4a-0187-45bc-b234-1de949933f34_en?filename=210608-ukraine-opinion_en.pdf]

Original scientific paper

ON THE PUBLIC HEALTH CRISIS: WITH SPECIAL REFERENCE TO THE CASE LAW OF THE CROATIAN CONSTITUTIONAL COURT*

Ivana Tucak, PhD, Full Professor
Josip Juraj Strossmayer University of Osijek, Faculty of Law
Stjepana Radića 13, 31000 Osijek, Croatia
itucak@pravos.hr

Ivica Pavić, PhD candidate
Josip Juraj Strossmayer University of Osijek, Faculty of Law
Stjepana Radića 13, 31000 Osijek, Croatia
ipavic@pravos.hr

Žaklina Harašić, PhD, Full Professor
University of Split, Faculty of Law
Domovinskog rata 8, 21000 Split
zaklina.harasic@pravst.hr

ABSTRACT

This article aims to explore the effect of the Public Health Crisis on liberal democracies such as the Republic of Croatia. We will focus on the experiences of the last such crisis - the COVID-19 pandemic, which the WHO declared on March 11, 2020. The article is divided into three parts. The first part of the article provides a conceptual analysis of the term "emergency" or "state of emergency". Public health crises are only one type of crisis that trigger legal mechanisms intended for situations that go beyond the framework of "normal". Therefore, these situations differ from normal and are spatially and temporally limited. They all have in common that they are unexpected, unpredictable and demand an urgent and exceptional reaction from the state. Although crises differ in scope, novelty, or secrecy, their separation is methodologically problematic. It is argued that public health emergencies are "scientific" in the sense that state authorities should primarily follow the recommendations of public health experts.
The second part of the paper refers to the impact of crises on the state's constitutional framework, the relations between the executive, legislative and judicial branches and the protection

* This paper is a product of work that has been supported by the Faculty of Law Osijek, Josip Juraj Strossmayer University of Osijek, under the project No. IP-PRAVOS-23 "Contemporary Issues and Problems in the Protection and Promotion of Human Rights".

of human rights. This section of the paper will focus on the critical analysis of articles about this problem in the context of the COVID-19 pandemic. Most constitutions define emergencies and mechanisms to protect the democratic order from usurpation of power. However, these terms are broadly formulated and, in practice, have proven unclear. The answers to the posed questions should prove vital if and when the EU decides to adopt a more comprehensive emergency legal framework by providing guidelines on essential issues that may arise.

The final part of the article provides an overview of arguments presented by different authors regarding whether the COVID-19 pandemic and the response in Croatia represented a state of emergency as defined under Article 17 of the Constitution. This is notable because the Parliament passed COVID–19 legislation under Article 16, which does not recognise a crisis. This section of the paper explores why the Constitutional Court did not acknowledge this distinction while reviewing pandemic-related legislation. It questions whether the Croatian constitutional framework adequately ensures mechanisms are in place to confirm that an emergency is still ongoing, preventing it from exceeding the "necessary" timeframe and potentially becoming "the new normal." It also examines whether said framework provides sufficient parliamentary and judicial oversight of the executive branch, as discussed in European Parliament research papers from 2020 and on, showing it to also be an important issue at the EU level. All this is done through an analysis of landmark cases of the Constitutional Court of the Republic of Croatia.

Keywords: *Constitutional Court of the Republic of Croatia, Public Health Crisis, Public Trust, Separation of Powers, State of Emergency*

1. INTRODUCTION

On March 11, 2020, the World Health Organisation declared the severe acute respiratory syndrome coronavirus 2 (SARS-Cov-2) a pandemic.[1] High disease transmission rates and an initial lack of adequate medicines and vaccines marked the COVID-19 pandemic.[2] A global crisis has emerged as countries were unprepared for the situation, ignoring previous warnings from the World Health Organisation.[3] COVID-19 is not the first global emergency that the world has encountered. In the first decades of this century, the world was faced with a terrorist threat that led to numerous countries declaring a formal or *de facto* state of emergency, which implied a deviation from fundamental human rights guaranteed by the constitution and international conventions, such as the right to a fair trial.[4]

---

1 Kouroutakis, A., *Abuse of Power and Self-entrenchment as a State Response to the COVID-19 Outbreak: The Role of Parliaments, Courts and the People*, in: Ketteman, M. C.; Lachmayer, K., Pandemocracy in Europe. Power, Parliaments and People in Times of COVID-19, Hart Publishing, 2022, pp. 33-46, p. 33.

2 Kouroutakis, *op. cit.*, note 1, p. 33.

3 Lachmayer, K; Ketteman, M. C.; Conclusions: Pandemocracy - *Governing for the People, Without the People?* in: Ketteman, M. C.; Lachmayer, K., Pandemocracy in Europe. Power, Parliaments and People in Times of COVID-19, Hart Publishing, 2022, pp. 329-346, p. 329.

4 Jabauri, A, *State of emergency: shortcut to authoritarianism*, Journal of Constitutional Law, Vol. 1, 2020, pp. 121-143, p. 127.

The first part of the paper attempts to define the concept of an emergency. There are different crises, but this paper focuses on public health emergencies. Pandemics approach the ideal type of emergency and the most extreme.[5] Emergencies vary at first glance, as some present a security threat, others threaten public health and financial stability, and human rights that are affected by the emergency measures that states have resorted to.[6] Although crises differ in scope, novelty, or secrecy, distinguishing between them poses a methodological challenge.

The fundamental challenge that accompanied the pandemic, in addition to the fight against the disease itself in circumstances of overcrowded hospitals, deaths, and substantial economic costs, was maintaining the democratic order.[7] This was especially challenging in the early 2020s, as democracies faced weakening from populism and authoritarianism.[8] Therefore, the second part of the article will consider the relationship between law and politics, focusing on the impact of the pandemic on the rule of law and the principle of separation of powers. In times of crisis, citizens often call for a swift response from the executive branch, which has led to the concentration of power in the hands of its holders.[9] One author noted that "The Hour of the Executive" had arrived.[10] Some authors argue that the changes that affected liberal democracies were so profound that democracy as a concept has evolved into a pandemocracy with new priorities, actors and normative goals.[11]

A state of emergency is a situation where the rule of law is tested.[12] It is important to emphasise that the state of emergency applies only to liberal democracies in which the rule of law must be maintained even during times of crisis, since there is no democracy without it.[13] At the core of the concept of democracy, as the

---

5 Postema, G. J., *Law's rule: the nature, value, and viability of the rule of law*, Oxford University Press, New York, 2022, pp. 247-262.

6 Jabauri, *op. cit.*, note 4, p. 127.

7 Lachmayer; Ketteman, *op. cit.*, note 3, p. 346; Dyzenhaus, D., '*Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?*', Cardozo Law Review, Vol. 27, No. 5, 2006, pp. 2005–2040, p. 2006.

8 Lachmayer; Ketteman, *op. cit.*, note 3, p. 346

9 Lachmayer; Ketteman, *op. cit.*, note 3, p. 335; Jabauri, *op. cit.*, note 4, p. 123; Gragl, P., *Lawless Extravagance: The Primacy Claim of Politics and the State of Exception in Times of COVID-19*, in: Ketteman, M. C.; Lachmayer, K., Pandemocracy in Europe. Power, Parliaments and People in Times of COVID-19, Hart Publishing, 2022, pp. 9-31, p. 21.

10 Gragl, *op. cit.*, note 9, p. 22.

11 Ketteman, M. C.; Lachmayer, K., *Introduction,* in: Ketteman, M. C.; Lachmayer, K., Pandemocracy in Europe. Power, Parliaments and People in Times of COVID-19, Hart Publishing, 2022, pp. 1-8, p. 1.

12 Zwitter, A., *The Rule of Law in Times of Crisis: A Legal Theory on the State of Emergency in the Liberal Democracy*, ARSP Archiv für Rechts- und Sozialphilosophie, ARSP Band 98 Heft 1, 2012, pp. 95-111. p. 95.

13 Dyzenhaus, *op. cit.*, note 7, pp. 2005 -2040; Zwitter, *op. cit.*, note 12, p. 103.

foundation of justice, lies the principle of citizens' right to vote freely, equally, and secretly, while the state's primary duty is to regularly hold elections that will enable citizens' participation in governance.[14] In authoritarian states, there is less concern about derogating the rule of law and the separation of powers.[15] Most authoritarian systems do not meet the rule of law criteria since they do not have "supremacy of and equality before the law".[16]

Because public health crises are open-ended, there were fears about the "normalisation" of the state of emergency. [17] Parliamentary oversight of declaring and extending a state of emergency is essential in a crisis. The role of the judiciary during the pandemic has also been criticised. The judicial practice was particularly problematic in some Central and Eastern European countries, where fears of the growth of autocracy are already present, and many of the measures to fight the coronavirus were passed by executive power without parliamentary oversight. Critics claimed that courts unquestioningly supported the decisions of governments in the fight against COVID-19.

The final section of the paper focuses on Croatia's handling of the COVID-19 pandemic situation in the context of the whole European Union, starting from the declaration of an "epidemic" for the entirety of Croatian territory in March 2020 by the Minister of Health,[18] the Croatian Parliament's decision not to activate Article 17 of the Constitution regarding constitutional states of emergency at any point and its consequent role in dealing with the pandemic, up to the Croatian Government's declaration of the end to the pandemic decision in May 2023.[19] It gives a brief explanation of the anti-epidemic legislation amendments that were adopted and the criticism they received by the scientific community and in the form of many constitutionality review applications that followed and persisted throughout the pandemic period. Lastly, a more detailed overview of landmark cases of the Constitutional Court of the Republic of Croatia regarding specific measures adopted by the National Civil Protection Directorate[20] is also provided,

14 Zwitter, *op. cit.,* note 12, p. 104.

15 *Ibid.*, p. 103.

16 *Ibid.*, p. 106.

17 Jabauri, *op. cit.*, note 4, p. 127.

18 Available at: [https://zdravstvo.gov.hr/UserDocsImages/2020%20CORONAVIRUS/ODLUKA%20O%20PROGLA%C5%A0ENJU%20EPIDEMIJE%20BOLESTI%20COVID-19.pdf], Accessed 2 April 2025.

19 Official Gazette, No. 51/2023.

20 A special executive body appointed by the Croatian Government to adopt specific measures that dealing with the epidemic on a day-to-day basis required. It was first regulated in 2018 via an amendment to the Civil Protection System Act, but its powers were expanded through the adoption of multiple amendments to both the aforementioned act and the Act on the Protection of Population from In-

focusing primarily on the arguments provided in the joint (majority opinion) sections of the Court's decisions and rulings in order to examine whether and how it fulfilled its role as the guardian of the rule of law, checks and balances and the rights and freedoms of the people in extremely challenging and never before seen circumstances.

2. THE CONCEPT OF A STATE OF EMERGENCY

Various legal traditions and constitutional laws define states of emergency differently.[21] The first part of the article will, therefore, provide an overview of the definitions of "states of exception",[22] "states of emergency", or "emergencies".[23] This paper will use the last two terms interchangeably, with the same meaning.[24] We must agree that the terms relating to states of emergency have proven unclear in practice.[25] This is not only because different legislations use different terminology to describe a state of emergency. Additionally, many legal frameworks lack a precise definition of a state of emergency, making it an ambiguous term. Some constitutions do not define a state of emergency at all.[26]

Emergencies are commonly viewed as crises that a state perceives to surpass the threshold of a serious threat and to require urgent, exceptional and temporary measures that are not permitted under normal circumstances.[27] Legal theorist Gerald

---

fectious Diseases that followed in 2020 and 2021. Its composition, *modus operandi* and appointment requirements were regulated in the Rules of composition, functioning and appointment requirements for the directors and deputies of civil protection directorates adopted by the Minister of the Interior, Official Gazette, No. 126/2019. The Directorate started adopting measures even before the before mentioned Minister of Health's epidemic declaration decision.

21 Lachmayer; Ketteman, *op. cit.*, note 3, p. 330.

22 Carl Schmitt used this term. According to Schmitt, a state of exception is not described within the valid legal order. Schmitt, C., *Politička teologija*, Naklada Breza, Zagreb, 2019, p. 14. See also Zwitter, *op. cit.,* note 12, p. 98.

23 Zwitter, *op. cit.,* note 12, pp. 96-97.

24 Com. Gragl, *op. cit.*, note 9, p. 10.

25 Zwitter, *op. cit.,* note 12, pp. 96-97.

26 *Ibid.*

27 Greene, A., *Emergency Powers in a Time of Pandemic*, Bristol University Press, Bristol, 2021, p. 30, according to Günther, C. M., *Legal vs. Extra-Legal Responses to Public Health Emergencies*, European Journal of Health Law, Vol. 29, No., 1, 2022, p. 133. On emergencies and conceptions of law, see Krešić, M., *Emergency Situations and Conceptions of* Law, in: Amatucci, C. (ed.), Revisiting the limits of freedom while living under threat. II. Collection of research papers in conjunction with the 9th International Scientific Conference of the Faculty of Law of the University of Latvia, Riga, University of Latvia Press, 2024. pp. 68-78.

Postema defined emergencies as "circumstances of great peril and complexity that urgently demand a decisive response" that would not otherwise be permissible.[28]

The legal definition of emergencies must be broad since what constitutes an emergency is decided by the state authorities who have to deal with it, and their decision can be unpredictable.[29] Zwitter points out that all states of emergency have the following features:

" (…) they deal with cases where the nature of a situation requires the restructuring of state functions in order to mitigate the situation's negative effect on the state and its citizenry more effectively (better) and more efficiently (faster). The reason for the existence of legal regulations on states of emergency is thus to ensure the survival of a state and its citizenry and to bring the situation back to normal by temporarily changing the structure of state functions in favour of efficiency and effectiveness (…)."[30]

The nature of emergencies is thus related to the conditions "of necessity, concreteness and urgency".[31] It is important to emphasise that a state of emergency is "a legal state" different from normal.[32] It denotes "an exception" to the normal state functioning, not a situation outside the application of the constitution.[33]

"Henceforth, a theoretical (and not an operational) definition of emergency cannot be material but has to be structural-functional - a definition that focuses on the state."[34]

A crisis is a factual situation in which the state must change its structure to meet the conditions of urgency and concreteness.[35] The threat in question "must be of a magnitude that severely harms the state or its citizens and of such a gravity that the state can successfully only face by changing its own structure".[36] Urgency implies efficiency, the need for "speedy action", and concreteness refers to "a precisely defined beginning and end".[37]

---

28 Postema, *op. cit.*, note 5, 248.

29 Zwitter, *op. cit.,* note 12, p. 97.

30 *Ibid.*

31 *Ibid.*

32 *Ibid.*

33 *Ibid.,* p. 99.

34 *Ibid.*, p. 97.

35 *Ibid.*

36 *Ibid.*

37 *Ibid.* p. 98.

"Emergencies are therefore situations that hit the states in an unforeseen, unforeseeable, or unpreventable way when applying state functions of times of normalcy."[38]

Emergencies have a beginning and an end; they are limited by time (temporal limitation).[39] Whether an emergency "actually exists" is conditioned by the necessity that arises from the state's vision that a change in its structure is necessary (spatial and territorial limitation), and the only goal for which emergency power can be used is to alleviate the emergency (limitation of objective).[40] Postema points out that different types of emergencies differ in severity, scope, novelty, and the need to maintain confidentiality.

"(…) some emergencies combine extreme peril, genuine novelty, radical urgency, and a need for utmost secrecy. But many do not, and it distorts our thinking to put all emergencies into the basket with the most extreme ".

Emergencies can represent threats to national security that are located within the borders of a country, for example, violent public unrest; threats can also cross-national boundaries, as in the case of terrorism or war, there are also natural disasters, for example in the form of earthquakes or floods, these can also be accidents such as nuclear power plant explosions, financial crises and public health crises.[41]

States of emergency marked the first decades of the 21st century. First, as already pointed out in the article's introduction, in 2001, the state measures introduced to combat terrorism were problematic. However, terrorism was not the cause of most of the emergencies that followed; much more often, the causes were economic, civil wars, natural disasters or contagious diseases.[42] Thus, the crisis caused by terrorist threats was followed by state measures to combat the financial crisis in 2008, the migrant crisis in 2015[43], and finally, the pandemic in 2020. We agree with Zwitter that a precise demarcation of these crises is impossible in "a legal-theoretical and methodological" sense since emergency norms are generally not specified for a specific type of crisis.[44] In the following section of the paper, we will highlight specific features of public health crises.

---

38 Zwitter, *op. cit.,* note 12, p. 98.

39 *Ibid.*, pp. 98-100.

40 *Ibid.*

41 Postema, *op. cit.*, note 5, p. 256.

42 Zwitter, *op. cit.,* note 12, p. 95.

43 See Dyzenhaus, *op. cit.*, note 7, pp. 2005–2040; Krešić, M., I*zbjeglička i COVID-19 kriza: Izvanredni režimi – da ili ne?*, Godišnjak Akademije pravnih znanosti Hrvatske, Vol. XV, No. 1, 2024, pp. 27-48.

44 Zwitter, *op. cit.,* note 12, p. 96.

2.1. PUBLIC HEALTH EMERGENCIES

The COVID-19 pandemic has been described as a public health emergency due to its unexpectedness, severity, and danger, necessitating swift government action.[45] Pandemics almost correspond to the "ideal" state of emergency.[46] This threatens the well-being of the entire state population, which requires urgent and exceptional but temporary measures by the state authorities.[47]

When we compare the way the media and politicians discussed the terrorist threat at the beginning of the 21st century with their approach to the COVID-19 pandemic, we can see an apparent similarity. In both instances, war-related language was employed.[48] We heard terms like the "war on terror" and the "war against COVID-19".[49]

"If we look into the linguistic aspects of the speeches made in the context of COVID19- related emergencies, we will see the same pattern, - the virus is a common enemy, against which we are at 'war'; medical professionals - i.e. the 'troops' are at the 'front line' while fighting against the common enemy and often speeches include calls for 'unification' and 'standing together' in times of this emergency".[50]

Countries have tried to "flatten the curve". The term means "using social distancing to decrease the peak burden on healthcare systems and to buy time for scientists and doctors to respond".[51] To achieve social distancing, governments used various means, such as the obligation to wear masks, general or partial closure, and contact tracing.[52] There have been, for example, restrictions on freedom of movement, assembly, worship, education, participation in elections, and the right to access courts. [53]

When it comes to serious threats to public health, restrictions on certain rights may be justified provided that there is a legal basis for it, that they are necessary,

---

45 Lachmayer; Ketteman, *op. cit.*, note 3, p. 330.

46 Günther, *op. cit*, note 27, p. 139.

47 *Ibid.*

48 Jabauri, *op. cit.*, note 4, p. 127.

49 *Ibid*.

50 *Ibid.,* p. 128.

51 Markel, H., *America's Coronavirus Endurance Tes*t, New Yorker, available at: [https://www.newyorker.com/science/medical-dispatch/americas-coronavirus-endurance-test] accessed 10 February 2025, see more in: Weiss, A., Binding the Bound: State Executive Emergency Powers and Democratic Legitimacy in the Pandemic, *Columbia Law Review*, Vol. 121, No. 6, 2021, pp. 1853–1894, p. 1855, note 10.

52 Kouroutakis, *op. cit.*, note 1, p. 34; Weiss, *op. cit.*, note 48, p. 1873.

53 Amon J. J.; Wurth M. A., *Virtual Roundtable on COVID-19 and Human Rights with Human Rights Watch Researchers*, Health and Human Rights Journal, Vol. 22, No. 1, 2020, p. 399.

proportionate to the aim, based on scientific evidence, non-discriminatory, limited in time, respect the dignity of the individual, and that the legislative body or the courts can review the restrictions introduced.[54] While not the only example of human rights restrictions due to extraordinary circumstances in modern times, the limits due to the COVID-19 pandemic have been the most restrictive.

The strain between "technocratic agility and democratic legitimacy" has been highlighted in the fight against the COVID-19 pandemic.[55] The pandemic has been accompanied by a global increase in "unilateral executive lawmaking worldwide".[56] The executive branch obtained legislative powers, putting parliaments in a bind, which we will discuss further in one of the following sections of the paper.[57] This has led to the issue of "democratic illegitimacy", which carries the risk of citizens' non-compliance with public health regulations.[58] There has been a reversal of positions; democratic participation in government has been given a lower place in the hierarchy of values compared to "centralized, direct technocratic decision-making".[59] One of the distinguishing characteristics of a public health emergency from other crises is that it is a "scientific emergency"; state policies should "follow the science".[60] The state of emergency, if we go all the way in this approach, is just a legal way for governments to impose the recommendations of public health experts on the population.[61]

What is not present in other crises, such as crises caused by terrorism, civil wars or natural disasters, is precisely the key role of public health experts.[62] Legal regulation should direct the population's behaviour, motivate individuals, or require them to behave in a certain way, even contrary to what individuals believe to be in their best interests.[63] The fight against the pandemic required the most extreme restrictions on almost all dimensions of life, an exceptionally high level of community coordination that cannot be achieved by force alone.[64] The key was to en-

---

54 Amon; Wurth, *op. cit.*, note 53, p. 399.

55 Weiss, *op. cit.*, note 51, p. 1853.

56 *Ibid.*, p. 1854.

57 Windholz, E. L., *Governing in a Pandemic: From Parliamentary Sovereignty to Autocratic Technocracy*, Theory & Prac. Legis., Vol. 8, No. 1-2, 2020, p. 94 according to Weiss, *op. cit.*, note 51, p. 1854, note 1.

58 Weiss, *op. cit.*, note 51, p. 1857.

59 *Ibid.*. 1857-1858.

60 *Ibid.*, p. 1877.

61 *Ibid.*

62 Windholz, E. L., *Governing in a Pandemic: From Parliamentary Sovereignty to Autocratic Technocracy*, Theory & Prac. Legis., Vol. 8, No. 1-2, 2020, p. 94.

63 Windholz, *op. cit.*, note 62, p. 96.

64 *Ibid*.

sure voluntary compliance with the introduced measures, and this is only possible when citizens believe that such government demands are legitimate, i.e. acceptable and credible.[65] Legitimacy is thus closely tied to citizens' trust in the government.[66] Research shows that citizens' perception of the legitimacy of government is a decisive factor in their compliance with imposed obligations.[67] To ensure public trust, it is necessary to enable the transparency of government actions.[68] In a pandemic, the success of public health measures depends on citizens' willingness to agree to and respect them, so legitimacy is not just a matter of academic debate.[69]

3. PRESERVING THE DEMOCRATIC ORDER

This article section is primarily devoted to the issue of protecting democratic values and institutions in crises. The first subsection will show why the law is the best tool for overcoming these challenges. In his famous work, *Political Theology* from 1922, Carl Schmitt defines a state of exception as a situation not covered by the existing legal framework. This state arises in cases of extreme necessity or when there is a threat to the state's existence, highlighting the importance of determining who holds sovereignty. The sovereign is the one who decides whether an emergency has taken place and what actions are necessary to address it.[70] The second subsection deals with the issue of how to maintain the foundations of the principle of separation of powers in times of crisis.

3.1. LAW AND POLITICS IN THE TIME OF COVID-19

We came to the issue of whether a state of emergency is within the law. When we talk about people's dealings with health crises, stories of society's moral and legal collapse in such situations have been preserved since ancient times.[71] Thucydides writes about the plague in Athens in 430 BC during the Peloponnesian War, describing these times of crisis as "lawless extravagance" (ἐπὶ πλέον ἀνομίας). In the event of a public health crisis, those in power will regularly try to prevent society from "descending into utter lawlessness".[72]

---

65 *Ibid*., pp. 95, 103.

66 *Ibid.,* p. 102.

67 Weiss, *op. cit.*, note 51, p. 1873.

68 Grogan, J., *States of emergency: analysing global use of emergency powers in response to COVID-19*, European Journal of Law Reform, Vol. 22, No. 4, 2020, p. 352.

69 Weiss, *op. cit.*, note 51, p. 1873.

70 Schmitt, *op. cit.*, note 22, p. 14.

71 Gragl, *op. cit.*, note 9, p. 9.

72 *Ibid.,* pp. 9-10.

The idea that law and crises exclude each other is not new.[73] Often, the historical source for the state of emergency is found in the tradition of the Roman dictatorship.[74] In emergencies, the Senate would urge the consuls to appoint a dictator with almost unlimited powers for six months.[75] In that case, the "trusted individual" would be given the legal authority to restore "normal government" and, when he succeeds, return the power obtained in the state of emergency to regular state bodies.[76]

According to Giorgio Agamben, modern theorists use this Roman example to show that dictatorship belongs to the sphere of law. Still, this example shows that dictatorship has no limits and is absolute.[77] The dictator operates in "an emptiness of law".[78] Only in modern times, Agamben points out, is the state of emergency not discussed predominantly as a "quaestio facti" but as a legal problem, and it is precisely in this context that efforts are made to include it in the legal order. Agamben placed the state of emergency between law and politics.[79] A state of emergency is both a component of the legal order that is activated during crises when the survival of that order is at risk and a unique "technique of ruling" that allows the sovereign's decisions to supersede legal norms. This results in suspending those norms, effectively placing them outside the established legal system.[80] The state of emergency represents a "grey zone" that indicates the "affirmation of the legal order" and its suspension, creating space for decisions not bound by existing norms.[81]

Paul Gragl points out that the relationship between law and politics is extremely problematic during emergencies since there is a belief that "politics is permitted to do anything, even in violation of the law, if necessary"[82] to avoid society's aforementioned moral and legal collapse.[83] This is embodied in the Latin maxim "necessitas non habet legem" (necessity has no law).[84] Gragl calls this "the primacy

---

73 *Ibid.*, p. 9.

74 Dyzenhaus, *op. cit.*, note 7, p. 2012.

75 Weiss, *op. cit.*, note 51, p. 1858.

76 Dyzenhaus, *op. cit.*, note 7, p. 2012.

77 *Ibid.,* p. 2015.

78 *Ibid*.

79 Agamben, G., *Izvanredno stanje*, Deltakont, Zagreb, 2008, pp. 9, 35 and 39. See also Kukavica, S., *Izvanredno stanje. Između prava i politike. Temelji moderne države*, 2022. [https://ideje.hr/izvanredno-stanje-izmedu-prava-i-politike-temelji-moderne-drzave/] Accessed 10 January 2025.

80 Agamben, *op. cit.,* note 79, pp. 9-11 according to Kukavica, *op. cit*., note 79.

81 Agamben, *op. cit.*, note 79, pp. 35-36 according to Kukavica, *op. cit.,* note 79.

82 Ketteman ; Lachmayer, *op. cit.,* note 11, p. 2.

83 *Ibid.*; Gragl, *op. cit.*, note 9, p. 10.

84 Gragl, *op. cit.*, note 9, p. 10.

claim of politics"[85] - the law should follow politics, not *vice versa*.[86] In such situations, health and life represent the supreme good that needs to be protected.[87]

"We may interpret these words to the effect that, under the primacy claim of politics which places the good before the right, any use of constitutional provisions that constrain the powers of politics can be regarded as an abuse directed against this good itself."[88]

Law and politics are closely connected even in regular times, especially in legislation.[89] The influence of politics on law does not necessarily have to be detrimental, Grangl points out; politics continually adapts the law to reflect changes in the world.[90]

"This good pursued by politics is historically contingent and will usually also change in accordance to what is required in a specific situation: in the case of a pandemic such as COVID-19, the preservation of life and public health will most likely take the position of the supreme good; in the event of a security crisis, the defence of the State itself will be considered paramount; and during a global recession and financial crisis, the protection of the economy and the banking system will have absolute priority."[91]

Politics becomes problematic when it ascribes "absolute primacy over the law", cancels constructive legal reforms, disproportionately suspends or abolishes fundamental human rights and ignores the principle of separation of powers.[92]

To solve the existing paradoxes, there are efforts to include "the state of exception" in positive law; a well-known example is Article 48 of the Weimar Constitution from 1919.[93] The mentioned constitutional article authorised the president of the republic to derogate from the constitutional provisions on the rule of law if it is necessary to preserve the constitution.[94] The lack of oversight regarding emergency powers has created significant challenges in practice.[95]

---

85 *Ibid*.

86 *Ibid*., p. 12.

87 *Ibid*., p. 10.

88 *Ibid*., p. 13.

89 *Ibid*., p. 14.

90 *Ibid*., p. 14.

91 *Ibid*., p. 15.

92 *Ibid*., pp. 14, 17.

93 Gragl, *op. cit.*, note 9, p. 20.

94 Jabauri, *op. cit.*, note 4, p. 134.

95 *Ibid*., p. 125. See Schmitt, *op. cit.*, note, p. 18.

Gragl believes that law cannot be derived from exceptions. Still, only from rules, and even in the crisis brought about by the COVID-19 pandemic, should the power of exceptions not be overestimated.[96] The legal system requires reform to establish clear guidelines for responding to emergencies. This includes defining the circumstances under which legal rules can be suspended, outlining the scope of such suspensions, and specifying when and how these rules should be reinstated. Additionally, provisions should allow individuals to challenge any suspension of their rights.[97] Zwitter also believes that a state of emergency does not override the rule of law, which he describes as "a common (mis)perception".[98]In any case, whether a state of emergency is within or outside the law is still not "an old-fashioned or settled debate".[99]

When governments face crises that require decisive and immediate action, scholars also question whether these actions must be legally limited.[100] In this paper, we will follow the path of those convinced of the value of law even in states of emergency.[101] Christian M. Günther provides additional theoretical arguments, referring to the American legal theorist Lon Fuller and his understanding of the "inner morality of law" based on eight legal principles, according to which a legal norm that governs human behaviour must be "(1) promulgated (2) general (3) clear (4) non-contradictory (5) possible to comply with (6) constant through time (7) prospective (i.e. non-retroactive); and (8) there must be congruence between these norms and their administration".[102] The listed elements should contribute to the success of public health measures, helping us differentiate laws from arbitrary authority.[103] Laws equally bind both citizens and government officials.[104] Günther emphasizes the value of individual autonomy or freedom, even in emergencies.[105]The legal form inspires trust among citizens and is thus essential for the effectiveness of public health measures, the value of autonomy, and the creation of a "framework for self-directed action".[106]

---

96 Gragl, *op. cit.*, note 9, p. 30-31.

97 *Ibid*.

98 Zwitter, *op. cit.,* note 12, p. 100.

99 Günther, *op. cit*, note 27, p. 132.

100 *Ibid.*

101 *Ibid.*

102 *Ibid.,* pp. 134-135.

103 *Ibid.*, p. 147.

104 *Ibid.,* pp. 147-148.

105 *Ibid.*, pp. 133 and 143.

106 *Ibid.*

3.2. SEPARATION OF POWERS

The idea of the separation of powers originates from the Enlightenment and the French Revolution.[107] The fundamental features of the state of emergency are expanding state powers over citizens and granting legislative powers to the executive.[108] Anomia, Gragl points out, arises with the onset of an emergency and must be remedied, usually by granting legislative power to the executive. Then, executive time comes, and the "Hour of the Executive" occurs.[109] Constitutions are regularly designed to operate in a "state of normative normality," however, emergencies necessitate a deviation from the traditional understanding of the separation of powers.[110] The main argument in favour of giving the executive power a decisive role in crisis management is temporal; emergencies require a swift reaction that can only come from it.[111] This undoubtedly weakens democracy.[112] Democracy necessitates monitoring the initiation, continuation, and duration of a state of emergency by either parliament or the judiciary (relative temporal limitation). Additionally, the powers granted during states of emergency should have a fixed duration (absolute temporal restriction).[113]

In many countries, explicit constitutional restrictions on transferring legislative powers to the executive in crises give them legitimacy.[114] Today, over ninety per cent of constitutions in force provide emergency powers. These emergency clauses allow governments to step out of the usual constitutional framework and take actions they would otherwise not be able to do.[115]However, some countries do not expressly mention the state of emergency in their constitution. The countries that fought against the pandemic without the concept of a state of emergency in the constitution are, for example, Sweden, France and Italy; the latter does not recognize the concept of a state of emergency in peacetime.[116] During the COVID-19 pandemic, a number of countries did not formally declare a state of emergency but managed the crisis through existing or new laws, primarily statutory health

---

107 Zwitter, *op. cit.,* note 12, p. 107.

108 *Ibid*.

109 Gragl, *op. cit.*, note 9, p. 22.

110 *Ibid.*, pp. 22-23.

111 *Ibid*.

112 Zwitter, *op. cit.,* note 12, p. 95.

113 *Ibid*., p. 109.

114 Lachmayer; Ketteman, *op. cit.*, note 3, p. 330.

115 Weiss, *op. cit.*, note 51, p. 1858; Ginsburg, T.; Versteeg, M., *COVID-19. States of Emergencies: Part I,* available at:
[https://blog.harvardlawreview.org/states-of-emergencies-part-i/] Accessed 10 July 2022.

116 Lachmayer; Ketteman, *op. cit.*, note 3, p. 330.

law, for example, Austria and Germany.[117] Health legislation may be unsuitable as a basis for emergency powers either by design or by purpose.[118]

We agree with those who point to the need for detailed constitutional regulation of the exercise of authority in crises, providing more guarantees for preserving democracy.[119] The constitution should define how emergency powers can be used, their limitations, parliamentary oversight of their proclamation and possible extension, and judicial review of emergency powers.[120]

It is necessary to create guarantees against abuse and rules to end the state of emergency and return to normality.[121] In case of improper formulation of the constitutional norms on the state of emergency, the executive can completely take over the legislative power.[122] Due to reshaping the principle of separation of powers during the state of emergency and the concentration of power in the executive, "political self-entrenchment" or "executive abuse of power for self-serving purposes" may occur.[123]

The return to normality is especially problematic in countries where there is already a democratic deficit, since the process of "continuous deterioration" of constitutional democracy[124] - "democratic decay"[125] is taking place in them. In these states, without adequate supervision of the executive, there is an acute danger of their transformation into authoritarian or semi-authoritarian regimes.[126] The COVID-19 pandemic thus represented an exceptional challenge for liberal democracies in Central and Eastern Europe, where signs of democratic decay have been present for a long time.[127] In the mid-2000s, the democratic processes in these countries began to go in the opposite direction.[128] An often-mentioned example is Hungary, which, according to some indicators, can no longer be considered a

---

117 *Ibid.*, p. 334.

118 Grogan, *op. cit.*, note 68, pp. 338-339.

119 Drinóczi, T.; Bień-Kacała, A., *COVID-19 in Hungary and Poland: extraordinary situation and illiberal constitutionalism*, The Theory and Practice of Legislation, Vol. 8, No. 1–2, 2020, pp. 171–192, pp. 171-172.

120 *Ibid.*, pp. 172; Jabauri, *op. cit.*, note 4, p. 143.

121 Drinóczi; Bień-Kacała, *op. cit.,* note 119, pp. 172.

122 *Ibid*. p. 125.

123 Kouroutakis, *op. cit.*, note 1, pp. 37 and 45.

124 Drinóczi; Bień-Kacała, *op. cit.,* note 119, pp. 172-1733.

125 Daly, T., *Designing the Democracy-Defending Citizen*, Constitutional Studies, Vol. 6, 2020, pp.189-193, p. 192.

126 Jabauri, *op. cit.*, note 4, p. 143.

127 Guasti, P., *The Impact of the COVID-19 Pandemic in Central and Eastern Europe. The Rise of Autocracy and Democratic Resilience*, Democratic Theory, Vol. 7, No. 2, 2020, pp. 47–60.

128 Daly, *op. cit.,* note 125, p. 192.

liberal democracy but rather a hybrid system that contains elements of democratic rule, since elections are still held, but also elements of authoritarian rule due to the concentration of power in the ruling party.[129] During emergencies, the legislature and judiciary should stay true to their functions while overseeing the executive branch.[130] With necessary adjustments, the legislature and judiciary should continue performing their "ordinary functions".[131]

Parliamentary oversight of the implementation of emergency powers by the executive branch is crucial to the legitimacy of these regulations.[132] When introducing a state of emergency, the exceptional problem and most significant danger is the possibility of its indefinite extension.[133] The problem appears in the literature as the "normalization" of the state of emergency.[134]

What was the role of parliaments during the COVID-19 pandemic? Research has shown that most countries' executive branch was leading in legislation during the pandemic, while the parliaments were marginalised.[135] This is also confirmed by Joelle Grogan's extensive analysis of the legal measures taken by states to fight the pandemic, which included 74 states.[136] The parliaments thus had limited scope for intervention in the fight against the pandemic, which contributed to the opinion that these bodies are being transformed from legislators into bodies that only have a particular influence when passing laws.[137]

In all European countries, governments have introduced public health measures and measures to assist economic actors through urgent procedures.[138] Parliamentary decision-making was therefore limited in scope; governments often adopted the measures above, bypassing parliaments, and the role of parliaments used to be reduced to the ratification of executive power proposals. The dominance of executive power is also visible at the European Union level; the Commission and intergovernmental bodies played a key role in the fight against the pandemic, thus ensuring the importance of national governments.[139] Therefore, in addition to the

---

129 *Ibid*.

130 Jabauri, *op. cit.*, note 4, p. 143.

131 Grogan, *op. cit.*, note 68, p. 353.

132 Griglio, E., *Parliamentary oversight under the Covid-19 emergency: striving against executive dominance*, The Theory and Practice of Legislation, Vol. 8, No. 1-2, 2020, pp. 49-70, p. 53.

133 Jabauri, *op. cit.*, note 4, pp. 122.

134 *Ibid*.

135 Griglio, *op. cit.*, note 132, p. 49-50.

136 Grogan, *op. cit.*, note 68, p. 338.

137 Griglio, *op. cit.*, note 132, p. 51.

138 *Ibid.*, pp. 49-50.

139 *Ibid.*, p. 50.

concentration of power at the domestic level (horizontal aspect), the executive has also strengthened its role concerning other layers of governance, international and European (vertical aspect).[140]

As Griglio pointed out, this can be seen as part of a longer trend of marginalizing parliament in its traditional role as a legislator, or rather, its declining involvement in lawmaking.[141] This is related to the greater technical complexity of the decisions made and, in European countries, to the increasing penetration of European governance into national systems.[142] Parliaments have less information than the executive and are faced with the problem of collective action. Courts also show weaknesses concerning the executive; for example, they lack more information than parliament. The courts also lack democratic legitimacy.[143]

In the last pandemic, neither the legislature nor the judiciary succeeded in checking the executive branch.[144] In a pandemic, when "technocrats with expertise in medicine" decide on policies to fight the disease, the courts are inclined to support them. In theory, judicial review is a decisive element of constitutionalism.[145]

„On top of that, it is well known that the judiciary in times of stress shows deference on emergency provisions. On the one hand, the limited function of the legislatures and on the other hand the operation of courts in an environment of emergency created a fertile ground for the executive to take the lead in the constitutional system".[146]

Finally, it is interesting to mention the results of the research by Joelle Grogan on the behaviour of governments in 74 countries during COVID-19. Grogan concluded that the likelihood of abuse of emergency powers is not affected by whether a state of emergency was formally declared or whether the executive branch relied on ordinary legislative procedure to combat the pandemic. Success in tackling the pandemic and maintaining the democratic constitutional order has been demonstrated through state policies that prioritize legal certainty and transparency. Grogan emphasises the importance of a swift response from authorities and effective communication between state bodies and all relevant stakeholders.[147]

---

140 Lachmayer; Ketteman, *op. cit.*, note 3, pp. 346 and 343.

141 Griglio, *op. cit.*, note 132, pp. 50-51.

142 *Ibid.*, p. 51.

143 Weiss, *op. cit.*, note 51, p. 1859.

144 *Ibid*.

145 Kouroutakis, *op. cit.*, note 1, p. 42.

146 *Ibid.*, p. 37.

147 Grogan, *op. cit.*, note 68, p. 354.

4. DEALING WITH THE COVID-19 PANDEMIC IN CROATIA – OVERVIEW, EU CONTEXT AND LANDMARK CASE LAW OF THE CONSTITUTIONAL COURT

4.1. OVERVIEW AND EU CONTEXT

The Constitution of the Republic of Croatia does not recognize the term „emergency".[148] Instead, it mentions three kinds of states of emergency as viewed in legal theory (Article 17), four if we also count the inability of state authorities to perform their constitutional duties in Article 100 of the Constitution.[149]

Something constitutional authors in Croatia agree on is the fact that the Constitution is unclear on who decides whether a state of emergency has occured. Omejec argued that, while it is indeed likely a legislative oversight, it would be enough to conclude that an emergency state is declared or ongoing simply by the fact that Article 17 is applied.[150]

A 2020 study published by the European Parliament examined normative responses by the 27 member states from pandemic declaration in March 2020 to mid-June 2020 and found that 19 states enacted either a constitutional state of emergency or a statutory emergency regime, or both, while 8 states enabled governments to adopt containment measures either via special or ordinary legislation. The duration of states of emergency ranged between 10 and 90 days and was generally renewable.

The study also showed that the participation of national parliaments in management of the pandemic differed greatly as well. It included special constitutional tools, such declaring and prolonging emergency states where a constitutional emergency was declared, either *ex ante* or *ex post* oversight of special legislative powers constitutionally granted to the executive, but also the normal parliamentary legislative (adopting amendments), budgetary (amendments) and oversight powers (reports on the measures adopted by the government and/or its executive bodies).[151]

---

148 Blagojević, A.; Antunović, M., *Izvanredno stanje u kontekstu COVID-a 19: hrvatski ustavnopravni okvir i praksa*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 60, No. 1, p. 126.

149 Some authors argue it should not be considered a separate, fourth state of emergency because it can occur in either of the three cases mentioned in Article 17, e.g. Gardašević, Đ., *Ograničenja ljudskih prava i temeljnih sloboda u izvanrednim stanjima*, PhD Thesis, Zagreb, 2010, p. 350, Gardašević also argues that the fourth case could apply not only to the Croatian Parliament, but also to other state authorities, see *Ibid.*, p. 352.

150 More in Omejec, J., *Izvanredna stanja u pravnoj teoriji i ustavima pojedinih zemalja*, Pravni vjesnik, Vol. 12, No. 1-4, pp. 172-196.

151 *States of emergency in response to the coronavirus crisis. Normative response and parliamentary oversight in EU Member States during the first wave of the pandemic*, authored by Maria Diaz Crego and Silvia

The pandemic did not only completely disrupt the ordinary functioning of member states, but also that of the European Union and its institutions. Even though it is a whole other topic of analysis, it is worth pointing out that scholars started pointing out the lacking emergency regulation within the EU which led to "creative" practices and how it could be improved so the EU is prepared for such events in the future as well as what we've learned from different member states' experience in dealing with the pandemic.

As the 2024 Jacques Delore Institute policy paper titled „Regulating European emergency powers: towards a state of emergency of the European Union" suggested, the ensuing discussions mostly revolved around which model would be best suited for the EU – the constitutional model or the legislative model.[152]

The paper concluded that the constitutional model would be more appropriate, although it would require consensus of all member states as it requires treaty amendments. This model would require defining what circumstances would constitute an emergency, who would declare it and how, who would manage executive actions, regulation of checks and balances, and precise boundaries on limitations to suspensions of rights and freedoms regulated within the EU (the emergency would likely be managed by the European Commission and oversight would be conducted by the EU Parliament).[153]

The legislative model was deemed to be more flexible and to strengthen the position of the EU Parliament with ever present danger of possible EU Parliament paralysis due to the emergency and the overall lack of urgency and political consensus for adopting the necessary measures. The conclusions of the paper also fear that the EU Parliament could use those to absolve itself of responsibility for dealing with the crisis. Lastly, the paper states that legislative measures have a higher tendency for becoming the "new normal" than executive measures, as they tend to fall under parliamentary oversight and either get confirmed or repealed.[154]

Kotanidis, EPRS, December 2020, available at: [https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2020)659385], Accessed 1 April 2025.

152 *Regulating European emergency powers: towards a state of emergency of the European Union*, authored by Julia Fernandez Arribas, Jacques Delore Institute, Policy Paper No. 295, January 2024, available at: [https://institutdelors.eu/en/publications/regulating-european-emergency-powers-towards-a-state-of-emergency-of-the-european-union/], 3 April 2025.

153 *Ibid*., pp. 8-9.

154 *Ibid*., pp. 9-16., Gardašević wrote extensively about this topic and argued that the risk is higher in states combating the pandemic through ordinary governance mechanisms as those have the tendency to work around the "temporary duration" requirement, see Gardašević, Đ., *Pandemija kao stanje „velike prirodne nepogode" i Ustav Republike Hrvatske*, in: Primjena prava za vrijeme pandemije COVID-19,

As the number of decisions and ruling delivered by the Constitutional Court of the Republic of Croatia during the pandemic/epidemic period is too great to present every single one and in sufficient detail to be deemed relevant to the analysis by the reader, this section will focus only on the landmark decisions, i.e. those that contain new, different and/or additional insight on the Court's interpretation perspective when it comes to the anti-pandemic regulation and measures that were subsequently implemented.

Following the World Health Organization's decision to declare global COVID-19 pandemic the Croatian Health Minister declared a state-wide "epidemic" for the entirety of the Republic of Croatia territory on the same day, March 11 2020.[155] The legal basis for the decision was found in Article 2 Paragraph 4 of the Act on the Protection of Population from Infectious Diseases and Article 197 of Health Protection Act, but not the Constitution.

Therefore, Croatia was among the group of countries that dealth with the COVID-19 pandemic using legislation in place beforehand,[156] though some amendments were later made to that legislation as a result of unique characteristics (*sui generis*) of this particular public health emergency.[157] It did not declare a constitutional state of emergency.

As a result of this, the constitutionality of initial decisions made by the executive was not called into question – not until there was a need to adopt legislative

---

Barbić, Jakša (ed.)., Zagreb: Hrvatska akademija znanosti i umjetnosti - Znanstveno vijeće za državnu upravu, pravosuđe i vladavinu prava, 2021, pp. 29, 41.

155 It is worth mentioning that the Minister's decision was not published in the Official Gazette as there was no legal grounds to doing so at the time, whereas the Government's decision to declare the end of the epidemic was. An amendment after the epidemic had already been declared made it so the decision is now in the hands of the Croatian Government, not the Minister, and is published in the Official Gazette before going into effect, in accordance with Article 90 of the Constitution. See Constitutional Court Ruling U-II-1800/2021 of June 8, 2021.
The first documented case of COVID-19 occurred on February 25, 2020, with the first documented death reported on March 25, 2020.

156 Countries are usually classified in three categories based on their legislative approach to an emergency: a) constitutional norms of emergency state, b) existing legislation (emergency or regular), or c) new emergency legislation. See Blagojević; Antunović, *op. cit.*, note 148, p. 129, from: Ginsburg, T., Versteeg, M., COVID-19. *States of Emergencies: Part 1*, Harvard Law Review Blog, 2020, available at: [https://harvardlawreview.org/blog/2020/04/states-of-emergencies-part-i/] , April 3, 2025.

157 *Sui generis* classification of an emergency can be dangerous as it provides the basis for hasty legislation because something that is new and unique is usually not regulated well enough and requires special powers to be vested to executive bodies (which is usually done without due political and legal consideration) riddled with non-transparency, inconsistency and a general lack of oversight which usually also tends to be *pro forma* and politically coloured rather than legal, even when talking about courts and constitutional courts. The problematic nature of classifying particular emergencies as "sui generis" states of emergency was discussed by Gardašević, see Gardašević, *op. cit.*, note 154, p. 34.

changes that would broaden the scope of executive's power to provide sufficient and effective response to specific dangers that the COVID-19 pandemic had posed.

It was those legislative amendments that started a "snowball" effect of constitutionality review applications made to the Constitutional Court, both of new and existing emergency legislation.[158]

4.2. LANDMARK CASES OF THE CONSTITUTIONAL COURT

On September 14, 2020 the Constitutional Court delivered its first landmark ruling, the Ruling U-I-1372/2020 and others of September 14, 2020,[159] in which it rejected multiple applications to review the constitutionality of Article 22.a of the Act of the Civil Protection System[160] (the Amendment Act which contained the provision was passed by the Croatian Parliament on March 18, 2020) and Articles 10, 13, 14 and 18 of the Amendment Act of the Act on the Protection of the Population from Infectious Diseases[161] (passed on April 17, 2020).

The Court confirmed previously established view that, regardless of whether a state has declared an emergency and notified the Council of Europe in accordance with Article 15 of the Convention on the Protection of Human Rights or

---

158 Analysis of the Constitutional Court's case law shows there were a total of 254 applications made challenging a total of 62 acts in the period from March 2020 to May 2023. However, the actual number of decisions and rulings delivered is much lower due to the Court using the option to join multiple applications under same decisions and opinions if they concerned the same legal matter.

159 Official Gazette, No. 105/2020.

160 The new provision gave substantial decision making power to a special body, the National Civil Protection Directorate of the Ministry of the Interior, presided by the Minister of Interior. In total, the Directorate issued 18 decisions, many of which had serious effects on constitutional rights of both the people and the public institutions (authorities as well as public service institutions). The provision craftily avoids using the term "emergency", presumably so as to avoid any connection to Article 17 of the Constitution.

161 Article 10 amended Article 47 of the Act by adding COVID-19 to the list of infectious diseases against which measures can be adopted according to the Act, introducing self-isolation as a possible measure and giving the Directorate the power to pass the necessary measures under direct oversight of the Croatian Government and in cooperation with the Health Ministry and the Public Health Agency.
Article 13 introduced self-isolation as a possible measure resulting from border health and sanitary inspections.
Article 14 allowed for mandatory self-isolation and quarantine by State Inspectorate sanitary inspection officials.
Article 18, perhaps the most controversial of them all, declared previously made decisions of the Directorate as measures adopted under the newly amended Article 47. The Court explained that there was no retroactive effect as the authority to pass the necessary measures before the amendment in question had already been established under Article 22.a (paragraph 35.2 of the Ruling – the Court stated that the purpose of said declaration was to establish the connection between provisions regarding the same type of measures regulated in two different acts). This argument was highly criticized in the scientific community.

not (paragraphs 20 and 21),[162] all measures limiting rights and freedoms must be taken only when absolutely necessary, have a legitimate public interest cause and be proportional to the risks and dangers the emergency poses in terms of their extent and duration (paragraph 23).

Regarding applications concerning the Parliament not implementing Article 17 of the Constitution to first formally declare an emergency, which would then require that all restricting measures be passed directly by the Parliament with a two-third majority, the Court stated that the Parliament's decision to „activate" Article 17 is primarily a political decision and, therefore, not subject to the Court's review (paragraphs 27 and 28).[163]

It continued by confirming the decision-making powers of the National Civil Protection Directorate as a state authority under previously mentioned Articles 22.a and Article 47. of the two acts in question (paragraph 31).[164]

Considering that the Parliament opted for Article 16 (i.e. to not formally declare an emergency), the Court also reviewed all decisions made by the Directorate from the aspect of legitimate cause and proportionality, basing its competence on Article 125 Paragraph 2. of the Constitution which allows for constitutional review of "other acts" (meaning – acts not passed by the Parliament itself).

The Court rejected the argument that Directorate's decisions, as defined in the Act on the Protection of Population from Infectious Diseases, were not defined in terms of their duration and not subject to judicial review (paragraph 34).

Finally, regarding the regulation of the self-isolation measure (whose constitutionality was called into question by multiple applicants), the Court found that its purpose (legitimate cause) and duration were in accordance with the current

---

[162] Blagojević and Antunović recognize three groups of states in terms of application of Article 15 of the Convention: states that declared an emergency and notified Secretary General, states that declared an emergency, but did not notify and those that did not declare an emergency, See Blagojević, Antunović, *loc. cit.*, note 156.

[163] Blagojević, Antunović and Gardašević all agree that both social circumstances (self-isolation, limited movement and transport, limited gatherings, focusing on slowing down the spread of the disease, uncertainties regarding duration and global spread and effects) and legal circumstances (Croatian Government asking the Parliament to delegate them the necessary powers, urgent legislative amendments, difficulties in the functioning of the Parliament resulting in Rules of Procedure amendment introducing a special session regime) occurred that warranted the use of Article 17 of the Constitution to declare an emergency. Gardašević, *Pandemija i Ustav Republike Hrvatske*, Informator, No. 6623, 2020, p. 2., Blagojević; Antunović, *op. cit.*, note 148, p. 132.

[164] For all decisions made by the Directorate during the pandemic see: [https://civilna-zastita.gov.hr/sve-odluke-stozera-civilne-zastite-rh-za-sprecavanje-sirenja-zaraze-koronavirusom/2302], 2 April 2025.

scientific and medical data on the disease[165] and proportional. It distinguished between general measures passed through Directorate's decisions – which are subject to constitutionality review – and individual cases of application of said measures by a general medical practitioner or an epidemiologist, which can only be reviewed through means of invididual review, either via inspection or by means of a complaint, a dispute or a constitutional complaint (paragraphs 39.1 and 39.2).[166]

In the second landmark ruling U-II-3170/2020 and others delivered on the same day (September 14, 2020) the Constitutional Court rejected multiple applications regarding constitutionality review of the two decisions made by the Directorate – one to institute mandatory masking and the other to introduce special rules regarding denying access to public transportation to unmasked individuals for the duration of the COVID-19 epidemic.[167]

The Court found that mandatory masking, as regulated in the decision under review, did not meet the minimum severity to be considered in violation of human dignity under Article 23 Paragraph 1 of the Constitution and Article 3 of the Council of Europe Convention (paragraph 9).

Regarding the protection of Article 35 of the Constitution (the protection of person and family life), it explained that the demand of said provision represents not only a negative requirement, baring the state to intervene, but also a positive obligation to intervene when it's necessary to protect the public interest, the latter involving a certain level of judgement by the state (paragraph 9.1).[168]

It confirmed the legitimacy of the cause established in the U-I-1372/2020 ruling and deemed the decisions necessary in a democratic society based on then current level of scientific evidence and World Health Organization recommendations. According to the Court, masking at the time was necessary, despite occasionally causing discomfort in the form of rashes and other forms of skin discoloration, both as a containment measure (to limit the spread of the disease) towards already

---

165 Paragraph 39.
For example, the incubation period of the virus was found to be between 2 and 14 days, which explains why the self-isolation measure then lasted 14 days.
The President of the Croatian Government founded the National Scientific Advisory Committee on March 25, 2020, in order to facilitate the complex process of balancing the scope and duration of decisions that were to be made by the Directorate in order to protect public health and prevent further spread of the disease (paragraph 18).

166 This view was repeated in multiple rulings, e.g. U-I-2162/2020 of September 14, 2020 and U-II-6087/2020 and others of February 23, 2021.

167 Constitutional Court Ruling U-II-3170/2020 and others of September 14, 2020.

168 The Court repeated this view in later decisions and rulings, e.g. in Ruling U-II-5709/2020 and others of February 23, 2021 (paragraph 17).

symptomatic people, as well as to protect those who have not yet been exposed to the virus, albeit as a supplemental measure to other measures, such as physical distancing and personal hygiene (paragraph 12).

In the decision U-II-2379/2020 of September 14, 2020[169] the Constitutional Court declared that one segment of the Directorate's decision to regulate working hours of stores, markets and warehouses during the COVID-19 pandemic was unconstitutional during one period of time, before the provisions in question were removed via an amendment. The provisions in question contained "Sunday" as one of the exceptions for when working was not permitted or, on the contrary, when it was permitted, but only for certain types of shops and stores.

Although the Court did not find the grounds to declare the cause of decisions illegitimate, it found the Government's explanation to why Sunday was particularly relevant to the realization of that cause inadequate and, as a result, it did not meet the criterion of necessity (paragraph 13).[170]

As the epidemic slowly began to subside in the summer of 2020, which was obvious by the declining number of total and daily reported infections and deaths, the Directorate began to ease (and eventually completely abolish) most restrictions that were previously imposed and then reinstate them as the second wave of the epidemic began to struck at the end of 2020 and the beginning of 2021. This was also true for later waves of the disease in 2021 and 2022.[171]

Considering the circumstances as well as the scientific evidence on the disease had already changed quite considerably by then, the Constitutional Court deemed it necessary to re-examine those decisions in their renewed form. It was obvious by this point that the Court would acknowledge legitimacy of the cause of vast

---

169 This was one of the few occasions during the pandemic in which the Constitutional Court decided to trigger review and deliver a decision on its own initiative (paragraph 9).

170 In fact, using the logic provided by the Croatian Government in response to the Court's request for information and explanation in the proceeding, there were far more reasons to regulate Friday as the busiest market day, i.e. the day when the risk of exposure and spreading of the virus was the highest and, therefore, possibly merited barring sales on that day of the week (paragraph 4).

171 See *infra*. Balancing between strengthening and relaxing the limitations often proved to be a more challenging task than simply imposing and implementing them in the first place. Constitutionality reviews became more and more complex as the decisions later in the epidemic regulated many exemptions and different treatment of various everyday activities. See, for example, Ruling U-II-6267/2021 and others of April 22, 2022, Official Gazette, No. 49/2022, in which there were notable inconsistencies in the Court's argumentation, for example, when it comes to the older population and allowing religious gatherings, on which occasion the Court pointed out the attention the older population gave to following the established epidemiological measures (paragraph 17), despite characterizing that same population as "more vulnerable" in a number of other decisions and rulings, See, for example, Ruling U-II-6278/2021 of April, 12, 2022.

majority of measures implemented by the Directorate and that the main point of contention would be the questions of necessity and proportionality of (individual) measures. The Court based many of its decisions and rulings concerning meeting those requirements by reviewing the argumentations and data provided by the Croatian Government and the Ministry of Health, which constituted the basis for the Directorate's decisions.[172]

Regarding the duration of general measures regulated in the Act on the Protection of Population from Infectious Diseases (Article 47 Paragraph 2),[173] the Court stood by its viewpoint that it is not possible to determine the duration of those measures at the time of their implementation because it depends on the type of disease as well as its progression, as those measures were not legislated specifically for the case of COVID-19.[174]

In December 2021, by which time Croatia was already struck with the fourth wave of the COVID-19 epidemic, characterized mainly by the so-called "delta" strain of the disease, the Constitutional Court was once again faced with multiple applications to review already reviewed articles of the Act on the Protection of Population from Infectious Diseases and the Civil Protection System Act. Applicants argued that 19 months after the declaration of the epidemic enough time has passed to warrant an evaluation and a change in the system of handling the situation. They added that the Parliament was practically unable to supervise the Directorate because it fell under oversight of the Croatian Government and that its role was limited solely to *ex post* reports. It was their opinion that the Parliament should take over the decision making process of dealing with the pandemic. The Court once again gave its opinion in Ruling U-I-5781/2021 and others of December 21, 2021.

The Court noted that the Parliament had, since the epidemic was declared, already – leaning on the latest scientific evidence about the disease – gradually legislated new forms of measures to be taken to combat the epidemic, such as self-isolation, masking and limitations to public gatherings, performances and even private gatherings (paragraph 13). Through those legislative amendments, the Court added, the Parliament displayed its continued political determination to further maintain

---

172 An example of such a decision would be the Ruling U-II-6087/2020 and others of February 23, 2021, see paragraphs 13, 14.1 and 17. For example: *„... The Court finds that the Directorate's estimates were founded on expert medical data and research,... are limited in duration and contain an obligation to regularly assess their necessity and proportionality, ..."* (paragraph 17).

173 Such as disinfection, quarantine, travel limitations, or self-isolation, masking, limitations to public gathering and performances, limitations to private gatherings.

174 See Ruling U-I-263/2021 of June 8, 2021 in which the Court was asked to assess the limitation to private gatherings imposed by the Directorate earlier that year.

the current form of emergency management. It was the Court's position that it is up to the Parliament to decide how to implement the power of parliamentary oversight vested to him in Article 80 of the Constitution. It finished by stating that the decisions taken by the Directorate did often lack sufficient reasoning important for judicial and the Court's oversight.[175]

In Ruling U-II-5571/2021 and others of December 21, 2021 the Court rejected numerous applications regarding the Directorate's decision for implementation of a safety measure regarding patient admittance[176] that would require patients to either display their COVID pass,[177] negative COVID-19 test result done recently or another proof of vaccination (with at least a single dose of vaccine) or recovery from the disease. This obligation was also mandated for anyone accompanying the patient to the public health institution, though there were many exceptions to these rules. Primary medical care, medical emergency cases and COVID-19 cases, as well as children under 12, were exempt from this mandate.

The Court reiterated that the decisions taken by the Directorate which, beyond reasonable doubt, limit rights and freedoms, are subject to the Court's constitutionality review and must, therefore, meet and pass the proportionality test of Article 16 of the Constitution. It accepted the Government's opinion that the cause was legitimate, proportional, based on scientific evidence and backed by statistical data (paragraph 12) and rejected the implication that the obligation was discriminatory towards non-vaccinated patients, practically forcing them to get vaccinated.[178]

Another important ruling on applications regarding two Directorate decisions from the same set of decisions as the COVID pass decision regarding patient admittance was the Ruling U-II-5417/2021 and others of 21 December, 2021.

---

175 Horvat Vuković and Kuzelj particularly emphasize this as, they argue, it, together with overall non-transparent functioning of the Directorate, enabled the Constitutional Court to legitimize severe limitations to constitutional rights and freedoms. See Horvat Vuković, A., Kuzelj, V., *Constitutionality during times of crisis: Anti-pandemic measures and their effect on the rule of law in Croatia*, 6th International Conference – ERAZ 2020 – Knowledge based sustainable development, Online/virtual, May 21, 2020, Conference Proceedings, p. 62., available at: [https://eraz-conference.com/eraz-2020-59/], April 3, 2025.

176 Official Gazette, No. 105/2021., 108/2021.

177 Though the primary role of COVID pass is to enable easier movement across the borders of Croatia, it can also be used for other purposes in accordance with measures set forth by the Directorate. See Decision on the Establishment of the National EU Digital COVID Pass, Official Gazette, No. 60/2021.

178 The Constitutional Court repeated the ECHR opinion in *Zambrano v. France* (Decision No. 41994/21, October 7, 2021) that *„... as long as unvaccinated patients can obtain the COVID pass via means of recovery or COVID tests as alternatives to vaccination, it does not represent a de facto obligatory legislative measure."* (paragraph 17).

These decisions required all medical and social care institution workers to undergo mandatory testing on site at least twice per week, exemptions of this being workers with proof of vaccination or recovery (unless displaying symptoms). Workers who refused to get tested or failed to provide proof of above said facts were to not be allowed on institutional premises (paragraph 4).

The Croatian Government defended these decisions explaining that the most common strain of the disease at that point was the "delta" strain which, according to then available scientific data, had twice the infection spread rate of earlier strains, despite the effects of the disease caused by it being milder on average.

Again, the Court found both decisions to be in compliance with legitimate cause clause of Article 16 of the Constitution and proportional, meaning: 1) adequate – can achieve the desired legitimate cause, on its own or in combination with other measures, 2) necessary – the legitimate cause is unachievable without it, and 3) reasonable – not arbitrary and achieving balance between limitations to rights and freedoms and the risks and dangers posed by the situation warranting the measure.

As for the applicants' argument that refusing to get tested or provide the necessary proof otherwise limits the right to work of affected workers, the Court argued that disallowing access to the institutional premises to those workers protected life and health of other workers and patients, lowered the risk of the disease spreading, especially among other workers, which in turn protects the integrity of the healthcare system as a whole. It continued by stating that failure to comply in either of the three ways also represented a contractual breach with their employers (healthcare institutions). Therefore, the described testing or its alternatives did not pose an undue burden on the workers, the work process – testing is free, i.e. covered by the employer, quick, easy and painless and occurs before the daily work process even begins – or the worker's right to work. Any possible consequences would have been the result of work regulations, not of anti-pandemic measures (paragraph 17).

By far the most elaborated, and one of the most important decisions, was the Decision U-II-7149/2021 and others of February 15, 2022 (Official Gazette, No. 25/2022). In total, there were 29 applicants who approached the Constitutional Court with questions regarding the constitutionality of the mandatory COVID-19 testing and the displaying of testing, vaccination or recovery proof when entering public institution premises.[179]

[179] The actual title of the decision did not use the term „public institutions", but instead tried defining the scope of who it applied to more thoroughly. The Directorate's decision was published in the Official Gazette, No. 121/2021 and 10/2022.

The Court accepted the applications regarding one particular provision providing higher learning institutions with the option to regulate exemptions from it, while rejecting them in other matters.

The decision in question was announced on November 15, 2021 and it contained multiple exemptions: healthcare institutions, students at higher learning institutions – unless the institution regulated otherwise, school children, persons accompanying children to preschool, etc. (paragraph 5).

Similarly to earlier decisions made by the Directorate regarding mandatory testing and providing proof, this decision also required testing to be done twice a week in an authorized institution or a laboratory. Resources spent on testing by employees were to be refunded by the employer on their request. The decision also provided the option for the employer to fund and organize testing on its own grounds. Finally, it recommended institutions on which the decision did not apply to institute mandatory testing in order to grant access into their premises.

Applicants claimed that the measures regulated in the decision could not meet the high proportionality standards of Article 16 of the Constitution and that the only alternative would be Article 17,[180] which would mean the Parliament would need to be the one to decide on them. They called out the Court for the opinion expressed in the Decision U-I-1372/2020 of September 14, 2020 regarding the Parliament's decision whether to deal with an emergency situation by deciding on the matters concerning limitations of rights and freedoms itself (Article 17) or by assigning that power to the executive through legislative acts (Article 16). They also argued against the Parliament being reduced to *ex post* oversight through reports which they found insufficient and ineffective to protect the rule of law, separation of powers, checks and balances and its citizens against arbitrary actions of the executive branch and its operative bodies (paragraph 36).

The Court found the applicant's arbitrary executive's actions to be of political nature due to the fact that the legal basis for acts that enabled the executive's decision making in the epidemic was Article 16 of the Constitution. The Court believed that the applicants implied that in the case of application of Article 16 acts could be passed with a majority consisting only of the governing political party or coalition, whereas Article 17 application required a higher form of consensus – a two third majority, which always transcends daily political feuds, since no party has

[180] Article 17 of the Constitution instead opts for the concept of "adequate", which is only one of the elements in the proportionality test under Article 16 and a lower standard of scrutiny, Abramović, A., *Ustavnost u doba virusa*, available at: [https://www.iusinfo.hr/aktualno/u-sredistu/ustavnost-u-doba-virusa-41073], 3 April 2025.

had anything close to such a majority in the Parliament at least in the last twenty years.

The Court stated that the Constitution is and should be interpreted as "politically neutral". The principle of separation of powers does not refer to the political relations inside one of the state authorities (in this case, the Parliament), but to the relations between different branches of government (paragraph 39).[181]

The Court repeated that the Parliament already had the necessary tools at its disposal on the basis of Article 80 of the Constitution (supervisory power). It pointed out that dealing with the epidemic requires specific knowledge only medical experts could provide as well as urgent, but continued reaction, both of which the legislative body is not suited for (paragraph 39.2).[182] Of course, all this does not exculpate the executive of any responsibility for its actions – all the measures taken need to be accompanied by proper argumentation and reasoning. The amendment and revision of the decision in question did meet that requirement. Moreover, the Croatian Government's responses to the Court's request for statement in earlier review proceedings showed that the Government closely followed scientific papers on the pandemic as well as statistical data and recommendations by the National Scientific Advisory Committee, comprised of top experts in the fields of epidemiology, others fields of medicine and biology.

As for the proportionality of the decision, the Court found that the argumentation given in an earlier decision regarding mandatory employee testing in healthcare and social care institutions was applicable in this case as well.[183]

Lastly, the Court found that the Government and the Directorate did not provide sufficiently convincing and adequate reasoning behind the possibility given to higher learning institutions to exempt their students from the decision as the main

---

[181] The Court pointed out that the relevant acts of the Parliament were all passed (excluding their amendments and revisions) before the epidemic was declared, meaning – during ordinary circumstances, which, in Court's opinion, displayed their intention to assign those powers to the executive as the more "operative" branch of government. Not only that, but the amendments to those acts were passed in March 2020 with more than a two-third majority, proving that it is quite possible to put aside political differences in the view of a threat in the form of a crisis. For example, the amendment to the Civil Protection System Act was passed with 108 votes. Gardašević, *loc. cit.*, note 163, plenary discussion and voting reports available at:
[https://edoc.sabor.hr/Views/AktView.aspx?type=HTML&id=2024679], 2 April 2025.

[182] Gardašević disagrees with this assessment and, instead, views it as the Parliament taking political responsibility for measures adopted dealing with the pandemic, Gardašević, *loc. cit.*, note 16, *cf.* Blagojević; Antunović, *loc. cit.*, note 163.

[183] See *supra* regarding Ruling U-II-5417/2021 and others of 21 December, 2021.

argument was protecting the university autonomy instead of objective and verifiable epidemiological reasons (paragraphs 60.3. and 60.4.).

In May of 2022 the Constitutional Court found itself having to review the constitutionality of two referendum initiatives – one, aimed at amending Article 17 of the Constitution to expressly state epidemic and pandemic as emergency states, and another, aimed at amending and revising the Act on the Protection of Population from Infectious Diseases by taking away powers from the Directorate and assigning them to the Croatian Parliament if the proposed measures involve limitations to constitutional rights and freedoms or represent a pandemic declared by the World Health Organization. It also contained a provision by which all previous measures taken by the Directorate are to be subjected to parliamentary confirmation within 30 days.

It found both referendum initiative proposals to be unconstitutional,[184] stating notable similarities between numerous earlier constitutionality review applications on anti-epidemic legislation and Directorate's decisions. The Court argued that Article 16 of the Constitution can be the legal basis for anti-pandemic legislation and measures, declaring it "obvious" as one of the legitimate causes is the protection of public health, and declared that the actual aim of both initiatives was to make sure the next time the need for a limiting decision arose, as was then the case with the pandemic, the decision is made by the Croatian Parliament by a two third majority in each such case, as well as to "eliminate" the Directorate from the Act's provisions when a pandemic has been declared by the World Health Organization or when a measure is aimed at limiting constitutional rights and freedoms,[185] thus taking away its role in dealing with the pandemic. It concluded that the proposals put forward were not adequate to realize that aim and were, in that sense, redundant and added that the second initiative also meddled in the constitutional relationship between the Parliament and the executive, which is, according to the Court, a "structural characteristic of the Croatian constitutional state".[186]

The Constitutional Court reviewed the constitutionality of provisions of the Act on the Protection of Population from Infectious Diseases for the final time right

[184] See Decision U-VIIR-2180/2022 of May 16, 2022 and Decision U-VIIR-2181/2022 of May 16, 2022, Official Gazette, No. 61/2022.

[185] Which is often difficult to distinguish in practice, so the Court argued it would institute a complex system of duality in handling health crises (Decision U-VIIR-2181/2022 of May 16, 2022, paragraph 26.1).

[186] See paragraphs 15 and 16 of the Decision U-VIIR-2180/2022 of May 16, 2022, paragraphs 25 and 27 of the Decision U-VIIR-2181/2022 of May 16, 2022.

after the end of the epidemic had been declared, in the Ruling U-I-998/2022 of June 27, 2023. However, in that ruling it did not offer any significant new arguments. Instead, it reaffirmed arguments provided in the Ruling U-I-1372/2020 of September 14, 2020. It insisted that the Croatian Parliament already had the necessary constitutional tools to supervise the Government and that it proved its continued support of the current legislative model by further amending anti-epidemic acts as the pandemic required of them (paragraph 10).

5. CONCLUSION

In 2020, the health systems of countries worldwide came under tremendous pressure; the consequences of the COVID-19 pandemic were a massive loss of human life. But so is the halting of economic activities at the world level. In a crisis of such severity, the state authorities found themselves either de jure or de facto in a state of emergency. The executive then naturally appears as a branch of government that can effectively and efficiently respond to challenges. The first question we tried to find an answer to in this paper was related to the definition of a state of emergency. We pointed out certain specificities of the public health crisis. Still, we concluded that its fundamental characteristics do not differ significantly from other types of crises that can lead to a state of emergency.

Then, we questioned the arguments on whether the state of emergency is a legal or a political phenomenon. States of emergency are introduced by law, and most countries' constitutions contain norms that regulate emergency powers. We agreed with theorists like Zwitter and Günther that law has (and should have) a key role in the declaration, duration and abolition of the state of emergency and the return to normality. The law gives legitimacy to the state authorities, which enables better communication with the population, whose cooperation with the authorities in the emergency circumstances brought about by the pandemic was necessary for the successful fight against the disease. It is key to public trust. Numerous studies already exist on how the measures to combat this public health threat affected the constitutional framework in different countries, i.e., constitutional values, the concept of democracy, the principle of separation of powers, and the rule of law. For this reason, it is necessary to specify the constitutional provisions related to states of emergency; the law should serve as an instrument to guarantee the most essential democratic values. In a sense, the law restrains itself.[187]

Although the Croatian Constitution does not recognize the term "emergency", the concept of states of emergency is regulated in Article 17 of the Constitution,

[187] Dyzenhaus, *op. cit.*, note 7, p. 2006.

which provides for three types of states of emergency, of which the most fitting in the context of a public health crisis seems to be "major natural disasters".

The social and legal circumstances described in the paper testify to the fact that there was a basis for declaring an emergency, after which the obligation to adopt restrictive measures would lie with the Croatian Parliament.

Although such a position seems correct from an *ex post* perspective, it is questionable and unprovable whether such a system would have yielded better results than the one applied.

The Republic of Croatia belongs to the group of member states that neither declared a constitutional emergency and instead, faced the pandemic through the application of special legislation, a lot of which was already in place before the pandemic.

The Constitutional Court confirmed that Article 16 of the Constitution also enables the state authorities to deal with the crisis, provided that the measures are transparently adopted, reasoned (explained) and accompanied by an appropriate system of both implementation and supervision. Practice has shown that this was not always the case. However, it doesn't appear that the main culprit was the application of a particular provision of the Constitution.

The analysed case law of the Constitutional Court showed how complex and intertwined with different viewpoints it was to simply review the measures, let alone collect and monitor data and consider, adopt, change and abolish epidemiological measures of various types almost daily.

Although there were certainly decisions that may not have had their practical foothold, the Constitutional Court confirmed that the decisions did largely follow expert opinions and were based on objective statistical indicators, although many of them were accompanied by numerous problems in implementation, which was not the case only in Croatia.

It is completely natural to view restrictions on rights and freedoms from one's own perspective and, therefore, to be extremely critical of them, but those given the authority to act in crisis situations primarily act with collective protection aims, and those can come into conflict with individual rights and freedoms in times of crises.

Finally, the pandemic has caused many problems for the institutions of the European Union, so much so that serious discussions are underway about building a more comprehensive anti-crisis regulation of procedures and measures at the EU level, most of which are down to which model to apply. The constitutional model

appears safer and more complete, although it seems more difficult to achieve because it requires amending the treaties, while the legislative model is more flexible, but also less efficient and resistant to the threat of normalization of crisis legislation because both political decision-making and political oversight are combined in one authority. It also largely depends on the possibility of decision-making within the European Parliament, which can vary decision to decision and is endangered when the functioning of the Parliament is paralyzed.

REFERENCES

BOOKS AND ARTICLES

1. Agamben, G., *Izvanredno stanje*, Deltakont, Zagreb, 2008.
2. Amon J. J.; Wurth M. A., *Virtual Roundtable on COVID-19 and Human Rights with Human Rights Watch Researchers*, Health and Human Rights Journal, Vol. 22, No. 1, 2020, pp. 399-413.
3. Blagojević, A., Antunović, M., *Izvanredno stanje u kontekstu COVID-a 19: hrvatski ustavnopravni okvir i praksa*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 60, No. 1, 2023, pp. 119-144.
4. Daly, T., *Designing the Democracy-Defending Citizen*, Constitutional Studies, Vol. 6, 2020, pp.189-193.
5. Drinóczi, T.; Bień-Kacała, A., *COVID-19 in Hungary and Poland: extraordinary situation and illiberal constitutionalism*, The Theory and Practice of Legislation, Vol. 8, No. 1–2, 2020, pp. 171–192.
6. Dyzenhaus, D., '*Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?*', Cardozo Law Review, Vol. 27, No. 5, 2006, pp. 2005–2040.
7. Gardašević, Đ., *Ograničenja ljudskih prava i temeljnih sloboda u izvanrednim stanjima*, PhD Thesis, Zagreb, 2010.
8. Gardašević, *Pandemija i Ustav Republike Hrvatske*, Informator, No. 6623, 2020, pp. 1-5.
9. Gardašević, Đ., *Pandemija kao stanje „velike prirodne nepogode" i Ustav Republike Hrvatske*, in: Primjena prava za vrijeme pandemije COVID-19, Barbić, Jakša (ed.)., Zagreb: Hrvatska akademija znanosti i umjetnosti - Znanstveno vijeće za državnu upravu, pravosuđe i vladavinu prava, 2021,
10. Gragl, P., *Lawless Extravagance: The Primacy Claim of Politics and the State of Exception in Times of COVID-19*, in: Ketteman, M. C.; Lachmayer, K., Pandemocracy in Europe. Power, Parliaments and People in Times of COVID-19, Hart Publishing, 2022, pp. 9-31.
11. Griglio, E., *Parliamentary oversight under the Covid-19 emergency: striving against executive dominance*, The Theory and Practice of Legislation, Vol. 8, No. 1-2, 2020, pp. 49-70.
12. Grogan, J., *States of emergency: analysing global use of emergency powers in response to COVID-19*, European Journal of Law Reform, Vol. 22, No. 4, 2020, pp. 338-354.
13. Guasti, P., *The Impact of the COVID-19 Pandemic in Central and Eastern Europe. The Rise of Autocracy and Democratic Resilience*, Democratic Theory, Vol. 7, No. 2, 2020, pp. 47–60.

14. Günther, C. M., *Legal vs. Extra-Legal Responses to Public Health Emergencies*, European Journal of Health Law, Vol. 29, No. 1, 2022, pp. 131-149.
15. Jabauri, A. *State of emergency: shortcut to authoritarianism*, Journal of Constitutional Law, Vol. 1, 2020, pp. 121-143.
16. Ketteman, M. C.; Lachmayer, K., *Introduction,* in: Ketteman, M. C.; Lachmayer, K., Pandemocracy in Europe. Power, Parliaments and People in Times of COVID-19, Hart Publishing, 2022, pp. 1-8.
17. Kouroutakis, A., *Abuse of Power and Self-entrenchment as a State Response to the COVID-19 Outbreak: The Role of Parliaments, Courts and the People*, in: Ketteman, M. C.; Lachmayer, K., Pandemocracy in Europe. Power, Parliaments and People in Times of COVID-19, Hart Publishing, 2022, pp. 33-46.
18. Krešić, M., *Izbjeglička i COVID-19 kriza: Izvanredni režimi – da ili ne?*, Godišnjak Akademije pravnih znanosti Hrvatske, Vol. 15, No. 1, 2024, pp. 27-48.
19. Krešić, M., *Emergency Situations and Conceptions of Law*, in: Amatucci, C. (ed.), Revisiting the limits of freedom while living under threat. II. Collection of research papers in conjunction with the 9th International Scientific Conference of the Faculty of Law of the University of Latvia, Riga, University of Latvia Press, 2024. pp. 68-78.
20. Lachmayer, K., Ketteman, M. C.; Conclusions: Pandemocracy - *Governing for the People, Without the People?* in: Ketteman, M. C.; Lachmayer, K., Pandemocracy in Europe. Power, Parliaments and People in Times of COVID-19, Hart Publishing, 2022, pp. 329-346.
21. Omejec, J., *Izvanredna stanja u pravnoj teoriji i ustavima pojedinih zemalja*, Pravni vjesnik, Vol. 12, No. 1-4, pp. 172-196.
22. Postema, G. J., *Law's rule: the nature, value, and viability of the rule of law*, Oxford University Press, New York, 2022.
23. Schmitt, C., *Politička teologija*, Naklada Breza, Zagreb, 2019.
24. Weiss, A., Binding the Bound: State Executive Emergency Powers and Democratic Legitimacy in the Pandemic, *Columbia Law Review*, Vol. 121, No. 6, 2021, pp. 1853–1894.
25. Windholz, E. L., *Governing in a Pandemic: From Parliamentary Sovereignty to Autocratic Technocracy*, Theory & Prac. Legis., Vol. 8, No. 1-2, 2020, pp. 93-113.
26. Zwitter, A., *The Rule of Law in Times of Crisis: A Legal Theory on the State of Emergency in the Liberal Democracy*, ARSP Archiv für Rechts- und Sozialphilosophie, ARSP Band 98 Heft 1, 2012, pp. 95-111.

INTERNET SOURCES

1. Abramović, A., *Ustavnost u doba virusa*, available at: [https://www.iusinfo.hr/aktualno/u-sredistu/ustavnost-u-doba-virusa-41073], 3 April 2025.
2. Ginsburg, T., Versteeg, M., COVID-19. States of Emergencies: Part 1, Harvard Law Review Blog, 2020, available at: [https://harvardlawreview.org/blog/2020/04/states-of-emergencies-part-i/], 3 April 2025.
3. Horvat Vuković, A., Kuzelj, V., *Constitutionality during times of crisis: Anti-pandemic measures and their effect on the rule of law in Croatia*, 6th International Conference – ERAZ 2020

– Knowledge based sustainable development, Online/virtual, May 21, 2020, Conference Proceedings, pp. 59-65, available at:
[https://eraz-conference.com/eraz-2020-59/], April 3, 2025.

4. Kukavica, S., *Izvanredno stanje. Između prava i politike. Temelji moderne države*, 2022, available at:
[https://ideje.hr/izvanredno-stanje-izmedu-prava-i-politike-temelji-moderne-drzave/] Accessed 10 January 2025
5. Ministry of Interior – National Civil Protection Directorate decisions, available at:
[https://civilna-zastita.gov.hr/sve-odluke-stozera-civilne-zastite-rh-za-sprecavanje-sirenja-zaraze-koronavirusom/2302] 2 April 2025
6. Regulating European emergency powers: towards a state of emergency of the European Union, authored by Julia Fernandez Arribas, Jacques Delore Institute, Policy Paper No. 295, January 2024, available at:
[https://institutdelors.eu/en/publications/regulating-european-emergency-powers-towards-a-state-of-emergency-of-the-european-union/] 3 April 2025.
7. States of emergency in response to the coronavirus crisis. Normative response and parliamentary oversight in EU Member States during the first wave of the pandemic, authored by Maria Diaz Crego and Silvia Kotanidis, EPRS, December 2020, available at:
[https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2020)659385], 1 April 2025

LEGISLATION

1. Constitution of the Republic of Croatia, Official Gazette, No. 56/1990, 135/1997, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010, 05/2014
2. Act on the Civil Protection System, Official Gazette, No. 82/2015., 118/2018, 31/2020
3. Amending Act of the Civil Protection System Act, Official Gazette, No. 31/2020
4. Act on the Protection of Population from Infectious Diseases, Official Gazette, No. 79/2007, 113/2008, 43/2009, 130/2017, 114/2018, 47/2020, 134/2020, 143/2021
5. Amending Act of the Protection of Population from Infectious Diseases Act, Official Gazette, No. 47/2020
6. Amending Act of the Protection of Population from Infectious Diseases Act, Official Gazette, No. 134/2020
7. Amending Act of the Protection of Population from Infectious Diseases Act, Official Gazette, No. 143/2021
8. Decision to proclaim the COVID-19 epidemic on the entire territory of the Republic of Croatia, Minister of Health, March 11, 2020, available at:
9. [https://zdravstvo.gov.hr/UserDocsImages/2020%20CORONAVIRUS/ODLUKA%20O%20PROGLA%C5%A0ENJU%20EPIDEMIJE%20BOLESTI%20COVID-19.pdf], 2 April 2025.
10. Decision to proclaim the end of the COVID-19 pandemic, Official Gazette, No. 51/2023
11. Decision on the Establishment of the National EU Digital COVID Pass, Official Gazette, No. 60/2021

12. Rules of composition, functioning and appointment requirements for the directors and deputies of civil protection directorates adopted by the Minister of the Interior, Official Gazette, No. 126/2019

CASE LAW

1. Constitutional Court Ruling U-I-1372/2020 and others of 14 September 2020.
2. Constitutional Court Ruling U-I-2162/2020 of 14 September 2020.
3. Constitutional Court Decision U-II-2379/2020 of 14 September 2020.
4. Constitutional Court Ruling U-II-3170/2020 and others of 14 September 2020.
5. Constitutional Court Ruling U-II-5709/2020 and others of 23 February 2021.
6. Constitutional Court Ruling U-II-6087/2020 and others of 23 February 2021.
7. Constitutional Court Ruling U-I-263/2021 of 8 June 2021.
8. Constitutional Court Ruling U-II-1800/2021 of 8 June 2021.
9. Constitutional Court Ruling U-II-5417/2021 and others of 21 December, 2021.
10. Constitutional Court Ruling U-II-5571/2021 and others of 21 December 2021.
11. Constitutional Court Ruling U-I-5781/2021 and others of 21 December 2021.
12. Constitutional Court Decision U-II-7149/2021 and others of 15 February 2022.
13. Constitutional Court Ruling U-II-6278/2021 of 12 April 2022.
14. Constitutional Court Ruling U-II-6267/2021 and others of 22 April 2022.
15. Constitutional Court Decision U-VIIR-2180/2022 of 16 May 2022.
16. Constitutional Court Decision U-VIIR-2181/2022 of 16 May 2022.
17. Constitutional Court Ruling U-I-998/2022 of 27 June 2023.

THE PRINCIPLE OF NON-REFOULMENT A CORNERSTONE OF REFUGEE PROTECTION OR A LEGAL FICTION?

Rebecca Lilla Hassanová, PhD, JUDr.
Assistant Professor, Pan-European University, Bratislava, Slovakia
Junior Researcher, Central European Academy, Budapest, Hungary
Doctoral Candidate, University of Miskolc, Hungary
Tomášikova 20, 821 02 Bratislava, Slovakia
rebecca.hassanova@paneurouni.com

Dominika Moravcová, PhD, MBA, JUDr. Ing., Assistant Professor
Trnava University, Faculty of Law, Institute of Clinical Legal Education
Kollárova 10, 917 01 Trnava, Slovakia
dominika.moravcova@truni.sk

ABSTRACT

The principle of non-refoulement, enshrined in Article 33(1) of the 1951 Refugee Convention, is widely regarded as a cornerstone of international refugee protection. It prohibits states from expelling and returning individuals to territories where their life or freedom would be threatened due to race, religion, nationality, membership of a particular social group, or political ideology. The mentioned principle has been reinforced through several international human rights treaties and customary international law, emphasizing its universality and binding nature. However, its practical implementation often reveals significant challenges, leading some to question whether non-refoulement remains a robust legal safeguard or has devolved into a legal fiction in contemporary refugee governance.

Keywords: *Cross-border parenthood, judicial cooperation*

1. INTRODUCTION

As the States are the bearers of sovereignty, they have the kompetenz-kompetenz to provide some scope of rights to another subjects. Nevertheless, the jurisdiction always keeps its backbone decisive-rights regarding the persons who the state allows on its territory. With the emergence of international law and its obligations the freedom of states had been more and more restricted. The phenomena

of enhanced limitations had become stronger in Europe after the II.WW, with the creation of the international and European human rights system. Nevertheless, politics remained deeply ingrained in the framework of international refugee law and protection, fundamentally because the definition of a refugee itself arises from political considerations. There is no intrinsic quality of "refugeeness" that unambiguously differentiates one group of border crossers from another. Rather, the act of recognizing a particular group as especially vulnerable, in need of assistance, or deserving of protection is inherently a political choice. This process of constructing the category of refugees inevitably creates contrasts between forced and voluntary migration, as well as between political and economic motivations. Such distinctions tend to privilege certain forms of suffering while marginalizing others, thereby shaping societal perceptions and responses. Ultimately, this construction carves out a unique exception to the generally accepted principle that sovereign states have the right to control and restrict entry into their territories. By delineating who qualifies for protection, the process underscores the political nature of such determinations, further complicating the landscape of refugee law and humanitarian response.[1]

International asylum law is now a recognized field of international law. Since the Refugee Convention was adopted 70 years ago, it has evolved into a dynamic and continually challenging area of international law. This complexity is particularly evident as the relationship between refugee law and other branches of law, such as human rights law, international humanitarian law, and domestic legal frameworks, continues to be actively explored and understood. The ongoing development and interpretation of these interconnections highlight the adaptability and significance of the Refugee Convention in addressing contemporary issues faced by refugees and asylum seekers around the world.[2]

One of the achievements of the asylum protection is the principle of non-refoulment, being part of asylum provisions as well as the human rights framework. The principle obliges states not to return a person to another state, where there is a real risk that he may face persecution or be victim of some form of illicit treatment.[3] It is today understood as the cornerstone of the modern international refugee protection system.[4] In addition, the UNHCR stipulated it as one of the

---

1 See Tuitt,P. *False Images: Law's Construction of the Refugee*, Pluto Press 1996.

2 UN Refugge Convention, 1951., [https://www.unhcr.org/about-unhcr/overview/1951-refugee-convention], Accessed 10 April 2025.

3 The authors decided to use the male form of pronouns when they are reffering to an individual in general.

4 Rodger, J., *Defining the Parameters of the Non-Refoulment Principle*, Research Paper, International Law. Laws 509, 2016; Goodwin-Gill, G.S.; McAdam, J., *The Refugee in International Law*, Oxford Univer-

fundamental principles of international law.[5] Lastly, some scholars even claim that the principle is part of the jus cogens enhancing the nature of "absoluteleness" and non-derogation.[6] Consequently, its customary nature is without a doubt not a question in academic circles.

Notwithstanding the above-mentioned theoretical arguments, the authors deem to question the practical and real applicability of the principle at hand. In fact, there are very few states which are not bound by any treaty which includes the obligation of non-refoulment in certain special situations. Still, the international jurisprudence is the true indicator of the applicability of the principle in real-life situations. Which region is more suitable for a search for "good practices" of the use of principle, than the European human rights framework? Hence, the below observed research is devoted to the in-depth critical analysis of the framework which claims to be the most developed in questions of the rule of law and human rights.

2. CONVENTION RELATING TO THE STATUS OF REFUGEES

Art. 33 (1):

„*No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."*[7]

The principle of non-refoulment is included in various influential universal and regional human rights instruments. It is understood as part of the right (not) to return person to its country of residence. The text seen upon enhances various human rights, such as right to life, prohibition of torture as well as in some way prohibition of discrimination. Numerous countries that are parties to the Convention impose restrictions, particularly affecting the rights of asylum seekers, who have not yet been recognized as refugees through a national refugee status determination process. Thus, these migrants who crossed the borders are in an especially vulnerable position. As there is no decision regarding their legal status, they have no direct access to social security, healthcare or education. Nonetheless,

---

sity Press, 2007, Chapter V.

5 UNHCR, 'Note on Non-Refoulement, Submitted by the High Commissioner, No. EC/SCP/2'23, 1977.

6 Kalin; Caroni; Heim, in: Zimmermann, A. *et al,* The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary, n 5, 2011, p. 1346.

7 Convention Relating to the Status of Refugees, UNGA resolution 2198 (XXI), 1951.

at the same time, the principle of non-refoulement is offering at least some level of protection from an arbitrary decision. The principle applies not only to recognized refugees, but also to those who have not had their status formally declared.[8] The policies of states are often implemented as a means of deterrence, frequently stemming from concerns that the economic migrants are exploiting asylum procedures to migrate for employment or to access welfare benefits. Thus, the most significant is to properly analyze the reason for exclusion, which are possible under section 2 of the article 33.[9]

Firstly, the principle does not apply to those who has committed international crimes, which we see in the Rome Statute, i.e. crime against peace, war crime or crime against humanity. There are various examples where either national authorities of states or international criminal tribunals, such as ICTY, determined that the refugee protection could not be awarded on the basis that the person seeking the protection is responsible for these crimes. Nevertheless, the Refugee convention is silent regarding the conditions of responsibility, which may lead to wide scope of possibilities for national legislators. Several western European countries has established the notion of personal and knowing participation of the crime as the fundamental element for setting up links to the person.[10] Generally, when looking for the proper interpretations of the responsibility, the countries should be influenced by the Rome Statute, declaring that the sole membership in a terrorist group is not sufficient for the establishment of connection. The situation is definitely different when the person has voluntarily taken part in the criminal activity. The ICC is taking into account numerous factors: organizations character, legality of the organization, recruiting process, duration of the membership and the conditions of leaving, knowledge of the activities and lastly personal involvement. Consequently, when states plan to use the exception set in article 33 (2) they shall consider all these circumstances. Lean links to criminal activity as a basis for extradition to an unsafe country would constitute violation of the principle of non-refoulment.[11]

Secondly, the subsection provides another exception, when the person seeking protection has committed serious non-political crime prior to his admission to

---

8 UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 2007, para. 6.

9 Mathew, P. *Constructive refoulement, Research handbook on international refugee law*, in Singh Satvinder, J. (ed), "Research Handbook on International Refugee Law", Edward Elgar Publishing, 2019, p. 209.

10 Canada, Australia, Belgium, the Netherlands or New Zealand. See Rikhof, J. *The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law*, 2012.

11 Rikhof, J., *The exclusion clauses in refugee law*, Research handbook on international refugee law, 2019, p. 393.

the safe country. The mentioned exception incorporates similarly ambiguities. Some questions arise whether the notion of crime includes international crime. Likewise, whether both the refuge and the residence country has to understand the committed act as falling under the notion of crime under their national legislation. Caution is advised also regarding the conviction. The conviction may be falsely imposed in the country of origin in order to expel those who are political refugees. Hence, the countries have to necessarily investigate the legal system of the country including the independence of the judiciary.

Usually the second exception is used for expulsion of those linked to terrorist activities. Some authors claim, that given the recent advancements in international law, there is a reasonable expectation that the approach toward activities categorized as terrorist will become more systematic and coherent, moving away from the ad hoc methods that characterized previous responses. This shift is anticipated to result in more standardized frameworks and guidelines, which will promote greater consistency in how such activities are addressed globally. After all, implementing a more organized approach, states and international bodies would likely enhance even their ability to combat terrorism more effectively while adhering to legal and human rights standards.[12] However, the authors of the research are less positive. Keeping in mind that terrorism is a very serious crime, which may affect the whole infrastructure of the state, the authorities are more likely to extradite anyone who has links to terrorist groups. Regularly even without profound investigation of the aspects of his complicity.

The third and last reason for exclusion is when the person is being guilty of acts which are contrary to the purposes and principles of the UN. The jurisprudence of some national courts provide examples when the reason was applied, however we may observe some overlapping. The decisions based on this exception were either expulsion for terrorist activities or for international crimes, as apartheid or war crimes.[13] At the first glance the provision seems as abundant as international crimes (apartheid as such is explicitly mentioned in the Rome Statute under crimes against humanity) are part of the first exception and terrorism is generally invoked under second exception. Nevertheless, the provision can be practical when the person has committed terrorism but the crime does not exist in the national legislation of the residence country.

---

12 See Jore, S. H., *Is Resilience a Good Concept in Terrorism Research? A Conceptual Adequacy Analysis of Terrorism Resilience,* Studies in Conflict and Terrorism, Vol. 46/1, 2023.

13 Rikhof, J., *The exclusion clauses in refugee law*, Research handbook on international refugee law, 2019, p. 400.

The system of protection which is granted by the Refugee Convention is for various reasons different from the one which can be provided by the European Convention for the protection of Human Rights ("ECHR"). First, the Refugee Convention relies on the decisions of national court in each state which ratified the convention. Hence, the national authority has strong influence over the interpretation of its provisions. Second, the convention applies to those who fall either under the notion of a refugee or asylum-seekers waiting for their refugee status. Thus, those are not regarded under the restrictive definition have no rights under the convention. Third, the text of the convention in the second section of article 33 set exemption from the principle excluding it from non-derogatory norms. Last, there is no binding enforcement mechanism attached to the rules of the convention.[14]

3. EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS COURT

The principle of non-refoulment frequently appears in the case law of regional human rights courts, and these rulings have significantly helped to clarify its scope and content, while also emphasizing its various fundamental aspects.[15] There is no explicit provision setting up the principle of non-refoulment in the ECHR. Nevertheless, the case-law of the European Court of Human Rights ("ECtHR") has interpreted repeatedly, that article 3 declaring prohibition of torture and other forms of illicit treatment implicitly enhances the principle in its scope.[16][17] The El-Masri case declared, that the State's decision to extradite an individual, and indeed the actual act of deportation itself, can potentially give rise to concerns under the article 3. This determination may trigger the responsibility of that State under the ECHR if there are substantial grounds to believe that the person in question would, if expelled or extradited, encounter a real risk of being subjected to treatment that is incompatible with the Convention, in the country to which they are

---

14 Lambert, H., *Protection against Refoulment from Europe: Human Rights Law comes to the rescue*, International and Comparative Law Quarterly, Vol. 48/3, 1999, p. 516.

15 Molnár, T., *The principle of non-refoulment under international law: Its inception and evolution in a nutshell,* Corvinus Journal of International Affairs, Volume I/1, 2017. p. 51-61.

16 Hassanová, R.L., *The Prohibition of Torture and its Implications in the European Legal Sphere,* Central European Journal of Comparative Law. Volume IV. 2023/1. ISSN 2732-0707. p. 51-73.

17 The ECtHR regularly makes distinction between the three parts of the prohibition (from the most sever to the least one): torture, inhuman treatment and degrading treatment. Nevertheless, in asylum matters it does not make any distinction. It declared such approach in the Harkin and Edwards v United Kingdom case from 2012. Therefore, the authors similarly understand the right in this regard as one; Hassanová, R., *The Prohibition of Torture and its Implications in the European Legal Sphere*, Central European Journal of Comparative Law, Vol. IV. 2023/1, 2023, p. 59-60.

being sent. Such circumstances underscore the obligation of states to carefully assess the potential consequences of their actions in order to prevent any violation of the rights protected by the Convention, highlighting the critical importance of safeguarding individuals from harmful treatment in the receiving country.[18]

The principle was already invoked in the famous *Soering case* in 1989, when a German national who committed murder in the USA applied for protection from the possible capital punishment if extradited to the United States. The application established the death row phenomenon, whereas the prisoner suffers from a severe psychological pressure based on the fact that he is for a prolonged period waiting for his death. The claim included evidence of extreme stress and trauma as well as the risk of physical attack and abuse in cells of those who were on the death row. When the ECtHR decided that the extradition would constitute a violation of article 3 it significantly influenced asylum law. Consequently, the principle of non-refoulment would undoubtedly include the protection from severe physical and mental harm of those who face the real risk of it when returned to their country of residence.[19]

A good practices example for triggering the principle is the *Hirsii Jamaa case* later from 2012. The ECtHR in the pertinent situation involved 11 Somali and 13 Eitrean national who had been collective expelled by the Italian authorities. These persons' were captured on the sea and immediately returned to Libya upon a bilateral agreement between the two governments. The ECtHR ruled in favor of the applicants, who claimed that such arbitrary expulsion was not compatible with the article 3 of the ECHR. In addition, protocol 4. of the ECHR declares the prohibition of collective expulsion. Even though the situation was not preventative it presented the obligation of states to consider the situations of the repatriated state and keep in mind the principle of non-refoulment.[20]

The *case of Ilias and Ahmed* further highlights the fundamental role of the principle in safeguarding human rights during migration. The two men, seeking asylum in Hungary, entered from Serbia and tried to claim for protection. However, Hungarian authorities considered Serbia a safe third country and rejected their applications without examining the specific dangers they might face if returned. Instead of assessing the actual risks involved, Hungary expedited their deportation back to Serbia, believing that Serbia would process their asylum claims or accept their return under existing agreements. The applicants contested this, argu-

[18] ECtHR, Case of *El-Masri v Former Yugoslav republic of Macedonia*, Application No. 39630/09, 2012, para. 212.

[19] ECtHR, Case of Soering v United Kingdom, Application No. 14038/88, 1989, para. 105-106.

[20] ECtHR, Case of *Hirsi Jamaa and other v Italy*, Application No. 27765/09, 2012, para. 211.

ing that they faced a real threat of mistreatment in Serbia, especially because that country's asylum system was at the time unable to provide adequate protection. The ECtHR carefully reviewed whether Hungary had met its obligations under the non-refoulement rule. The Court stressed that this prohibition is absolute as individuals cannot be expelled to a country where there is a substantial likelihood they would suffer inhuman or degrading treatment. It noted with concern that Hungary had not sufficiently investigated the applicants' particular circumstances nor obtained credible guarantees from Serbian authorities about their safety.[21] The Court pointed out that relying solely on broad lists of safe third countries or general reports is not enough, each case must be handled with an individual assessment, considering the specific risks the asylum seekers face. Because Hungary fell short of these standards, the Court found a violation of the non-refoulement obligation under the Convention.[22]

Moreover, the landmark *case of M.S.S.* emphasized the vital importance of the principle. The applicant, a Syrian national, arrived in Greece and sought asylum, but due to systemic deficiencies in Greece's asylum procedures and detention conditions, the Court found that Greece was unable to guarantee effective protection against refoulement. When Belgium transferred him under the Dublin Regulation to Greece, the Court concluded that this transfer violated the applicant's rights because Greece's practices at the time risked returning him to a situation of ill-treatment or inaccessibility to fair asylum procedures. The Court emphasized that the de facto risks of illicit treatment or inadequate protection constitute substantial grounds for prohibiting removal, and that States must conduct individual assessments explicitly considering these risks prior to expelling or transferring asylum-seekers.[23]

Further reinforcing the core principle, the Court clarified that the obligation of non-refoulement extends beyond formal legal protections and requires States to ensure, through concrete and individualized evaluations, that asylum-seekers will not be subjected to treatment contrary to article 3 in the country of onward transfer. Relying solely on general reports about systemic deficiencies, without a specific assessment of the individual's circumstances, is insufficient. The Court highlighted that failure to undertake such assessments, especially in the context of recognized systemic abuses and persistent violations in the receiving country, breaches the fundamental protections owed to asylum-seekers. Consequently, the

21 ECtHR, Case of *Ilias and Ahmed v Hungary*, Application No. 47287/15, 2019, para. 128-138.

22 Drinóczi, T.; Mohay, Á., *Has the Migration Crisis Challenged the Concept of the Protection of the Human Rights of Migrants? The Case of Ilias and Ahmed v. Hungary,* in: Kuzelewska, E.; Weatherburn, A.; Kloza, D. (eds),. Irregular Migration as a Challenge for Democracy, 2018, p. 97-112.

23 ECtHR, Case of *M.S.S. v Belgium and Greece,* Application No. 30696/09, 2011, para. 258-260.

Court found that both Greece's and Belgium's acts of transferring the applicant without proper safeguards violated the absolute obligation of non-refoulement, resulting in a violation of article 3.[24]

The scholarly works related to refugee law usually refers to the above-mentioned and similar jurisprudence, which offer light for asylum-seekers. In these cases, as the ECtHR found violation, the protection was achieved through the principle of non-refoulment, hence the refugee status had to be granted. Although, the jurisprudence is wide where ECtHR found violations, the jurisprudence presents also vast amount of cases where the states did not violate and had the possibility to send the applicant to the residence country. We may mention the *Abu Qatada case* decision from 2012, which involves a Jordanian national, who arrived in the United Kingdom in 1993 and after fulfilling the national requirements was granted asylum protection. Nonetheless, later he was detained as he became to be associated with an extremist group. The charges were based on evidence that he was linked to activities that were considered as preparatory to committing terrorist acts.[25] As he posed security threat to the country, the UK government sought to deport him back to Jordan. In 2005, the UK and Jordan signed a memorandum of understanding containing assurances that international human rights standards would be upheld upon his return. The treaty included commitments for regular monitoring visits by an independent body, the Adaleh Centre for Human Rights Studies.[26] Despite the applicant's appeal against deportation being dismissed by domestic courts, concerns were raised about the risk of ill-treatment in Jordan, given reports of widespread torture. The ECtHR assessed the quality of the assurances provided, considering factors such as their specificity, binding nature, and the Jordanian government's track record on human rights. It concluded that both governments had made significant efforts to ensure that Abu Qatada would not face ill-treatment. The Memorandum was detailed, formal, and backed by high-ranking Jordanian officials, considering the strong bilateral relations between the UK and Jordan. Given his high profile, the decision declared that the Jordanian authorities would be particularly cautious to avoid violations of article 3 including prevention of negative repercussions.[27]

The Abu Qatada case proves that when the member state is able to sufficiently argue that the cooperation between the two states regarding the matter is effective and honest the states have possibility to expel a person on the basis of national

[24] *Ibid*, para. 321.

[25] United Kingdom Anti-terrorism, Crime and Security Act. 2001 c. 24, sec. 21, 23, 28, 31.

[26] Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Hashemite Kingdom of Jordan regulating the provision of undertakings in respect of specified persons prior to deportation.11.08.2005.

[27] ECtHR, Case of *Othman (Abu Qatada) v United Kingdom*, App. No. 8139/09, 2012.

security. Certainly, the decision was supported by the overall estimation of the human rights protection in the third country, yet these decisions raise concerns for asylum-seekers. Consequently, even though the protection provided for refugees seems as more extensive than the protection provided by the Refugee Convention, there are still possibilities that the ECtHR will take into account arguments rested upon international relations, such as those in the Abu Qatada case.

The refoulment cases are those which consider future possible actions which are hypothetical and would be considered as violation of human rights. The court acts already preventively and stops countries from performing their rights arising from their sovereignty.[28] Such understanding seems from the legal point of view as extraordinary and odd. However, on the one hand, the preventive approach arises from the heightened level of right which is protected at hand. The prohibition of torture, being a peremptory norm, enjoys absolute nature and states are obliged to abide by it. Indeed, the logical approach would be to demand the obligation from the country where the person is going to be sent. Although the peremptory norm applies everywhere the ECtHR admitted the weakness of these norms by acknowledging that various African and Asian countries do not properly stick to their obligations. Additionally, general international law declares, that the regional framework has no right to establish responsibility of the receiving country. Thus, the ECtHR shifts the responsibility to those countries where the person is actually present.[29] On the other hand, the countries have the obligation to properly investigate the objective and subjective elements of the risk of acts of violation. Thus, if there is no evidence proving real risk of ill-treatment the non-refoulment principle is not triggered and the country is free to expel.

4. THE PRINCIPLE OF NON-REFOULEMENT IN THE LEGAL FRAMEWORK OF THE EUROPEAN UNION AND THE CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

The European Union ("EU"), through its primary law, explicitly commits itself to the observance of international law[30]. Nonetheless, the principle of non-refoule-

---

[28] Suntinger, W., *The Principle of Non-Refoulment: Looking Rather to Geneva than to Strasbourg?,* Austrian Journal of Public and International Law, Vo. 49, 1995, p. 204.

[29] De Weck, F., *Non-refoulment under the European Convention on Human Rights and the UN Convention against Torture,* The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee against Torture under Article 3 CAT. Brill, Nijhoff.Leiden, Boston, 2017, p. 20.

[30] Art. 21 of the Consolidated version of the Treaty on European Union (OJ C 326, 26.10.2012, p. 13–390) (hereafter referred to as „TEU").

ment arises not only from international legal instruments but also constitutes a binding principle within the legal order of the European Union *per se.* At the EU level, its key legal basis can be found in primary law, which stands at the top of the hierarchy of EU *acquis*. In this context, article 78[31] is of particular importance, as it links EU asylum law to the Geneva Convention already at the level of primary law. Similarly, the article 19(2) of the Charter of Fundamental Rights of the European Union ("Charter"), which, following the Lisbon revision, has acquired the status of primary EU law, cannot be omitted. Article 19(2) expressly enshrines the principle of non-refoulement, stating that: „No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."[32] It is important to note that the enshrinement of the non-refoulement principle in primary law triggers its application as a binding standard. In accordance with the general rule of interpretation, whereby norms of lower legal force must be interpreted in conformity with those of higher legal force, principle of non-refoulment must serve as a referential interpretative framework in the interpretation of relevant provisions of secondary EU legislation. The Court of Justice clarifies: „Consideration of the texts which constitute the Common European Asylum System shows that it was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard."[33]

As noted by the European Union Agency for Fundamental Rights, a key procedural safeguard for ensuring compliance with the prohibition of refoulement and collective expulsion lies in the obligation to conduct an individualised assessment of each person's specific circumstances. This must be carried out on a case-by-case basis prior to the adoption of any return or refusal of entry decision. In line with this approach, Member States are required, particularly in the context of transfers to designated return hubs, to verify not only the legal permissibility of transferring an individual to a third country, but also to establish with sufficient clarity that no

---

31 Art. 78 (1) of the TFEU: „The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties." Consolidated version of the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, pp. 47–390) ("TFEU").

32 Art. 19 (2) of the Charter of Fundamental Rights of the European Union

33 Judgment of the Court of 21 December 2011, C- 411/10, *N. S. and Others*, EU:C:2011:865, para. 78.

legal obstacles exist which would prevent the return of the third-country national to their country of origin or habitual residence.[34]

This principle is also affirmed in a number of secondary EU legislative instruments, including Regulation Dublin III[35], the Qualification Directive[36], and others. Notably, Article 5 of the Return Directive directly requires compliance with the principle of non-refoulement.[37] A thorough analysis of the complexities inherent in the legal framework underpinning this principle is essential to properly assess potential breaches of its application.[38]

It is particularly noteworthy that several of these instruments make explicit reference, primarily in their preambles, to key sources of international law, e.g. the Geneva Convention relating to the Status of Refugees. While such preambular references are not, strictly speaking, legally binding,[39] they serve a crucial interpretative function, especially within a teleological interpretation of the relevant legal provisions.[40]

Although the European Convention on Human Rights might be formally external to the EU legal order, this cannot be accepted in a substantive sense. Fundamental rights and general principles of EU law, as recognised in Article 6 TEU, include constitutional traditions common to the Member States,[41] many of which are

---

34 European Union Agency for Fundamental Rights, 2025. Planned return hubs in third countries. Available at:
[https://fra.europa.eu/sk/publication/2025/return-hubs], Accessed 01 April 2025.

35 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ L 180, 29/06/2013, s. 31 – 59) ("Regulation Dublin III").

36 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ L 337, 20.12.2011, s. 9 – 26) ("Qualification Directive").

37 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 24.12.2008, s. 98 – 107) ("Return Directive").

38 Mungianu R. The Principle of Non-Refoulement in the EU Legal Setting. In: Frontex and Non-Refoulement: The International Responsibility of the EU. Cambridge Studies in European Law and Policy. Cambridge University Press; 2016:89-135.

39 Judgment of the Court of 19 November 1998, C-162/97, *Nilsson and Others*, EU:C:1998:554, para. 54.

40 Moravcová, D. 2024. Účinky preambúl medzinárodných zmlúv v úniovom práve (Effects of preambles to international treaties within the EU). In: Právník, Praha (ČR): Akademie věd České republiky, Ústav státu a práva AV ČR, Roč. 163, č. 8 (2024), s. 865-876.

41 Art. 6(3) TEU: „Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

rooted in the human rights standards enshrined in the ECHR. Furthermore, the Charter itself mandates that where a Charter right corresponds to a right guaranteed by the ECHR, such right must be interpreted in accordance with the minimum standard provided by the ECHR. The Court of Justice of the European Union ("CJEU" or "Court of Justice"), fully aware of the foundational role of the ECHR as a central human rights instrument on the European continent, regularly draws on the case-law of the European Court of Human Rights in its own reasoning.[42] In this respect, the jurisprudence of the ECtHR is highly relevant to the interpretation and application of EU law.

Finally, it must be stressed that the exclusive authority to deliver binding interpretations of EU law lies with the CJEU.[43] Through the preliminary ruling procedure established in Article 267 TFEU, the CJEU provides authoritative guidance on the interpretation of EU legal order, thereby ensuring the uniform and effective application of Union law across all Member States. Despite the fact that this principle is enshrined in all the aforementioned sources, and in addition to those, further instruments exist addressing more specific aspects, its application in practice may, notwithstanding the existing jurisprudence of the CJEU and the ECtHR, still pose significant challenges. As some authors point out, in light of increasingly unmanageable migratory pressures, states may in practice resort to a restrictive interpretation of these obligations.[44] Whether such an approach should be subject to reproach is a politico-legal question which, in our view, ought to remain firmly within the legal domain.

In order to grasp selected aspects of the application of the principle of non-refoulement in EU law, we have chosen several cases from the case-law of the Court of Justice, through which we aim to demonstrate how the Court defines and interprets this principle for the purposes of its practical application.

We shall commence with one of the most well-known decisions in this area, *M'Bodji,* selecting only those aspects that are directly relevant to the topic under examination. Mr M'Bodji arrived in Belgium in 2006, and at the time the proceedings were initiated, he was in possession of an open-ended residence permit

---

42 E.g. Judgment of the Court of 20 May 2003, C-465/00, Österreichischer Rundfunk a i., EU:C:2003:294, paras 71,72.

43 Siman, M., Slašťan, M. 2012. Súdny systém Európskej únie. 3. vyd. Bratislava: EUROIURIS, 2012. 786 s. ISBN 978-80-8940-607-4.

44 Saliba, S. 2015. Non-refoulement, push-backs and the EU response to irregular migration. Available at: [https://epthinktank.eu/2015/05/13/non-refoulement-push-backs-and-the-eu-response-to-irregular-migration/], Accessed 01 April 2025.

granted on medical grounds.[45] The case arose primarily in connection with the interpretation of provisions of EU law concerning access to social security and healthcare. Nevertheless, the Court of Justice seized this opportunity to elaborate on several legally significant factual and normative considerations of broader relevance. Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees[46] lays down in Article 15 three categories of serious harm that may justify the granting of subsidiary protection. In this context, the Court engaged in an in-depth interpretation of the terms torture, inhuman, and degrading treatment or punishment in the country of origin. Furthermore, the Court considered the concept of serious harm within the meaning of the Directive, referring explicitly to Article 6, which enumerates the potential actors responsible for such harm. The Court clarified that the relevant conduct must be attributable to a third party and cannot arise merely from general shortcomings in the healthcare infrastructure of the applicant's country of origin.[47] General deficiencies of this kind affect the population at large and, as such, cannot be regarded as giving rise to an individualised risk necessary to trigger protection under Article 15(b) of the Directive.[48]

The Court of Justice further emphasised that this interpretation is also teleological in nature, aligned with the overarching objective of the Directive to complement the protection afforded by the 1951 Geneva Convention by identifying individuals genuinely in need of subsidiary protection. Accordingly, the scope of this protection does not extend to persons who have been granted residence permits in a Member State on other grounds. This interpretation is not in conflict with the Charter, in particular Article 19(2).[49] The Court also addressed relevant case law of the European Court of Human Rights, specifically referencing the judgment in *N. v. the United Kingdom*[50]. It reaffirmed that individuals cannot, as a rule, claim a right to remain in a Member State solely for the purpose of receiving medical treatment. Nonetheless, CJEU acknowledged that, in line with ECtHR jurisprudence, "a decision to remove a foreign national suffering from a serious physical or mental illness to a country where the facilities for the treatment of the illness are inferior to those available in that State may raise an issue under Article 3 ECHR in very exceptional cases, where the humanitarian grounds against removal are

45 Judgment of the Court, 18 December 2014, C-542/13, *M'Bodj*, EU:C:2014:2452, para. 21.

46 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304, 30.9.2004, s. 12 – 23).

47 Judgment of the Court, 18 December 2014, C-542/13, *M'Bodj*, EU:C:2014:2452, para. 35.

48 *Ibid*., para. 36.

49 *Ibid.,* paras. 37,38.

50 ECtHR, judgment in *N. v. the United Kingdom* [GC], no. 26565/05, § 42, ECHR 2008.

compelling."[51] The Court of Justice reached a similar conclusion in the *Abdida* judgment, wherein it further elaborated that, in those highly exceptional circumstances where the removal of a third-country national suffering from a serious illness to a state lacking adequate medical treatment would constitute a breach of the principle of non-refoulement, such removal is impermissible.[52]

Another noteworthy judgment in this context is the *Bevándorlási és Menekültügyi Hivatal (Tompa)* case, in which the Court of Justice interpreted selected provisions of the Asylum Procedures Directive.[53] In addition to addressing a procedural question concerning the availability of remedies, the Court, from our perspective, examined what may initially appear to be a straightforward matter, though not one explicitly resolved by the wording of the relevant provisions, whether under national law an application for international protection may be declared inadmissible solely on the basis that the applicant entered the country via a third country in which they were not exposed to the relevant risks and where an adequate level of protection is guaranteed. The Court ruled that such an interpretation is precluded by Directive, specifically Article 33. [54] It must be emphasised that a contrary interpretation would be entirely unacceptable, as its application could, in principle, exclude from protection all individuals who do not arrive directly from a country where they are at risk. Such an approach would, in effect, shift the burden of international protection exclusively onto states bordering conflict or high-risk regions. The Court further clarified that a third country may only be regarded as a "first country of asylum" if the individual has been formally recognised as a refugee there and enjoys sufficient protection, including compliance with the principle of non-refoulement.[55]

In the *M a i.* judgment, the Court of Justice of the European Union addressed the issue of cumulative protection granted by multiple Member States. The applicants' request for international protection was declared inadmissible in the Netherlands on the grounds that they had already been granted protection in other Member States. The preliminary question referred to the Court concerned whether the Re-

---

51 C-542/13, *M'Bodj*, Judgment of the Court, 18 December 2014, EU:C:2014:2452, para. 39.

52 C-562/13, *Abdida*, Judgment of the Court 18 December 2014, EU:C:2014:2453, para. 48.

53 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (OJ L 180, 29.6.2013, s. 60 – 95).

54 Judgment of the Court of 19 March 2020, C-564/18, *Bevándorlási és Menekültügyi Hivatal (Tompa),* EU:C:2020:218.

55 EDAL, 2020. CJEU: Judgment on the grounds for issuing an admissibility decision and imposition of time-limits in such decisions. Available at: [https://www.asylumlawdatabase.eu/en/content/cjeu-judgment-grounds-issuing-admissibility-decision-and-imposition-time-limits-such], Accessed 01 April 2025.

turn Directive precludes the administrative detention of a third-country national who is unlawfully staying in the territory of a Member State, without a prior return decision, where the purpose of such detention is to enforce the transfer of that person to the Member State that has granted protection, and the individual has refused to comply voluntarily with an invitation to return to that Member State.[56] These procedures of forced transfer do not fall under the common legal framework as such; however, the Court of Justice emphasised that individuals who have been granted refugee status in other Member States cannot be returned to their country of origin. Doing so would constitute a violation of the principle of non-refoulement, a cornerstone of both international and Union law.[57] The Court of Justice held that the relevant Directive does not per se preclude such a procedure. However, it clarified that any forced transfer and detention must fully comply with fundamental rights, in particular the rights enshrined in the ECHR.[58]

Case *Ministero dell'Interno (Brochure commune - Refoulement indirect)* was extremely wide-ranging as it concerned the interpretation of several acts related to the analysis of the policy. The referring courts ask whether Article 3 of the Dublin III Regulation, in conjunction with Article 27 of that regulation and Articles 4, 19, and 47 of the Charter, allow a national court to assess the risk of indirect refoulement when the applicant, after being transferred to the requested Member State, faces a rejected asylum application there, even if that Member State does not have systemic flaws in its asylum procedure or reception conditions. Specifically, the courts inquire whether this is possible when the national court interprets „internal protection" (under Article 8 of the Qualification Directive) differently than the requested Member State, or believes that an armed conflict exists in the applicant's country of origin. In these cases, the referring courts are concerned with the risk of so-called indirect refoulement.[59] It must be assumed that the treatment of applicants for international protection in all Member States adheres to the standards set forth by the Charter, the Geneva Convention and the ECHR. However, it is not entirely improbable that, in practice, a Member State's system may face significant operational issues, leading to a considerable risk that asylum seekers transferred to that Member State could be subjected to treatment that violates their fundamental rights. The Court concluded that the relevant provisions must be interpreted to mean that the court or tribunal of the requesting Member State,

---

56 C-673/19, *M and Others (Transfert vers un État membre)*, Judgment of the Court of 24 February 2021, EU:C:2021:127, para. 27.

57 *Ibid.,* paras 40, 45.

58 *Ibid.,* paras 47,49.

59 C-228/21, *Ministero dell'Interno (Brochure commune - Refoulement indirect),* Judgment of the Court of 30 November 2023, EU:C:2023:934, para. 129.

when reviewing an action contesting a transfer decision, cannot assess whether there is a risk in the requested Member State of breaching the principle of non-refoulement to which the applicant for international protection would be exposed during or after their transfer, unless that court or tribunal determines the existence of systemic deficiencies in the asylum procedure and reception conditions in the requested Member State. Disagreements between the authorities and courts of the requesting and requested Member States regarding the interpretation of the material conditions for international protection do not, by themselves, constitute evidence of such systemic deficiencies.[60]

In the submitted article, we have already referred to the proceedings before the European Court of Human Rights in the case of *M.S.S. v. Belgium and Greece*,[61] which concerned the return of an asylum seeker to Greece. A comparable factual situation was also addressed by the Court of Justice of the European Union, and the intersection of international law and EU law in such cases is undeniable. Accordingly, similar cases may fall within the jurisdiction of both the CJEU and the ECtHR, despite the procedural divergences inherent in their respective mechanisms. In the landmark judgment of *N. S. and Others*, the CJEU considered the situation of an Afghan national who, in the course of his journey to the United Kingdom, transited through Greece and was subsequently returned there under the Dublin II[62] Regulation. This case exemplifies the complex interaction between the European Union's asylum acquis and the standards enshrined in international human rights instruments, particularly where systemic deficiencies in the asylum system of a Member State give rise to potential violations of fundamental rights as protected under the Charter of Fundamental Rights of the European Union. The case concerned joined proceedings involving five applicants with similar factual circumstances, originating from Afghanistan, Iran, and Algeria. Although unrelated to each other, each applicant had transited through Greece, where they were detained for unlawful entry. They subsequently traveled to Ireland and applied for asylum. Three of them failed to disclose their prior presence in Greece, while the remaining two did. The Eurodac system later confirmed that all five had previously entered Greek territory, though none had lodged an asylum claim there. The Common European Asylum System is premised on the full and comprehensive application of the Geneva Convention and its 1967 Protocol, particularly the

60 *Ibid*., paras. 129-142.

61 ECtHR, Case of *M.S.S. v Belgium and Greece*, Application No. 30696/09, 2011, para. 258-260.

62 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 50, 25.2.2003, p. 1–10) ("Regulation Dublin II").

guarantee of non-refoulement and protection from persecution. As reaffirmed by the CJEU[63], this obligation is enshrined in Article 18 of the Charter of Fundamental Rights and Article 78 TFEU. While the system is built on mutual trust that all participating states, both EU and third countries, uphold fundamental rights, the Court has acknowledged that serious deficiencies in individual Member States may endanger asylum seekers' rights, warranting an exception to automatic application of the Dublin mechanism. The CJEU has clarified that systemic deficiencies in the asylum procedure, such as those found in Greece during the *M.S.S. v. Belgium* case, preclude the automatic application of the Dublin mechanism. In such instances, Member States, including their national courts, must refrain from transferring an applicant to the designated responsible Member State under Dublin II, where there are substantial grounds to believe that such transfer would expose the applicant to a real risk of inhuman or degrading treatment contrary to Article 4 of the Charter. Consequently, the presumption that all Member States respect fundamental rights is rebuttable, and the transferring state is obligated either to continue the hierarchy of criteria under Chapter III of the Regulation or to examine the application itself under Article 3(2).[64] In this context, some scholars have criticised the Court for its reluctance to engage fully with the fifth preliminary question, namely whether the protection conferred by the general principles of EU law and the rights enshrined in Articles 1, 18, and 47 of the Charter may, in certain respects, afford broader safeguards than those guaranteed under Article 3 of the ECHR.[65] This omission is seen as a missed opportunity to delineate the potentially autonomous scope of fundamental rights protection within the EU legal order, which, as we have already mentioned, must be at least up to the standard guaranteed by the Convention.

In general, it can be stated that several authors also highlight the disparities in the approaches of individual Member States. As countries are confronted with progressively overwhelming migratory pressures, they frequently resort to a more restrictive interpretation of their international obligations.[66] Goldner Lang and Lang state, that: „member states gradually started to exploit legal uncertainties and they occasionally committed direct breaches of human rights obligations, includ-

63 E.g. C-175/08, *Salahadin Abdulla and Others*, Judgment of the Court of 2 March 2010, EU:C:2010:105.

64 C-411/10, *N. S. and Others,* Judgment of the Court of 21 December 2011, EU:C:2011:865.

65 Buckley, J. 2012. *Case Comment: N.S v Secretary of State for the Home Department (C-411/10).* Available at: [https://eutopialaw.wordpress.com/2012/01/25/case-comment-n-s-v-secretary-of-state-for-the-home-department-c-41110/], Accessed 22 May 2025.

66 Saliba, S., *Non-refoulement, push-backs and the EU response to irregular migration*, 2015, Available at: [https://epthinktank.eu/2015/05/13/non-refoulement-push-backs-and-the-eu-response-to-irregular-migration/], Accessed 01 April 2025.

ing refoulement."[67] From our perspective, this shift in approach arises from the growing challenges associated with managing the influx of migrants and refugees, prompting states to adopt narrower interpretations of their legal commitments in order to mitigate the impact of such pressures on their national systems. Consequently, the application of international legal standards may be subject to reinterpretation in a way that seeks to balance state interests with the practical realities of migration management.

In our perspective, the approach of individual states is also significantly influenced by their experiences with migration flows, as well as whether they are primarily destination countries or merely transit countries through which migrants pass. States that function as primary destinations often face different challenges and may develop policies that reflect a need for greater control over immigration and asylum processes. In contrast, countries that are transit points may focus more on managing the temporary presence of migrants, resulting in a distinct set of legal and procedural responses. These varying roles within the migration route can shape national policies and influence the interpretation and application of international legal obligations.

In this regard, it is essential to point out that this policy is subject to a number of changes, some of which are already on the table. However, PICUM points out in this regard he EU Pact on Migration and Asylum is predicated on the premise that individuals who enter or reside irregularly within the EU and whose asylum claims are unsuccessful should be swiftly returned or deported. They point out that a number of planned amendments, including, for example, the amended Asylum Procedures Regulation or the recast Return Directive[68], build upon this foundation, seeking to institutionalise and operationalise this principle within the EU. These proposals are currently in the final stages of negotiation between the European Parliament and the Council but should the provisions under discussion be approved, they may jeopardize the full application of the principle of non-refoulement.[69]

The final topic addressed in this paper concerns the externalisation of border and migration control, a concept that has gained significant legal and political rel-

---

67 Goldner Lang, I.; Nagy, B., *External Border Control Techniques in the EU as a Challenge to the Principle of Non- Refoulement,* European Constitutional Law Review, 2021, pp. 1-29.

68 In the explanatory memorandum of the Return Directive, it is stated that the effective return of third-country nationals who lack the right to remain in the EU is a crucial element of the European Agenda on Migration.

69 PICUM, *Non-refoulement in the context of the EU Pact on Migration and Asylum*, 2025, Available at: [https://picum.org/blog/non-refoulement-in-the-context-of-the-eu-pact-on-migration-and-asylum/], Accessed 01 April 2025.

evance in recent years, particularly in light of increasing migratory flows, and which refers to the European Union's practice of delegating migration management functions beyond its territorial borders, primarily through agreements with third countries aimed at intercepting or containing migration before individuals reach EU territory. We can refer here to a legal concept aimed at managing and controlling migratory flows through mechanisms which, as noted by certain scholars, may circumvent the application of stricter, and in some cases more protective, legal safeguards in the destination state, from EU perspective Member State. This is achieved by outsourcing migration control to other states or external authorities, rather than by applying such mechanisms through domestic means. Scholars also rightly point out that such practice no longer represents a novelty but has rather become a widespread and systematic approach at both EU and extra-EU global levels.[70] A frequently cited example in this context is the EU-Turkey Statement[71], which, due to its legal effects and nature, became the subject of review by the Court of Justice of the European Union, specifically by the General Court. The EU-Turkey Statement, while aiming to curb irregular migration through returns from Greek islands to Turkey, explicitly affirmed compliance with EU and international law, emphasising that all measures would be taken in accordance with the principle of non-refoulement and that no collective expulsions would occur. In the context of assessing this so-called agreement, the General Court ultimately held that: "independently of whether it constitutes, as maintained by the European Council, the Council and the Commission, a political statement or, on the contrary, as the applicant submits, a measure capable of producing binding legal effects, the EU-Turkey statement…cannot be regarded as a measure adopted by the European Council, or, moreover, by any other institution, body, office or agency of the European Union, or as revealing the existence of such a measure that corresponds to the contested measure. For the sake of completeness, with regard to the reference in the EU-Turkey statement to the fact that 'the EU and [the Republic of] Turkey agreed on … additional action points', the Court considers that, even supposing that an international agreement could have been informally concluded during the meeting of 18 March 2016, which has been denied by the European Council, the Council and the Commission in the present case, that agreement would have been an agreement concluded by the Heads of State or Government of the Member States of the European Union and the Turkish Prime

---

70 Nicolosi, S.F., *Externalisation of Migration Controls: A Taxonomy of Practices and Their Implications in International and European Law,* Netherlands International Law Review, 2024, 71:1–20, [https://doi.org/10.1007/s40802-024-00253-9].

71 Also e.g. Memorandum of Understanding on a strategic and comprehensive partnership between the EU and Tunisia.

Minister."[72] We acknowledge that a range of complex challenges may arise, particularly those that deepen the tension between state security objectives and the protection of fundamental rights of migrants. Indeed, we agree with the scholarly consensus that externalization measures—whereby states seek to manage migration flows beyond their borders—often reflect an intentional strategy to circumvent direct accountability for the treatment of migrants under their jurisdiction. Such measures, while purportedly justified by the imperatives of border control and national security, increasingly prioritize securitization at the expense of legal obligations stemming from international human rights law. This legal-political dynamic raises serious normative concerns, as it becomes increasingly difficult to reconcile these practices with the principle of non-refoulement.[73]

5. CONCLUSION

Specific responsibilities stem from the broader duty to respect and safeguard human rights, with strategies adapted to address the unique protection needs of individuals based on their personal situations. Undocumented migrants and asylum-seekers are especially susceptible to rights violations, often lacking sufficient safeguards. Although states are entitled to take measures against migrants who break laws, they remain obligated to uphold human rights and provide equal protection to all individuals, regardless of their legal status, nationality, race, or gender. When asylum-seekers are unsuccessful in securing residency through national regulations, they look for any possible grounds to ensure their safety. The core protections for refugees are derived from the Refugee Convention, however, this treaty only offers safeguards against persecution based on unjustified reasons. The individual's legal status does influence the scope of protection. But what occurs if a person has no specific personal fear of persecution, yet the circumstances of their return could expose them to a real and imminent risk of torture? In such cases, the principle of non-refoulement, which originates from both UNCAT and the ECHR, serves as a crucial safeguard and can be invoked as a last resort. This principle applies universally to all individuals, meaning that even those considered undesirable or potentially dangerous have a fundamental human right to protection against forcible return.

In scenarios where an individual expresses a reluctance to return to their home country, it is essential for state authorities to conduct a thorough assessment to

---

72 Order of the General Court of 28 February 2017, *NF v European Council*, T-192/16, EU:T:2017:128, paras 71,72.

73 Nicolosi, S.F., Externalisation of Migration Controls: A Taxonomy of Practices and Their Implications in International and European Law, Netherlands International Law Review, 2024, 71:1–20, [https://doi.org/10.1007/s40802-024-00253-9].

confirm that there are no obstacles hindering the individual's safe return to their country of origin. This verification process must be completed before the authorities exercise their power to deport or expel the individual. Ensuring that no obstacles exist is crucial in safeguarding the rights and well-being of the individual prior to any actions taken to facilitate their departure.

In the European framework the states have imposed obligations from the Refugee Convention and the ECHR. The first offer variety of exceptions. As these exceptions are vague the countries abusing the legal gaps have possibilities to extradite even those who fear risk of persecution. Nevertheless, the reasons to protect the national security override the fears of an individual asylum-seeker. In fact, the UN system has its UN High Commissioner for Refugees, which has the right to oversee the treatment of refugees including complaint mechanism. However, the reports of the commissioner have no binding nature. On the other hand the Council of Europe's framework offers an enforcement mechanism. Even though, the system through the ECtHR is definitely more effective and offers great possibilities of protection (including interim measures). The Abu Qatada case presents, that even today, the states may deport persons to questionable countries on the basis of promises.

The application of the non-refoulement principle is typically viewed as an exception, underscoring its critical importance and the fact that these protections are absolute. The case law of ECtHR clarifies that restrictions on the expulsion of foreign nationals do not automatically apply to other rights guaranteed by the ECHR. The Court has noted that the international human rights framework does not require states to suspend all forms of expulsion, especially when an individual can be safely returned to a country that fully respects and protects all fundamental rights and freedoms. Nevertheless, the Court has acknowledged that certain rights, specifically the right to a fair trial under article 6 and the right to liberty and security under article 5, may be applicable beyond territorial borders under limited circumstances. It has also indicated that this scope might be broadened in the future if societal changes demand a different interpretation of the principle.

In this regard, the case law of the European Court of Human Rights and the Court of Justice of the European Union seem to be closely interconnected. Notably, in the case law of the CJEU, we frequently find references to well-known decisions of the ECtHR, as the rights guaranteed by the Convention, as demonstrated in the presented paper, are of indispensable significance even in the application of Union acquis. In several judgments of the CJEU, we have attempted to illustrate that the legal foundation of the principle of non-refoulement is established both in the EU primary law and in acts adopted within the framework of the analysed

policy. However, the implementation and materialization of these formal guarantees in practice presents numerous challenges and questions. Whether these can be resolved by the planned amendments to key regulations within secondary law remains uncertain.

In final section, the article has also opened the chapter on externalisation within the context of the examined topic, drawing attention to the emergence of various forms of what may be termed agreements with third countries. Scholars have expressed concerns regarding the potential erosion of human rights protections in the course of implementing externalisation measures in third states. These concerns are well-founded, as such practices frequently occur in legal and institutional environments with weaker safeguards for fundamental rights. We acknowledge these risks and emphasise that the European Union must, to the greatest extent possible within the bounds of legal competence, ensure that external cooperation frameworks are subject to robust legal oversight and incorporate binding human rights guarantees. This is essential to uphold the Union's foundational values and prevent the displacement of legal responsibility beyond its borders through practices that may otherwise circumvent its normative commitments. We maintain that, notwithstanding the perception that such agreements may be considered as concluded not by the European Union *per se*, but rather by the heads of its Member States, the substantive effects and implementation of these arrangements often operate within the framework of EU law.

Although the principle of non-refoulement as articulated in human rights law is broader in scope than that defined in the Refugee Convention, states have yet to fully recognize and apply the implications of human rights law as a means of international protection. This inconsistency highlights a double standard that fails to account for the reality that, when evaluated against the framework of human rights law, refugee law stands to benefit significantly from the insights and protections offered by the former. It is important to acknowledge that human rights law provides a more comprehensive foundation for ensuring the safety and dignity of individuals facing expulsion, and states should consider integrating these broader protections into their understanding and application of refugee principles. By doing so, they would not only enhance the effectiveness of their legal frameworks but also uphold their obligations to protect vulnerable populations in a more meaningful way.[74]

[74] Costello, C.; Foster, M.; McAdam, J., *The Oxford handbook of international refugee law,* Oxford University Press: New York, 2021, p. 215.

REFERENCES

BOOKS AND ARTICLES

1. Buckley, J. 2012. *Case Comment: N.S v Secretary of State for the Home Department (C-411/10).* Available at: [https://eutopialaw.wordpress.com/2012/01/25/case-comment-n-s-v-secretary-of-state-for-the-home-department-c-41110/], Accessed 22 May 2025
2. De Weck, F., *Non-refoulment under the European Convention on Human Rights and the UN Convention against Torture,* The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee against Torture under Article 3 CAT. Brill, Nijhoff.Leiden, Boston, 2017
3. Drinóczi, T.; Mohay, Á., *Has the Migration Crisis Challenged the Concept of the Protection of the Human Rights of Migrants? The Case of Ilias and Ahmed v. Hungary,* in: Kuzelewska, E.; Weatherburn, A.; Kloza, D. (eds),. Irregular Migration as a Challenge for Democracy, 2018
4. Goldner Lang, I.; Nagy, B., *External Border Control Techniques in the EU as a Challenge to the Principle of Non- Refoulement,* European Constitutional Law Review, 2021, pp.1-29
5. Hassanová, R., *The Prohibition of Torture and its Implications in the European Legal Sphere*, Central European Journal of Comparative Law, Vol. IV. 2023/1, 2023
6. Hassanová, R.L., *The Prohibition of Torture and its Implications in the European Legal Sphere,* Central European Journal of Comparative Law. Volume IV. 2023/1. ISSN 2732-0707
7. Jore, S. H., *Is Resilience a Good Concept in Terrorism Research? A Conceptual Adequacy Analysis of Terrorism Resilience,* Studies in Conflict and Terrorism, Vol. 46/1, 2023
8. Kalin; Caroni; Heim, in: Zimmermann, A. *et al,* The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary, n 5, 2011, p. 1346
9. Lambert, H., *Protection against Refoulment from Europe: Human Rights Law comes to the rescue*, International and Comparative Law Quarterly, Vol. 48/3, 1999
10. Mathew, P., *Constructive refoulement, Research handbook on international refugee law*, in Singh Satvinder, J. (ed), "Research Handbook on International Refugee Law", Edward Elgar Publishing, 2019
11. Molnár, T., *The principle of non-refoulment under international law: Its inception and evolution in a nutshell,* Corvinus Journal of International Affairs, Volume I/1, 2017
12. Moravcová, D., Účinky preambúl medzinárodných zmlúv v úniovom práve (Effects of preambles to international treaties within the EU), Právník, Praha (ČR): Akademie věd České republiky, Ústav státu a práva AV ČR, Roč. 163, č. 8 (2024), s. Pp. 865-876
13. Mungianu R., *The Principle of Non-Refoulement in the EU Legal Setting,* in: Frontex and Non-Refoulement: The International Responsibility of the EU. Cambridge Studies in European Law and Policy. Cambridge University Press; 2016:89-135
14. Nicolosi, S.F., *Externalisation of Migration Controls: A Taxonomy of Practices and Their Implications in International and European Law,* Netherlands International Law Review, 2024, 71:1–20, [https://doi.org/10.1007/s40802-024-00253-9]
15. Nicolosi, S.F., *Externalisation of Migration Controls: A Taxonomy of Practices and Their Implications in International and European Law,* Netherlands International Law Review, 2024, 71:1–20, [https://doi.org/10.1007/s40802-024-00253-9]

16. Rikhof, J. *The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law*, 2012
17. Rikhof, J., *The exclusion clauses in refugee law*, Research handbook on international refugee law, 2019
18. Rodger, J., *Defining the Parameters of the Non-Refoulment Principle*, Research Paper, International Law. Laws 509, 2016; Goodwin-Gill, G.S.; McAdam, J., *The Refugee in International Law*, Oxford University Press, 2007, Chapter V.
19. Saliba, S., *Non-refoulement, push-backs and the EU response to irregular migration*, 2015, Available at: [https://epthinktank.eu/2015/05/13/non-refoulement-push-backs-and-the-eu-response-to-irregular-migration/], Accessed 01 April 2025
20. Siman, M.; Slašťan, M., *Súdny systém Európskej únie. 3. vyd. Bratislava*: EUROIURIS, 2012. 786 s. ISBN 978-80-8940-607-4
21. Suntinger, W., *The Principle of Non-Refoulment: Looking Rather to Geneva than to Strasbourg?,* Austrian Journal of Public and International Law, Vo. 49, 1995
22. Tuitt,P. *False Images: Law's Construction of the Refugee*, Pluto Press 1996

INTERNATIONAL LAW

1. Convention Relating to the Status of Refugees, UNGA resolution 2198 (XXI), 1951
2. Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Hashemite Kingdom of Jordan regulating the provision of undertakings in respect of specified persons prior to deportation.11.08.2005
3. UN Refugge Convention, 1951., [https://www.unhcr.org/about-unhcr/overview/1951-refugee-convention], Accessed 10 April 2025
4. UNHCR, 'Note on Non-Refoulement, Submitted by the High Commissioner, No. EC/SCP/2'23, 1977
5. UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 2007
6. United Kingdom Anti-terrorism, Crime and Security Act. 2001 c. 24, sec. 21, 23, 28, 31

EUROPEAN COURT OF JUSTICE

1. Case of *El-Masri v Former Yugoslav republic of Macedonia*, Application No. 39630/09, 2012
2. Case of *Hirsi Jamaa and other v Italy*, Application No. 27765/09, 2012
3. Case of *Ilias and Ahmed v Hungary*, Application No. 47287/15, 2019
4. Case of *M.S.S. v Belgium and Greece,* Application No. 30696/09, 2011
5. Case of *Othman (Abu Qatada) v United Kingdom*, App. No. 8139/09, 2012
6. Case of Soering v United Kingdom, Application No. 14038/88, 1989
7. ECtHR, judgment in *N. v. the United Kingdom* [GC], no. 26565/05, § 42, ECHR 2008

EU LAW

1. Charter of Fundamental Rights of the European Union
2. European Union Agency for Fundamental Rights, 2025. Planned return hubs in third countries. Available at: [https://fra.europa.eu/sk/publication/2025/return-hubs], Accessed 01 April 2025
3. Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29/06/2013, s. 31 – 59) ("Regulation Dublin III"
4. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ L 337, 20.12.2011, s. 9 – 26) ("Qualification Directive")
5. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 24.12.2008, s. 98 – 107) ("Return Directive").
6. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (OJ L 180, 29.6.2013, s. 60 – 95)
7. Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 50, 25.2.2003, p. 1–10) ("Regulation Dublin II")
8. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304, 30.9.2004, s. 12 – 23)
9. Treaty on European Union (OJ C 326, 26.10.2012, p. 13–390) (hereafter referred to as „TEU")
10. Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, pp. 47–390) ("TFEU")

COURT OF JUSTICE OF THE EUROPEAN UNION

1. C-564/18, *Bevándorlási és Menekültügyi Hivatal (Tompa),* Judgment of the Court of 19 March 2020, EU:C:2020:218
2. C-162/97, *Nilsson and Others*, Judgment of the Court of 19 November 1998, EU:C:1998:554
3. C-465/00, Österreichischer Rundfunk a i., Judgment of the Court of 20 May 2003, EU:C:2003:294
4. C-673/19, *M and Others (Transfert vers un État membre)*, Judgment of the Court of 24 February 2021, EU:C:2021:127

5. C-228/21, *Ministero dell'Interno (Brochure commune - Refoulement indirect),* Judgment of the Court of 30 November 2023, EU:C:2023:934
6. T-192/16, *NF v European Council*, Order of the General Court of 28 February 2017, EU:T:2017:128
7. C-175/08, *Salahadin Abdulla and Others*, Judgment of the Court of 2 March 2010, EU:C:2010:105
8. C-542/13, *M'Bodj*, Judgment of the Court, 18 December 2014, EU:C:2014:2452
9. C-562/13, *Abdida*, Judgment of the Court 18 December 2014, EU:C:2014:2453
10. C- 411/10, *N. S. and Others*, Judgment of the Court of 21 December 2011, EU:C:2011:865
11. C-411/10, *N. S. and Others,* Judgment of the Court of 21 December 2011, EU:C:2011:865

WEBSITE REFERENCES

1. EDAL, 2020. CJEU: Judgment on the grounds for issuing an admissibility decision and imposition of time-limits in such decisions. Available at: [https://www.asylumlawdatabase.eu/en/content/cjeu-judgment-grounds-issuing-admissibility-decision-and-imposition-time-limits-such], Accessed 01 April 2025
2. PICUM, *Non-refoulement in the context of the EU Pact on Migration and Asylum*, 2025, Available at: [https://picum.org/blog/non-refoulement-in-the-context-of-the-eu-pact-on-migration-and-asylum/], Accessed 01 April 2025

Review article

THE ROLE OF EUROPEAN CULTURAL CSOS IN FOSTERING THE EU'S EXTERNAL CULTURAL RELATIONS

Jeronim Dorotić, PhD, Assistant Professor
Catholic University of Croatia
Ilica 244, 10000 Zagreb, Croatia
jeronim.dorotic@unicath.hr

ABSTRACT

The main aim of this paper is to explore the role of the European cultural civil society organizations (CSOs) in fostering the EU's external cultural relations. This paper is obtained in the following way. Firstly, the important role culture plays in contemporary international relations is conceptualized as well as the key concepts such as soft power, cultural diplomacy and international cultural relations are outlined. Secondly, the EU's external cultural relations are articulated as an emerging cross-sectoral policy field which is extending between the EU's cultural and external policies. Lastly, the role of the European cultural CSOs in fostering the EU's external cultural relations is assessed in three following steps: firstly, by conceptualizing civil society organizations from general towards the EU's perspective; secondly, by identifying the significance of involving the CSOs within the EU's policy framework for external cultural relations; and thirdly, by providing review and analysis of European cultural CSOs' actions in the field of the EU's external cultural relations. Considering that culture represents an important component of contemporary international relations, this paper indicates that within the EU context cultural CSOs play an increasingly significant role in fostering further development of more comprehensive EU's policy framework for external cultural relations.

Keywords: *civil society organizations (CSOs), European Union, EU cultural policy, EU external policy, international cultural relations*

1. INTRODUCTORY REMARKS: INTERSECTING CULTURE, FOREIGN RELATIONS AND CIVIL SOCIETY IN THE EU CONTEXT

Ever since the political phase of the European integration was completed by the Maastricht Treaty (TEU)[1] in 1992, the Union has been searching more intensively

[1] Treaty on European Union, 7 February 1992, (OJ C 191, 29.7.1992, pp. 1-112) (TEU, Maastricht Treaty).

for both internal and external legitimacy that would guarantee its further development. In this respect, it is interesting to notice the more intensive engagement of the EU decision-makers from that time onwards in three related fields - namely, in the fields of culture, foreign relations and civil society. Speaking firstly about the culture, it can be noted that it explicitly entered the primary legal framework of the Union within the Maastricht Treaty in 1992, after which the EU cultural policy gradually evolved through numerous initiatives supplementing the actions of the Member States in the field of culture.[2] Likewise, the EU's Common Foreign and Security Policy (CFSP) also emerged by the Maastricht Treaty, that is, as a "second pillar" within the framework of the Union's "three pillar structure"[3] with broadly defined objectives aiming, in general, to promote peace, security, prosperity and democratic values globally via intergovernmental cooperation at the EU level.[4] Accordingly, and with the intention of overcoming the problems of democratic deficit and governance within the EU, the gradual intensification of the Union's relations with civil society actors in the period just before the Maastricht Treaty entered into force is also evident by the EU's initiatives such as Commission's Communication on Open and Structured Dialogue between the Commission and Special Interest Groups[5] (1992), which ultimately resulted in acknowledging the importance of civil society for the European integration process in the Article 11 (TEU) and in the Article 15 (TFEU) of the Lisbon Treaty (2007).[6] Apparently, this brief overview of the emergence of cultural and external policy fields within the EU legislative framework points to the legal basis upon which the EU's external cultural relations evolved as a cross-sectoral policy field. Nonetheless, it can also be asserted that gradual intensification of the Union's relations with civil society is likewise reflected in the context of the evolving EU's external cultural relations, especially after the adoption of the Commission's Communica-

---

2 TEU, Maastricht Treaty, Article 128. Culture was initially introduced within the primary EU legal framework within the ex - Article 128 of the Treaty on the European Union (TEU, Maastricht Treaty) in 1992, which was later renumbered in current Article 167 TFEU (Lisbon) in 2007.

3 Cini, M.; Pérez-Solórzano Borragán, N., *European Union Politics*, (4th edition), Oxford University Press, 2013, p. 29-31. The "three pillar structure" of the Union introduced by the Maastricht Treaty was eventually surpassed by the Lisbon Treaty in 2007. Nonetheless, the first pillar referred to the original European Communities (i.e. EC, ECSC and EAEC), the second pillar to Common Foreign and Security Policy (CFSP) and the third pillar to Justice and Home Affairs (JHA). Also, in general, the first pillar operated under so-called "Community method", whereas second (CFSP) and third (JHA) pillars under intergovernmental cooperation.

4 TEU, Maastricht Treaty, Article J.1., *op. cit.,* note 2.

5 Communication from the Commission, An Open and Structured Dialogue between the Commission and Special Interest Groups, December 1992, SEC (92) 2272 final.

6 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007.

tion on a European Agenda for Culture in Globalizing World in 2007;[7] therefore, indicating that this emerging policy field is characterized by the involvement of civil society actors in its development.

In line with these remarks, the main aim of this paper is to explore the role of the European cultural civil society organizations (CSOs) in fostering the EU's external cultural relations. Accordingly, to reach relevant findings qualitative methodology will be applied to this inquiry by relying upon primary (i.e. content analysis of the EU's legislation and key documents) and secondary sources (i.e. relevant literature and web sources). More precisely, this paper will be obtained in the following way. Firstly, it will be necessary to conceptualize the important role culture plays in contemporary international relations as well as to articulate the key concepts such as soft power, cultural diplomacy and international cultural relations. Secondly, the EU's external cultural relations will be articulated as an emerging cross-sectoral policy field which is extending between the EU's cultural and relevant external policies. Lastly, it will be needed to assess the role of the European cultural CSOs in fostering the EU's external cultural relations in three following steps: firstly, by conceptualizing civil society organizations from general towards the EU's perspective; secondly, by identifying the significance of involving the CSOs within the EU's policy framework for external cultural relations; and thirdly, by providing review and analysis of European cultural CSOs' actions in the field of the EU's external cultural relations. Accordingly, by analyzing the actions of the representative European cultural CSOs (i.e. European Cultural Foundation (ECF), Culture Action Europe (CAE) and Culture Solutions Europe (culture Solutions)), indicative insights will be provided regarding their contributions to foster further development of the EU's policy framework for external cultural relations. The conclusion will reflect upon the main results of this inquiry.

2. CULTURE AS IMPORTANT COMPONENT OF INTERNATIONAL RELATIONS: FROM GENERAL CONCEPTUALIZATIONS TOWARDS EU PERSPECTIVE

2.1. Culture as a source of soft power

The important role culture plays in the sphere of international relations has gained increasing academic attention ever since American political scientist Joseph Nye popularized the concept of 'soft power' in 1990.[8] Since then, this analytical con-

[7] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European agenda for culture in a globalizing world (COM (2007) 242 final) (European agenda for culture in a globalizing world).

[8] Nye, J. S. Jr., *Bound to Lead: The Changing Nature of American Power*. Basic Books: New York, 1990.

cept characterized by "slightly oxymoronic resonance" has been used in various contexts, but as Nye himself concluded almost 30 years after he coined the term - "it has taken particular root in international relations, and as the European Union developed, more European leaders began to refer to its soft power" while "the term was less used, however, by American political leaders."[9] Therefore, and prior to consider complementary notions of 'cultural diplomacy' and 'international cultural relations' in the context of conceptualizing cultural dimension in global affairs, it is first necessary to provide basic insights by referring to Nye who acknowledges that culture represents an important source of what he articulated as soft power in the context of world politics. Accordingly, to define soft power Nye firstly defines power in simple terms as "the ability to affect others to obtain the outcomes you want" as well as he further explains that three main ways this could be achieved are through "threats of coercion ("sticks"), inducements and payments ("carrots"), and attraction that makes others want what you want."[10] With regards to the last mentioned way directed towards achieving desired outcomes by attraction Nye refers to soft power which according to his views "rests on the ability to shape the preferences of others."[11] Moreover, as a main three sources of one country's soft power in the global affairs he distinguishes "its culture (in places where it is attractive to others), its political values (when it lives up to them at home and abroad), and its foreign policies (when they are seen as legitimate and having moral authority)."[12] In line with these thoughts Nye further differentiates soft from the hard power. Thus, according to his views hard power implies "the use of force, payment, and some agenda setting based on them" while soft power entails "agenda-setting that is regarded as legitimate by the target."[13] Nevertheless, Nye also argues that soft power "like any form of power (…) can be wielded for good or bad purposes."[14] This, however, is not surprising since besides states soft power is also being used by various actors in international relations such as "corporations, institutions, NGOs, and transnational terrorist networks" including "even individual celebrities."[15] Likewise, regarding the outcomes of soft power Nye highlights several problems, including greater control by the target party towards which soft power is directed; then, a longer time it takes for the results of applying soft power

---

9 Nye, J. S., Jr., Soft power: the origins and political progress of a concept. *Palgrave Communications*. 3:17008 doi: 10.1057/palcomms.2017.8., 2017, p. 2.

10 Nye, J. S., Jr., Public Diplomacy and Soft Power. *The Annals of the American Academy of Political and Social Science, 616*, pp. 94-109., 2008, (Nye, Public Diplomacy and Soft Power), p. 94.

11 *Ibid.*, p. 95.

12 *Ibid.*, p. 96.

13 Nye, J. S., Jr., *The Future of Power*. New York: PublicAffaires, 2011, (Nye, The Future of Power), p. 20.

14 *Ibid.*, p. 81.

15 *Ibid.*, p. 83.

to become visible; and the fact that the instruments of soft power are not entirely in the hands of governments who are controlling policy, but also in the hands of civil societies since they are embedding culture and values.[16] Furthermore, in the context of the application of soft power Nye highlights the importance of credibility as opposed to the manipulation and propaganda that governments sometimes use.[17] However, despite of its obvious impact, Nye also argues that importance of soft power should not be exaggerated,[18] as well as he claims that regardless of its insufficiencies, soft power is a form of power that in this century "marked by global information and the diffusion of power to non-state actors (…) will become an increasingly important part of smart power strategies."[19] Speaking of smart power it is important to add that Nye developed this term in 2004 as an attempt to explain that soft power is not sufficient for creating an effective foreign policy. In other words, Nye describes smart power "as the ability to combine hard and soft power resources into effective strategies."[20] Finally, when referring to culture - besides political values and foreign policies - as potentially important source of soft power, Nye provides several complementary explanations. In one of such references Nye refers to culture as "the set of practices that create meaning for a society" with "many manifestations" that can be differentiated "between high culture such as literature, art, and education, which appeals to elites; and popular culture, which focuses on mass entertainment."[21] Also, in a yet another reference, Nye articulates culture as "the pattern of social behaviors by which groups transmit knowledge and values" and which "exists at multiple levels."[22] In this context he asserts that "some aspects of human culture are universal, some are national, and others are particular to social class or small groups" as well as he adds that "culture is never static", which implies that "different cultures interact in different ways."[23] Consequently, even though Nye argues that "more research needs to be done on the connection between culture and power behavior",[24] nonetheless, he also accentuates the importance of "direct cultural contacts" as an example of how culture can be used as a positive source of soft power.[25]

---

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*, pp. 83-84.

19 *Ibid.*, p. 84.

20 *Ibid.*, pp. 22-23.

21 Nye, Public Diplomacy and Soft Power, *op. cit.*, note 10, p. 96.

22 Nye, The Future of Power, *op. cit.*, note 13, p. 84.

23 *Ibid*.

24 *Ibid.*

25 *Ibid.*, p. 85.

2.2. From public diplomacy towards cultural diplomacy

In line with presented contours of the soft power concept it is also needed to reflect upon its complementary and inevitably interconnected concepts of cultural diplomacy and international cultural relations to provide broader conceptual insights regarding the role of culture in contemporary international relations. Nonetheless, to conceptualize cultural diplomacy, it is first important to point at the relationship between public diplomacy and soft power, since according to Nye soft power resources are being managed through public diplomacy. In other words, by arguing that soft power resources "arise in large part from the values an organization or country expresses in its culture, in the examples it sets by its internal practices and policies, and in the way it handles its relations with others", Nye further clarifies that "[P]ublic diplomacy is an instrument that governments use to mobilize these resources to communicate with and attract the publics of other countries, rather then merely their governments."[26] Accordingly, from this perspective it appears that cultural diplomacy represents a sub-field of public diplomacy which is focused on cultural aspects of international relations between countries. However, this is just one of many views on cultural diplomacy, which as a concept predates soft power conceptualization, but still lacks conceptual clarity.[27] In this regard, and with an aim to narrow down wide range of conceptualizations, it appears appropriate to refer firstly to one of frequently cited definitions[28] on the subject matter according to Cummings who views cultural diplomacy as "the exchange of ideas, information, art, and other aspects of culture among nations and their peoples in order to foster mutual understanding."[29] This conceptualization, however, implies that cultural diplomacy is state-driven, and therefore, as Schneider acknowledges by referring to the same definition - cultural diplomacy "provides much of the content of public diplomacy" and as such can be viewed as "a prime example of "soft power"."[30] Correspondingly, in the context of

---

26 Nye, Public Diplomacy and Soft Power, *op. cit.*, note 10, p. 95.

27 See: Grincheva, N., *The past and future of cultural diplomacy*, International Journal of Cultural Policy, 30:2, 172-191, DOI: 10.1080/10286632.2023.2183949, 2024, pp. 172-173. Accordingly, in the corresponding article Grincheva provides overview of the development of academic field focused on cultural diplomacy through evolving academic literature on the subject matter since the term was firstly defined in 1959.

28 See: Unesco.org. *Cutting Edge | From standing out to reaching out: cultural diplomacy for sustainable development*, [https://www.unesco.org/en/articles/cutting-edge-standing-out-reaching-out-cultural-diplomacy-sustainable-development], Accessed 15 March 2025 (Unesco.org.). For example, it is interesting to notice that UNESCO on one of its official web pages devoted to cultural diplomacy is also referring to corresponding definition of cultural diplomacy articulated by Cummings.

29 Cummings, M. C., Jr., *Cultural Diplomacy and the United States Government: A Survey,* Washington D.C: Center for Arts and Culture, 2003, p. 1.

30 Schneider, C.P., *Cultural Diplomacy: The Humanizing Factor,* In: Singh, J.P. (eds*), International Cultural Policies and Power,* International Political Economy Series. Palgrave Macmillan, London. https://doi.org/10.1057/9780230278011_9, 2010, pp. 101-102.

articulating the position of cultural diplomacy in American foreign policy in the post 9/11 era, Schneider views cultural diplomacy as a potent humanizing factor in international relations because "creative expression has the potential to increase understanding and respect between disparate cultures and peoples" which "is not a trivial concern", since "the reverse produces catastrophic results."[31] Furthermore, and among many, yet another complementary perspective on cultural diplomacy is provided by Zamorano in the context of his critical analysis concerning the instrumentalization of cultural diplomacy under the soft power theory. Namely, after delivering several definitions of cultural diplomacy according to various authors, Zamorano assumes that "[C]ultural diplomacy involves the systematic intervention of governments in the arts, sciences, and other cultural expressions as the basis of an official categorization of national identity."[32] Nonetheless, he also asserts that apart from governments in the contemporary international context "cultural diplomacy is characterized by the multiplication of its intervenient agents at different scales and levels and by the growing importance of supra-national organizations."[33] In this regard, and as a prelude to conceptualization of international cultural relations, two prominent supranational organizations active in the field of cultural diplomacy can be single out - namely, the UNESCO, which views itself as "a global platform for cultural diplomacy";[34] and the European Union, which aspires to be "committed to promoting Europe's diverse culture in its international relations."[35] Nonetheless, even though UNESCO is not in the focus of this inquiry, it should be noted here that its main legally binding international instrument in the field of cultural diplomacy and international cultural relations refers to the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.[36] Likewise, in the context of this paper it is important to note that the EU adopted corresponding Convention in 2006.[37]

---

31 *Ibid.*, p. 101.

32 Zamorano, M. M., *Reframing Cultural Diplomacy: The Instrumentalization of Culture Under the Soft Power Theory*, Culture Unbound 8 (2): 165–186. doi:10.3384/cu.2000.1525.1608165., 2016, p. 169.

33 *Ibid.*

34 Unesco.org., *op. cit.*, note 28.

35 Culture.ec.europa.eu. *International cultural relations*, [https://culture.ec.europa.eu/policies/international-cultural-relations], Accessed 15 March 2025.

36 Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005, entered into force 18 March 2007) UNESCO Doc CLT-2005/CONVENTION DIVERSITY-CULT REV.

37 Ec.europa.eu. FAQ: UNESCO Convention on Cultural Diversity – a new instrument of international governance, [https://ec.europa.eu/commission/presscorner/detail/en/memo_06_500], Accessed 15 March 2025.

2.3. From cultural diplomacy towards international cultural relations in the EU context

In order to articulate international cultural relations, it is firstly needed to point at the conceptual modification of cultural diplomacy beyond being perceived merely as a state-driven instrument of soft power, which is apparently echoed in the current EU approach to external cultural relations. Namely, in the EU context this became especially evident since the Joint Communication titled Towards an EU strategy for international cultural relations was adopted in 2016, according to which the EU expressed its "commitment to both promoting 'international cultural relations', through the support and assistance the EU provides to third countries, and supporting the promotion of the Union and the diverse cultures of EU Member States through 'cultural diplomacy.'"[38] In other words, the EU approach towards new modes of cultural diplomacy can be more clearly illustrated by referring to Triandafyllidou and Szucs - who in a Policy Brief devoted to the EU cultural diplomacy after the corresponding Joint Communication was adopted - differentiate between "more traditional" and "more self-reflexive" definitions of cultural diplomacy. Specifically, the first "more traditional" definition implies that "cultural diplomacy is a soft power tool through which states and/or international organisations pursue foreign policy objectives", whereas the second "more self-reflexive" definition "conceives it as a policy area on its own right, which promotes quality of life, the arts, joint capacity building, economic growth and social cohesion by engaging citizens, both as producers and consumers of cultural activities."[39] Notably, in a light of provided definitions authors further indicate the intentions of evolving international cultural relations in the context of cultural diplomacy by emphasizing that: "[W]ithin the cultural diplomacy domain, an organic development of international cultural relations aims at engaging national governments, international and regional organisations as well as civil society actors into a constructive dialogue based on equality and mutual respect, over and beyond socio-economic and power inequalities between the different countries and actors involved."[40] Accordingly, and based on these conceptual clarifications, Triandafyllidou and Szucs are highlighting that "[T]he new cultural diplomacy model embraced by the EU combines elements of both definitions" as

---

38 Joint Communication to the European Parliament and the Council, Towards an EU strategy for international cultural relations (JOIN/2016/029 final) (Towards an EU strategy for international cultural relations).

39 Triandafyllidou, A. and Szucs, T., *EU cultural diplomacy: challenges and opportunities*, Policy Briefs, 2017/13, Global Governance Programme, Cultural Pluralism - https://hdl.handle.net/1814/46904, 2017, p. 2.

40 *Ibid.*

well as it "responds both to pragmatic and altruistic motives at the same time."[41] However, and in line with these reflections, it is interesting to notice that provided "self-reflexive" definition of cultural diplomacy largely corresponds with an idea of international cultural relations. In this regard it is appropriate to refer to Higgott who in order to provide analysis of the role of culture in the EU's external relations conceptually distinguishes cultural diplomacy (i.e. CD) from international cultural relations (i.e. ICR) by claiming that: "CD relies on the mobilization of culture to activate soft power while ICR tries to foster culture to build consensus and a common knowledge on the international stage based on argumentation."[42] In other words, according to his view cultural diplomacy "can be seen as part of wider public diplomacy and strategic communications as the key to a state's soft power effort", whereas cultural relations "do not aim to mobilise soft power and do not pursue strategic interests other than those of the internationalisation agendas of the individual stakeholders involved."[43] Therefore, according to Higgott this differentiation between cultural diplomacy (i.e. CD) and international cultural relations (i.e. ICR) corresponds to two different, but coexisting approaches to culture in the EU's external relations.[44] Nonetheless, he concludes that cultural diplomacy (i.e. CD) approach "is more aligned with contemporary realist trends than ICR and therefore has a better chance of surviving."[45]

3. OUTLINING THE EU'S POLICY FRAMEWORK FOR EXTERNAL CULTURAL RELATIONS

3.1. The EU's external cultural relations in the context of the EU's primary legislation and beyond

The EU's actions in the field of external cultural relations have been gradually evolving through both primary and subsequent EU legal acts mostly in the fields of the Union's cultural and relevant external policies and instruments, therefore, outlining the current contours of its more comprehensive, but still evolving policy framework. Accordingly, the primary legal basis for the EU's external actions in the field of its cultural policy is rooted in the Article 167 TFEU (Lisbon), which besides defining Union's internal actions[46] guided by the principle of subsidiar-

---

41 *Ibid.*

42 Higgott, R., *The Role of Culture in EU Foreign Policy: Between International Cultural Relations and Cultural Diplomacy, Økonomi* & Politik, bd. 94, nr. 4, april 2022, p. 103.

43 *Ibid.*, p. 105.

44 *Ibid.,* pp. 102-103, 108.

45 *Ibid.*, p. 112.

46 See: Article 167(1)(2)(4) TFEU (Lisbon).

ity, also specifies its intention to provide supportive activities in the cultural field externally by emphasizing that "[T]he Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture."[47] In addition, the Article 6 TFEU (Lisbon) also indicates that among other specified policy areas, the Union has competences to pursue supporting actions to its Member States in the field of culture, which besides internal, as well implies external cultural actions.[48] However, even though there is no explicit reference to culture within the General Provisions on the Union's External Action and Specific Provisions on the Common Foreign and Security Policy of the Lisbon Treaty (TEU, Title V); still, it can be asserted that from broader perspective the Article 21 TEU (Lisbon) implicitly - and among various forms of international cooperation - also encompasses cultural cooperation, and therefore, is linked to the EU's external actions, including CFSP.[49] More precisely, corresponding Article 21 TEU (Lisbon) emphasizes Union's intention to pursue "a high degree of cooperation in all fields of international relations" with several aims including the objective to "foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty" which, likewise, may imply international cultural cooperations.[50]

Accordingly, in the broader context of further explicating the Union's intent to consider cultural aspects in other policy fields including its external policies, it is needed again to refer to Article 167 TFEU (Lisbon) which indicates that "[T]he Union shall take cultural aspects into account in its action under other provisions of the Treaties."[51] Moreover, in order to provide a comprehensive, but due to the limited format of this paper - still concise overview of the primary legal framework which enables integration of cultural aspects within relevant EU's external policies and instruments, it is important to add that such legal provisions are also inherent to the EU's international development and cooperation policy,[52] its neighborhood[53] and enlargement[54] policies, including the propositions concerning the role of the Union's Delegations in third countries and at international organizations.[55] Lastly, in this context it is also important to add that the EU's external cultural

47 Article 167(3) TFEU (Lisbon).

48 See: Article 6 TFEU (Lisbon).

49 See: Article 21(2) TEU (Lisbon).

50 Article 21(2)(d) TEU (Lisbon).

51 Article 167(4) TFEU (Lisbon).

52 See: Articles 208-211 TFEU (Lisbon).

53 See: Article 8 TEU (Lisbon).

54 See: Article 49 TEU (Lisbon).

55 See: Article 221 TFEU (Lisbon).

actions are aiming to be promoted mostly through already existing instruments in the fields of the Union's cultural (e.g. through the Creative Europe Programme) and relevant external policies (e.g. through Instrument for Pre-Accession Assistance (IPA) within the EU's enlargement policy or through the European Neighborhood Instrument (ENI) within the EU's neighborhood policy).[56]

3.2. Approaching the EU's policy framework for external cultural relations

In line with provided insights, the EU's policy framework for external cultural relations has been gaining more comprehensive contours by the Union's and Member States' subsequent initiatives since the first decades of the 2000s. Namely, this manifested noticeably within the Commission's Communication on a European agenda for culture in a globalizing world adopted in 2007, which as pivotal document in shaping further development of the EU's cultural policy, among its three main objectives explicitly included "promotion of culture as a vital element in the Union's international relations."[57] However, it is important to note that already in 2006 a group of prominent Member States' cultural institutes[58] have established the European Union National Institutes for Culture (EUNIC) which embodies "the European network of organisations engaging in cultural relations."[59] Accordingly, since then, EUNIC represents important stakeholder in fostering development of the EU's external cultural relations as a platform which "advocates a prominent role of culture in international relations and is a strategic partner of the EU, actively involved in the further definition of European cultural policy."[60] Nonetheless, after the adoption of aforementioned European agenda for culture in a globalizing world, what followed was a series of Union's soft law initiatives (e.g. conclusions, resolutions, reports, strategies) which incrementally formed the current policy framework for the EU's external cultural relations.

---

56 See: Towards an EU strategy for international cultural relations, *op. cit.*, note 38, pp. 5-6.

57 European agenda for culture in a globalizing world, *op. cit.*, note 7, p. 8. Namely, three objectives of this document refer firstly to "promotion of cultural diversity and intercultural dialogue"; secondly to "promotion of culture as a catalyst for creativity in the framework of the Lisbon Strategy for growth and jobs"; and thirdly to "promotion of culture as a vital element in the Union's international relations."

58 EUNIC was established by six following Member States' cultural institutes: Austrian Ministry of Foreign Affairs, British Council, Danish Cultural Institute, Goethe-Institut, Institut français and SICA (the predecessor of DutchCulture).

59 Eunicglobal.eu. European Union National Institutes for Culture, [https://www.eunicglobal.eu/about], Accessed 20 March 2025.

60 *Ibid.*

In this regard, it is adequate to chronologically first single out the Council's Conclusions on the Promotion of cultural diversity and intercultural dialogue in the external relations of the Union and its Member States adopted in 2008, which was aiming at the EU level towards "strengthening the place and the role of culture in the policies and programmes conducted within the framework of external relations and promoting cooperation with third countries and international organisations with responsibility in the field of culture."[61] Nevertheless, in the context of providing insights regarding the important stakeholders involved in development of the EU's policy framework for external cultural relations, it is important to signify that in 2010 was established the European External Action Service (EEAS) under the provisions of Lisbon Treaty;[62] as unifying EU's diplomatic service led by the High Representative of the Union for Foreign Affairs and Security Policy.[63] Namely, the significance of the EEAS reflects in its increasingly pivotal role in fostering development of the EU's external cultural relations in partnership with the European Commission and the EUNIC which is "[A]t the heart of EU international cultural relations."[64] Subsequently, the significance of this partnership was reflected already in Resolution on the cultural dimensions of the EU's external actions adopted in 2011, in which the European Parliament called "on the EEAS and the Commission to coordinate the strategic deployment of the cultural aspects of external policy" as well as it encouraged "the EEAS, when developing its resources and competences in the cultural sphere, to cooperate with networks such as EUNIC."[65] Nonetheless, it is important to add that within the corresponding document the European Parliament explicitly expressed its position regarding the important role of culture in the EU's external relations by stating that it „[U]nderlines the cross-cutting nature and the importance of culture in all aspects of life, and believes that culture needs to be taken into consideration in all EU external policies, in line with Article 167(4) TFEU."[66]

---

61 Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the promotion of cultural diversity and intercultural dialogue in the external relations of the Union and its Member States, (OJ C 320, 16.12.2008, p. 10–12) (Conclusions on the promotion of cultural diversity and intercultural dialogue), p. 10.

62 See: Article 27 TEU (Lisbon).

63 Eeas.europe.eu. About the European External Action Service, [https://www.eeas.europa.eu/eeas/about-european-external-action-service_en], Accessed 20 March 2025.

64 Eeas.europe.eu. Culture – Implementing EU international cultural relations, [https://www.eeas.europa.eu/eeas/culture-%E2%80%93-implementing-eu-international-cultural-relations_en], Accessed 20 March 2025 (Eeas.europe.eu.).

65 European Parliament resolution of 12 May 2011 on the cultural dimensions of the EU's external actions (2010/2161(INI)) (European Parliament resolution on the cultural dimensions).

66 *Ibid.*

Furthermore, in 2014 the European Commission published a report titled Preparatory action 'Culture in external relations': engaging the world: towards global cultural citizenship, as a product of inquiry conducted by several prominent European cultural organizations.[67] In general, this report has made significant impact on the further development of the EU's external cultural relations since it "has uncovered a very considerable potential for culture in Europe's international relations and has also explored the ways in which culture and cultural expression have been deployed already by European actors in multiple relationships with their counterparts elsewhere."[68] Moreover, in 2015 the Council of the European Union has adopted Conclusions on culture in the EU's external relations with a focus on culture in development cooperation as yet another important EU initiative in framing its external cultural relations based on the Councils' view "that culture needs to form part of a strategic and cross-cutting approach to the Union's external relations and development cooperation given its substantial capacity to reinforce these policies by contributing to the building of long-term relationships based on people-to-people exchange, mutual understanding, trust and credibility."[69]

3.3. Further steps towards more comprehensive EU's policy framework for external cultural relations

Eventually, the above-presented actions have led towards previously mentioned Joint Communication Towards an EU strategy for international cultural relations[70] in 2016, by which the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy provided a more comprehensive policy framework for the EU' external cultural relations. In other words, the Joint Communication is based on several guiding principles (i.e. to promote cultural diversity and respect for human rights, to foster mutual respect and inter-cultural dialogue, to ensure respect for complementarity and subsidiarity, to encourage a cross-cutting approach to culture, and to promote culture through existing frameworks for cooperation);[71] as well as it is proposing three work streams to advance international

---

67 The European Commission entrusted the Preparatory Action to the following organizations which were led by the Goethe Institute: the British Council, the European Cultural Foundation, the Danish Cultural Institute, the Institut français, the ifa (Institut für Auslandsbeziehungen), KEA European Affairs and BOZAR (Centre for Fine Arts, Brussels).

68 European Commission, Directorate-General for Education, Youth, Sport and Culture, *Preparatory action 'Culture in external relations': engaging the world: towards global cultural citizenship*. Publications Office, 2014. (Preparatory action 'Culture in external relations') p. 7.

69 Council Conclusions on culture in the EU's external relations with a focus on culture in development cooperation, (OJ C 417, 15.12.2015, p. 41–43) (Conclusions on culture in the EU's external relations), p. 41.

70 Towards an EU strategy for international cultural relations, *op. cit.*, note 38.

71 *Ibid.*, pp. 3-7.

cultural relations with partner countries (i.e. supporting culture as an engine for sustainable social and economic development, promoting culture and intercultural dialogue for peaceful inter-community relations, and reinforcing cooperation on cultural heritage);[72] and it provides a strategic EU approach to cultural diplomacy.[73] Subsequently, the Joint Communication was endorsed by the Council of the European Union[74] and the European Parliament[75] in 2017. However, in 2016 the EEAS has published A Global Strategy for the European Union's Foreign And Security Policy in which it has been recognized that besides energy and economic diplomacy, new fields of joined EU external actions also include cultural diplomacy.[76] Likewise, it is important to note that significance of more coherent partnership between the European Commission, the EEAS and EUNIC was further emphasized in 2017, by signing administrative agreement between three corresponding parties in order for them "to enhance cooperation in the field of culture, both at the level of Headquarters and at the local level in partner countries."[77] Moreover, based on this agreement, the first joint guidelines articulated to further strengthen this relationship were published in 2019, and were later on updated in 2021.[78]

Nonetheless, roughly ten years after the first Communication on a European agenda for culture in a globalizing world was adopted, the European Commission presented A New European Agenda for Culture in 2018 as currently leading document guiding further development of the EU's cultural policy. Namely, A New European Agenda for Culture consists of three strategic objectives which contain social, economic and external dimensions.[79] Accordingly, the third strategic objective with external dimension is directed towards "[S]trengthening international

---

72 *Ibid.*, pp. 7-12.

73 *Ibid.*, pp. 12-15.

74 Council conclusions on an EU strategic approach to international cultural relations, OJ C 189, 15.6.2017, p. 38–39.

75 European Parliament resolution of 5 July 2017 on Towards an EU strategy for international cultural relations (2016/2240(INI)), OJ C 334, 19.9.2018, p. 112–123.

76 European External Action Service, *Shared vision, common action: a stronger Europe: a global strategy for the European Union's foreign and security policy*. Publications Office; 2016, p. 49.

77 European External Action Service, *Administrative arrangement for activities to be developed by the European Union National Institutes for Culture (EUNIC) in partnership with the European Commission Services and the European External Action Service jointly referred to hereinafter as "the two Sides"*, (16 May 2017), 2017, p. 1.

78 Eeas.europe.eu. *Partnership between EUNIC, the EEAS and the European Commission: Joint Guidelines updated*, [https://eunic.eu/news/joint-guidelines-updated], Accessed 20 March 2025.

79 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 New European Agenda for Culture, (COM/2018/267 final) (A New European Agenda for Culture). Namely, three strategic objectives of this document refer to: Social dimension - harnessing the power of culture and cultural diversity for social cohesion and well-being; Economic dimension - supporting

cultural relations" and, in this regard, aims to "[S]upport culture as an engine for sustainable social and economic development", as well as to "[P]romote culture and intercultural dialogue for peaceful inter-community relations" and to "[R]einforce cooperation on cultural heritage" in international context.[80] Nevertheless, by relying on the above-mentioned EU initiatives, in 2019 the Council of the European Union has adopted Conclusions on an EU strategic approach to international cultural relations and a framework for action which are, in general, aiming to "strengthen the effectiveness and impact of EU foreign policy by integrating international cultural relations in the range of its foreign policy instruments, especially with a long-term perspective."[81] In this context, it is important to signify that according to the EEAS the corresponding Council's Conclusions along with Joint Communication Towards an EU strategy for international cultural relations "serve as strategic basis and framework for action" in the field of the EU's international cultural relations.[82] Also, among specified EU initiatives it is also needed to include current EU Work Plan for Culture 2023-2026, since its fourth priority area titled - "Culture for co-creative partnerships: strengthening the cultural dimension of EU external relations" - explicitly indicates the Union's dedication to further foster its external cultural relations.[83] Lastly, it is important to add that in accordance with presented initiatives, the EU has eventually supported a number of activities in the field of its external cultural relations, among which can be singled out Cultural Relations Platform (ex. Cultural Diplomacy Platform)[84] and European Spaces of Culture (ex. European 'Houses' of Culture).[85]

---

culture-based creativity in education and innovation, and for jobs and growth, and External dimension - strengthening international cultural relations.

80 *Ibid.*, 6.

81 Council conclusions on an EU strategic approach to international cultural relations and a framework for action, ST/8361/2019/INIT, OJ C 192, 7.6.2019, p. 6–10 (Council conclusions on an EU strategic approach).

82 Eeas.europe.eu., *op. cit.*, note 64.

83 Council Resolution on the EU Work Plan for Culture 2023–2026 2022/C 466/01, ST/15381/2022/INIT, OJ C 466, 7.12.2022, p. 1–18 (Council Resolution on the EU Work Plan for Culture 2023–2026). Four priority areas of the EU's Work Plan for Culture 2023-2026 are titled as it follows: a) Artists and cultural professionals: empowering the cultural and creative sectors, b) Culture for the people: enhancing cultural participation and the role of culture in society, c) Culture for the planet: unleashing the power of culture, and d) Culture for co-creative partnerships: strengthening the cultural dimension of EU external relations.

84 See: Cultureinexternalrelatoins.eu *About us*, [https://www.cultureinexternalrelations.eu/about-us/], Accessed 25 March 2025 (Cultureinexternalrelatoins.eu). Cultural Relations Platform initiative is led by the Goethe-Institut Brussels, in partnership with the European Cultural Foundation, the International Network for Contemporary Performing Arts and the University of Siena.

85 See: Europeanspacesofculture.eu, *European Spaces of Culture*, [https://europeanspacesofculture.eu/about], Accessed 25 March 2025. European Spaces of Culture initiative is led by the EUNIC.

4. ASSESSING THE ROLE OF THE EUROPEAN CULTURAL CSOS IN FOSTERING THE EU'S EXTERNAL CULTURAL RELATIONS

4.1. Conceptualizing civil society organizations: From general towards the EU's perspective

Prior to providing insights into the relevant CSOs' actions in the field of the EU's external cultural relations, it is first needed to deliver concise definition of the civil society concept, and consequently, to approach conceptualizations of the civil society organizations (CSOs) from the EU's perspective. Therefore, in order to narrow down the wide range of often inconsistent definitions of civil society, it is adequate to refer to A dictionary of civil society, philanthropy and the non-profit sector, where despite claiming that „there is little agreement on its precise meaning" Anheier and List still indicate „that modern civil society is the sum of institutions, organizations and individuals located between the family, the state and the market, in which people associate voluntarily to advance common interests."[86] In other words, according to same authors "[C]ivil society is primarily about the role of citizens and the society they constitute in relation to that of both the state and the market" and as such it may be approached from different, but "often complementary" perspectives (e.g. from macro-sociological, individualistic or institutional viewpoints).[87] Additionally, and in line with these formal conceptualizations, it is suitable to further refer to Rifkin who accentuates the significance of civil society in the context of the EU governance by pointing that "[P]olitics in the nation-state era operates along two poles - market and government" whereas "EU politics, by contrast, operates between three nodes - commerce, government, and civil society."[88] Accordingly, he also provides broader conceptual insights concerning the civil society by indicating that it "is composed of all the activities that make up the cultural life of individuals and their communities", and as such it "includes religious institutions, the arts, education, health care, sports, public recreation and entertainment, social and environmental advocacy, neighborhood engagement, and other activities whose function is to create community bonds and social cohesion."[89] Moreover, Rifkin further recognizes growing importance of CSOs at the national and international levels of governance by emphasizing that "CSOs have pushed for greater representation in every country as well as at global institutions such as the

---

86 Anheier, H. K.; List, R. A., *A dictionary of civil society, philanthropy and the non-profit sector*, Routledge, London, 2005., p. 54.

87 *Ibid.*, pp. 54-55.

88 Rifkin, J., *The European Dream: How Europe's Vision of the Future Is Quietly Eclipsing the American Dream*. New York: Jeremy P. Tarcher/Penguin, 2004, p. 234.

89 *Ibid.*

United Nations, World Bank, IMF, and World Trade Organization."[90] However, even though Rifkin asserts that in general participation of CSOs is mostly "advisory in nature";[91] when speaking further about the Union's approach towards the CSOs, he argues that EU has different perspective on this matter by claiming that "[T]he EU has become the first government to formally acknowledge CSOs as fullfledged partners in public policy networks" and which "has recognized the civil society as the "third component" of European Union governance."[92]

Although these insights reveal that CSOs play significant role in the EU politics, it is important to indicate that their growing importance in the EU context became noticeable in the two following EU documents adopted at the turn of millennium - namely, in the Opinion of the Economic and Social Committee on The role and contribution of civil society organisations in the building of Europe[93] adopted in 1999; and in the Commission's White paper on European governance[94] adopted in 2001. In this respect, the corresponding Opinion provides conceptual insights about the civil society which according to the document "can be defined only loosely, as a society that embraces democracy", and which is composed out of components determined by culture such as pluralism, autonomy, solidarity, public awareness, participation, education, responsibility and subsidiarity.[95] Furthermore, according to the same document CSOs "can be defined in abstract terms as the sum of all organisational structures whose members have objectives and responsibilities that are of general interest and who also act as mediators between the public authorities and citizens."[96] Also, corresponding document recognizes that players in civil society organizations include labor-market players, organisations representing social and economic players, NGOs (non-governmental organisations), CBOs (community-based organisations) and religious communities.[97] Subsequently, with regards to the role of CSOs at the EU level, it can be singled out from the same document that "[O]ne common feature of these civil society organisations at European level is the intermediary role which they have taken over from the national level" as well as they „have the important task of contribut-

90 *Ibid*., p. 239.

91 *Ibid*.

92 *Ibid*.

93 Opinion of the Economic and Social Committee on 'The role and contribution of civil society organisations in the building of Europe' (OJ C, C/329, 17.11.1999.), p. 30 (Opinion on 'The role and contribution of civil society organisations).

94 European governance - A white paper (COM/2001/0428 final), OJ C 287, 12.10.2001., pp. 1–29, (European governance - A white paper).

95 Opinion on 'The role and contribution of civil society organisations, *op. cit*, note 93, p.32.

96 *Ibid.*, p. 33.

97 *Ibid.*, pp. 33-34.

ing to a public and democratic discourse."[98] On the other hand, the Commission's White paper on European governance refers to civil society in the context of proposing its better involvement in both shaping and implementing EU policies. In this regard, the corresponding document emphasizes that "[C]ivil society plays an important role in giving voice to the concerns of citizens and delivering services that meet people's needs."[99] Also, according to the same document it is recognized that "[C]ivil society increasingly sees Europe as offering a good platform to change policy orientations and society", but this also implies that "[C]ivil society must itself follow the principles of good governance, which include accountability and openness."[100] Lastly, the recognized need to involve CSOs more intensely in the EU governance was eventually reflected within the EU's primary legislation, that is, in the Article 11 (TEU)[101] and in the Article 15 (TFEU)[102] of the Lisbon Treaty.

4.2. Identifying the significance of involving the CSOs within the EU's policy framework for external cultural relations

In order to approach the CSO's actions in the field of the EU's external cultural relations, it is also needed to point out that many of the previously presented EU documents which constitute the EU's policy framework for external cultural relations (i.e. in chapter 3) emphasize the significance of involving the CSO in the corresponding policy field. Therefore, it is interesting to note that already in the European agenda for culture in a globalizing world it is indicated that "[T]his agenda is to be shared by all stakeholders (the Commission, Member States and involving civil society and the European Parliament)."[103] Furthermore, the Council of the European Union in its Conclusions on the Promotion of cultural diversity and intercultural dialogue in the external relations of the Union and its Member States as well emphasizes the need to "encourage the involvement of artists, cultural professionals, and, more broadly, civil society, in both Member States and partner countries, in drawing up and implementing external cultural policies."[104] Also, the European Parliament in its Resolution on the cultural

98 *Ibid.*, p. 34.

99 European governance - A white paper, *op. cit.*, note. 94, p. 11.

100 *Ibid.*, p. 12.

101 Article 11(2) TEU (Lisbon) emphasizes the following: „The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society."

102 Article 15(1) TFEU (Lisbon) emphasizes the following: „In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible."

103 European agenda for culture in a globalizing world, *op. cit.*, note 7, p. 3.

104 Conclusions on the promotion of cultural diversity and intercultural dialogue, *op. cit.*, note 61, p. 12.

dimensions of the EU's external actions is recognizing that "the Union and its Member States, citizens, businesses and civil society both in the EU and in third countries are key actors in cultural relations."[105] Moreover, the Preparatory action 'Culture in external relations' in one of the key messages deriving from its findings and recommendations explicates that "EU institutions, national cultural relations agencies and cultural civil society need to work together to build a strategy that is both transversal and 'joined up' across different sectors and that also respects the ideas and ideals of global cultural citizenship: reciprocity, mutuality and shared responsibility."[106] Likewise, the Council of the European Union in its Conclusions on culture in the EU's external relations with a focus on culture in development cooperation is encouraging "a bottom-up approach that fosters national and local ownership, involves partner countries and engages all stakeholders, in particular NGOs, civil society and the private sector."[107] Subsequently, in the context of outlining a strategic EU approach to cultural diplomacy it is emphasized in the Joint Communication Towards an EU strategy for international cultural relations that "[T]o advance successful cooperation with partner countries in the three work streams proposed, it is important for the relevant EU stakeholders to join forces to ensure complementarity and synergies" which „includes government at all levels, local cultural organisations and civil society, the Commission and the High Representative (through EU Delegations in third countries), Member States and their cultural institutes."[108] In addition, with regards to implementing A New European Agenda for Culture the European Commission is relying on cooperation with the Member States, but also aims to further enhance structured dialogue with civil society by "going beyond topics examined under the Open Method of Coordination, making more of online collaboration opportunities, and opening up to relevant organisations outside cultural and creative sectors on a case-by-case basis."[109] Correspondingly, the Council of the European Union in its Conclusions on an EU strategic approach to international cultural relations and a framework for action is also recognizing the need for "a new spirit of dialogue, mutual understanding and learning, which entails the cooperation with local stakeholders and civil society at all levels (planning, design, implementation) and on an equal footing, aiming at bottom-up and people-to-people approach, local empowerment, participation and co-creation."[110] Also, it the context of the fourth priority area of the current EU Work Plan for Culture 2023-2026 - that is devoted to „strength-

[105] European Parliament resolution on the cultural dimensions, *op. cit.*, note 65.

[106] Preparatory action 'Culture in external relations', *op. cit.*, note 68, pp. 13-14.

[107] Conclusions on culture in the EU's external relations, *op. cit.*, note 69, p. 43.

[108] Towards an EU strategy for international cultural relations, *op. cit.*, note 38, p. 12.

[109] A New European Agenda for Culture, *op. cit.*, note 79, pp. 9-10.

[110] Council conclusions on an EU strategic approach, *op. cit.*, note 81, p. 7.

ening the cultural dimension of EU external relations" - it is highlighted that „Europe's cultural richness and freedom, the EU's bottom-up approach rooted in civil society and the EU's strong engagement in co-creation are strong assets for international relations from the perspective of building sustainable partnerships on an equal footing."[111] Lastly, in accordance with presented views which signify the importance of involving CSOs in the EU's external cultural relations, it is important to add that in order to enhance structured dialogue with the civil society in the framework of the EU's cultural policy, the European Commission has organized an initiative titled Voices of Culture (VoC) in the period from 2015 until 2023, which among various covered themes, also resulted in a report concerning international cultural relations.[112]

4.3. Review and analysis of the European cultural CSOs' actions in the field of the EU's external cultural relations

Given that there are numerous European cultural CSOs, this review and analysis will focus on those that, within the framework of their activities, also intensely participate in initiatives (e.g. advocacy actions, publications, events, networks, projects, etc.) in the field of the EU's external cultural relations. Likewise, this approach will provide illustrative (i.e. at the level of selected examples), yet indicative insights into their contributions in fostering the EU's external cultural relations. In other words, the selection of representative CSOs is based on the following criteria - first, that they are prominent organizations active in the field of the EU's external cultural relations; second, that they have a strong European dimension inherent to their mission; and third, that through their actions they are not just aiming to implement, but also effectively influence further development of policies in the field of the EU's external cultural relations. Accordingly, the selected organizations are the European Cultural Foundation (ECF), Culture Action Europe (CAE) and Culture Solutions Europe (culture Solutions).

4.3.1. European Cultural Foundation (ECF): Civil society at the heart of the emerging EU's external cultural relations

Accordingly, one of the most important CSOs in this regard is the European Cultural Foundation (ECF) from Netherlands, which since 1954, and therefore, in line with the beginning of the European integration process, "promotes a Euro-

[111] Council Resolution on the EU Work Plan for Culture 2023–2026, *op. cit.*, note 83, p. 4.

[112] See: Culture.ec.europa.eu. *Dialogue with cultural and creative sectors and industries*, [https://culture.ec.europa.eu/policies/cultural-policy-cooperation-at-the-eu-level/dialogue-with-cultural-and-creative-sectors-and-industries], Accessed 25 March 2025.

pean sentiment through developing and supporting cultural initiatives that let us share, experience and imagine Europe."[113] In general, the ECF "has always focused on programs and grants enabling mobility and the exchange of ideas, education through culture, and capacity-building" as well as it has "initiated and developed dozens of programmes, supported thousands of Europeans with grants and exchanges and helped put culture and cultural policies on the European agenda."[114] Consequently, with regards to its contributions to development of the EU's external cultural relations, the ECF played important role in advocating its emergence since the early 2000s. More precisely, the ECF has published several studies on the subject matter already in 2006[115] and 2007;[116] as well as it was involved in former advocacy initiative titled More Europe - external cultural relations[117] (i.e. which was active in the field of promoting the EU's external cultural relations for roughly ten years since 2011).[118] Moreover, in the following years the ECF has also participated as a member of consortium led by the Goethe Institute in preparing and delivering previously mentioned Preparatory action 'Culture in external relations' published in 2014, which had profound impact on the further development of the EU's external cultural relations.[119] Furthermore, in the context of its more recent involvement in the field of the EU's external cultural relations, it should be noted that in wake of the COVID-19 crisis in 2020, the ECF along with Culture Action Europe (CAE) and Europa Nostra - as another two prominent European cultural CSOs - has initiated the ongoing campaign articulated in a form of a joint statement titled Cultural Deal for Europe. Namely, through this campaign corresponding CSOs have "called on the European Union to fully integrate culture and cultural heritage into its actions and policies, making it an overarching strategy in analogy to the Green Deal."[120] Accordingly, one of the main points of this joint statement is titled "Culture is key for the EU's external relations" by which corre-

---

113 Culturalfoundation.eu. *ECF in One Paragraph*, [https://culturalfoundation.eu/about/our-story/], Accessed 25 March 2025.

114 *Ibid*.

115 See: Dodd, D.; Dittrich Van Weringh, K., *A cultural component as an integral part of the EU's foreign policy?* Amsterdam: Boekmanstudies, 2006.

116 See: Fisher, R., *A cultural dimension to the EU's external policies. From policy statements to practice and potential*. Amsterdam: Boekmanstudies and European Cultural Foundation, 2007.

117 See: Ifacca.org. *The More Europe initiative has published its final publication to memorize ten years of work*, [https://ifacca.org/news/2023/03/06/more-europe-initiative-has-published-its-final-pub/], Accessed 25 March 2025.

118 See: Preparatory action 'Culture in external relations', *op. cit.*, note 68, pp. 15-16.; Isar, Y. R., 'Culture in EU external relations': an idea whose time has come? *International Journal of Cultural Policy*, *21*(4), 494–508., [https://doi.org/10.1080/10286632.2015.1042472], 2015, pp. 498-500.

119 Preparatory action 'Culture in external relations', *op. cit.*, note 68, p. 7.

120 Culturalfoundation.eu. *Cultural Deal for Europe*, [https://culturalfoundation.eu/stories/cultural-deal-for-europe/], Accessed 25 March 2025.

sponding CSOs are explicitly calling for further development of the EU's external relations in the following words: "We reiterate the need to strengthen the role of international cultural relations in the EU's foreign, neighborhood and sustainable development policies. Culture is key to peace, mutual understanding and trust, it contributes to democratic, free, and sustainable societies. International relations boost opportunities for interconnecting cultural communities."[121] Also, it is important to note that the ECF is currently a part of consortium led by Goethe Institute in implementing previously mentioned EU initiative titled Cultural Relations Platform (ex. Cultural Diplomacy Platform) along with the International Network for Contemporary Performing Arts and the University of Siena.[122] Accordingly, in this regard it is necessary to clarify that Cultural Relations Platform is actually "an EU-funded project that connects cultural practitioners worldwide for dialogue, exchange and co-operation" as well as it "provides expertise to the European Union (EU) in the field of international cultural relations."[123] Lastly, it is important to add that through current initiatives such as the European Cultural Deal for Ukraine,[124] the ECF continues to further contribute to the EU's external cultural relations according to its core values.

4.3.2. Culture Action Europe (CAE): Civil society reflecting and advocating for further development of the EU's external cultural relations

On the other hand, the Culture Action Europe (CAE) is CSO from Belgium which forms a network of cultural organization active in the field of cultural policies at the EU level since 1994. More precisely, the CAE represents "the major European network of cultural networks, organisations, artists, activists, academics and policymakers", and as such it "is the political voice of the cultural sector in Europe, the first port of call for informed opinion and debate about arts and cultural policy."[125] In general, the CAE is pursuing its goals through campaigns, advocacy, networking, projects and events in various fields within the framework of European cultural sector, including the activities in the area of the EU's external cultural relations. In this regard, it can be noticed that as the EU's policy framework for ex-

---

121 Culture Action Europe, European Cultural Foundation, Europa Nostra. *A cultural deal for Europe: a central place for culture in the EU's post-pandemic future*, 2020, [https://cultureactioneurope.org/wp-content/uploads/2020/11/Cultural-Deal-EU-Statement_2020.pdf], Accessed 25 March 2025 (A cultural deal for Europe).

122 Cultureinexternalrelations.eu., *op. cit.*, note 84.

123 *Ibid*.

124 See: Culturalfoundation.eu. *Public Policy*, [https://culturalfoundation.eu/public-policy/], Accessed 25 March 2025.

125 Cultureactioneurope.org. *About us*, [https://cultureactioneurope.org/about-us/], Accessed 25 March 2025.

ternal cultural relations has been gaining more comprehensive contours after the adoption of the Joint Communication Towards an EU strategy for international cultural relations in 2016, so did the involvement of the CAE intensified towards providing advocacy, strategic reflections and participation on the subject matter. Therefore, already in 2017, the CAE has articulated reflections on the corresponding Joint Communication, by welcoming this initiative, yet among other points, underlying a need for "a clear governance on EU level" regarding the subject matter, as well as accentuating "the importance to involve civil society actors in the field of culture on all sides in the planning of the strategy and future exchanges."[126] Moreover, in 2020 the CAE along with the ECF and other 20 prominent European cultural organizations have signed an open letter (initiated by More Europe - external cultural relations) titled Culture in EU's External Relations - The Way Forward?. In general, in this open letter the CAE along with corresponding signatories urged "the European Commission and the European Parliament to give proper consideration and strengthen international cultural relations within future policy frameworks including in foreign and sustainable development policies; as well as in the upcoming EU financial framework."[127] Furthermore, it is important to signify once more that in 2020 the CAE, along with the ECF and Europe Nostra, have initiated the ongoing campaign Cultural Deal for Europe, by which they have been urging the EU to integrate cultural aspects into its policies including external relations by emphasizing that "Culture is key for the EU's external relations."[128] Nonetheless, in the context of numerous challenges the EU is currently facing, the CAE among its recent activities in 2025 again accentuated the importance of including cultural aspects into Union's actions by sending "a letter to the European Commission advocating for the integration of culture into the EU's policies on defence, security, preparedness, and democracy."[129] Moreover, with regards to the EU's external cultural relations the CAE in the same letter also explicitly urges "for updating the EU Strategy for International Cultural Relations and allocating 2% of Russia's frozen assets for Ukraine's cultural recovery."[130]

---

126 Cultureactioneurope.org. *CAE reflection: towards an EU strategy for international cultural relations*, [https://cultureactioneurope.org/advocacy/cae-reflection-towards-an-eu-strategy-for-international-cultural-relations/?utm_source=chatgpt.com], Accessed 26 March 2025.

127 Cultureactioneurope.org. *Open Letter | Culture in EU's External Relations*, [https://cultureactioneurope.org/news/open-letter-culture-in-eus-external-relations/?utm_source=-chatgpt.com], Accessed 26 March 2025.

128 A cultural deal for Europe, *op. cit*., note 121.

129 Cultureactioneurope.org. *Culture for a stronger, more secure and resilient EU*, [https://cultureactioneurope.org/advocacy/culture-for-a-stronger-more-secure-and-resilient-eu/], Accessed 26 March 2025.

130 *Ibid*.

4.3.3. Culture Solutions Europe (culture Solutions): Civil society in front of further developments of the EU's external cultural relations

Finally, the Culture Solutions Europe (culture Solutions) is CSO from France which, as the youngest of the above-presented CSOs, operates since 2018 as "an independent social innovation group contributing to the excellence of EU international cultural relations" and with a clear goal "to help to develop a stronger trust in the European project."[131] Accordingly, the culture Solutions is focused on several priority themes (i.e. cultural action and legitimacy, digital and internet governance, cultural relations, cultural diplomacy, and intercultural coexistence and language skills), as well as it provides various services (i.e. information sharing, open space for dialogue, policy analysis, training, implementation support) and also participates in, or organizes events concerning the EU's external cultural relations.[132] Therefore, even though the culture Solutions is relatively new organization, it is specifically oriented towards fostering the EU's external cultural relations, and as such until today has produced a number of publications (e.g. briefs, reports, proposals) and podcasts, as well as it has participated in the events tackling directly up-to-date issues on the subject matter. In this context, and due to the limited format of this paper, it is adequate just to signify at the level of examples, that some publications of the culture Solutions have been, so far, covering topics ranging from financing and digital change to climate change and heritage protection aspects of the EU's external cultural relations.[133] In this regard, it can be asserted that the culture Solutions represents the CSO which is aiming specifically to be in front of further developments, and therefore, make its contribution in fostering the EU's external cultural relations. Since this intention is in line with the EU views too, then it can be expected that from such mutual interactions the EU's policy framework for external cultural relations will continue to further evolve.

5. CONCLUSIONS

The man aim of this paper was to explore the role of the European cultural CSOs in fostering the EU's external cultural relations. Accordingly, the results indicate that within the EU context cultural CSOs play an increasingly significant role in fostering further development of more comprehensive EU's policy framework for external cultural relations. Therefore, and in line with provided conceptual

131 Culturesolutions.eu., *About us*, [https://www.culturesolutions.eu/about-us/], Accessed 26 March 2025.

132 Culturesolutions.eu., *Our work*, [https://www.culturesolutions.eu/our-work/], Accessed 26 March 2025.

133 See: Culturesolutions.eu. *Publications*, [https://www.culturesolutions.eu/publications/], Accessed 26 March 2025.

insights regarding the cultural dimension in global affairs it can be concluded that even though cultural activities have been shaping relations between the people and nations throughout the history, their significance has been acknowledged and formalized in present days through evolving cultural diplomacy; and therefore, has justifiably gained increasing academic attention ever since the concept of soft power has been introduced in the field of international relations. In this context, the concept of soft power has accentuated that international relations are not just shaped by economic, political or security considerations, but also by seemingly intangible value-based influences among which culture - in all of its manifestations, plays a significant role. For these reasons, it is not surprising that soft power concept dominates academic debate focused on culture in international relations as well as it complements inevitably interconnected concepts of cultural diplomacy and international cultural relations. In this regard, provided conceptual insights signify current shifts towards new modes of cultural diplomacy or international cultural relations, which are not predominantly driven by the state interests, but are characterized more by "self-reflexiveness" and interactions between broad range of actors among which supranational organizations such as the EU and CSOs play increasingly important role.

Moreover, the insights provided regarding the emerging EU's policy framework for external cultural relations indicate that due to internal and external dimensions of the EU cultural policy enshrined within Article 167 TFEU (Lisbon), the EU's external cultural relations have been steadily developing in the context of fostering not just social and economic, but also the external dimension of the EU cultural policy; as well as they have been evolving in the context of recognizing the importance of cultural aspects within relevant EU's external policies and instruments (e.g. within the CFSP, including the EU's international development and cooperation policies, and its neighborhood and enlargement policies). In this regard, and due to the overall growing significance of CSOs in the EU context at the turn of the millennium, the involvement of the European cultural CSOs also gained relevance in terms of their influence on not just internal, but also external aspects of the EU cultural policy. Therefore, it can be asserted that these CSOs have been complementing further development of the EU's policy framework for external cultural relations along with other key actors in the field (i.e. the European Commission, the EEAS and the EUNIC).

Lastly, in accordance with the insights provided regarding the role of the European cultural CSOs in fostering the EU's external cultural relations, it can be concluded that CSOs play a significant role in the context of EU governance, which besides Member States' governments and representatives of private sector, equally includes civil society actors. In general, it can be asserted that this intention to

involve civil society in the EU governance springs from the quest of the EU to gain legitimacy so necessary for its long-term success. Subsequently, the presented insights indicate that this intention is further reflected in the context of the evolving EU's policy framework for external cultural relations. In other words, this is not just evident from the EU documents which constitute this policy framework, but also at the level of involvement of the European cultural CSOs in emergence and further development of the corresponding policy field. Moreover, presented insights reveal that the relationship between the EU and the CSOs in this field is based on close and open interactions, which are guided from the above (i.e. by the EU), but implemented, and often initiated from the below (i.e. by the CSOs). Nonetheless, since the current governance of the EU's external cultural relations is still fragmented between the European Commission, the EEAS and the EUNIC, it can be emphasized that CSOs should continue to support them by providing limited, but still valuable inputs on the subject matter through their actions (e.g. via advocacy, campaigns, publications, events, networks, projects, etc.), therefore, contributing to further development of more comprehensive EU's policy framework for the external cultural relations.

REFERENCES

BOOKS AND ARTICLES

1. Anheier, H. K.; List, R. A., *A dictionary of civil society, philanthropy and the non-profit sector*, Routledge, London, 2005
2. Cini, M.; Pérez-Solórzano Borragán, N., *European Union Politics*, (4th edition), Oxford University Press, 2013
3. Cummings, M. C., Jr., *Cultural Diplomacy and the United States Government: A Survey,* Washington D.C: Center for Arts and Culture, 2003
4. Dodd, D.;Dittrich Van Weringh, K., *A cultural component as an integral part of the EU's foreign policy?* Amsterdam: Boekmanstudies, 2006
5. Fisher, R., *A cultural dimension to the EU's external policies. From policy statements to practice and potential*. Amsterdam: Boekmanstudies and European Cultural Foundation, 2007
6. Grincheva, N., *The past and future of cultural diplomacy,* International Journal of Cultural Policy, 30:2, 172-191, DOI: 10.1080/10286632.2023.2183949, 2024
7. Higgott, R., *The Role of Culture in EU Foreign Policy: Between International Cultural Relations and Cultural Diplomacy, Økonomi* & Politik, bd. 94, nr. 4, april 2022
8. Isar, Y. R., '*Culture in EU external relations': an idea whose time has come? ,* International Journal of Cultural Policy, 21(4), 494–508., https://doi.org/10.1080/10286632.2015.1042472, 2015
9. Nye, J. S., Jr., *Public Diplomacy and Soft Power.* The Annals of the American Academy of Political and Social Science, 616, pp. 94-109., 2008

10. Nye, J. S., Jr., *Soft power: the origins and political progress of a concept.* Palgrave Communications. 3:17008 doi: 10.1057/palcomms.2017.8., 2017
11. Nye, J. S., Jr., *The Future of Power*. New York: PublicAffaires, 2011
12. Nye, J.S. Jr., *Bound to Lead: The Changing Nature of American Power*. Basic Books: New York, 1990
13. Rifkin, J., *The European Dream: How Europe's Vision of the Future Is Quietly Eclipsing the American Dream*. New York: Jeremy P. Tarcher/Penguin, 2004
14. Schneider, C.P., *Cultural Diplomacy: The Humanizing Factor.* In: Singh, J.P. (ed.) International Cultural Policies and Power. International Political Economy Series. Palgrave Macmillan, London. https://doi.org/10.1057/9780230278011_9, 2010
15. Triandafyllidou, A.; Szucs, T., *EU cultural diplomacy: challenges and opportunities*, Policy Briefs, 2017/13, Global Governance Programme, Cultural Pluralism - https://hdl.handle.net/1814/46904, 2017
16. Zamorano, M. M., *Reframing Cultural Diplomacy: The Instrumentalization of Culture Under the Soft Power Theory*, Culture Unbound 8 (2): 165–186, doi:10.3384/cu.2000.1525.1608165., 2016

INTERNATIONAL LAW

1. Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005, entered into force 18 March 2007) UNESCO Doc CLT-2005/CONVENTION DIVERSITY-CULT REV

EU LAW

1. 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 New European Agenda for Culture, (COM/2018/267 final)
2. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European agenda for culture in a globalizing world (COM (2007) 242 final)
3. Communication from the Commission, An Open and Structured Dialogue between the Commission and Special Interest Groups, December 1992, SEC (92) 2272 final
4. Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the promotion of cultural diversity and intercultural dialogue in the external relations of the Union and its Member States, (OJ C 320, 16.12.2008, p. 10–12)
5. Council conclusions on an EU strategic approach to international cultural relations and a framework for action, ST/8361/2019/INIT, OJ C 192, 7.6.2019, p. 6–10
6. Council conclusions on an EU strategic approach to international cultural relations, OJ C 189, 15.6.2017, p. 38–39
7. Council Conclusions on culture in the EU's external relations with a focus on culture in development cooperation, (OJ C 417, 15.12.2015, p. 41–43)

8. Council Resolution on the EU Work Plan for Culture 2023–2026 2022/C 466/01, ST/15381/2022/INIT, OJ C 466, 7.12.2022, p. 1–18
9. European Commission, Directorate-General for Education, Youth, Sport and Culture, *Preparatory action 'Culture in external relations': engaging the world: towards global cultural citizenship*. Publications Office; 2014
10. European External Action Service, *Administrative arrangement for activities to be developed by the European Union National Institutes for Culture (EUNIC) in partnership with the European Commission Services and the European External Action Service jointly referred to hereinafter as "the two Sides"*, (16 May 2017), 2017
11. European External Action Service, *Shared vision, common action: a stronger Europe: a global strategy for the European Union's foreign and security policy*. Publications Office; 2016
12. European governance - A white paper (COM/2001/0428 final), OJ C 287, 12.10.2001., p. 1–29
13. European Parliament resolution of 12 May 2011 on the cultural dimensions of the EU's external actions (2010/2161(INI))
14. European Parliament resolution of 5 July 2017 on Towards an EU strategy for international cultural relations (2016/2240(INI))
15. European Parliament resolution of 5 July 2017 on Towards an EU strategy for international cultural relations (2016/2240(INI)), OJ C 334, 19.9.2018, p. 112–123
16. Joint Communication to the European Parliament and the Council, Towards an EU strategy for international cultural relations (JOIN/2016/029 final)
17. Opinion of the Economic and Social Committee on 'The role and contribution of civil society organizations in the building of Europe' (OJ C, C/329, 17.11.1999.), p. 30
18. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007.
19. Treaty on European Union (Consolidated Version 2016), OJ C 202, 7.6.2016.
20. Treaty on European Union (TEU, Maastricht Treaty), 7 February 1992, (OJ C 191, 29.7.1992, pp. 1-112)
21. Treaty on the Functioning of the European Union (Consolidated version 2016), OJ C 202, 7.6.2016.

WEBSITE REFERENCES

1. Culturalfoundation.eu. *Cultural Deal for Europe*, [https://culturalfoundation.eu/stories/cultural-deal-for-europe/], Accessed 25 March 2025
2. Culturalfoundation.eu. *ECF in One Paragraph*, [https://culturalfoundation.eu/about/our-story/], Accessed 25 March 2025
3. Culturalfoundation.eu. *Public Policy*, [https://culturalfoundation.eu/public-policy/], Accessed 25 March 2025
4. Culture Action Europe, European Cultural Foundation, Europa Nostra. *A cultural deal for Europe: a central place for culture in the EU's post-pandemic future*, 2020,

[https://cultureactioneurope.org/wp-content/uploads/2020/11/Cultural-Deal-EU-Statement_2020.pdf], Accessed 25 March 2025

5. Culture.ec.europa.eu. *Dialogue with cultural and creative sectors and industries*, [https://culture.ec.europa.eu/policies/cultural-policy-cooperation-at-the-eu-level/dialogue-with-cultural-and-creative-sectors-and-industries], Accessed 25 March 2025
6. Culture.ec.europa.eu. *International cultural relations*, [https://culture.ec.europa.eu/policies/international-cultural-relations], Accessed 15 March 2025
7. Cultureactioneurope.org. *About us*, [https://cultureactioneurope.org/about-us/], Accessed 25 March 2025
8. Cultureactioneurope.org. *CAE reflection: towards an EU strategy for international cultural relations*, [https://cultureactioneurope.org/advocacy/cae-reflection-towards-an-eu-strategy-for-international-cultural-relations/?utm_source=chatgpt.com], Accessed 26 March 2025
9. Cultureactioneurope.org. *Culture for a stronger, more secure and resilient EU*, [https://cultureactioneurope.org/advocacy/culture-for-a-stronger-more-secure-and-resilient-eu/], Accessed 26 March 2025
10. Cultureactioneurope.org. *Open Letter | Culture in EU's External Relations*, [https://cultureactioneurope.org/news/open-letter-culture-in-eus-external-relations/?utm_source=chatgpt.com], Accessed 26 March 2025
11. Cultureinexternalrelations.eu. *About us*, [https://www.cultureinexternalrelations.eu/about-us/], Accessed 25 March 2025
12. Culturesolutions.eu. *About us*, [https://www.culturesolutions.eu/about-us/], Accessed 26 March 2025
13. Culturesolutions.eu. *Our work*, [https://www.culturesolutions.eu/our-work/], Accessed 26 March 2025
14. Culturesolutions.eu. *Publications*, [https://www.culturesolutions.eu/publications/], Accessed 26 March 2025
15. Ec.europa.eu. *FAQ: UNESCO Convention on Cultural Diversity – a new instrument of international governance*, [https://ec.europa.eu/commission/presscorner/detail/en/memo_06_500], Accessed 15 March 2025
16. Eeas.europe.eu. *About the European External Action Service*, [https://www.eeas.europa.eu/eeas/about-european-external-action-service_en], Accessed 20 March 2025
17. Eeas.europe.eu. *Culture – Implementing EU international cultural relations*, [https://www.eeas.europa.eu/eeas/culture-%E2%80%93-implementing-eu-international-cultural-relations_en], Accessed 20 March 2025
18. Eeas.europe.eu. *Partnership between EUNIC, the EEAS and the European Commission: Joint Guidelines updated*, [https://eunic.eu/news/joint-guidelines-updated], Accessed 20 March 2025
19. Eunicglobal.eu. *European Union National Institutes for Culture*,

[https://www.eunicglobal.eu/about], Accessed 20 March 2025

20. Europeanspacesofculture.eu. *European Spaces of Culture*, [https://europeanspacesofculture.eu/about], Accessed 25 March 2025
21. Ifacca.org. *The More Europe initiative has published its final publication to memorize ten years of work*, [https://ifacca.org/news/2023/03/06/more-europe-initiative-has-published-its-final-pub/], Accessed 25 March 2025
22. Unesco.org. *Cutting Edge | From standing out to reaching out: cultural diplomacy for sustainable development*, [https://www.unesco.org/en/articles/cutting-edge-standing-out-reaching-out-cultural-diplomacy-sustainable-development], Accessed 15 March 2025

Chapter 6

Review article

LINKING EU STRATEGIC GOALS WITH NATIONAL BUDGETS: INSIGHTS FROM SLOVENIA

Aljanka Klajnšek, MSc., PhD Student
Court of Audit of the Republic of Slovenia
Slovenska cesta 50, SI-1000 Ljubljana, Slovenia
aljanka.klajnsek@rs-rs.si

ABSTRACT

With the development of the European Union as a political community, also its public finances and fiscal policies have gradually taken shape and developed. The research focuses on the period from 2020 to 2025 and seeks to answer the question of whether and how the European Union's economic governance system ensures that its strategic goals and priorities are reflected in the Member States' strategic and budgetary planning, and what new developments in this respect have been brought about in 2024 and 2025 by the fiscal rules reform, the new composition of the European Parliament and the European Commission, as well as by the substantially changed geopolitical and economic situation and increased security risks. The research is based on empirical and qualitative research methods. The results of the research analysis shows that the European Union's economic and fiscal governance system has linked its strategic goals to national budgetary and reform policies and has responded to changing circumstances through ad hoc emergency instruments such as the fiscal escape clause and the Recovery and Resilience Facility. In particular, the 2024 reform of the European Union's fiscal rules, and changes in the geopolitical and security situation, have brought about greater flexibility and individualisation in the coordination of fiscal policy when dealing with Member States according to their characteristics. The findings of the research indicate the start of a new, broader reform of the economic governance of the European Union, which will allow sustainable adjustments of the European Union to changing geopolitical circumstances and security challenges. While the Republic of Slovenia has kept pace with the European Union's objectives in terms of economic and fiscal governance, it has been less successful in achieving its national goals. Between 2020 and 2025, the transition from national strategic to budgetary planning in the Republic of Slovenia remained incomplete.

***Key words**: European Union, economic and fiscal governance, extraordinary situations, Republic of Slovenia, strategic goals, priorities*

1. INTRODUCTION

The European Union (EU) was established by the Maastricht Treaty[1] in 1992 to pursue the common objectives of the Member States. The EU is an international transnational organisation and a legal entity, based on the Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU).[2] The TEU provides that the Contracting States delegate to the EU powers for the pursuit of common objectives.[3] The TEU defines the fundamental values and objectives of the EU.[4] The integration of the Member States into the EU aims for a balanced[5] and sustainable[6] economic and social progress and a common economic and monetary policy,[7] including the introduction of a single currency - the euro.[8]

With the development of the EU as a political community, also its public finances and fiscal policies have gradually taken shape and developed.[9] In this context, the

---

1 Treaty on European Union [1992] OJ C 191/1. The Maastricht Treaty marked the beginning of political integration of EU Member States.

2 Consolidated version of the Treaty of the European Union and the Treaty on the Functioning of the European Union [2016] OJ C 202/1. The EU was given legal personality for the first time by the Treaty of Lisbon (Article 47 TEU (Lisbon)). For more, see Cvikl, M. M., *Prenovljeno pravo Evropske unije*, 2009, pp. 46, 47, 51, 70.

3 Article 1(1) TEU (Lisbon). Joint action in the so-called "strategic policy", such as security issues, presumes a certain leap in the integration process for which the states must be politically prepared. Several international relations theorists believe that international threats force sovereign states to enter into alliances of a federal nature. For more, see Brinar, I., *Politično sodelovanje in politično združevanje v Evropski skupnosti*, Teorija in praksa, Vol. 28, No. 1/2, 1991, pp. 115–118.

4 Articles 1 to 3 TEU (Lisbon).

5 The EU's general budget (the EU budget) must be balanced (Article 314(10) TFEU (Lisbon)) and must not be in deficit.

6 From 2015 to 2025, the United Nations 2030 Agenda for Sustainable Development was in force at the global level, see Resolution adopted by the General Assembly of United Nations on 25 September 2015, A/RES/70/1. In 2017, the EU fully integrated the Agenda for Sustainable Development 2030 into its policy framework and the European Commission's priorities. This integration has been reflected in the EU's focus on employment and social affairs to promote a more sustainable socio-economic model. More on the concept of sustainable development see in Rainer L.; Ronny, R., *Managing sustainable development with management control systems*, in: A literature review, European Management Journal, Vol. 34, No. 2, 2016, pp. 158–171.

7 The term "policy" refers to the regulation and decision-making by the state and its authorities regarding social issues, either at the societal level or within a specific area. For more, see Klajnšek, A., *Jezikovna politika Republike Slovenije in oglaševanje*, in: Repas, M. (ed.), Dileme sodobnega oglaševanja: izbrane teme, Univerza v Mariboru, Univerzitetna založba, Maribor, 2023, p. 5. Policy is a complete set of programmes with a common overall objective. See Art. 2 of the Decree on Development Planning Documents and Procedures for the Preparation of the Draft State Budget, Official Gazette No. 54/2010, 35/2018. Policy is also the highest level of the programme classification of budget expenditure, according to which budget expenditure in the budget of the Republic of Slovenia (Slovenia) is classified.

8 For more, see Cvikl, M. M.; Korpič-Horvat, E., *Proračunsko pravo: priprava, izvrševanje in nadzor proračunov*, GV Založba, Ljubljana, 2007, p. 134.

9 *Ibid*., p. 258.

EU budget has also evolved[10] as a key instrument for achieving the objectives incorporated in the TEU and for implementing the EU policies and priorities. EU and Member States' national policies are formulated through a strategic planning process, with the formulation of strategies and priorities as the starting point for budgetary planning.[11]

Strategic documents and budgetary plans need to adapt to significant changes in circumstances, as these affect the needs and present challenges facing the EU and its Member States. Such changes require appropriate adjustments in policy content, objectives and priorities. Also, political changes in the EU, such as the changes in the composition of the European Parliament and the European Commission in 2024, normally lead to adjustments and amendments of strategic documents.

There are three institutions relevant in the adoption of the EU budget:[12] The European Commission[13], the Council of the EU[14] (Economic and Financial Affairs Council, ECOFIN) and the European Parliament[15]. The European Council gives the EU the necessary impetus for its development and defines the broad political orientations.[16] The budgetary procedure involves negotiation and coordination of political priorities between the EU institutions. Political and institutional negotiations and coordination result in an interinstitutional agreement. Decision-making power on budgetary matters is divided between the European Parliament and the Council of the EU, which adopt the EU budget under a special legislative procedure upon a proposal of the European Commission,[17] making the general EU budget a *sui generis* legal act.

---

10 *Ibid*., pp. 257–271.

11 For more, see Vitalis, N. *et al*., *New development: Between politics and strategic planning—the management of government priorities in Lithuania*, Public Money & Management, Vol. 40, No. 4, 2020, pp. 299–303.

12 For more, see Cvikl, M. M.; Korpič-Horvat, E., *op. cit.*, note 8, pp. 268–269.

13 The TEU and TFEU set out the legal framework within which the European Commission functions and its core competences and tasks. Article 17 TEU (Lisbon) sets out the general tasks and competences of the European Commission, including the management and implementation of the EU budget. The European Commission is responsible for strategic, medium-term and annual planning at the EU level. Under these competences, the European Commission plays the role of a manager of EU policies in specific areas. Articles 244 to 250 TFEU (Lisbon) set out the composition and functioning of the European Commission.The European Commission sets out its priorities and strategic orientations in various multiannual documents.

14 Article 17 TEU (Lisbon) sets out the general tasks and competences of the Council of the EU. The Council of the EU has a policy-making function and legislative and budgetary function.

15 Article 14 TEU (Lisbon) sets out that the European Parliament has legislative, budgetary and political control functions.

16 Article 15 TEU (Lisbon).

17 Article 314 TFEU (Lisbon).

As an EU country and a member of the Economic and Monetary Union (EMU), Slovenia must pursue the EU's common strategic and long-term objectives, in addition to its national ones. In its economic and fiscal governance, Slovenia must respect the rules of the Stability and Growth Pact (SGP),[18] the EU's main instrument for safeguarding economic stability and fiscal discipline[19] in the euro area. At the EU level, the so-called European Semester[20] process provides basic framework for delivering on these objectives and priorities. The rules of the European Semester are covered by the governance package, known as "six-pack"[21] and were reformed in 2024.[22]

---

[18] Originally, in 1997, the SGP consisted of: Resolution of the European Council on the Stability and Growth Pact [1997] OJ C 236/1, Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (Council Regulation (EC) No 1466/97) [1997] OJ L 209/84 and Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure (Council Regulation (EC) No 1467/97) [1997] OJ L 209/89. In 2005 the SGP was reformed with the adoption of the Council Regulation (EC) No 1055/2005 of 27 June 2005 amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2005] OJ L 174/1 and Council Regulation (EC) No 1056/2005 of 27 June 2005 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2005] OJ L 174/5.

[19] Fiscal policy can be defined as a state measure to stabilise the economy and achieve economic and other broader societal objectives (sustainable development) through the use of public revenues and setting of tax policy. For more, see Stare, J.; Pečarič, M., *Znanost o javni upravi*, Fakulteta za upravo, Ljubljana, 2021, p. 252; Afonso, A. et al., *Sovereign risk dynamics in the EU: The time varying relevance of fiscal and external (im)balances*, Journal of International Financial Markets, Institutions & Money, 2024, Vol. 94., pp. 1–22; Asteriou, D.; Spanos, K., *The relationship between financial development and economic growth during the recent crisis: Evidence from the EU*, Finance Research Letters, Let. 28, 2019, pp. 238–245.

[20] The European Semester is fundamentally about the *ex ante* coordination of the EU countries' economic policies. The procedure was established in 2011 by Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (Regulation (EU) No 1175/2011) [2011] OJ L 306/12. Since 2024, the European Semester has been defined in Art. 3 of the Regulation (EU) 2024/1263 of the European Parliament and of the Council of 29 April 2024 on the effective coordination of economic policies and on multilateral budgetary surveillance and repealing Council Regulation (EC) No 1466/97 (Regulation (EU) 2024/1263 [2024] OJ L 1263/1.

[21] The "six-pack" (EU law) includes: Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States (Council Directive 2011/85/EU) [2011] OJ L 306/41, Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area [2011] OJ L 306/1, Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area [2011] OJ L 306/8, Regulation (EU) No 1175/2011, Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L 306/25 and Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2011] OJ L 306/33. For more, see Kamnar, H.; Borak N., *Fiskalna pravila*, Zveza ekonomistov Slovenije, Ljubljana, 2013, pp. 57–67.

[22] Regulation (EU) 2024/1263, Council Regulation (EU) 2024/1264 of 29 April 2024 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2024] OJ L 1264/1 and Council Directive (EU) 2024/1265 of 29 April 2024 amending

The period from 2020 to 2025 has been marked by a number of crises and extraordinary situations in the EU, which have changed both the external and internal circumstances of the EU and its Member States action in a highly dynamic and intense manner. This paper presents the key regulations and strategic documents for the EU and Slovenia's budgetary governance, links them together and highlights how have the changes at the EU level affected Slovenia's budgetary governance as an EU Member State in the period from 2020 to 2025.

The topic of the paper is interdisciplinary, at the intersection of political science, economics, law and organisational studies. It addresses economic governance at the EU and Member State level and analyses the impact of a transnational organization on the budgetary management of a Member State.

The paper results from gaps in the academic literature addressing the legal and strategic basis for strategic and budgetary planning in the context of the EU economic and fiscal governance, and the link between the EU and Slovenia's economic and fiscal governance. The research seeks to fill this gap by addressing the following question: whether and how the European Union's economic governance system ensures that its strategic goals and priorities are reflected in the Member States' strategic and budgetary planning, and what new developments in this respect have been brought about in the period from 2024 to 2025 by the fiscal rules reform, the new composition of the European Parliament and the European Commission, as well as by the substantially changed geopolitical and economic situation and increased security risks.

The research is based on empirical and qualitative research methods, primarily on the analysis of legal and strategic documents, and includes methods of description, compilation, logical integration and inference, and the method of synthesis. Slovenia as an EU and EMU Member State is considered as a case study.

In the main part, following the introduction, the paper starts with chapter on the EU economic and fiscal governance. A chapter on Slovenia's economic and fiscal governance follows. The two central analytical chapters include developments from 2020 to 2025. The conclusion of the paper summarises the findings.

2. EU ECONOMIC AND FISCAL GOVERNANCE

The EU budget is a fundamental tool for implementing EU policies and achieving the EU's long-term and strategic goals. The TEU defines the general political

Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States [2024] OJ L, 1265/1. The Regulations and the Directive were first used in the preparation of the Member States' budgets for 2025.

objectives of the EU[23] and the basic provisions of the EU institutions.[24] The budgetary functions are implemented by the European Parliament, the Council of the EU and the European Commission.[25] In the context of the budgetary procedure, these institutions present their positions, negotiate and coordinate budgetary priorities. Since 1988, the annual budget has been based on a political agreement on the so-called Multiannual Financial Frameworks[26] (MFF).[27] Decision-making power on budgetary matters is divided between the European Parliament and the Council of the EU, while the European Commission implements the EU budget and manages programmes.[28] The EU budget shall be implemented in accordance with the principle of sound financial management.[29]

The EU budget is managed and implemented at several levels, including the European Commission, the Member States[30] and indirect management structures. Member States cooperate with the EU to ensure that the appropriations are used in accordance with the principle of sound financial management. The ultimate responsibility for implementation of the EU budget lies with the European Commission.[31]

The basic rules for the EU's economic governance and budgetary management are laid out in the financial provisions of the TFEU[32] and the Financial Regulation.[33]

---

23 Article 3 TEU (Lisbon).

24 Articles 13 to 19 TEU (Lisbon).

25 See notes 14 to 16.

26 The MFF is the EU's long-term budget plan that sets out the limits for EU spending over a period of 5-7 years. It defines the overall financial priorities, allocations, and ceilings for different areas of expenditure within the EU, ensuring that spending aligns with the EU's political priorities and long-term objectives.

27 Cvikl; Korpič-Horvat, *op. cit.*, note 8, p. 134.

28 Approach to EU budgetary management constitutes *sui generis.* For more, see Downes, R. et al., *Budgeting and performance in the European Union: A review by the OECD in the context of EU budget focused on results,* OECD Publishing, Paris, 2017, p. 2.

29 Article 310(5) TFEU (Lisbon). The principle of sound financial management requires efficient implementation of the EU budget, which means applying the principles of economy, efficiency, and effectiveness.

30 For more, see Franek, S., *Diversity of public finance management instruments in EU countries*, Optimum Studia Ekonomiczne, Vol. 93, No. 3, 2018, pp. 63–75.

31 Article 317 TFEU (Lisbon).

32 Articles 310 to 325 TFEU (Lisbon).

33 The Financial Regulation is the most important implementing act, which specifies in more detail the provisions of the TFEU on the financial management of the EU budget. The Financial Regulation lays down the rules for the preparation and implementation of the EU budget. In the period from 2020 to 2025, the following two regulations were in force, the Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No

The EU budget is an annual financial and programming plan (work programme), which includes all revenue and expenditure.

The TFEU provides that to achieve the EU policy objectives, the Member States and the EU shall include the adoption of an economic policy,[34] which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives.[35]

The MFF is a key instrument for strategic and budgetary planning, as it sets out spending priorities and budgetary limits. The MFF ensures stability and predictability of budgetary resources and enables the exercise of long-term projects in line with the EU strategies.[36] It shall be adopted for a period of at least five years. The EU's annual budget shall be in conformity with the MFF.[37] The European Commission presents a proposal for a MFF for the new multiannual period in line with its priorities, which are then set out by a special legislative procedure. The adoption of the MFF is confirmed by a Council Regulation, approved by the European Parliament.

In the MFF for the period from 2014 to 2020, the main spending categories were the Common Agricultural Policy (around 40%) and the Structural Funds and Cohesion Fund (30%).[38] For the period from 2021 to 2027, in line with the new priorities of the EU, larger shares of the budget are assigned to moving to sustainable economy, strengthening social cohesion and developing digital technologies.[39] The

1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (Regulation EU 2018/1046) [2018] OJ L 193/1 and Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union (Regulation (EU, Euratom) 2024/2509) [2024] OJ L, 2509/1. For the substantive and financial management of policy areas in the EU, in accordance with Article 317 TFEU (Lisbon) and Article 33 of Regulation (EU, Euratom) 2018/1046, or Regulation (EU) 2024/2509, a "budget focused on results" approach is applied.

34 Article 3 TFEU (Lisbon). For more, see Klajnšek, A., *Vpliv Evropske unije na ekonomsko upravljanje Republike Slovenije*, in: Repas, M. (ed.), Studia Iuridica Miscellanea: MMXXI, Univerza v Mariboru, Univerzitetna založba, Maribor, 2024, pp. 657–687.

35 Article 119 TFEU (Lisbon).

36 Article 312(1) TFEU (Lisbon).

37 Article 312(3) TFEU (Lisbon).

38 Council Regulation (EU, Euratom) No 1311/2013 of 2 December 2013 laying down the Multiannual Financial Framework for the years 2014-2020 [2013] OJ L 347/884. More about the Fiscal Union in the period from 2005 to 2017 see Delgado, F. J., *On the Determinants of Fiscal Decentralization*: *Evidence From the EU*, Amfiteatru Economic, Vol. 23, No. 56, 2021, pp. 206-220.

39 Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the Multiannual Financial Framework for the years 2021 to 2027 [2020] OJ L 433I/11.

MFF for the period from 2021 to 2027 sets out also new own sources for the EU budget.

In March 2020, in the light of the COVID-19 epidemic, the European Commission activated the general escape clause of the SGP, allowing the Member States to temporarily derogate from the fiscal rules.[40] In December 2020, the COVID-19 Recovery Facility was agreed under the MFF 2021-2027[41] and launched in February 2021 (Recovery and Resilience Facility, RRF).[42] The RRF incorporates much of the content of the European Green Deal, with the use of funds linked to the implementation of the reforms included in the European Semester.

In February 2022, the war in Ukraine caused not only a security crisis but also an energy crisis in the EU, to which the EU responded in 2023 by creating a new REPowerEU chapter[43] under the RRF. REPowerEU is the EU's plan to reduce dependence on Russian fossil fuels and accelerate the green transition.

---

40 European Commission, *Activation of the general escape clause of the Stability and Growth Pact*, Communication, COM(2020) 123. The clause, as set out in Articles 5(1), 6(3), 9(1) and 10(3) of the Council Regulation (EC) No 1466/97 and Articles 3(5) and 5(2) of the Council Regulation (EC) No 1467/97, facilitates the coordination of budgetary policies in times of severe economic downturn. In 2024, the Regulation (EU) 2024/1263 was adopted, which in Article 25 provides a general escape clause for the event of a severe economic downturn in the euro area or EU as a whole. Article 26 of the Regulation (EU) 2024/1263 introduces a national escape clause for exceptional circumstances beyond the control of a Member State that significantly impact the public finances of the concerned Member State. For more see Tofan, M.,*et al.*, *Fiscal responsibility legal framework: New paradigm for fiscal discipline in the EU*, Risks, Vol. 8, No.3, 2020, pp. 1–18.

41 Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020] OJ L 433I/23.

42 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L 57/17. For more, see Crescenzi, R. *et al.*, *Mind the Covid-19 crisis: An evidence-based implementation of Next Generation EU*, Journal of Policy Modeling, Vol. 43, No. 2, 2021, pp. 278–297; Dermine, P.; Markakis, M., *EU economic governance and the COVID-19 crisis: Between path-dependency and paradigmatic shift*, International journal of public law and policy, Vol. 6, No. 4, 2020, pp. 326–345; Dornean, A.; Oanea, D.-C., *The effectiveness of fiscal-budgetary measures to counteract the COVID-19 crisis: Evidence from EU countries*, Economics, Vol. 16, No.1, 2022, pp. 137–151; Kramer, Z., *Fiscal sovereignty under EU crisis management: A comparison of Greece and Hungary*, Acta Oeconomica, Vol. 69, No. 4, 2019, pp. 595–624; Ladi, S.; Tsarouhas, D., *EU economic governance and Covid-19: policy learning and windows of opportunity*, Journal of European Integration: Pandemic Politics and European Union responses, Vol. 42, No. 8, 2020, pp. 1041–1056; Levy, D. L., *COVID-19 and Global Governance, Journal of management studies*, Vol. 58, No. 2, 2021, pp. 562–566; Vitalis, *et al.*, *op. cit.,* note 11.

43 Regulation (EU) 2023/435 of the European Parliament and of the Council of 27 February 2023 amending Regulation (EU) 2021/241 as regards REPowerEU chapters in recovery and resilience plans and amending Regulations (EU) No 1303/2013, (EU) 2021/1060 and (EU) 2021/1755, and Directive 2003/87/EC [2023] OJ L 63/1.

In February 2024, the European Parliament and the Council of the EU reached a political agreement on a reform of the EU's economic and fiscal governance framework, including better coordination of economic policies, simplification of fiscal rules, focus on medium-term fiscal-structural plans and strengthening of national fiscal frameworks, including by improving budgetary procedures and making Member States more accountable managing their public finances. On the basis of a political agreement, in April 2024 the Council of the EU adopted three rules reforming the EU's economic governance.[44]

After the European Parliament elections in June 2024, the European Council has set out the EU's new priorities in the EU Strategic Agenda 2024-2029.[45] A new European Commission was also constituted at the end of 2024, which set out its new priorities for the 2024-2029 mandate based on the EU Strategic Agenda.[46]

In 2025, the period of deviation from the fiscal rules ended[47] and Member States had to start applying the reformed rules of the SGP in 2024. At the same time, the war in Ukraine and the significantly changed external political situation in the EU have increased the security risks, geopolitical and economic environment, giving additional priority to objectives and activities related to security, defence and economic competitiveness.

In March 2025, the European Commission presented a proposal for a new plan to strengthen defence capabilities, EU ReArm Europe,[48] which includes the possibility of unlocking public defence funding at national level in the amount of EUR 800 billion. The proposal includes the activation of the national escape clause of

---

44 See note 24.

45 The Strategic Agenda, which guides the work of the EU institutions, sets out the EU's priorities and strategic orientations for the 2024-2029 institutional cycle. European Council, *Strategic Agenda 2024–2029*, [https://www.consilium.europa.eu/media/yxrc05pz/sn02167en24_web.pdf], Accessed 5 April 2025.

46 European Commission, [https://commission.europa.eu/priorities-2024-2029_en] and European Commission, *Political Guidelines for 2024–2029*, [https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en?-filename=Political%20Guidelines%202024-2029_EN.pdf], Accessed 5 April 2025. European Commission, *Political Guidelines for 2019–2024*, [https://commission.europa.eu/system/files/2020-04/political-guidelines-next-commission_en_0.pdf], Accessed 5 April 2025.

47 [https://ec.europa.eu/slovenia/news/eu-general-escape-clause_sl], Accessed 5 April 2025. For more, see Nahtigal, M., *EU recovery plans, inclusive knowledge economy and overcoming regional disparities*, Lex localis, Vol. 20, No.4, 2022, pp. 1171–1189.

48 European Commission, [https://ec.europa.eu/commission/presscorner/detail/en/ip_25_793], Accessed 5 April 2025.

the SGP,[49] which would allow Member States to increase defence expenditure without triggering the Excessive Deficit Procedure. It also proposes the creation of a new instrument providing loans of EUR 150 billion for defence investments.

In the period between 2020 and 2025, the EU's economic and fiscal governance system has, despite the exceptional situation and significant changes in circumstances, linked links the EU's strategic goals with national budgetary and reform policies. Increased security risks due to the war in Ukraine and changes in the internal and external political situation have changed the EU's priorities, now focusing on security, defence, and competition in the economic area. The EU has responded to the changed circumstances mainly through *ad hoc* emergency instruments such as the fiscal escape clause and the innovative and temporary RRF.[50] In particular, the 2024 reform of the EU fiscal rules and changes in the geopolitical and security situation, have brought about greater flexibility and individualisation in the coordination of fiscal policy when dealing with Member States according to their characteristics.[51] Adjustments to budgetary programming have been made to enhance the focus on defence investment and encourage Member States to allocate cohesion policy funds toward defence spending. These adjustments indicate the start of a new, broader reform of the EU economic governance, which will allow sustainable adjustments to changing geopolitical circumstances and security challenges, while accommodating the need for more comprehensive financing and more coordinated economic governance.

3. ECONOMIC AND FISCAL GOVERNANCE IN SLOVENIA

Slovenia is an EU Member State and an EMU member and must thus pursue the EU's common strategic and long-term objectives, in addition to its national ones.[52] In its fiscal governance, it must follow the rules of the SGP. The European Semester represents the fundamental framework for the implementation of the EU's strategic goals and priorities at Member State level, which aims to provide coherence between economic decisions, budgetary constraints and effective implementation of European policies at national level.[53]

---

49 Art. 26 of the Regulation (EU) 2024/1263.

50 For more, see Regling, K., EU Fiscal Rules: *A Look Back and the Way Forward*, Inter Economics, Vol. 57, No. 1, 2022, pp. 8–10.

51 For more, see Voda, A. D. *et al.*, *Error correction model for analysis of influence of fiscal policy on economic growth in EU*, Journal of Business Economics and Management, 2022, pp. 586–605.

52 For more, see Kovač, P.; Bileišis, M. (eds.), *Public Administration Reforms in Eastern European Union Member States: Post-Accession Convergence and Divergence*, Faculty of Administration and Mykolas Romeris University, Ljubljana: Vilnius, 2017.

53 For more, see Klajnšek, *op. cit.*, note 42, pp. 657–687.

The European Semester requires medium-term fiscal policy planning.[54] The key documents for medium-term fiscal planning are the Stability Programme and the National Reform Programme.[55] Member States of the euro area have submitted these documents to the European Commission and the other Member States in the context of the European Semester. Since 2021, Member States are also required to submit a National Recovery and Resilience Plan under the European Semester, under which additional funding for reforms and investment from the RRF takes place.

The annual Stability Programme set out the multiannual macroeconomic and fiscal framework, key fiscal projections and components, and assessed the public finance objectives, in compliance with the requirements of the European Commission and the SGP. The European Commission assessed whether the objectives and the contents of the programme are such as to enable the achievement of the medium-term public finance objectives.

The National Reform Programmes set out the Member States' plans in relation to structural reforms, growth-enhancing measures, job creation measures and measures to progress towards the EU's strategic and policy objectives.[56] In the National Reform Programme, the government set out the priorities, planned to pursue the[57] European Commission's specific recommendations and the EU's strategic goals. The National Reform Programme set out the content of the Member State government's planned actions over the medium term.

---

54 Council Directive 2011/85/EU. The Directive had to be transposed into national legislation by the end of 2013. In Slovenia, this requirement was only met in 2018 with the adoption of the Act Amending the Public Finance Act (ZJF-H), Official Gazette No. 13/2018. Računsko sodišče Republike Slovenije, *Uresničevanje Strategije razvoja Slovenije 2030 in Agende za trajnostni razvoj do leta 2030*, Računsko sodišče Republike Slovenije, Ljubljana, 2021, pp. 9–13.

55 The rules on National Reform Programmes are laid down in Regulation (EU) No 1175/2011, which was replaced by Regulation (EU) 2024/1263 in April 2024. The Member States' National Reform Programmes are intended to support the EU strategy and have been designed in line with the guidance provided in Regulation (EU) No 1175/2011 and the general guidelines for the Member State issued by the European Commission and the European Council at the start of the annual cycle of surveillance.

56 In the period between 2010 and 2020 the strategic development objectives derived from European Commission, *Europe 2020: A strategy for smart, sustainable and inclusive growth*, Communication, COM(2010) 2020 final.

57 Country-Specific Recommendations (CSRs) in the context of the European Semester are a tool for implementing EU strategic goals and priorities at national level. They serve as a bridge between the EU's long-term strategies and the concrete reform and budgetary measures that Member States need to introduce into their economic, social and budgetary policies. The content of the recommendations is based on assessments of the Member State's situation, in particular, as regards economic imbalances, sustainability of public finances, employment, social inclusion, climate objectives, digitalisation, etc.

Since 1999, the Public Finance Act (ZJF) and the Accounting Act[58] have been the main national normative basis for public expenditure management in Slovenia.[59] ZJF enacted the budget focused on results and multiannual budgetary planning,[60] while strategic and development planning was regulated by a government decree in 2010.[61] In Slovenia, the transition from strategic and development to budgetary planning[62] is still incomplete.[63] In Slovenia, the conditions regarding supplementing, amending or replacing development planning documents[64] with new ones in the event of a significant change in circumstances are laid down in the Regulation on development planning documents and procedures for preparing the state budget proposal.[65] The Fiscal Rule was incorporated in the Constitution of the Republic of Slovenia in 2013,[66] and the implementing Fiscal Rule Act was adopted in 2015.[67]

The last implementation of the "six-pack" rules in Slovenia was implemented by amending the ZJF in 2018. Even in 2018, important shortcomings in the strategic and development planning regime in Slovenia were not remedied with the amendment of the ZJF and the amendments to the Regulation on development planning documents and procedures for the preparation of the draft state budget.[68]

The procedures, key documents, and responsible entities for medium-term fiscal policy planning for the years 2020 and 2021 were laid down in Articles 9.a to 9.o

---

58 Official Gazette No. 11/2011 – Official Consolidated Text, 14/2013 – amended, 101/2013, 55/2015 – ZFisP, 96/2015 – ZIPRS1617, 13/2018, 195/2020 – Decision of the Constitutional Court.

59 Official Gazette No. 23/1999, 30/2002 – ZJF-C, 114/2006 – ZUE.

60 Official Gazette No. 11/2011 – Official Consolidated Text, 14/2013 – amended, 101/2013, 55/2015 – ZFisP, 96/2015 – ZIPRS1617, 13/2018, 195/2020 – Decision of the Constitutional Court.

61 For more, see Vitalis *et al.*, *op. cit.,* note 11.

62 For more, see Klužer, F., Lautar, K., *Razvojno načrtovanje, spremljanje in vrednotenje ter zasnova programskega proračuna 2009 – 2011*, SVREZ, Ljubljana, 2011; Vries, Michiel S. de *et al. Performance-based budgeting in the public sector*, Palgrave Macmillan, Cham, 2019, pp. 209–226.

63 For more, see Klajnšek, A., *Uspešnost uveljavljanja k ciljem in rezultatom usmerjenega proračunskega procesa ministrstev v letih 2010-2011*, in: Aristovnik, A. (ed.), Zbornik referatov: XXI. Dnevi slovenske uprave, 2014, Fakulteta za upravo, Ljubljana, 2014, 16 pp.; Klajnšek, A., *Strateško-razvojno načrtovanje Republike Slovenije in epidemija, in:* Repas, M. (*ed.*), Pravo in ekonomija: pravo, ekonomija in epidemija, Univerza v Mariboru, Univerzitetna založba, Maribor, 2022, pp. 146–162.

64 Decree on Development Planning Documents and Procedures for the Preparation of the Draft State Budget, the framework long-term strategic and development planning document is the Development Strategy of Slovenia Official Gazette No. 54/2010, 35/2018.

65 *Ibid*.

66 Art. 148 of the Constitution of the Republic of Slovenia Official Gazette No 33/1991-I, 42/1997 – UZS68, 66/2000 – UZ80, 24/2003 – UZ3a, 47, 68, 69/2004 – UZ14, 69/2004 – UZ43, 69/2004 – UZ50, 68/2006 – UZ121,140,143, 47/2013 – UZ148, 47/2013 – UZ90,97,99, 75/2016 – UZ70a, 92/2021 – UZ62a.

67 Fiscal Rule Act , Official Gazette No. 55/2015, 177/2020 – amended.

68 For more, see Računsko sodišče Republike Slovenije, *op. cit.*, note 64 pp. 9–13.

of the ZJF and in the Regulation on development planning documents and procedures for preparation of the draft state budget. According to the ZJF, the first National Development Policy Programme for the period between 2020 and 2023 should have been drafted and adopted in November 2019, but it was not.[69]

In March 2020, the European Commission assessed that the EU found itself in exceptional situation due to the COVID-19 pandemic and activated the general escape clause of the SGP, allowing a temporary derogation from the fiscal rules. In March 2020, Slovenia was also declared to be in a COVID-19 epidemic.[70]

In the period from 2020 to 2024, the National Development Policy Programme and the medium-term fiscal strategy were not prepared due to the temporary derogation from the fiscal rules and the simplified European Semester procedure. The link between the EU's strategic and long-term objectives and Slovenia's budgetary planning was established in the context of the European Semester through the National Reform Programme[71], the Stability Programme[72] and the National Recovery and Resilience Plan.[73] From 2020 to 2024, the European Semester was adapted to the exceptional situation (activation of the general escape clause) and to the implementation of the RRF. To meet the priority policy objectives in the context of the European Semester, it was particularly important that the national Recovery and Resilience Plans be fully implemented, contributing to the effective addressing of the challenges identified in the specific recommendations for EU Member States.[74]

At the end of April 2024, renewed EU legislation on the governance of economic and fiscal policies entered into force. Member States were required to draw up and submit to the European Commission a medium-term fiscal and structural plan for the period from 2025 onwards.[75] The plan should specify the planned fiscal

---

69 *Ibid.*, p. 48.

70 Order on the Declaration of an Epidemic of the SARS-CoV-2 (COVID-19) Communicable Disease in the territory of the Republic of Slovenia, Official Gazette No. 19/2020.

71 [https://commission.europa.eu/documents_en?prefLang=sl&f%5B0%5D=document_title%3Aslovenia%2C%20national%20reform%20programme], Accessed 5 April 2025.

72 [https://commission.europa.eu/documents_en?prefLang=sl&f%5B0%5D=document_title%3Aslovenia%2C%20stability%20programme], Accessed 5 April 2025.

73 Služba Vlade RS za razvoj in evropsko kohezijsko politiko, [https://www.eu-skladi.si/sl/po-2020/nacrt-za-okrevanje-in-krepitev-odpornosti], Accessed 5 April 2025.

74 Council Recommendation of 21 October 2024 on economic, budgetary, employment and structural policies of Slovenia [2024] OJ C 6831/1.

75 In 2025, the government drafted a proposal for a new Fiscal Rule Act. Following the reform of the fiscal rules at the EU level, it will unify the legal basis for the conduct of fiscal policy at both the national and European levels.

policy and key reforms and investments in response to country-specific recommendations under the European Semester and other EU priorities. The suitability of the plan is verified by the European Commission and endorsed by the Council of the EU.

On 19 June 2024, the European Commission published the Country Report for Slovenia 2024,[76] assessing Slovenia's progress in implementing the country-specific recommendations and the Recovery and Resilience Plan. The report also addressed Slovenia's progress in meeting the objectives of the European Pillar of Social Rights and the United Nations Sustainable Development Goals.[77]

By October 2024, Slovenia prepared its first Medium-Term Fiscal and Structural Plan for the period 2025-2028,[78] which includes fiscal, reform and investment commitments based on the challenges of the European Semester, such as a fair green and digital transition, energy security, and strengthening of defence capabilities.

Following the submission of the document, the Council of the EU forwarded to Slovenia new specific recommendations,[79] and the European Commission adopted its Opinion on Slovenia's medium-term fiscal-structural plan on 26 November 2024.[80] In its opinion, the Commission stated that the plan includes all necessary information and measures for addressing the main challenges established in the context of the European Semester and the EU priorities, including environmental sustainability, social and economic resilience and defence capabilities. Slovenia's medium-term fiscal-structural plan includes also correlation tables linking individual policy areas financed by the European Cohesion Policy Programme 2021-2027 to country-specific recommendations, and provides information on possible synergy with the Cohesion Policy Funds and the Slovenia's Recovery and Resilience Plan.[81]

As an EU Member State, Slovenia is required to coordinate its national objectives with the EU's long-term strategic goals, which requires an effective integration of

---

76 European Commission, *Country Report – Slovenia Accompanying the document Recommendation for a Council Recommendation on the economic, social, employment, structural and budgetary policies of Slovenia*, Staff Working Document, SWD/2024/624 final.

77 Council, *op. cit.*, note 86, p. 6.

78 On 4 October 2024, the National Assembly of the Republic of Slovenia discussed draft medium-term fiscal-structural plan. It was adopted by the Government of the Republic of Slovenia on 10 October 2024.

79 Council, *op. cit.*, note 86, p. 1.

80 European Commission, *Opinion on the Draft Budgetary Plan of Slovenia*, C(2024) 9064 final, p. 8.

81 Slovenia's medium-term fiscal-structural plan includes correlation tables linking the individual policy areas financed by the European Cohesion Policy Programme 2021–2027 to country-specific recommendations.

national strategic development objectives into the European framework. However, Slovenia lacks a suitable legal basis for strategic development planning within its national public finance system. In the period between 2020 and 2025, the integration between the European strategic goals and Slovenia's national objectives took place mainly through the European Semester.

In Slovenia, no change to the national strategic development planning documents was proposed in the period between 2020 and 2025 due to a significant change in circumstances, which means that the formal national objectives and priorities remained unchanged despite the changed circumstances. Changes have only been made to documents directly related to the European Semester commitments and EU legislation, such as the National Reform Programme, the budgetary plans and the medium-term fiscal-structural plan. This represents a significant deficiency in Slovenia's strategic and budgetary planning, as outdated strategic documents reduce the consistency with the country's long-term development priorities and actual budgetary and reform measures. This reduces the country's resilience to new challenges and the effectiveness of budgetary planning, and may have a negative impact on the country's long-term development. A comprehensive alignment of national strategies could allow Slovenia to respond more effectively to current challenges, to more targeted spending and better coordination of national strategic goals with European ones.

Despite these requirements and the possibilities to adjust strategic documents in the light of significantly changed circumstances, Slovenia has not formally amended its key national strategic plans after 2020, including the Slovenian Development Strategy 2030[82]. Changes have only been made to documents directly related to the European Semester commitments and the EU legislation. This represents a significant deficiency in Slovenia's strategic and budgetary planning, as outdated strategic documents reduce the consistency with the country's long-term development priorities and actual budgetary and reform measures. Consequently, there is an increased risk of inefficiency in achieving strategic goals, which are driven by national interests as well as common EU objectives. The lack of a systematic and comprehensive approach to the alignment of national strategy papers puts Slovenia in a more unfavourable position in realising the full potential of all EU instruments available and in ensuring the long-term flexibility and resilience of the public finance management system.

[82] Government of the Republic of Slovenia, *Slovenia Development Strategy 2030*, Government Office for Development and European Cohesion Policy, Ljubljana, 2017.

4. CONCLUSION

This paper investigates whether and how the EU's economic governance system ensures that its strategic goals and priorities are reflected in the Member States' strategic and budgetary planning, and what new developments in this respect have been brought about in 2024 and 2025 by the fiscal rules reform, the new composition of the European Parliament and the European Commission, as well as by the substantially changed external political and economic situation and increased security risks. We were wondering whether the changes in the external political situation and the multiple crises have led to a change in the EU's long-term and strategic goals.

Strategic and budgetary planning in the EU and in the Member States is regulated by legal acts at the EU and the national level, and the national legislation should be in line with EU legislation. The fundamental objectives of the EU are set out in the EU primary law, in particular the TEU (stability of public finances, sustainable development, social cohesion, competitiveness of economic and strengthening strategic autonomy and defence capabilities).

The EU's economic and fiscal governance system for the period 2020-2025 was based on the connection between the European strategic goals and the national ones, notably through the SGP and the European Semester. This framework ensured that Member States' budgetary and reform policies were aligned with the EU priorities. The COVID-19 pandemic triggered the activation of the general escape clause, allowing Member States to temporarily derogate from the budgetary rules, however, the commitment to the EU strategic goals through the European Semester and the implementation of the RRF was maintained.

The reform of the fiscal rules adopted in April 2024 brought substantial changes to the economic and fiscal governance system. The reformed governance framework is based on medium-term fiscal-structural plans that integrate fiscal policy with structural reforms and investments, while at the same time taking into account country-specific recommendations. An important innovation is individualisation of fiscal paths, allowing the states more flexibility to respond to their specific fiscal challenges, with the possibility to extend the adjustment period to up to seven years if they include credible reforms and investments contributing to the EU objectives.

Due to the significantly changed geopolitical and security situation, priorities related to energy security and defence have been integrated into the European Commission's priorities and the reformed EU economic and fiscal governance frame-

work. Investments in energy diversification and infrastructure have become an integral part of the Member States' fiscal policies, which applies also for Slovenia.

The new composition of the European Parliament and the European Commission in 2024 further emphasised the importance of competitiveness, strategic autonomy and strengthening defence capabilities with the EU Strategic Agenda 2024-2029. In the coming years, these priorities will need to be reflected in national strategic and budgetary documents. In line with these priorities, Slovenia has prepared its first medium-term fiscal-structural plan 2025-2028, bringing together reforms and investments for Slovenia's green and digital transition, strengthening social and economic resilience, energy security, and increasing defence expenditure.

In March 2025, the European Commission again proposed the use of emergency instruments in view of the heightened geopolitical and security situation: The new EU's defence capabilities plan ReArm Europe and the use of the national escape clause under the SGP, to provide greater flexibility to increase Member States' defence spending in the short term and to encourage the redirection of funds from cohesion policy to security and defence.

Strategic documents such as the EU Strategic Agenda, the European Commission's priorities and work programmes, the MFF, the RRF and the medium-term fiscal-structural plans are derived from or are formally and substantively aligned with EU legal acts. These are political and governance acts with not formal legal nature in terms of directly binding regulations, however, they are indirectly binding as they constitute a key basis for the implementation of EU policies through the EU budget and guide the design of national reform programs, investments and budgetary plans of Member States in the context of the European Semester. Their binding nature is reflected in the surveillance mechanisms, the recommendations of the Council of the EU, the conditions for access to the EU funds (e.g. the RRF) and the sanctions in the event of non-compliance with the (fiscal) rules.

The EU budget and national budgets are the main instruments for financing policy objectives and EU priorities set out in legal and strategic instruments, including the green and digital transition, enhancing social cohesion, defence and ensuring security. This means that the content and the directions for European and national budgets in the period between 2020 and 2025 were directly connected to the priorities set out in the EU's strategic documents. The planned reuse of emergency instruments in 2025, following the reform of the EU's economic and fiscal governance in 2024, continues the use emergency mechanisms and marks the beginning of a new, broader reform of the EU's economic and fiscal governance, in particular towards allowing for greater flexibility in coordinating European and

national policies to respond and adapt to major changes in the geopolitical and security situation.

REFERENCES

BOOKS AND ARTICLES

1. Afonso, A; Alves, J.; Monteiro, S., *et al.*, *Sovereign risk dynamics in the EU: The time varying relevance of fiscal and external (im)balances*, Journal of International Financial Markets, Institutions & Money, Vol. 94, 2024, pp. 1–22.
2. Asteriou, D.; Spanos, K., *The relationship between financial development and economic growth during the recent crisis: Evidence from the EU*, Finance Research Letters, Vol. 28, 2019, pp. 238–245.
3. Brinar, I. *Politično sodelovanje in politično združevanje v Evropski skupnosti,* Teorija in praksa, Ljubljana, Vol. 28, No. 1/2, 1991, pp. 115–118.
4. Crescenzi, R. *et al.*, *Mind the Covid-19 crisis: An evidence-based implementation of Next Generation EU*, Journal of Policy Modeling, Vol. 43, No. 2, 2021, pp. 278–297.
5. Cvikl, M. M., *Prenovljeno pravo Evropske unije*, 2009
6. Cvikl, M. M.; Korpič-Horvat, E., *Proračunsko pravo: priprava, izvrševanje in nadzor proračunov*, GV Založba, Ljubljana, 2007
7. Delgado, F. J., *On the Determinants of Fiscal Decentralization: Evidence From the EU*, Amfiteatru Economic, 23, No. 56, 2021, pp. 206-220.
8. Dermine, P.; Markakis, M., *EU economic governance and the COVID-19 crisis: Between path-dependency and paradigmatic shift*, International journal of public law and policy, Vol. 6, No. 4, 2020, pp. 326–345.
9. Dornean, A.; Oanea, D.–C., *The effectiveness of fiscal-budgetary measures to counteract the COVID-19 crisis: Evidence from EU countries*, Economics, Vol. 16, No.1, 2022, pp. 137–151.
10. Downes, R. et al., *Budgeting and performance in the European Union: A review by the OECD in the context of EU budget focused on results,* OECD Publishing, Paris, 2017
11. Franek, S., *Diversity of public finance management instruments in EU countries*, Optimum Studia Ekonomiczne, Vol. 93, No. 3, 2018, pp. 63–75.
12. Kamnar, H.; Borak N., *Fiskalna pravila*, Zveza ekonomistov Slovenije, Ljubljana, 2013
13. Klajnšek, A., *Uspešnost uveljavljanja k ciljem in rezultatom usmerjenega proračunskega procesa ministrstev v letih 2010-2011*, in: Aristovnik, A. (ed.), Zbornik referatov: XXI. Dnevi slovenske uprave, 2014, Fakulteta za upravo, Ljubljana, 2014
14. Klajnšek, A., *Jezikovna politika Republike Slovenije in oglaševanje*, in: Repas, M. (*ed.*), Dileme sodobnega oglaševanja: izbrane teme, Univerza v Mariboru, Univerzitetna založba, Maribor, 2023, pp. 3–22.
15. Klajnšek, A., *Strateško-razvojno načrtovanje Republike Slovenije in epidemija, in:* Repas, M. (*ed.*), Pravo in ekonomija: pravo, ekonomija in epidemija,*a*. Univerza v Mariboru, Univerzitetna založba, Maribor, 2022, pp. 146–162.

16. Klajnšek, A., *Vpliv Evropske unije na ekonomsko upravljanje Republike Slovenije*, in: Repas, M. (ed.), Studia Iuridica Miscellanea: MMXXI, Univerza v Mariboru, Univerzitetna založba, 2024, pp. 657–687.
17. Klužer, F., Lautar, K., *Razvojno načrtovanje, spremljanje in vrednotenje ter zasnova programskega proračuna 2009 – 2011*, SVREZ, Ljubljana, 2011
18. Kovač, P.; Bileišis, M. (*eds.*), *Public Administration Reforms in Eastern European Union Member States: Post-Accession Convergence and Divergence*, Faculty of Administration and Mykolas Romeris University, Ljubljana: Vilnius, 2017
19. Kramer, Z., *Fiscal sovereignty under EU crisis management: A comparison of Greece and Hungary*, Acta Oeconomica, Vol. 69, No. 4, 2019, pp. 595–624.
20. Ladi, S.; Tsarouhas, D., *EU economic governance and Covid-19: policy learning and windows of opportunity*, Journal of European Integration: Pandemic Politics and European Union responses, Vol. 42, No. 8, 2020, pp. 1041–1056.
21. Levy, D. L., *COVID-19 and Global Governance,* Journal of management studies, Vol. 58, No. 2, 2021, pp. 562–566.
22. Nahtigal, M., *EU recovery plans, inclusive knowledge economy and overcoming regional disparities*, Lex localis, Vol. 20, No.4, 2022, pp. 1171–1189.
23. Računsko sodišče Republike Slovenije, *Uresničevanje Strategije razvoja Slovenije 2030 in Agende za trajnostni razvoj do leta 2030*, Računsko sodišče Republike Slovenije, Ljubljana, 2021
24. Rainer L.; Ronny, R., *Managing sustainable development with management control syst*ems, in: A literature review. European Management Journal, Vol. 34, No. 2, 2016, pp. 158–171.
25. Regling, K., EU Fiscal Rules: *A Look Back and the Way Forward*, Inter Economics, Vol. 57, No. 1, 2022
26. Stare, J.; Pečarič, M. *Znanost o javni upravi*, Fakulteta za upravo, Ljubljana, 2021
27. Tofan, M., *et al.*, *Fiscal responsibility legal framework: New paradigm for fiscal discipline in the EU,* Risks*,* Vol. 8, No.3, 2020, pp. 1–18.
28. Vitalis, N. *et al.*, *New development: Between politics and strategic planning—the management of government priorities in Lithuania*, Public Money & Management, Vol. 40, No. 4, 2020, pp. 299–303.
29. Vlada Republike Slovenije, *Strategija razvoja Slovenije 2030*, Služba Vlade Republike Slovenije za razvoj in evropsko kohezijsko politiko, Ljubljana, 2017
30. Voda, A. D. *et al.*, *Error correction model for analysis of influence of fiscal policy on economic growth in EU*, Journal of Business Economics and Management, 2022, pp. 586–605.
31. Vries, Michiel S. de; Nemec, J.; Špaček, D., (ed.) *et al. Performance-based budgeting in the public sector*, Palgrave Macmillan, Cham, 2019

UNITED NATIONS DOCUMENTS

1. Resolution adopted by the General Assembly of United Nations on 25 September 2015, A/RES/70/1

EU LAW

1. Consolidated version of the Treaty of the European Union and the Treaty on the Functioning of the European Union [2016] OJ C 202/1
2. Council Directive (EU) 2024/1265 of 29 April 2024 amending Directive 2011/85/EU on requirements for budgetary frameworks of the Member States [2024] OJ L 1265/1
3. Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States [2011] OJ L 306/41
4. Council Recommendation of 21 October 2024 on economic, budgetary, employment and structural policies of Slovenia [2024] OJ C 6831/1
5. Council Regulation (EC) No 1055/2005 of 27 June 2005 amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2005] OJ L 174/1
6. Council Regulation (EC) No 1056/2005 of 27 June 2005 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2005] OJ L 174/5
7. Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [1997] OJ L 209/84
8. Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure [1997] OJ L 209/89
9. Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020] OJ L 433I/23
10. Council Regulation (EU) 2024/1264 of 29 April 2024 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2024] OJ L 1264/1
11. Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2011] OJ L 306/33
12. Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027 [2020] OJ L 433I/11
13. Council Regulation (EU, Euratom) No 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020 [2013] OJ L 347/884
14. European Commission, *Activation of the general escape clause of the Stability and Growth Pact*, Communication, COM(2020) 123
15. European Commission, *Country Report – Slovenia Accompanying the document Recommendation for a Council Recommendation on the economic, social, employment, structural and budgetary policies of Slovenia*, Staff Working Document, SWD/2024/624 final
16. European Commission, *Europe 2020: A strategy for smart, sustainable and inclusive growth*, Communication, COM(2010) 2020 final
17. European Commission, *Opinion on the Draft Budgetary Plan of Slovenia*, C(2024) 9064 final

18. Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L 57/17
19. Regulation (EU) 2024/1263 of the European Parliament and of the Council of 29 April 2024 on the effective coordination of economic policies and on multilateral budgetary surveillance and repealing Council Regulation (EC) No 1466/97 [2024] OJ L 1263/1
20. Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area [2011] OJ L 306/1
21. Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area [2011] OJ L 306/8
22. Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2011] OJ L 306/12
23. Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L 306/25
24. Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (Regulation EU 2018/1046) [2018] OJ L 193/1
25. Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union [2024] OJ L, 2509/1
26. Resolution of the European Council on the Stability and Growth Pact [1997] OJ C 236/1
27. Treaty on European Union [1992] OJ C 191/1

LIST OF NATIONAL REGULATIONS

1. Accounting Act, Official Gazette No. 23/1999, 30/2002 – ZJF-C, 114/2006 – ZUE
2. Constitution of the Republic of Slovenia, Official Gazette No. 33/1991-I, 42/1997 – UZS68, 66/2000 – UZ80, 24/2003 – UZ3a, 47, 68, 69/2004 – UZ14, 69/2004 – UZ43, 69/2004 – UZ50, 68/2006 – UZ121,140,143, 47/2013 – UZ148, 47/2013 – UZ90,97,99, 75/2016 – UZ70a, 92/2021 – UZ62a
3. Decree on Development Planning Documents and Procedures for the Preparation of the Draft State Budget, Official Gazette No. 54/2010, 35/2018
4. Fiscal Rule Act, Official Gazette No. 55/2015, 177/2020 – amended
5. Order on the Declaration of an Epidemic of the SARS-CoV-2 (COVID-19) Communicable Disease in the territory of the Republic of Slovenia, Official Gazette No. 19/2020

6. Public Finance Act, Official Gazette No. 11/2011 – Official Consolidated Text, 14/2013 – amended, 101/2013, 55/2015 – ZFisP, 96/2015 – ZIPRS1617, 13/18, 195/2020 – Decision of the Constitutional Court, 18/2023 – ZDU-1O, 76/2023

WEBSITE REFERENCES

1. Council of the EU, [https://data.consilium.europa.eu/doc/document/ST-11716-2024-INIT/sl/pdf], Accessed 5 April 2025
2. European Commission, [https://ec.europa.eu/info/sites/default/files/2020-european-semester-national-reform-programme-slovenia_sl.pdf], Accessed 5 April 2025
3. European Commission, [https://commission.europa.eu/documents_en?prefLang=sl&f%5B0%5D=document_title%3Aslovenia%2C%20national%20reform%20programme], Accessed 5 April 2025
4. European Commission, [https://commission.europa.eu/documents_en?prefLang=sl&f%5B0%5D=document_title%3Aslovenia%2C%20stability%20programme], Accessed 5 April 2025
5. European Commission, [https://commission.europa.eu/document/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en], Accessed 5 April 2025 European Commission, [https://commission.europa.eu/priorities-2024-2029], Accessed 5 April 2025
6. European Commission, [https://ec.europa.eu/commission/presscorner/detail/en/ip_25_793], Accessed 5 April 2025
7. European Commission, *Political Guidelines for 2019-2024*, [https://commission.europa.eu/system/files/2020-04/political-guidelines-next-commission_en_0.pdf], Accessed 5 April 2025
8. European Commission, *Political Guidelines for 2024–2029*, [https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb-2cf648_en?filename=Political%20Guidelines%202024-2029_EN.pdfhttps://commission.europa.eu/index_en], Accessed 5 April 2025
9. European Commission, [https://ec.europa.eu/commission/presscorner/detail/en/ip_25_793], Accessed 5 April 2025European Council, *Strategic Agenda 2024–2029,* [https://www.consilium.europa.eu/media/yxrc05pz/sn02167en24_web.pdf], Accessed 5 April 2025
10. Služba Vlade RS za razvoj in evropsko kohezijsko politiko, [https://www.eu-skladi.si/sl/po-2020/nacrt-za-okrevanje-in-krepitev-odpornosti], Accessed 5 April 2025

DIGITAL LABOUR PLATFORM (DLP) REGULATION IN CROATIA

Jelena Tadić Cegnar, LLM, Teaching Assistant
University of Zagreb, Faculty of Economics and Business
Trg J. F. Kennedya 6, 10000 Zagreb, Croatia
jtadicceg@net.efzg.hr

ABSTRACT

Digital labour platforms (DLP) represent one of the most visible results of the latest technological revolution in the world of work. Working through online platforms in the Republic of Croatia is a relatively new phenomenon which has seen significant growth in the last few years, especially since the arrival of digital platforms such as Uber, Bolt, Wolt and Glovo, which operate in Croatia in the transport and delivery services. Although this phenomenon started before the COVID-19 crisis, for many platform workers the workload increased sharply due to the impact of the pandemic. The types of work offered through platforms are ever-increasing, as are the challenges for regulators.

In an effort to modernize and align Croatian labour law with the contemporary challenges, the amendments to the Croatian Labour Act governing work on digital platforms took effect on 1 January 2024, before the formal adoption of the EU Platform Work Directive in April 2024. With this regulatory harmonization, the Croatian legal framework represents one of the earliest regulations on platform work within the European Union.

This paper provides a concise overview of the main novelties brought by the Croatian Labour Act, as well as the key features from the EU Platform Work Directive. The analysis will also examine the Report on the state of Platform Work for the year 2024, which has to be published by the Croatian Ministry of Labour, Pension System, Family and Social Policy by 31 January 2025, being the first report since the implementation of the Unified Electronic Work Records ("JEER") system. The report is expected to provide a more detailed insight into the state of platform work in Croatia. A particular emphasis will be placed on foreign migrant workers, whose number is constantly growing and who are often employed as platform workers. Conclusions will be drawn on the necessary legislative changes during the formal alignment with the adopted directive.

Keywords*: Croatia, digital labour platforms, EU Platform Work Directive, labour market, platform work*

1. INTRODUCTION

1.1. The emergence of work on digital platforms

Rapid technological progress and the expansion of the internet have led to the Fourth Industrial Revolution, which is now re-defining the global economy and its labour markets. Digital platforms are one of the key outcomes of such a revolution[1], brought about by a combination of decentralized information networks, big data analytics and mobile digital devices.[2] This emerging form of work has driven the evolution of case law and prompted legislative changes in labour laws across various countries.

One of the defining aspects of platform work is its tripartite structure, which involves three key participants: the online platform, the platform worker, and the client. However, very often, the structure of digital platform work is in fact quadripartite, as it involves the online platform, a platform worker, a client but also an intermediate partner company („aggregator").[3] Platform work is characterized by its inherent diversity, posing substantial challenges in classification and legal regulation. Despite this complexity, there is a broad consensus on a fundamental distinction based on the location where work is performed[4]. Digital labour platforms can be broadly categorized into two primary types: crowdwork and gigwork[5]. Crowdwork is conducted remotely via the internet, allowing workers to complete tasks from any location, encompassing a wide range of activities, such as simple microtasks (e.g., data categorization, image labelling) and more complex tasks (e.g., software testing, product design). Gigwork[6], on the other hand, requires workers to be physically present at a designated location and time, as seen

---

1 World Economic Forum, *The Fourth Industrial Revolution: what it means, how to respond*, 2016, [https://www.weforum.org/stories/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond], Accessed 23 March 2025

2 Urzì Brancati M.C.; Pesole A.; Fernández-Macías E., *New evidence on platform workers in Europe, Results from the second COLLEEM survey,* 2020, p. 7.

3 Bjelinski Radić, I., *Kritička promišljanja o prijedlogu Direktive o poboljšanju radnih uvjeta platformsih radnika*, Zbornik Pravnog Fakulteta u Zagrebu, 2022, p. 1468., see also: Todoli-Signes, A., *The 'gig-economy': Employee, self-employed or the need for a special employment regulation?*, Transfer: European Review of Labour and Research, Vol. 23, Issue 2, 2017, pp. 140.

4 De Stefano, V.; Aloisi, A., *European legal framework for digital labour platforms*, *Publication Office of the European Union*, Luxembourg, 2018. p. 8.

5 For more comparison see: Dumančić, K.; Načinović Braje, I.; Aleksić, A., *Legal and Organizational Aspects of Labour Relations in the Collabourative Economy*, in: Teli, M.; Bassetti, C. (eds.), Becoming a Platform in Europe: On the Governance of the Collabourative Economy, Now Publishers Inc., Boston/Delft, 2021, p. 215.

6 More about: Dumančić, K.; Načinović Braje, I.; Wittine, Z., *GIG WORK: The Challenges for the Protection of Platform Workers' Rights,* pp. 933-944.

in services like ride-hailing, food delivery and domestic services.[7] It is important to distinguish between different forms of employment for platform workers, as their status can vary depending on the sector, platform practices, and national labor and tax regulations. Platform workers may either be employed directly by the platform (which is uncommon) or, more frequently, by a partner company acting as an intermediary. Alternatively, they may work as registered self-employed individuals or freelancers.[8] This distinction is crucial because labour law regulations apply to dependent work, whereas self-employment is governed by civil and commercial law.[9]

The emergence of platform work was accelerated by the COVID-19 pandemic. During that time, digital labour platforms played a crucial role in helping many businesses remain operational by providing much-needed flexibility. For instance, numerous restaurants were able to continue their activities during lockdown thanks to food-delivery platform services. However, despite this adaptability, the COVID-19 crisis has underscored the necessity of ensuring access to social protection and safeguards against occupational risks for platform workers. Platform work appears in numerous different forms, and the range of activities carried out through digital platforms is constantly expanding. Data shows that there were around 28 million platform workers in the EU-27 in 2022, and it was estimated that this number would grow to 43 million by 2025.[10] For comparison, this figure is ten times the total population of the Republic of Croatia.

1.2 The emergence of work on digital platforms in Croatia

Working through online platforms in the Republic of Croatia is a relatively new phenomenon, which has seen significant growth in the last few years. While digital platforms have been a global trend for some time, their widespread adoption in Croatia was notably accelerated by the events of the year 2020. The COVID-19 pandemic, followed by stringent lockdown measures, and the devastation caused by two powerful earthquakes that struck the country that year, particularly af-

---

7 Eurofound, *Non-standard forms of employment: Recent trends and future prospects,* 2017, [https://www.eurofound.europa.eu/en/publications/2017/non-standard-forms-employment-recent-trends-and-future-prospects], Accessed 22 March 2025, p. 22.

8 Vukorepa, I., *Cross-border platform work: riddles for free movement of workers and social security coordination,* Zbornik Pravnog Fakulteta Zagrebu, Vol. 70, Issue 4, 2020, p. 487.

9 For more see: Bjelinski Radić, I., *Novi oblici rada kao suvremeni izazov za radno pravo – slučaj UBER,* Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol.38, Issue 2, 2017, pp. 881-905.

10 Impact Assessment Report accompanying the Proposal for a Directive of the European Parliament and of the Council to improve the working conditions in platform work in the European Union, Staff Working Document, European Commission, 2021., p. 19.

fecting the city of Zagreb, were key catalysts in this shift[11]. As businesses closed their physical locations and individuals were forced to stay at home to prevent the spread of the virus, the demand for remote work and online services skyrocketed. For many workers whose businesses were no longer operational or whose industries had ground to a halt due to the pandemic or earthquake-related circumstances, platform work emerged as an existential solution. Those workers turned to platform work as a way to maintain their income.

Moreover, the reliance on these platforms highlighted a growing need for regulatory frameworks to protect platform workers in Croatia. In an effort to modernize and align Croatian labour law with contemporary challenges, the Republic of Croatia has become the first country in the European Union to fully regulate work[12] performed through digital labour platforms[13], even before the official adoption of the EU directive on improving working conditions in platform work[14]. In the explanation of the final proposal of amendments to the Labour Act, the Government of the Republic of Croatia highlighted the regulation of platform work as one of the key challenges of modern labour legislation. Considering both the advantages and disadvantages of this form of work, the Government of Croatia deemed it necessary to balance supporting the sustainable growth of digital labour platforms and ensuring their transparency with securing decent working conditions for individuals engaged in platform work.[15]

The legal framework regulating this emerging form of work, introduced through the Croatian Labour Act, came into force on 1 January 2024.[16] At the same time, the JEER system was implemented under the jurisdiction of the Ministry of La-

---

11 For instance, while in 2018, the platforms Glovo and Wolt had a few thousand deliveries per month in Croatia, by 2020, they were handling several hundred thousand deliveries per month across the entire country. For more, see: Butković, H.; Samaržija, V.; Rukavina, I., *Foreign Workers in Croatia: Challenges and Opportunities for Economic and Social Development,* Institute for Development and International Relations, 2020, p. 70.

12 By contrast, at other national level, regulation has often approached the phenomenon narrowly and in a fragmented and casuistic way, typically by focusing on specific forms of work provided through platforms (e.g. couriers, urban transport workers) rather than holistically, see: Aloisi, A.; Rainone, S.; Countouris, N., *An unfinished task? Matching the Platform Work Directive with the EU and international 'social acquis', Working Paper 101*, ILO, 2023, p. 5.

13 Report on the State of Platform Work in Croatia, 2025, p. 1.

14 Directive of the European Parliament and of the Council on improving working conditions in platform work, Official Journal of the European Union, 2024.

15 Konačni prijedlog Zakona o izmjenama i dopunama Zakona o radu, Vlada Republike Hrvatske (eng. The Final Proposal of the Act on Amendments to the Labour Act, Government of the Republic of Croatia), p. 65.

16 Labour Act, Official Gazette No. 93/14, 127/17, 98/19, 151/22, 46/23, 64/23.

bour, Pension System, Family and Social Policy of the Republic of Croatia[17], which is responsible for maintaining records of work conducted via digital platforms. This paper will examine the key provisions of the Croatian Labour Act related to platform work, as well as the first annual report on its implementation, published by the Ministry for the year 2024. Furthermore, it will explore the novelties introduced by the EU Directive on Improving Working Conditions in Platform Work and outline the necessary legislative amendments required to align national regulations with the adopted directive.

2. THE CROATIAN LABOUR ACT

The new provisions regulating work through digital platforms have been included in Chapter IVa. of the Labour Act (LA) under the title "Work through Digital Labour Platforms", incorporating Articles 221a to 221p. This chapter of the LA regulates matters related to platform work, defines key terms, and establishes specific rights and obligations arising between employers and workers engaged in such work. Additionally, it sets a minimum level of protection for rights and working conditions when such work is performed by other individuals and outlines the rights and responsibilities of digital labour platforms to ensure their transparent operation, as described in Article 221a. In the following part of this paper, the provisions of the article will be analyzed, divided into 4 thematic sections.

2.1. Definitions of Key Terms Related to Platform Work

Work performed using a digital work platform is considered billable work carried out by a natural person under a contractual relationship with a digital work platform or an aggregator. This work is facilitated through digital technology and can be performed remotely via electronic means, such as a website or mobile application, or directly at a specific location between participants involved in the job (Article 221b). A digital work platform is a natural or legal person that provides services at the request of a service recipient using digital technology. Additionally, an aggregator is an entity that engages in mediation activities for one or more digital work platforms. Both digital work platforms and aggregators must be registered in the records of the competent ministry to operate legally (Article 221c). Regarding employment relationships, Article 221d establishes that a digital work platform or an aggregator is considered the employer of a worker who performs tasks personally through a digital work platform. If an aggregator acts as the work-

[17] Pravilnik o Jedinstvenoj elektroničkoj evidenciji rada, (eng. Ordinance on Unified Electronic Labour Records), Official Gazette No. 8/2024.

er's employer, the digital work platform is jointly liable for the aggregator's obligations toward the worker. However, the digital work platform may be exempted from this liability if it demonstrates that the aggregator is duly registered, ensures workers' enrollment in pension and health insurance, regularly pays wages, and has no outstanding tax debts. To verify these conditions, the digital work platform may request supporting documentation from the aggregator before entering into a contract or on a monthly basis during the contract's duration.

This provision is particularly significant in the context of Croatia, where many workers enter into contracts with aggregators rather than directly with platforms. Even before the legal regulation of this form of work, platform work was largely carried out in practice with the involvement of aggregators.[18] Relevant data shows that for platform workers offering physical labour services a significant issue is their relationship with aggregators who act as intermediaries between them and the platforms. Aggregators frequently sign employment contracts with workers for only two or four hours per day, while they actually work up to 12 hours daily. The difference in working hours is not reported to the state, avoiding tax payments. All earned income first goes to the aggregators' accounts, and many do not pay any contributions to the state, despite deducting money from workers' earnings as if these payments were being made. To evade VAT obligations, many aggregators frequently shut down their companies, declaring fictitious bankruptcies, only to establish new ones where they transfer all former workers.[19] Digital platforms initially resisted the idea of joint legal responsibility in these situations. However, over time, platforms came to realize that they also benefit from the work facilitated by aggregators. These intermediaries bring workers to the platforms, generating revenue for them, which led platforms to understand that it would be more beneficial to regulate these relationships legally rather than eliminate the role of aggregators entirely. The introduction of joint liability in Article 221d is a key step towards ensuring fairness and transparency in the platform work ecosystem. It holds both the digital work platform and the aggregator accountable for the rights and obligations towards workers.

Finally, the Labour Act defines a worker who performs work using a digital work platform as a natural person engaged in an employment relationship with a digital work platform or an aggregator under an employment contract. Apart from employed workers, other persons may also perform work using a digital work plat-

---

18 ETUC*, Platform Report: Croatia Report*, 2022, [https://www.etuc.org/en/platform-reps-project-country-reports-and-key-policy-recommendations], Accessed 29 March 2025.

19 For more see: Butković, H., Samardžija, V., *The Digital Transformation of the Labour Market in Croatia,* Institute for Development and International Relations, 2019., p. 152.

form under a contractual arrangement that does not constitute an employment relationship. (Article 221e).[20]

2.2. Use of Automated Management Systems in Platform Work

Algorithmic management is a crucial element of the platform business model, playing a central role in the automated or semi-automated decision-making systems (ADM) that govern how platforms operate. As many argue, it is not simply a tool for companies to streamline operations; it represents a fundamental shift in how work is organized and managed. These systems make real-time decisions about workers, including assigning tasks, predicting performance, and even assessing workers' emotions. However, these decisions are often opaque and nearly impossible for workers to challenge. This lack of transparency leads to several potential risks, including a loss of autonomy, discrimination, unpredictable incomes, and increased surveillance[21].

That is why, according to Croatian Labour Act, employers who utilize digital technology and automated management systems based on algorithms in organizing work through digital platforms have several key obligations towards their workers. These obligations ensure transparency, fairness, and the protection of workers' rights.

2.2.1. Transparency and Worker Awareness

Before starting work on a digital platform, the employer must introduce workers to the organization of work on the platform and explain how decisions are made within the automated management system, ensure transparency and availability of data related to work performed via digital platforms, provide clear information regarding job assignments, work tasks, and performance evaluations, inform workers about their rights, including access to work tasks, working hours, workplace conditions, career advancement opportunities, training, and wage calculation. Additionally, employment contracts must explicitly state these obligations to ensure that workers fully understand their rights and the conditions of their employment (Article 221l).

---

[20] See also: Bjelinski Radić, I., *Kritička promišljanja o prijedlogu Direktive o poboljšanju radnih uvjeta platformsih radnika*, Zbornik Pravnog Fakulteta u Zagrebu, 2022, p. 1476.

[21] Ponce Del Castillo, A.; Naranjo, D., *Regulating algorithmic management - An assessment of the EC's draft Directive on improving working conditions in platform work*, Policy Brief 2022.8, ETUI, 2022. p. 2.

2.2.2. Supervision and Worker Protection

To maintain fairness and accountability, employers are required to: appoint an authorized person to oversee the safety and workload of workers, designate an official responsible for reviewing decisions made by the automated management system upon the worker's request, provide professional communication channels between workers, employers, and other business participants to facilitate seamless information exchange, assess potential work risks and their impact on workers' safety and health, ensuring that work intensity does not endanger physical or mental well-being (Article 221h). If a worker believes their safety and health rights have been violated due to working conditions on a digital platform, they have the right to request protection and receive a written explanation or review of any specific measure or decision. The designated official has the authority to oversee and evaluate such concerns (Article 221g, paragraph 1, point 3.)

2.2.3. Protection of Workers' Rights in Automated Decision-Making

Workers have the right to challenge decisions made by an automated management system, particularly those related to: access to work tasks, working hours, opportunities for advancement and training, and wage calculation and benefits. If a worker believes such a decision has infringed upon their employment rights, they may request a written explanation and a review of the decision. The employer must appoint an expert to explain and, if necessary, amend the decision (Article 221i).

2.2.4. Privacy and Data Protection

To safeguard workers' privacy, digital work platforms and aggregators are prohibited from: processing private conversations, collecting data on workers' emotional or psychological states, processing health-related data, except in cases specified by data protection regulations, and collecting personal data when the worker is not actively engaged in work (Article 221j). This article is closely related to the existing regulation known as the **General Data Protection Regulation (GDPR).**[22]

2.2.5. Ensuring Professional Communication

For the sake of uninterrupted workflow and effective collaboration, employers must provide communication channels between workers, employers, and other

[22] 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.

participants in the business process. This ensures smooth professional interactions and the exchange of relevant information (Article 221k).

By adhering to above mentioned obligations, employers create a fairer and more transparent work environment for individuals engaged in digital work platforms.

2.3. Platform Workers' Rights

2.3.1. Mandatory Content of the Written Employment Contract

According to Article 221l of the Act, when an employer and an employee enter into an employment contract using a digital work platform, the contract must include certain specific information. This includes the job assignment and evaluation process, along with details on how decisions regarding working hours, conditions, safety, health, career advancement, and salary payments are made. The employer is obligated to inform the worker about who is responsible for supervising their work performance through the automated system. Additionally, the contract must describe the electronic tools and other equipment required for the job.

The contract should also provide information on professional communication opportunities, ensuring the worker can communicate with other workers, their representatives, the employer, and third parties involved in the business process.

Furthermore, there should be a provision on reimbursing workers for costs related to work performance, including wear and tear on personal vehicles or equipment if applicable. The employer is also responsible for providing accident and liability insurance, particularly for workers who may need to use vehicles in their work, in compliance with road traffic safety regulations.

Lastly, the contract should outline how training and professional development will be provided to the worker, along with a clear explanation of how the worker can exercise their right to participate in decision-making processes.

However, if the work is contracted due to an unpredictable work pattern, such as work requested at the employer's invitation, the contract must include specific provisions. It should detail the variable work schedule, outlining the unpredictable nature of the worker's hours and specifying the reference period during which the employer can request work. The contract must also guarantee a minimum number of hours that the employer is required to pay the worker, even if no work is requested. The employee must have the right to refuse a work assignment without penalty, under certain conditions. In the event that a work assignment is revoked within the agreed timeframe, the employer is obligated to provide salary compensation.

2.3.2. Assumption of Employment Relationship

The main challenge in platform work is the unclear employment status of platform workers and the risk of the precariousness of their work which includes absence of some or all forms of labour-related security.[23] That is why Article 221m outlines the conditions under which an employment relationship is presumed to exist when using a digital work platform. If a digital platform or aggregator enters into a contract with a worker, and the nature of the work resembles that of an employment relationship, it is presumed that an employment contract exists, unless proven otherwise. Factors that support the presumption of an employment relationship include: direct performance of billed work, employer's control over work organization and instructions, limited freedom to refuse work or penalties for refusal, employer's control over work details, including time, location, and method of execution, supervision and performance evaluation of the worker, and prohibition on using other platforms for similar transactions. The burden of proof is on the platform or aggregator to disprove the presumption of employment. If workers believe they are not an employee, they have the right to challenge the presumption, and the platform or aggregator must provide necessary evidence to resolve the dispute. The presumption of employment represents a key innovation in digital labour platform regulation as it directly addresses the uncertainty regarding the employment status of platform workers.

2.4. Transparency of Work through Digital Labour Platforms

Article 221p of the Labour Act requires the maintenance of records on work performed through digital labour platforms to enhance transparency, improve accountability, and strengthen legal security. These records are to be kept electronically by the ministry.

The records will collect data on digital labour platforms and aggregators operating in the market, including indicators of the scope of work, such as the number of workers and the types of contracts under which they work on the platforms. Platforms and aggregators are required to submit a request for registration in the records, which must include information such as the name, registered office, contact details, and, in the case of aggregators, an intermediation agreement. Data on the scope of work, including the number of workers and types of contracts, must be submitted to the ministry within the prescribed deadline.

---

[23] Bilic, A.; Smokvina, V., *What lessons could Croatia learn from a comparative perspective regarding the labour market status of on-demand platform workers,?* InterEULawEast: Journal for International and European Law, Economics and Market Integrations, Vol 9, Issue 1, 2022, p. 52.

In accordance with Article 221p, paragraph 8, the minister of labour, pension system, family, and social policy issued the Ordinance on work records using digital platforms. Under this ordinance, the Ministry of Labour maintains the records through the Unified Electronic Work Records system (referred to as the JEER system).[24] Digital labour platforms are required to submit data in the JEER system on each individual completed task in real-time, or at the latest within 24 hours after the task has been completed.

3. PLATFORM WORK IN CROATIA

3.1. Report on the State of Platform Work in Croatia

The Ministry of Labour is required to prepare a Report on the state of platform work in Croatia. This report is based on all annually collected data from the records. The report must be adopted and published on the ministry's website once a year for the previous year, no later than 31 January of the current year. This comprehensive reporting mechanism aims to provide transparency and oversight in the rapidly growing sector of platform work in Croatia. [25]

According to the first published Report on platform work in Croatia, by the end of 2024, a total of four digital work platforms were registered in Croatia. Although, for business protection reasons, the report does not specify the exact names and details—including the names of the four platforms—it is widely known that they are UBER, Glovo, Wolt, and Bolt. In addition to digital platforms, the register includes 3,048 aggregators. Of these aggregators, 1,743 were sole traders, while 1,305 were legal entities. This remarkably high number justifiably raises concerns and spreads uncertainty. However, the report indicates that most of these are very small size aggregators, often employing only one or two family members who occasionally work alongside them via a digital labour platform. Aggregators play a vital role in connecting workers with digital platforms and often act as intermediaries between the two. A majority of workers, 19,593 in total, have a contractual relationship with an aggregator, while only 26 individuals are directly contracted by a digital platform. The author argues that smaller aggregators require stricter oversight to prevent potential labour rights violations and ensure fair treatment of their employees. While the focus is often on major digital platforms, it is crucial not to overlook smaller aggregators, as they may be more prone to irregularities. Additionally, it is possible that in future reports, the number of aggregators will

[24] Article 2, Pravilnik o evidenciji rada korištenjem digitalnih radnih platformi (eng. Ordinance on Unified Electronic Labour Records), Official Gazette No. 8/2024.

[25] Article 12, Pravilnik o evidenciji rada korištenjem digitalnih radnih platformi (eng. Ordinance on Unified Electronic Labour Records), Official Gazette No. 8/2024.

slightly decrease, with those operating in the "grey" area likely to withdraw due to the introduction of stricter control mechanisms and enhanced oversight. The most common types of jobs performed through these platforms is ride-hailing, which accounts for 70% of the work, and delivery, at 30%. Throughout 2024, a total of 22,083 individuals worked via these platforms, with 16,382 of them being Croatian citizens and 5,104 foreign nationals. A significant gender disparity exists, with 19,667 men working on these platforms, compared to only 1,818 women. This aligns with global trends, as women are generally underrepresented in platform work worldwide. Women face obstacles entering the platform economy, with limited participation in riding and delivery services dominating the gig workforce, which are now the only sectors represented in platform work in Croatia.[26] In terms of age distribution, the largest group of workers falls within the 25 to 29 age range, indicating that digital platform work is particularly popular among younger individuals. Platform work is primarily concentrated in urban areas, particularly the City of Zagreb and Split-Dalmatia County, where the demand for services such as delivery and transportation is highest. Workers using digital platforms typically work an average of 4 hours and 10 minutes per day. This suggests a flexible working model, although it may also indicate that some workers are combining platform jobs with other employment or using platform work as a secondary source of income. Now that the four major platforms have adapted to the new regulations and there are far fewer uncertainties than before, it is expected that new platforms will emerge in the near future. For example, Croatia currently lacks a platform specializing in domestic services, which is quite common in other countries.

It is also expected that each subsequent annual report will be of higher quality and greater accuracy. In 2024, platforms were given a six-month adjustment period to comply with the new legislation, meaning that some data in the JEER system may be incomplete due to the missing transitional period. Additionally, the JEER application will be systematically technically improved and upgraded as needed. Furthermore, an upcoming report from the State Inspectorate will provide important data for analysis, and by consolidating all these sources, future reports will become even more transparent.

3.2. Foreign Platform workers in Croatia

Foreign workers are increasingly prominent in the digital platform economy across Europe. According to recent studies, migrants are more likely to engage in platform work due to its lower entry barriers and flexibility, which can be particu-

[26] Dumančić K; Obadić A., *Gendering analysis of working conditions and social protection law in digital labour platform work*, Labour & Law Issues, Vol.10, Issue 2, 2024, p. 47.

larly appealing when faced with limited job opportunities in traditional labour markets. However, this flexibility can also lead to precarious working conditions and economic dependency on platforms since migrants often rely on it as their primary source of income, making migrants more vulnerable to exploitation.[27]

Croatia's growing reliance on foreign labour across different sectors, including tourism and construction, indicates a broader trend where international workers are crucial for addressing labour shortages and supporting economic growth. While platform work provides opportunities for migrants, it also raises concerns about working conditions and social protection.

According to the Report on platform work in Croatia for 2024, foreign workers constitute a significant portion of the total number of workers on digital platforms. The report highlights that a total of 5,104 foreign nationals worked through digital platforms. More than a half of the foreign nationals (58.3%) come from India (1,938) and Nepal (1,039).[28] Other countries with a significant number of workers included Bangladesh (615), Uzbekistan (285), Egypt (202), Bosnia and Herzegovina (132), the Philippines (115), Turkey (111), and North Macedonia (106).

Foreign workers are primarily engaged in driving and delivery services, reflecting the dominant types of platform work in Croatia. The presence of foreign workers in these sectors underscores the global nature of platform work and the challenges faced by migrants in accessing stable employment opportunities.

When it comes to third-country workers, another major issue is the existence of aggregators specialized in importing labour from non-EU countries. Very often, they post job ads for full-time positions at minimum wage, which local workers in Croatia are unwilling to accept. This allows them to obtain work permits for foreign labour while simultaneously undermining the labour costs of the domestic workforce[29] In addition, undocumented migrants often work through digital labour platforms in sectors like ride-hailing and delivery, sometimes "renting" accounts from others, which reduces their earnings and increases their vulnerability to exploitation. Without work and residence permits, they face sudden dismissals, low pay, and no legal protection, making them highly precarious in the gig econo-

---

27 For more see: ETUI, Digital labour platforms and migrant workers, [https://www.etui.org/publications/digital-labour-platforms-and-migrant-workers], Accessed 25 March 2025; also: De Leo, A.; Grossi, T., *Regulating platform work: How will this impact migrant workers?* European Policy Centre, 2025, p. 4.

28 Report on the state of platform work in Croatia, p. 4.

29 Butković, H.; Samaržija, V.; Rukavina, I., *Foreign Workers in Croatia: Challenges and Opportunities for Economic and Social Development*, Institute for Development and International Relations, 2020, p. 74.

my.[30] Hopefully, this might change since the recent adoption of the new Aliens Act[31], which includes the implementation of Article 79, is expected to address certain issues in the regulation of foreign workers. According to the provisions of this article, during an inspection, the inspector from the relevant authority may issue an oral decision to ban an employer—whether a legal or natural person—from conducting business activities for a period of 30 days if it is found that a third-country national was working in violation of the law. This applies to situations where the foreign worker has not obtained the required residence and work permit or the work registration certificate. In addition, the article applies to employers representing or mediating for digital work platforms („aggregator"), prohibiting them from continuing such activities if they are found to be employing third-country nationals without the necessary documentation.[32] What is more, according to Article 93 of the Aliens Act, the ministry, through the police administration or police station, may reject an application for a residence and work permit if the employer has been penalized for undeclared work or illegal employment. This should discourage the undeclared employment of foreigners and the violation of their rights. This issue is not highlighted in the adopted EU Directive, but ETUC, as the main representative organization of workers at the EU level, continues to advocate for safeguards that protect undocumented third-country nationals from retaliation and deportation, particularly when they seek legal action to claim their workers' rights.[33]

Although recent legislation, through amendments to the Labour Act and the Aliens Act, improves certain equality aspects for migrant workers, there is a lack of long-term migration strategy with the aim of genuinely integrating such workers into society and ensuring their long-term stay in Croatia. The new migration strategy should integrate fundamental rights of migrant workers, security, and equal opportunities. It must result from extensive consultations between the government, social partners, experts, and civil society organizations and should be developed through constructive dialogue with migrant representatives.[34]

---

30 See: PICUM, *From taxis to food delivery: Undocumented migrants in platform work*, Platform for International Cooperation on Undocumented Migrants, 2023, [https://picum.org/blog/taxis-food-delivery-undocumented-migrants-platform-work/], Accessed 29 March 2025.

31 Aliens Act (Zakon o strancima), Official Gazette No. 133/20, 114/22, 151/22, 40/25 .

32 However, the imposed ban can be revoked if the employer or the third-country national service provider provides proof of payment of 3,981.68 euros per third-country national to the state budget within three days of the decision being issued.

33 See: ETUC, *ETUC's next steps towards fair platform work*, 2024, [https://www.etuc.org/en/document/etucs-next-steps-towards-fair-platform-work], Accessed 29 March 2025.

34 Butković, H.; Samaržija, V.; Rukavina, I., *loc. cit.*, note 29.

4. EU DIRECTIVE ON IMPROVING WORKING CONDITIONS IN PLATFORM WORK

4.1. Background

To enhance working conditions and social rights for individuals engaged in digital platform work while fostering the sustainable growth of digital labour platforms across the European Union, the European Commission has recognized the need to regulate this form of work at the European level. As part of these efforts, the Commission published the *Proposal for a Directive on Improving Working Conditions in Platform Work* in December 2021.[35]

The legal foundation for the adoption of the proposal stems from the European Union's core objectives to promote the well-being of its citizens and ensure the sustainable development of Europe through a highly competitive social market economy, with the ultimate goal of achieving full employment and social progress[36]. The right of every worker to safe, healthy, and dignified working conditions is firmly established in the Charter of Fundamental Rights of the European Union**.** Additionally, the European Pillar of Social Rights affirms that, regardless of the nature or duration of their employment relationship, all workers are entitled to fair and equal treatment in terms of working conditions and access to social protection[37]

According to the research conducted by the Commission, around 90% of platform workers are estimated to be formally classified as self-employed, meaning they genuinely operate autonomously, using platform work to expand their entrepreneurial ventures. However, a significant number of platform workers experience varying degrees of control by the digital platforms they rely on, particularly regarding pay rates and working conditions[38]. Approximately 5.5 million platform workers may face the risk of employment status misclassification, raising concerns about their legal rights and protections[39].

The main goal of the proposed directive is to improve the working conditions and social rights of individuals working through platforms, while also supporting the

---

35 Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, European Commission, Brussels, 9 December 2021.

36 Article 3 of the Treaty on European Union (2016) OJ C202/13

37 Principle 5 of the European Pillar of Social Rights

38 Brancati, R. *et al.*, *Digital Labour Platforms in Europe: Numbers, Profiles and Working Conditions*, European Trade Union Institute (ETUI), 2019, p. 22.

39 Impact Assessment Report accompanying the Proposal for a Directive of the European Parliament and of the Council to improve the working conditions in platform work in the European Union, Staff Working Document, European Commission, 2021., p. 9.

conditions necessary for the sustainable growth of digital labour platforms within the European Union. To achieve this, the proposal for a directive sets out three key objectives. These include ensuring that platform workers have the correct employment status based on their actual relationship with the platform, thus enabling them to access relevant labour and social protection rights. The main challenge in platform work lies in the risk of such misclassification of employment status. Additionally, the directive aims to promote fairness, transparency, and accountability in the algorithmic management of platform work. Furthermore, it seeks to enhance transparency within platform work, while improving the enforcement of applicable laws and regulations.

4.2. Adoption of the EU Directive 2024/2831 on Improving Working Conditions in Platform Work

On 24 of April 2024, the European Parliament formally adopted the directive, with 554 votes in favour, 56 against, and 24 abstentions. While the adoption demonstrated broad support, it also highlighted significant opposition and some reservations. That underscores the difficulty in reaching a consensus on such an evolving issue as platform work. The resistance from digital platforms was particularly strong, as they feared that the presumption of employment could drastically alter their business models and increase operational costs. The issue of algorithmic management, another key provision in the directive, also sparked considerable debate.[40]

It is important to mention that ETUC played a key role in the adoption of the Directive on Platform Work. Through negotiations with EU institutions, advocacy for better working conditions, and cooperation with national trade unions, ETUC ensured that workers' interests were properly considered, contributing to fairer regulation of platform work.[41]

The final step came on 14 October 2024, when the Council of the European Union officially adopted Directive (EU) 2024/2831 on Improving Working Conditions in Platform Work, marking its formal approval and signalling the readiness for its implementation across EU Member States.

---

[40] See: ETUC, *Platform Work Directive: A milestone towards innovation that delivers for all*, 2024 [https://www.etuc.org/en/publication/platform-work-directive-milestone-towards-innovation-delivers-all], Accessed 23 March 2025.

[41] See: ETUC, *ETUC's next steps towards fair platform work, loc.cit.,* note 33.

4.2.1. Key novelties of the Directive

The Platform Work Directive introduces significant reforms aimed at improving platform workers' rights, including provisions introducing legal presumption of employment status, algorithmic management and data rights.

Article 5 of the directive introduces a rebuttable legal presumption of an employment relationship for individuals performing platform work. According to Article 5(2), EU Member States are required to 'establish an effective rebuttable legal presumption of employment', which aims to facilitate the process for individuals performing platform work to be recognized as employees. This presumption is designed to be a procedural tool that eases the burden of proof for workers, making it simpler for them to claim their rights. However, Article 5 does not require this presumption to be linked to specific criteria, leaving it general and adaptive in nature. That is why these provisions should be carefully implemented at the national level to ensure that workers' rights are protected and that obstructive criteria do not diminish the effectiveness of this presumption.

For the first time in EU law, the directive establishes rules on algorithmic management, recognizing the impact of automated decision-making on workers' conditions[42]. Article 6 introduces provisions on algorithmic management. Platforms are strictly prohibited from processing certain categories of personal data, such as data related to the emotional or psychological state of workers, private conversations, sensitive personal data, or biometric data for identification purposes. Chapter III of the Directive represents a significant and novel development, as it directly responds to the shortcomings of the EU General Data Protection Regulation (GDPR) in the context of the workplace. The drafters clearly recognized that the GDPR, though foundational, does not sufficiently address the realities of algorithmic management in labour settings. One of the most impactful elements is found in Article 10(5), which explicitly prohibits decisions that limit, suspend, or terminate a contractual relationship or account—or any action with a similar effect—unless such decisions are made by a human being. This marks a substantial advancement compared to Article 22 of the GDPR, which bans decisions based solely on automated processing but provides a wide exception for the event of "contractual necessity," often undermining worker protection in practice[43]. This chapter of the directive sets a precedent for future European Union legislation on artificial intelligence in the workplace, ensuring that technological advancements do not undermine existing workers' rights. It raises the broader question of

---

42 *Ibid.*

43 Rainone, S.; Aloisi, A., *The EU Platform Work Directive: What's New, What's Missing, What's Next?,* ETUI Research Paper - Policy Brief, 2024., p. 5.

whether all workers, including those in traditional sectors, need stronger protection against the intrusion and dominance of automated systems.

4.2.2. Key Criticism of the Directive

Due to the minimum harmonization approach of the directive, national legislators have significant freedom in interpretation which could result in inconsistent application and weak enforcement mechanisms. This could result in the introduction of employment presumption thresholds that are too high or reliance on weak enforcement mechanisms that do not sufficiently consider collective rights[44]. During the transposition phase it will be crucial for trade unions, employers, and labour advocates to push for comprehensive and cohesive frameworks. For instance, national legislators could use the "more favourable provisions" clause (Article 26) to ensure that self-employed workers are fully included in the scope of labour protection and collective rights.

4.3. Implementation of the Directive

Article 9 of the directive sets out the timeline for implementation, requiring Member States to adopt the necessary measures for transposition into national law by 2 December 2026 at the latest. In the Croatian context, the implementation of the directive falls under the jurisdiction of the Sector for Labour within the Ministry of Labour, Pension System, Family and Social Policy. As mentioned above, Croatia was the first EU country to regulate platform work through its Labour Act. A conversation had with the Head of the Sector, Josipa Klišanin[45] on 26 March 2025, provides the background of this legislative process. In 2021, as part of the Recovery and Resilience Mechanism Plan, Croatia set the ambitious goal to amend its Labour Act by the end of 2022, including digital platform work regulation for the very first time.[46] The legislative working group greatly benefited from

---

44 *Ibid.*, p.8.

45 All the information in this section is derived from a conversation with Josipa Klišanin, Head of Sector for Labour at the Ministry of Labour, Pension System, Family and Social Policy, during a meeting held on 26.03.2025 at the Ministry of Labour.

46 National Recovery and Resilience Plan 2021-2026 (Croatian: NPOO) is as an important strategic document that obliged the Republic of Croatia to improve its labour legislation. NPOO is the result of a planning instrument through which the European Union responded to the economic and social crisis caused by the COVID-19 pandemic, and the implementation of the established reforms enabled the Republic of Croatia to utilize significant financial resources for structural reforms and investments aimed at economic recovery and building the resilience of the state and the economy during the crisis period. Therefore, a reform component included in this planning document concerned „Improvement of Labour Legislation" which starts from the fact that during 2020 and 2021, due to unforeseen and extraordinary circumstances caused by the COVID-19 pandemic, as well as by the strong earthquakes

the proposal of the EU directive on platform work, which served as a guideline. Additionally, intensive discussions with platform representatives, the Croatian Employers' Association (HUP), and three trade unions played a crucial role. However, it is important to highlight that the negotiations were further complicated by the fact that all four platforms operating in Croatia have foreign owners, which significantly prolonged the communication and decision-making processes. The Croatian working group played a proactive role in shaping the directive proposal, particularly emphasizing the presence of numerous aggregators in the Croatian market. Croatia strongly advocated for an explicit regulation of aggregators, as the initial draft of the proposal had entirely omitted this concept. This term is now regulated by the directive in Article 3 under the term "intermediary."

The Croatian government stated in the proposal of amendments that the new Labour Act was aligned with the directive proposal, which was later confirmed[47]. Although the amended Labour Act came into force in 2023, its provisions on platform work had a delayed implementation and became effective on 1 January 2024. This delayed enforcement allowed time for the development of the Unified Electronic Labour Records – JEER, which is arguably one of the most significant outcomes of the legislative changes. JEER is an advanced digital application that consolidates various databases and serves multiple institutions, including the Ministry of Labour, Pension System, Family and Social Policy, the Ministry of the Interior (for foreign workers on digital platforms), the Croatian Pension Insurance Institute, the Tax Administration, and, most importantly, the State Inspectorate, which benefits from it the most in its daily operations. The first State Inspectorate report since the JEER implementation will soon be published, providing valuable data for analysis. However, even at this stage, it is evident that inspectorate employees are highly satisfied with the information system, which has significantly improved their workflow, especially considering the current undercapacity of the inspectorate. Moreover, JEER has become an example of good practice, frequently consulted by other Member States seeking to improve their own labour monitoring systems. It was presented at the European Labour Authority Conference in Dubrovnik in October 2024, showcasing its effectiveness and inspiring other countries to adopt similar technological solutions[48].

---

that affected certain parts of the Republic of Croatia, various crisis situations occurred that significantly impacted the labour market. As a result of these crisis situations, a problem was identified regarding the lack of a quality legal framework in the area of general labour legislation that could appropriately respond to such challenges. See: Final Proposal of the Amendments to the Labour Act, Government of the Republic of Croatia, p. 63.

47 Final Proposal of the Amendments to the Labour Act, Government of the Republic of Croatia, p. 83.

48 See: European Labour Authority, *Thematic review workshop on challenges and approaches for tackling undeclared work on digital labour platforms*, 2024 [https://www.ela.europa.eu/en/news-event/events/themat-

From a legislative perspective, the Croatian Labour Act is well aligned with the final version of the directive. One key difference lies in Article 221m of the Croatian Labour Act which outlines the conditions under which an employment relationship is presumed to exist when using a digital work platform (corresponding to Article 5 of the directive). Initially, the proposal of the directive listed five factors that could indicate an employment relationship, requiring that at least two of them had to be fulfilled[49]. The Croatian working group opposed this numerical threshold, so the Labour Act simply lists the factors that support the presumption of an employment relationship without requiring a specific number to be fulfilled. The final directive also abandoned this strict enumeration, instead allowing Member States to determine the relevant criteria[50]. Although the factors listed in Article 5 of the adopted directive are no longer explicitly stated, the existing Croatian legal framework remains in alignment with the directive. This is because, instead of relying on a strictly exhaustive list, it provides examples that are left to the discretionary assessment of each individual case. This approach aligns with Article 6 of the directive, which calls on Member States to establish a framework of supporting measures and recommendations to substantiate the legal presumption.

Another notable difference is Article 221n[51], which has been criticized for potentially allowing employers to monitor and limit workers' earnings to avoid crossing the threshold that mandates an employment contract[52]. This article does not exist in the directive. However, this provision is not directly contrary to it, as the directive gives Member States discretion to regulate such matters. Nonetheless, there is a possibility that this article could be revised in the implementation procedure to further align with best practices.

ic-review-workshop-challenges-and-approaches-tackling-undeclared-work], Accessed 30 March 2025.

49 For more see: ETUC, *Platform Work Directive: A milestone towards innovation that delivers for all*, 2024 [https://www.etuc.org/en/publication/platform-work-directive-milestone-towards-innovation-delivers-all], Accessed 23 March 2025.

50 The European Parliament, in its Report on the proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work, Report (2022) A9-0301/202, also criticized the strict criteria for establishing employment status. Instead, it introduced a broad presumption of employment, allowing workers, trade unions, or national authorities to trigger it based on indicators of platform control, as outlined in the non-exhaustive list in Recital 25. of the final directive.

51 According to this article, as an exception to Article 221m of this Act, the presumption of an employment relationship does not apply to a natural person who, through work on digital labour platforms, has not earned more than 60% of the gross amount of three monthly minimum wages, as determined by a special regulation, in a given quarter of the calendar year.

52 Bjelinski Radić I., *Legal regulation of platform work in croatia*, Zagreb Law Review, Vol. 12 Issue 1, 2023, p. 56.

The working group for the implementation of the directive has not yet been established, but its task will be significantly easier due to Croatia's existing legal framework.

5. CONCLUSION

The regulation of digital labour platforms (DLPs) in Croatia represents a significant step forward in addressing the challenges posed by the evolving nature of work in the digital age. As the first country in the European Union to fully regulate platform work, Croatia has demonstrated proactive leadership in this area. The amendments to the Croatian Labour Act, which came into effect on 1 January 2024, introduced comprehensive provisions to govern platform work, including key definitions, workers' rights, and transparency requirements. Moreover, the inclusion of "aggregators" in the legislation reflects an understanding of the specific characteristics of the Croatian platform work market. The provision introduced in Article 221d**,** which establishes joint liability between digital work platforms and aggregators, is of particular importance for the protection of workers.

The implementation of the Unified Electronic Work Records (JEER) system and the requirement for annual reports on platform work demonstrate Croatia's commitment to transparency and data-driven policymaking. The first submitted report on the state of platform work is already important for further analysis, but each following annual report should be of even higher quality, especially as the JEER system will continue to improve and be upgraded.

However, challenges remain, such as a huge number of small-size aggregators who should be monitored in order to avoid potential misclassification of employment status and a high proportion of foreign platform workers who are always a vulnerable group.

While Croatia's regulations are largely in line with the EU Platform Work Directive, some adjustments are necessary to fully comply with its requirements, particularly in the official terminology used in the directive. However, as the platform economy continues to evolve, ongoing monitoring and potential legislative adjustments will be crucial to ensure that the regulatory framework remains effective and relevant. A constant dialogue between all key stakeholders—such as the ministry, platform representatives, the Croatian Employers' Association (HUP), trade unions, the European Commission, and other EU Member States—is particularly important.

In conclusion, as other EU countries begin to implement the EU Directive on Platform Work, Croatia is well-positioned to successfully implement the direc-

tive with only minor terminological and technical adjustments, rather than major substantive changes. Croatia's experience may serve as a valuable case study for balancing worker protection with the flexibility that characterizes the platform economy.

REFERENCES

BOOKS AND ARTICLES

1. Aloisi, A.; Rainone, S.; Countouris, N., *An unfinished task? Matching the Platform Work Directive with the EU and international 'social acquis'*, Working Paper 101, ILO, 2023
2. Bilic, A.; Smokvina, V., *What lessons could Croatia learn from comparative perspective regarding the labour market status of on-demand platform workers?* InterEULawEast: Journal for International and European Law, Economics and Market Integrations, Vol 9, Issue 1, 2022, pp. 51-84
3. Bjelinski Radić I., L*egal regulation of platform work in croatia,* Zagreb Law Review, Vol. 12 Issue 1, 2023, pp. 41-58
4. Bjelinski Radić, I., *Kritička promišljanja o prijedlogu Direktive o poboljšanju radnih uvjeta platformsih radnika*, Zbornik Pravnog Fakulteta u Zagrebu, 2022, pp. 1467-1491
5. Bjelinski Radić, I., *Novi oblici rada kao suvremeni izazov za radno pravo – slučaj UBER,* Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol 38, Issue 2, 2017, pp. 881-905
6. Brancati, R. *et al., Digital Labour Platforms in Europe: Numbers, Profiles and Working Conditions*, European Trade Union Institute (ETUI*)*, 2019
7. Butković, H.; Samaržija, V.; Rukavina, I., *Foreign Workers in Croatia: Challenges and Opportunities for Economic and Social Development,* Institute for Development and International Relations, 2020
8. De Leo, A.; Grossi, T., *Regulating platform work: How will this impact migrant workers?* European Policy Centre, 2025
9. De Stefano, V.; Aloisi, A., *European legal framework for digital labour platforms*, Publication Office of the European Union, Luxembourg, 2018
10. Dumančić, K.; Načinović Braje, I.; Aleksić, A., *Legal and Organizational Aspects of Labour Relations in the Collaborative Economy*, in: Teli, M.; Bassetti, C. (eds.), Becoming a Platform in Europe: On the Governance of the Collaborative Economy, Now Publishers Inc., Boston/ Delft, 2021, pp. 210-229
11. Dumančić, K.; Načinović Braje, I.; Wittine, Z., *GIG WORK: The Challenges for the Protection of Platform Workers' Rights*, in: Načinović Braje, I.; Jaković, B.; Ferjanić Hodak, D. (eds.), Proceedings of FEB Zagreb, 12th International Odyssey Conference on Economics and Business, 2021, pp. 933-944
12. Dumančić, K; Obadić A., *Gendering analysis of working conditions and social protection law in digital labour platform work*, Labour & Law Issues, Vol 10, Issue 2, 2024, pp. 28-51.
13. Ponce Del Castillo, A.; Naranjo, D., *Regulating algorithmic management - An assessment of the EC's draft Directive on improving working conditions in platform work*, *Policy Brief* ETUI, 2022

14. Rainone, S.; Aloisi, A., *The EU Platform Work Directive: What's New, What's Missing, What's Next?*, *ETUI Research Paper - Policy Brief,* 2024
15. Todoli-Signes, A., *The 'gig-economy': Employee, self-employed or the need for a special employment regulation?*, Transfer: European Review of Labour and Research, Vol 23, Issue 2, 2017, pp. 139-205
16. Urzì Brancati M.C., Pesole A., Fernández-Macías E., *New evidence on platform workers in Europe,* Results from the second COLLEEM survey, 2020
17. Vukorepa, I., *Cross-border platform work: riddles for free movement of workers and social security coordination*, Zbornik Pravnog Fakulteta Zagrebu, Vol 70, Issue 4, 2020, pp. 481-512

EU LAW

1. Communication from the Commission to the European Parliament, the Council, the Europan Parliament, the European Economic and social Committee and the Committee of the regions establishing a European Pillar of Social Rights, (2017) COM/2017/0250
2. Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work, Official Journal of the European Union (2024) OJ L 2024/2831
3. Impact Assessment Report accompanying the Proposal for a Directive of the European Parliament and of the Council to improve the working conditions in platform work in the European Union, Staff Working Document (2021) SWD/2021/395
4. Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work (2021) COM/2021/762
5. 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
6. Report on the proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work, Report (2022) A9-0301/2022
7. Treaty on European Union (2016) OJ C202/13

LIST OF NATIONAL REGULATIONS, ACTS AND COURT DECISIONS

1. Aliens Act (Zakon o strancima), Official Gazette No. 133/20, 114/22, 151/22, 40/25
2. Izvješće o stanju platformskog rada u Hrvatskoj (eng. Report on the State of Platform Work in Croatia), Zagreb, 2025
3. Konačni prijedlog Zakona o izmjenama i dopunama Zakona o radu, Vlada Republike Hrvatske (eng. The Final Proposal of the Act on Amendments to the Labour Act, Government of the Republic of Croatia)
4. Labour Act (Zakon o radu), Official Gazette No. 93/14, 127/17, 98/19, 151/22, 46/23, 64/23

5. Pravilnik o Jedinstvenoj elektroničkoj evidenciji rada, (eng. Ordinance on Unified Electronic Labour Records), Official Gazette No. 8/2024

WEBSITE REFERENCES

1. ETUC, *ETUC's next steps towards fair platform work*, 2024, [https://www.etuc.org/en/document/etucs-next-steps-towards-fair-platform-work], Accessed 29 March 2025
2. ETUC, *Platform Report: Croatia Report*, 2022, [https://www.etuc.org/en/platform-reps-project-country-reports-and-key-policy-recommendations], Accessed 29 March 2025
3. ETUC, *Platform Work Directive: A milestone towards innovation that delivers for all*, 2024 [https://www.etuc.org/en/publication/platform-work-directive-milestone-towards-innovation-delivers-all], Accessed 23 March 2025
4. ETUI, *Digital labour platforms and migrant workers,* [https://www.etui.org/publications/digital-labour-platforms-and-migrant-workers/], Accessed 25 March 2025
5. Eurofound, *Non-standard forms of employment: Recent trends and future prospects,* 2017 [https://www.eurofound.europa.eu/en/publications/2017/non-standard-forms-employment-recent-trends-and-future-prospects], Accessed 22 March 2025
6. European Labour Authority, *Thematic review workshop on challenges and approaches for tackling undeclared work on digital labour platforms,* 2024 [https://www.ela.europa.eu/en/news-event/events/thematic-review-workshop-challenges-and-approaches-tackling-undeclared-work], Accessed 30 March 2025
7. PICUM, *From taxis to food delivery: Undocumented migrants in platform work,* Platform for International Cooperation on Undocumented Migrants, 2023, [https://picum.org/blog/taxis-food-delivery-undocumented-migrants-platform-work/], Accessed 29 March 2025
8. World Economic Forum, *The Fourth Industrial Revolution: what it means, how to respond*, 2016, [https://www.weforum.org/stories/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/], Accesed 23 March 2025

Review article

LOBBYING IN THE EUROPEAN UNION

Jasminka Đojinčević, LLM, PhD Candidate
Josip Juraj Strossmayer University of Osijek, Faculty of Law
Stjepana Radića 13, 31000 Osijek, Croatia
jasminka.doc@gmail.com

ABSTRACT

The legislation procedure within the European Union (EU) legal system is determined by the sources of EU law. Therefore, the legal acts adopted by the EU institutions are the instruments by which the application of its public policies is regulated. The process of adopting legal regulations is provided for by the creation of the public policies of the EU, which are at the same time influenced by the number of actors involved. Various political groups and the public administration of the EU play a significant role in creating the EU's public policies. However, informal actors such as interest groups and lobbies play an increasingly important role in this process. Due to the participation of interest groups and lobbyists in the process of creating the EU's public policies, and consequently their implementation, their influence on the EU policies has been transformed and increased in comparison with previous decades. Thus, interest groups and lobbies have become leading actors on the European scene, influencing the law and the economy of the EU through legitimate means, which has consequently also affected its member states and international relations. This paper aims to show how the interest groups and lobbies legally operate within the European legal system, illustrating at the same time the EU mechanisms of lobbying regulation, as well as showing the consequences of the EU's institutions' dependence on such influence – particularly on the specialized professional knowledge of experts, whose opinions can influence the adoption of certain EU public policies. In addition, the paper provides an overview of lobbying strategies and the legal regulation of lobbying within the EU. Lastly, the paper analyses the limits of the legal activity of interest groups and lobbies in relation to illegal forms of lobbying and corruption. Applying the method of analysis, the paper attempts to shed light on the impact of lobbying on the design and implementation of public policies in the EU.

Keywords: *corruption, EU, lobbying regulation*

1. INTRODUCTION

Although democratic societies in North America and Europe are well aware of the phenomenon of lobbying, with some countries in Europe legally regulating it,[1] it

[1] In the EU, there are several states which have legislation on lobbying activities (Ireland, France, Lithuania, Austria, Poland, Slovenia and, most recently, Croatia. In Croatia, the Lobbying Act entered into

is necessary to identify the reasons behind its existence**.** In addition, the question arises as to whether lobbying has been a tradition in Europe, how we recognize and define it, as well as whether it is a legal form of influence in the process of creating public policies and the process of decision-making by EU bodies. If so, it is important to identify how lobbying takes place, what its limits in relation to corruption are, and how unauthorized forms of lobbying can be sanctioned.

2. HISTORICAL DEVELOPMENT OF LOBBYING IN THE EU

Lobbying was recognized relatively late as a phenomenon present in political relations in the EU and its member states. Thus, in the 1970s, this term was not often used in academic writing that dealt with political issues in European countries. The concept of lobbying was originally associated with the political system of the United States of America (USA). The Constitution of the USA implicitly guarantees lobbying, but the scope and definition of the term have often been the subject of decisions of the Supreme Court.[2] In European countries, lobbying emerged later, both as a term and as a common form of political activity, while in Latin America, Africa, and Asia the term is still rarely used today.[3]

In the EU, lobbying was for the first time officially recognized in 1988 in a report by Paolo Cecchini (the so-called Cecchini Report) in the context of completing the creation of the single European market. The Report recommended more active participation of business actors in the creation of EU policies.[4]

However, the fact that lobbying was not recognized for a long time as a clearly defined and legally regulated phenomenon neither in the political nor in the international legal order does not mean that it did not take place in international

---

force on October 1, 2024) or soft regulation (Netherlands, Belgium, Germany, Romania, Italy), while some states do not have lobbying regulation, although in some of them there are self-imposed rules within the sector (Bulgaria, Czechia, Denmark, Estonia, Greece, Cyprus, Luxembourg, Hungary, Malta, Portugal, Slovakia, Spain, Finland, Lithuania). For the Croatian Lobbying Act see: Official Gazette No. 36/24, for the status of EU countries regarding lobbying regulation see: [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.europarl.europa.eu/EPRS/Lobbying-transparency-comparative-analysis-rev-FINAL.pdf], Accessed 29 March 2025.

2 Barić., S.; Acinger., A., *Pravna regulacija položaja lobista u Sjedinjenim Američkim Državama*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 39, No. 2, 2018, p. 898.

3 Lobbying (eds.) in: Badie, B., Berg-Schlosser, D., Morlino, L., *International Encyclopedia of Political Science*, Vol. 1, SAGE Publications, Los Angeles, pp. 1459-1561.

4 Paolo Cecchini was previously the Deputy Director-General for Internal Market and Industrial Affairs in the European Economic Community (EEC). See: Transparency of lobbying at EU level, Briefing, December 2015, European available at: [Parliament,chrome extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/572803/EPRS_BRI(2015)572803_EN.pdf], Accessed 29 March 2025.

relations. In fact, when several people in a community try to secure economic, political, or other benefits for themselves or members of their group or community by influencing other people, we are usually faced with lobbying,[5] regardless of whether these activities are visible and regulated in the legal system or just practiced in an unofficial and invisible way.[6]

The modalities of lobbying within the EU have changed over time. Although lobbying has not often been externally visible or a topic of interest for political science, it continued to exist. Thus, from the late 1950s, at the time of the creation of the European Communities, until the 1970s, lobbying was in its first, so-called "fusion phase", focused on the central policies of the EEC; later, from 1971 to 1987, there was "diplomatic lobbying", followed by "strategic lobbying", from 1988 to 2005.[7] The period toward the end of the 1980s is considered by some authors a key moment during which lobbying in Brussels increased significantly. *Guéguen* terms the period after 2005 the "transversal period".[8]

Thus, the different phases of lobbying in the EU were conditioned by the development of the EU, the expansion of its powers, the creation of a common market, the increasing number of member states, as well as the allocation of powers to various institutions of the EU. Accordingly, lobbying appeared in different forms and using different techniques, and subsequently had to be regulated by law. Finally, in 1992 the Treaty on the EU signed in Maastricht established the legal foundations for lobbying in the EU. The same legal framework is retained in the Treaty on the EU (TEU) signed on December 13, 2007, in Lisbon.[9]

3. DEFINITION OF LOBBYING

Defining social phenomena such as lobbying requires knowing the causes of their occurrence, the reasons behind their existence, and the consequences they lead to. There are various definitions of lobbying and the characteristics attributed to it. The characteristics of lobbying depend on the degree to which political pluralism or totalitarianism is present, on the structure of government institutions in terms of centralization or fragmentation of the political process, or on political culture.[10]

---

5 Badie, *et. al., op. cit*, note 3, p. 1459.

6 Badie, *et. al., loc. cit,* note 3.

7 For more information about the lobbying phases see: Guéguen, D., *Europsko lobiranje*, Micropictures i Novum, Zagreb, 2007, pp. 15-17.

8 *Ibid*.

9 For the text of the Treaty on the EU see: [1992] OJ C 191, and for the TEU: [2012] OJ C 326/21.

10 Badie, *et. al., op. cit*, note 3, p. 1461

Even if a consensus is reached on the essential features of lobbying, many theoretical approaches to lobbying remain, such as decision theory, rational choice theory, cost-benefit analysis, game theory, change theory, and new institutionalism theory.[11]

Despite the numerous factors that consequently lead to theoretically different variants of lobbying, several characteristics are common to all of its forms and variants. First of all, in analyzing the phenomenon of lobbying one has to assume that it is possible to access the decision-making person. This leads to a further assumption – the ability to influence the decision-makers.[12] Following these characteristics of lobbying, we can broadly define it as the interaction of individuals, groups, and organizations with the government of a country with the aim of influencing its current policies or participating in shaping future ones.[13] Some authors describe lobbying in its simplest form as the art of persuasion.[14]

The problem of defining lobbying in the EU was resolved by the European Commission (EC) in its Green Paper of May 3, 2006. According to the EC, lobbying constitutes activities carried out with the aim of influencing the policy formulation and decision-making processes of European institutions.[15]

According to some authors, one difference between the American and European definitions of the influence of lobbying on the creation of public policies lies in the type of branches of government in relation to which lobbying is allowed. On this topic, Vlahović and Jelić point out that, unlike the European definition of lobbying, which links lobbying to the legislative and executive powers, the American definition broadly allows for the possibility of lobbying toward the legislative, executive, and judicial powers.[16]

However, it should be kept in mind that the EC has the power to initiate infringement proceedings before the Court of Justice of the EU (CJEU). Because of this, sometimes private interest groups develop so-called lobbying litigation strategies to push the EC

---

11 *Ibid*., note 3, p. 1459

12 *Ibid*., note 3, p. 1459

13 *Ibid.*, note 3, p. 1458; Similar: Chambers, A., *The Lobbying of the EU: How to achieve greater transparency*, in Civitas: Institute for the Study of Civil Society, 2016, p. 5, available at: [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.civitas.org.uk/content/files/Anthony-Chambers-EU-lobbying.pdf], Accessed 15 March 2025.

14 Barić; Acinger, *op. cit.*, note 2, p. 899.

15 Green Paper "European Transparency Initiative", Brussels, 3/5/2006 COM(2006) 194 final, p. 5, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52006DC0194], Accessed 17 March 2025.

16 Vlahović, N.; Jelić, B., *Profesionalni lobist, priručnik o interesnom zagovaranju*, M.E.P., Zagreb, 2015, p. 17.

to bring certain issues before the CJEU[17] if they are damaged by the actions of another party. In any case, there is no place for lobbying in court proceedings.

Likewise, when the issue of how to define an interest group trying to influence the government to create a certain policy is considered, there is no single approach either.

Any attempt to systematically arrange those individuals, groups, and organizations that through their actions towards the government try to influence its policy shows that they can be systematized according to various criteria. They can be analyzed according to the criteria of organizational level, structure, legal status, goals of activity, type of interest they represent (private or public), profit (non-profit or for-profit), etc.[18]

In the EU, for example, there is a tendency toward specialized, technological, and expert interest groups, stemming from the need to increase access to specialized types of information.[19]

Interest groups, on the other hand, seek to achieve their aims by influencing decision-makers, whether within a member state or the EU and its institutions. The influence of interest groups could most simply be described as a milder form of power.[20] In the Green Paper EC of May 3, 2006, lobbyists are defined as persons carrying out such activities, working in a variety of organizations such as public affairs consultancies, law firms, NGOs, think-tanks, corporate lobby units (in-house representatives), or trade associations.[21]

4. LEGAL REGULATION OF LOBBYING AT THE EU LEVEL

The legal basis for lobbying in EU law can be found in the provisions on participatory democracy although it is not mentioned by name. Art. 11(1) of the TEU[22] determines that institutions will, by appropriate means, provide citizens and representative associations with the opportunity to make known and publicly exchange their views in all areas of EU action. In addition, Art. 11(2) provides that the insti-

---

17 Bouwen, P., *The European Commission* in: Coen, D.; Richardson, J. (eds.), Lobbying the European Union: Institutions, Actors, and Issues, Oxford University Press, New York, 2009, p. 21.

18 Vidačak, I., Interest groups and lobbying in the European Union, *Croatian International Relations Review*, Vol. 9, No. 33, 2003, p. 178.

19 *Ibid.*

20 Michalowitz, I., What determines influence? Assessing conditions for decision-making influence of interest groups in EU, *Journal of European Public Policy*, Vol. 14, No. 1, 2007, p. 134.

21 *Supra*, note 15.

22 *Supra*, note 9.

tutions shall maintain an open, transparent and regular dialogue with representative associations and civil society. Concerning the EC, it is expressly regulated in Art. 11(3) that the EC shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

In accordance with Art. 11(1) of the TEU participatory democracy has been meant to, *inter alia*, furthering active citizenship in political life in the way where participatory democracy is an important instrument for democratic governance.

However, the multiple levels of governance within the EU institutions leads to the problem of reaching out of the citizens to the directly participation in the decision-making process. The citizens may participate in online consultations but they hardly ever do and their contribution is almost never taken.[23]

Although these opening of the EU institutions to the EU citizens, civil society and representative associations trough participation in decision-making process seems simple, this is a complicated process which success depends on the availability of information, the interpretation of unclear provisions of the EU law, as well as of the possibility of involvement in the EU bodies in which decisions are prepared.[24] It is much more likely that citizens will succeed in influencing this process by lobbying through their associations, as do business representative associations using lobbying.

Thereby, representative associations participate in participatory democracy, while the citizens are actually represented by "experts" from civil society. In this sense, it seems that Article 11(1) does not achieve its purpose of direct participation of citizens in the political life of the EU.

The existence and legality lobbying also derive from the case law of the CJEU.

The phenomenon of lobbying has been mentioned before the General Court in case EMC Development AB v EC in the context of the action Swedish company EMC Development AB for annulment of EC Decision SG-Greffe (2005) D/205249 of 28 September 2005 rejecting the complaint brought by the EMC Development AB against European Portland cement producers, the European Cement Association (Cembureau) and the European Committee for Standardization (CEN).[25]

Swedish company EMC Development AB contended that the European Cement Association's activities went beyond the usual lobbying activity carried out by any

---

[23] Kohler-Koch, B.; Quittkat, Ch., *De-mystification of participatory democracy: EU-governance and civil society*, Oxford University Press, Oxford, 2013, p. 11.

[24] See *infra* ANALYTICAL FRAMEWORK FOR ASSESSING SUCCESS IN THE LOBBYING PROCESS.

[25] Case T-432/05 EMC Development AB v Commission [2010] ECR II-01629.

association that brings together companies in an industry to protect and promote the interests of its members.

EMC Development AB has also asserted that it is not known how it was constituted or why it was formed an *ad hoc* group of members of CEN/TC 51 met in July 1997, although the group played a central role in the preparation of the document which resulted in the mandate which CEN was granted by the EC, so EMC Development invoked the lack of transparency in the procedure.[26]

But, the Court of Justice concluded that the applicant has not established that the contested decision was vitiated by a manifest error of assessment as regards the EC's finding that the procedure for adoption of the document was open, non-discriminatory and transparent,[27] so the applicant fails to demonstrate that the EC committed a manifest error of assessment by not finding that Cembureau influenced the procedure to the extent of controlling it and undermining it.[28]

Therefore, the Court of Justice recognized legitimacy representative associations when such activity was limited to influencing and did not control or corrupt the decision-making process. But, this decision has also been significant in the context formation and operation of *ad hoc* groups and problem of distribution information.

Art. 11 TEU clearly delimited that, in addition to citizens, civil society and representative associations participate in creating EU policies. Moreover, open decision-making requires implicitly an opening up of European institutions, which in turn implies greater participation of citizens in decision-making, while at the same time reinforcing the democratic principle[29] and reducing the democratic deficit.[30]

As a matter of fact, the institutions of the EU are obliged in the light of the principle of openness to distribute information and resources to participants in the policy-making process equally.[31]

---

26 Case T-432/05 EMC Development AB v Commission [2010] ECR II-01629, par. 100.

27 Case T-432/05 EMC Development AB v Commission [2010] ECR II-01629, par. 104.

28 Case T-432/05 EMC Development AB v Commission [2010] ECR II-01629, par. 81.

29 Macho, G., *Article 11 (Participatory Democracy)* in: Blanke, H-J.; Mangiameli, S. (eds.), The Treaty on European Union (TEU) A Commentary, Springer, Verlag Berlin Heidelberg, 2013, p. 452.

30 For the problem of democratic deficit see: Mangiameli, S., *Article 2. (The Homogeneity Clause)* in: Blanke, H-J.; Mangiameli, S. (eds.), The Treaty on European Union (TEU) A Commentary, Springer, Verlag Berlin Heidelberg 2013, pp. 123-124; Also Ramirez, P., *Article 10 (Representative Democracy)* in: Blanke, H-J.; Mangiameli, S. (eds.), The Treaty on European Union (TEU) A Commentary, Springer, Verlag Berlin Heidelberg 2013, pp. 433-434.

31 Cuesta Lopez, V., The Lisbon Treaty's provisions on democratic principles: A legal framework for participatory democracy, *European Public Law*, Vol. 16, No. 1, 2010, pp. 130-132.; See also: Macho, *op. cit.*, note 29, p. 453.

However, the possibilities of challenging breaches of the EU law by the EU institutions or bodies still have being remained particularly limited because EU law still fails to provide its citizens with access to information.

This was precisely important in the decision of the CJEU in case Stichiting Natur en Milieu and Pesticide Action Network Europe v Council of the EU and EC.[32] The Foundation Stichting Natuur en Milieu, whose object is protection of the environment, and the Foundation Pesticide Action Network Europe, which campaigns against the use of chemical pesticides requested EC to carry out an internal review of Regulation No 149/2008 claiming that Article 10(1) of Regulation No 1367/2006 is unlawful, in so far as it limits the concept of 'acts' in Article 9(3) of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (Aarhus Convention)[33] to "administrative acts", defined in Article 2(1)(g) of Regulation No 1367/2006 as "measures" of individual scope.

The General Court found that Article 9(3) of the Aarhus Convention cannot be construed as referring only to measures of individual scope[34] so, accordingly, Court rejected the Council's argument that limiting "administrative acts" to measures of individual scope is justified in the light of the conditions laid down in Article 230 EC.[35]

Consequently, the General Court annulled the decisions of the Commission of 1 July 2008 rejecting as inadmissible the requests made by Stichting Natuur en Milieu and Pesticide Action Network Europe for review by the Commission of Commission Regulation (EC) No 149/2008 of 29 January 2008 amending Regulation (EC) No 396/2005 of the European Parliament and of the Council.

But, Court of Justice sets aside the judgment of the General Court and dismisses the application for annulment lodged by Stichting Natuur en Milieu and Pesticide Action Network Europe before the General Court of the European Union[36] fined that Article 9(3) of the Aarhus Convention lacks the clarity and precision required for that provision to be properly relied on before the EU judicature for the purposes of assessing the legality of Article 10(1) of Regulation No 1367/2006. Court of

---

32 Joined Cases C-404/12 P i C-495/12 P Stichiting Natur en Milieu and Pesticide Action Network Europe v Council of the EU and EC [2012] ECJ II.

33 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, [2005] OJ L 264.

34 Case T-338/08 P Stichting Natuur en Milieu and Pesticide Action Network Europe v European Commission [2012] ECLI:EU:T:2012:300, par. 79.

35 *Ibid*, note 34, par. 82.

36 *Supra*, note 32.

Justice considered that Art. 9(3) of the Aarhus Convention "does not contain any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals and therefore does not meet those conditions" so only members of the public who "meet the criteria, if any, laid down in … national law" are entitled to exercise the rights provided for in Article 9(3).[37]

Besides, there is skepticism about the content of the term representative associations, since the concept lends itself to a diverse range of interpretations.

Nevertheless, lobbying is a legitimized and accepted activity in European democracy, and the openness and transparency of the process established by the Art. 11(2) of the TEU is an important step towards controlling these associations and avoiding opacity.[38]

Furthermore, this participation and influence on EU bodies needs to be appropriate. In order to clearly regulate relations and contacts with representatives of EU institutions who participate in decision-making, the EU institutions have their own Codes of Conduct.

In accordance with Art. 11 of the TEU, the Code of Conduct for Members of the European Parliament Regarding Integrity and Transparency, annexed to the 2024 Rules of Procedure of the European Parliament, includes the concept of lobbying and regulates some of its effects on the members of the European Parliament (Art. 2 and 9 Code of Conduct).[39] Thus, in exercising their duties, members of the European Parliament, according to Art. 2 of their Code of Conduct, should not engage in paid-lobbying activities directly linked to the EU decision-making process. In addition, former members of the European Parliament who engage in professional lobbying or representational activities directly linked to the EU decision-making process should inform the European Parliament thereof and may not, throughout the period in which they engage in those activities, benefit from the facilities granted to former members under the rules laid down by the Bureau to that effect.[40]

---

37 *Supra,* note 36.

38 Macho, *op. cit.*, note 29, p. 457.

39 Rules of Procedure of the European Parliament, available at: [https://www.europarl.europa.eu/doceo/document/RULES-10-2024-07-16-TOC_EN.html], Accessed 24 March 2025.

40 Bureau Decision of 17 April 2023 on former Members of the European Parliament. For the decision, see: [https://www.europarl.europa.eu/portal/en/search?planet=_all&searchQuery=Bureau+Decision+of+17+April+2023+on+former+Members+of+the+European+Parliament], Accessed 18 March 2025.

It is important to point out that the EC first published the Green Paper of May 3, 2006,[41] and then later the Communication from the Commission – Follow-up to the Green Paper „European Transparency Initiative" of March 21, 2007,[42] which sought to establish a framework for professional ethics in the EU institutions and a structured framework for the activities of interest lobbyists.

The EC has clearly stated that lobbying is a legitimate part of the democratic system, but influence should not be exerted on the European institutions through improper lobbying.[43] Therefore, for lobbying to be proper, the EC expects lobbyists to act according to the General principles and minimum standards for the consultation of interested parties (General principles).[44] The General principles might be visible in the interests that lobbyists represent and in how inclusive that representation is.[45]

Like the European Parliament, the EC adopted a Code of Conduct for EC officials.[46] Art. 6(4) of the Code of Conduct prohibits members of the EC from accepting any gift with a value of more than EUR 150, as well as hospitality, a decoration, prize, or honor awarded to them if it includes a sum of money or valuables. Pursuant to Art. 13(2) of the Code of Conduct the EC can, taking into account the opinion of the Independent Ethical Committee and on proposal of the President, express a reprimand and, where appropriate, make it public.[47]

The EU Transparency Register provides visibility into who is lobbying the EC, the European Parliament, and the Council.[48]

However, the question arises are these provisions of the Code of Conduct for EC officials and the General principles sufficient to prevent improper behavior by EC

---

41 *Supra*, note 15.

42 Communication from the Commission - Follow-up to the Green Paper „European Transparency Initiative" of the 21 March 2007, available at: [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52007DC0127], Accessed 17 March 2025.

43 *Ibid.*, note 42.

44 Communication from the Commission - Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52002DC0704], Accessed 17 March 2025.

45 Guéguen, *op. cit.*, note 7, p. 17.

46 Commission Decision on a Code of Conduct for the Members of the European Commission [2018] OJ C65/06.

47 *Ibid.*, note 46.

48 For details on the Transparency Register, see *infra* 6. EUROPEAN LOBBYING SUPERVISION TOOLS.

officials. Actually, there are no serious sanctions for lobbyists and for EC officials for unappropriated behavior in process of lobbying.

Even before the Code of Conduct for EC officials Dalli's case has been shown weakness unclear provisions EU law in the context of lobbying. Although OLAF's investigation regarding the undue influence of tobacco industry in Dalli case concluded that Dalli "was aware of this bribery attempt and did nothing to block, stop or report these events",[49] there was no sanction EU law against EU Health Commissioner John Dalli. Also, the Maltese Police Commissioner in 2013 announced that "Malta does not have enough evidence to start criminal proceedings against former EU Health Commissioner John Dalli in a bribery case".[50] At the end, Dalli action for compensation for damage allegedly suffered by the applicant as a result of the illegal conduct of the Commission and the European Anti-Fraud Office (OLAF) has been dismissed.[51]

Dalli's appeal to CJEU has been dismissed because it was not established that unlawful conduct may be attributed to an institution of the EU.[52]

Apart from Dalli's resignation, there are no clear determinations by the competent authority regarding the EC official's responsibility or sanctions. In fact, without clear evidence, the legality of Dali's tenure was publicly questioned, but even he did not prove in the court proceedings that there was illegality in the work of the EU institutions. At the end, nothing was clearly established. All that remained was doubt. Since the Code of Conduct for EC officials and the General principles does not provide clear rules of conduct and seriously sanctions for violation, we doubt that it will result in the behavior of EC officials.

The fact that the EU institutions permit the participation of interest groups in the creation of EU policies, and then in the adoption of regulations through the accessibility of the EU institutions in the regulatory process shows that the regulatory process in the EU has been transformed significantly.

Now, alongside EU bodies, interest groups also have a place in the legislative process.

---

49 For details see:
[https://www.tobaccotactics.org/article/tpd-dalligate/], Accessed 1 June 2025.

50 For details see:
[https://www.tobaccotactics.org/article/tpd-dalligate/], Accessed 1 June 2025.

51 Case T-399/17 John Dalli v European Commission [2019] ECJ ECLI:EU:T:2019:384.

52 Case C-615/19-P John Dalli v European Commission [2021] ECJ ECLI:EU:C:2021:133, par. 240.

However, lobbying remains a phenomenon with an unclear scope. In this regard, Chambers interestingly summarizes the possible ways in which the EU could improve the existing legal regulation of lobbying. Above all, he emphasizes the need to ensure the transparency of lobbying.[53]

5. METHODS OF LOBBYING IN THE EU

Lobbyists' access to the EU institutions and officials is regulated by law. In this process, lobbyists act on behalf of their organization, use the knowledge and political influence accrued in the organization, and develop organization-specific identifications and loyalties.[54] When they lobby, it must be clear to the general public what contribution they are making to the European institutions. It also must be clear whom they represent, what their mission is, and how they are financed.

Although the EU has taken a number of steps to prevent and detect undue influence, including in the case of lobbying, this system of protection seems insufficient. It should be noted that Brussels, as the place where EU power is concentrated, is also the place with the second highest concentration of lobbyists in the world after Washington DC.[55] The momentum of lobbying in the EU institutions is best shown by the data of the Registry of Transparency, where as many as 13,512 entities associated with lobbying activities in the EU were recorded.[56] Moreover, the fact that registration is not mandatory, although in that case, lobbyists would not be considered to have access to EU institutions and officials, opens up the possibility of a larger number of lobbyists. Such a substantial number of registered lobbyists shows that many interest groups have a stake in shaping EU policy.

5.1. LOBBYING STRATEGIES

Lobbying in the EU does not only involve the relationship of interest groups with the European institutions, but also with various groups from the same sector, but with different interests.[57] Therefore, in such a conflict-based and competitive atmosphere, lobbying strategies are of utmost importance.

---

53 Chambers, *op. cit.*, note 13, p. 16.

54 Lahusen, Ch., *European lobbying: An occupational field between professionalism and activism*, Routledge, London, 2023, p. 14.

55 Chamers, *op. cit.*, note 13, p. 5.

56 Data as of 18 February 2025. See: [https://transparency-register.europa.eu/find-out-more/statistics_eng, Accessed 17 March 2025.

57 Vidačak, *op. cit.*, note 18, p. 179.

Lobbying strategies can be divided into four groups. It is possible to resort to a negative lobbying strategy, which entails direct opposition to EC proposals or the introduction of conflicting proposals. Furthermore, lobbying can be carried out using a reactive strategy, by taking a tactical approach without initiative. A proactive strategy that involves consistent and constructive interaction with the EC in the spirit of partnership is also possible. Some authors also emphasize a defensive strategy. In principle, this strategy requires opposition to any evolution of regulations and legal frameworks in order to maintain the required privileges. It leads to a negative outcome in the long run and is used in specific situations, most often when someone wants to buy extra time. The success of lobbying is influenced by a number of circumstances, such as the availability of information,[58] timing, personal contacts, the creation of alliances, and participation in the work of EC working groups.[59]

5.2. LOBBYING TECHNIQUES

In essence, lobbying can be direct or indirect. In the case of direct lobbying, interest groups, represented by lobbyists, participate in the negotiation process with a decision-making person of significance for the interest group.[60] This lobbying technique is also acceptable to the EU institutions.

On the other hand, indirect lobbying, also called "grassroots", uses intermediaries in the process of creating influence, whether they are citizens, voters, coalitions, opinion makers, media, or associations, for the purpose of activating a larger collective that can exert stronger pressure on decision-makers.[61]

According to Art. 3(2) of the Interinstitutional Agreements of 20 May 2021 between the European Parliament, the Council of the EU and the EC on a mandatory transparency register (Interinstitutional Agreements), lobbying includes particularly organizing or participating in meetings, conferences or events, as well as engaging in any similar contacts with EU institutions; contributing to or participating in consultations, hearings or other similar initiatives; organizing com-

---

58 Laboutková, Šimral, Vymětal point out that lobbyists have access to information that others do not have, and thta information is the basic commodity traded in the political markets and seems to be the cornerstone of many issues, including the issue of decision-making and "fair" lobbying. For more details see Laboutková, Sárka, Šimral, Vít, Vymětal, Petr, *Transparent lobbying and democracy*, Palgrave Macmillan, Cham, 2020, p. 131.

59 Vidačak, *op. cit.*, note 18, p. 179.

60 The Princeton Review, available at: [https://www.princetonreview.com/careers/88/lobbyist], Assessed 17 March 2025.

61 Vlahović, *et. al.*, *op. cit.*, note 16, p. 174.

munication campaigns, platforms, networks and grassroots initiatives; preparing or commissioning policy and position papers, amendments, opinion polls and surveys, open letters and other communication or information material, and commissioning and carrying out research.[62]

5.3. ANALYTICAL FRAMEWORK FOR ASSESSING SUCCESS IN THE LOBBYING PROCESS

Three elements enable the creation of an analytical framework for assessing the success of an interest group in changing the position of decision-makers on an issue. The first element is the degree of conflict between private actors and decision-makers, i.e. how hard the interest group has to fight for its goal against opposing interests. The second element concerns the structural conditions of influence, while the final element covers the type of influence.[63]

In the context of the degree of conflict between private actors and decision-makers, it can be concluded that whether or not an interest group is part of a strong coalition in the lobbying process will affect the likelihood of changing the position of the authorized decision-maker.

The EC has an important role in drawing up the agenda. Because of this, interest groups can lobby the EC already at this stage.

According to some interpretations, the success of interest groups in lobbying the EC depends on their ability to negotiate with it regarding policy-relevant information, their ability to secure the support of citizens as voters, and their ability to provide the EC with support as powerful economic actors in the form of business investments and job creation.[64]

Since the EC does not have sufficient expertise to make decisions in all areas of the economic and technological sector, it employs experts, who in turn gain access to the decision-making process. Therefore, it is a mutually beneficial relationship in which the EC obtains resources like expert knowledge[65] and policy-relevant information that is crucial for its functioning. This also raises the question of the feasibility of the idea of participatory democracy from Art. 11 of the TEU.

---

62 Interinstitutional Agreements of 20 May 2021 between the European Parliament, the Council of the European Union and the European Commission on a mandatory transparency register, 2021OJ L 207/1.

63 Michalowitz, *op. cit.*, note 20, p. 134.

64 Klüver, H., *Lobbying as a collective enterprise: winners and losers of policy formulation in the European Union*, Journal of European Public Policy, 2013, p. 61.

65 Bouwen, *op. cit.*, note 17, p. 22.

Citizens, whether as individuals or as part of civil society organizations, cannot without significant difficulty collect precise technical data of high quality. On the other hand, this data is much easier to collect for representative organizations.

External experts provide advice to the EC, which is not binding, but the EC can take it into account in creating its decision. The EC's reliance on this advice is practically unavoidable, bearing in mind that the EC employs a relatively small number of people.[66]

Although the EC staff is supplemented by seconded national experts and temporary staff,[67] there is a need for specialized knowledge that the EC can only gather from experts. External experts participate in formulating the EC's decisions through expert groups or external consultants. These groups can be established by the EC through decisions (formal groups) or set up by a particular EC department that has obtained the agreement of the Commissioner and Vice-President responsible and of the Secretariat-General (informal groups), taking into account the anticipated political impact of the work of the group and the relevant specific circumstances. Either expert group may be set up for a fixed or unlimited duration.[68]

In addition, the EC can also draw on the necessary expert information in the form of studies. The members of the expert groups can be individuals appointed in their personal capacity, acting independently and in the public interest (so-called type A members). They can also be individuals appointed to represent a policy orientation common to different stakeholder organizations (type B members) if they are registered in the Transparency Register, various organizations including companies, associations, non-governmental organizations, trade unions, universities, research institutes, law firms, and consultancies (type C members) if they are registered in the Transparency Register, but also different member States' authorities at the national, regional or local level (type D members). Furthermore, the members sometimes come from other public entities, such as third countries' authorities, including candidate countries' authorities, EU bodies, offices or agencies, and international organizations (type E members).[69] Experts can be engaged via public calls for applications, except for type D and type E members, and for representa-

---

66 According to the Statistical Bulletin for Commission on 01/10/2024 there were 32758 employees of the EC. See [https://commission.europa.eu/about/organisation/commission-staff_en], Accessed, 23 March 2025.

67 Wallace, H., *et.al.*, *Policy-making in the European Union*, Oxford University Press, Oxford, 2020, p. 70.

68 Art. 4 Commission Decision of 30 May 2016 establishing horizontal rules on the creation and operation of Commission expert groups Brussels, 2016 C(2016) 3301 final; ANNEXES to the Commission Decision of 30 May 2016 establishing horizontal rules on the creation and operation of Commission expert groups, Brussels, 2016 C(2016) 3301 final ANNEXES 1 to 8.

69 *Ibid.*, note 68.

tive bodies established by EU legislation for advice in specific areas.[70] The selection of expert group members should ensure, as far as possible, a high level of expertise, a geographical balance, as well as a balanced representation of relevant know-how and areas of interest, taking into account the specific tasks of the expert group, the type of expertise required and accordingly the requirements expressed in the calls for applications.[71] The EC strives to eliminate any potential conflict of interest requiring individual experts to submit a declaration of interests.[72]

However, there is considerable skepticism concerning the quality of the experts and their expertise. Although challenging the work of the experts is not something new, their participation in EU policy-making seems to have provoked a strong public reaction. In this way, the quality of expertise has become a topic within the context of theoretical understanding of the concept of expertise [73], giving rise to questions about the composition of the EC expert groups, as well as the knowledge of their members and skepticism about what their contribution to and interest in shaping public policies really constitute.

Hence, some authors point out that challenging the expertise of members of expert groups leads to them no longer being perceived as top-rank specialists because their expert knowledge is neither a prerequisite nor a widely shared property.[74]

Consequently, the social impact of EU decisions has in some situations provoked political debate and public doubt about the expert basis of these decisions. As a result, there are many different views on the experts in the expert groups, from the perception that they are strategic tools used by policy-makers to justify political choices,[75] to the impression that the experts are prone to "corporate capture" by powerful industry groups.[76]

---

70 *Ibid.*, note 68.

71 *Ibid.*, note 68.

72 *Ibid.*, note 68.

73 Different interpretations of expertise stem from different approaches to the concept. According to one understanding, expertness is not a specific quality that only a few exceptional individuals possess, but something in the eyes of a beholding audience, while according to another point of view, experts do possess special qualities and characteristics, independent of their expertise being recognized by others. See for details: Blom, T., *Conceptualising the Role of Expertise in EU Policy-Making* in: Abazi, V.; Adriaensen, J.; Christiansen, T. (eds.), The Contestation of Expertise in the European Union Palgrave Macmillan, Cham, 2021, pp. 24-27.

74 Robert, C., *Who Are the European Experts? Profiles, Trajectories and Expert 'Careers' of the European Commission*, French Politics, Vol. 8, No. 3, 2010, p. 253.

75 Radulova, E., *et. al*, *The European Commission's Expert Groups: Adapting to the Contestation of Expertise* in: Abazi, V.; Adriaensen, J.; Christiansen, T. (eds.), The Contestation of Expertise in the European Union Palgrave Macmillan, Cham, 2021, p. 92.

76 Radulova, *et. al.*, *op. cit*, note 75, p. 96.

Indeed, the composition of the expert groups is noteworthy. According to some researchers, expert groups organized by the EC are dominated by representatives of member state governments, followed by the private sector, and only a third are representatives of the academic community.[77]

This problem was also noticed by the European Parliament and the European Ombudsman. They have expressed their concerns about major deficiencies in the advisory structures of the EU executive, such as an inconsistent categorization of expert group members, an overrepresentation of corporate interests, and, notably, frequent instances of conflict of interest among individual experts appointed in their personal capacity (type A experts).[78]

In this sense, ALTER-EU has also expressed concern that expert groups of the EC continue to be dominated by big business interests, meaning corporate lobbyists and the vested interests they represent play a big role in shaping laws and regulations.[79] For example, according to the ALTER EU research for 2013, in the Directorates-General Taxation and Customs Union (TAXUD), almost 80% of all stakeholders appointed in 2013 who do not represent governments actually represent corporate interests, with only 3% representing small- and medium-sized enterprises and 1% representing trade unions.[80]

Finally, in 2016 the EC adopted the Decision establishing horizontal rules on the creation and operation of Commission expert groups (Horizontal Rules), and then in 2017 it established a link between the Register of Expert Groups and the Transparency Register. In accordance with the Horizontal Rules, each expert group is required to submit their agenda and other relevant documents on the relevant expert group website.

However, even after the adoption of these regulations, research conducted by *Radulova et al*. shows that in 2018[81] the number of type A members in expert groups of the EC decreased even more, while the number of type D and E members increased. It seems that the problem of underrepresentation of type A members has not been solved. There is still a significantly smaller number of experts who act independently and in the public interest.

---

77 Gornitzka, A.; Sverdrup, U., Who Consults? The Configuration of Expert Groups in the European Union, *West European Politics*, Vol 31, No. 4, 2008, pp. 725–750.

78 Radulova, *et. al.*, *op. cit*, note 75, p. 100.

79 See ALTER-EU, A Year of Broken Promises: Big business still put in charge of EU Expert Groups, despite commitment to reform, pp. 3, available at: [www.alter-eu.org/sites/default/files/documents/Broken_Promises_web.pdf], Accessed 24 March 2025.

80 *Ibid.*, note 79.

81 Radulova, *et. al.*, *op. cit*, note 75, p. 105.

In fact, as noted by Mezt, given their broad base of participants and despite their label as actors tasked with delivering (neutral) advice, from the perspective of the participating advisors, expert groups can be seen as lobbying forums with privileged access to decision-makers.[82] On the other hand, the EC can monitor the represented lobby groups and influence the experts, helping to legitimize its own decision-making.[83]

The structural conditions of influence depend on the political system. Thus, for example, the EC functions in a political system based on the principle of checks and balances, including in the decision-making process. However, it could be possible for another European institution to impede the effects of an interest group's actions before the EC in the decision-making process. This circumstance weakens the position of interest groups in this lobbying process.[84]

Finally, it is also important to point out that the extent of the fundamental political interest of a European institution is affected by the actions of an interest group. Therefore, if an interest group intended to effect a change in an important issue regarding EU policies, this could potentially lead to a more pronounced conflict with the decision-maker.[85]

However, it should be noted that the number of EU institutions that have been identified as potential centers of influence on decision-making has changed over time. Among them, three are significant for lobbyists: the EC, the Council of Ministers, and the European Parliament.

It is worth noting that the European Parliament, for example, has become interesting for lobbyists through its own transformation over the past decades, which shaped and increased the powers granted by the TEU of 1992 and the Amsterdam Treaty of 1997, and due to the introduction of co-decision with the Council of Ministers including its influence on EU policy-making.

When it comes to adopting regulations, the roles of the European institutions participating in the decision-making process are intertwined. The EC has the legislative initiative and proposes a draft law. In the next stage of the process, the issue is discussed by the European Parliament. Finally, the European Parliament, in cooperation with the Council of the EU, makes a decision on the issue. Therefore,

---

82 Mezt, J., *Expert groups in the European Union: A sui generis phenomenon?* Policy and Society, Vol. 32, No. 3, 2013, p. 269.

83 Van Schendelen, R., *Machiavelli in Brussels: The Art of Lobbying the EU*, Amsterdam University Press, Amsterdam, 2002, p. 68.

84 Michalowitz, *op. cit.*, note 20, pp. 135-136.

85 Michalowitz, *op. cit.*, note 20, p. 136.

the role of the European Parliament and its representatives is significant when the decision is to be applied in the EU member states. In this phase, the role of lobbyists gains further importance.

According to some estimates, due to the increasing role of the European Parliament through its authority to participate in the law-making process, 70,000 individuals contact the European Parliament every year, and lobbyists spend around 20% of all allocated lobbying funds on lobbying in the European Parliament (around 25% is spent in the EC) in attempts to influence legislative committees and individual members of the European Parliament.[86]

Moreover, lobbying costs in the European Parliament also include the funds necessary to ensure the improvement of the reputation, and the creation of an individual profile for a Member of the European Parliament, both in their country and within the EU, although such activities lead to tension between the legislative branch as an effective branch of government and as a "public arena for broader political debate."[87]

The Council of Ministers is the institution least directly accessible to lobbyists due to its complexity and the associated higher costs of lobbying. In essence, lobbyists try to carry out their activities in three ways: through national contacts in the government, through national representatives in working groups, and through the Standing Committee of Representatives (COREPER), which includes representatives of the governments of EU member states. COREPER plays an important role in shaping the final measures of the Council of Ministers through various working groups that deal with draft proposals for legislative acts. Information about these acts can be important to lobbyists.[88]

The various ways in which lobbying takes place depend on specific political and cultural elements as well as the way the government is modeled.[89] In fact, the nature of lobbying derives from the nature of relations between people in a society. Logically, if two or more actors join together, especially if they constitute large groups or states, then they will want to influence others in order to secure economic, political, and other benefits for themselves, members of their group, or society as a whole.[90]

---

86 Coen., D.; Richardson, J., *Learning to Lobby the European Union: 20 Years of Change,* in: Coen., D.; Richardson, J. (eds.), Lobbying the European Union: Institutions, Actors and Issues, Oxford University Press, Oxford, 2009, p. 9.

87 Coen, D.; Richardson, J., *loc. cit.*, note 86, p. 9.

88 Vidačak, *op. cit.*, note 17, p. 183.

89 Badie, *et. al., op. cit*, note 3, pp. 1459-1561.

90 Badie, *et. al., op. cit*, note 3, p. 1459.

6. EUROPEAN LOBBYING SUPERVISION TOOLS

Although EU legislation seeks to clearly prescribe how permissible forms of meetings and discussions between EU bodies or officials on the one hand and lobbies on the other can take place, abuses are possible. Nevertheless, the EU has tools for monitoring whether lobbying complies with its laws. Legal regulation of lobbying supervision in the EU seeks to achieve a double effect. On the one hand, efforts are made to prevent abuses that may arise from permitted lobbying modalities, and on the other, if they do occur, legal norms have established a system of sanctioning unauthorized conduct.

The Transparency Register and the Anti-Corruption Report were established with the preventive purpose of monitoring lobbying.[91]

In this context, the Anti-Corruption Report[92] was conceived as a tool of the EC dedicated to driving the fight against corruption. Although there were no further reports after the 2014 report, it was the first EU action to cover all EU member states simultaneously.

The current Transparency Register was established by the EC, the European Parliament, and the Council of the EU in 2021. Thereby, these institutions try to coordinate their approach through the adoption of a joint framework for their cooperation, in order to promote interest representation that is transparent and ethical. The legal basis for this cooperation is the Interinstitutional Agreement.[93]

The Transparency Register prescribes the obligation to report certain data (head office, purpose, mission and interests, membership, clients, and an assessment of financial resources including EU funds received) and to abide by the Code of Conduct annexed to the Interinstitutional Agreements. According to Art. 3(1) of this Code of Conduct, after receipt of an admissible complaint, the Secretariat of the Transparency Register shall open an investigation and notify the complainant and the registrant concerned.[94] But, if the Secretariat concludes that a registrant is ineligible, it shall remove the registration concerned from the register, according to Art. 7(2) of the Code of Conduct.[95] Where the Secretariat removes a registration under point 7(2) of the Code of Conduct due to it having established that its

---

91 Chambers, *op. cit.*, note 13, pp. 7-8.

92 Anti-Corruption Report was established by EC Decision of 6 June 2011. See: Commission Decision of 6 June 2011 Establishing an EU Anti-corruption reporting mechanism for periodic assessment ("EU Anti-corruption Report") 2011 C(2011) 3673 final.

93 *Supra*, note 92.

94 *Supra*, note 92.

95 *Supra*, note 92.

ineligibility relates to non-observance, it may also prohibit the interest representative concerned from registering again for a period of between 20 working days and two years and publish the measure taken on the website of the register.[96]

However, while registration in the Transparency Register is necessary to access the European Parliament, it is not mandatory for lobbyists who operate outside the physical premises of the European Parliament. As a result, there are still unregulated opportunities for lobbying at conferences organized by political groups or the media.

Until recently, regulations mandated transparency in lobbyists' interactions with EU officials, but there was no indication of the content of their conversations.

Regarding the transparency of the EC approach, two recent decisions of the Commission on this matter are significant.

Decision (EU) 2024/3081 of 4 December 2024 provides for transparency measures regarding meetings held between EC officials and interest representatives; minutes are drawn up of these meetings, which, in addition to the names of EC officials and representative associations, also contain the subject of the meeting, the positions expressed and the conclusions (if applicable).[97]

A similar solution regarding the transparency of meetings is contained in Decision (EU) 2024/3082 of 4 December 2024 on transparency measures concerning meetings held between EC staff holding management functions and interest representatives.[98]

These decisions made it obligatory for all EC officials and staff holding management functions to publish the planned lobbying meetings and their arguments and conclusions in the form of minutes, so as to improve transparency. This obligation to transparently publish information about lobbying meetings has so far only applied to European commissioners, their cabinets, and directors-general, which is a significantly smaller group of people. These tools contribute to lobbying control, but there is still doubt about how completely is the undue influence of interest groups on EC institutions supervised.

---

96 *Supra*, note 92.

97 Commission Decision (EU) 2024/3081 of 4 December 2024 on transparency measures concerning meetings held between Members of the Commission and interest representatives, and repealing Decision 2014/839/EU, Euratom [2024] OJ L 2024/3081.

98 Decision (EU) 2024/3082 of 4 December 2024 on transparency measures concerning meetings held between Commission staff holding management functions and interest representatives, and repealing Decision 2014/838/EU Euratom [2024] OJ L 2024/3082.

As a tool for preventing corruption in lobbying, the EU has included in its legal system a ban on employment in the lobbying sector for a prescribed period after the end of an official mandate. For example, Chambers points out the particularly significant introduction of the legal standard of the "revolving door"[99] into the EU legislation, with the aim of preventing the rapid transition of EU officials from certain important positions into the lobbying sector.

The so-called "revolving door" practice of employing former EU officials who have insider knowledge of how the EU institution works remains a problem regardless of the cooling off period.

In addition to well-known names such as *Jose Manuel Barroso* and *Neelie Kroes*, there are a number of lower-ranking officials who use the "revolving door", as in the case of a former DG Competition official's involvement in the Bayer-Monsanto merger and the BASF/Bayer divestment deal, his move to the position of Vice-President of this consultancy via a revolving door, and his return to DG Competition two years later.[100]

According to the number of employees in the institutions of the EU who use "revolving door",[101] there is a cause for a concern in regards to conflicts of interest between protecting citizens' interests and those of the companies. The information that former employees can provide to the new employers could be crucial for forming lobbying approach to the EU institutions in decision-making process regardless of whether of information about person who has a decisive role in the formation of a public policy or right moment for lobbying.

Chambers specifically points out that the availability of information via online databases could also have a positive effect on the regulation of lobbying. The same can be achieved through a clear definition of who exactly can be a lobbyist, and through an extension of the "cooling off" period after the termination of duties of officials at EU institutions.[102]

---

99 Chambers, *op. cit.*, note 13, pp. 8-9.

100 For details see:
[https://corporateeurope.org/en/2024/02/bayer-and-monsanto-merger-what-role-did-revolving-doors-play], Accessed 1 June 2025.

101 For example, over 70% of Google and Meta's lobbyists have formerly worked for EU institution or under state level. For details see:
[https://corporateeurope.org/en/2022/09/revolving-door-public-officials-big-tech-lobbyists], Accessed 1 June 2025.

102 *Supra,* note 13, pp. 17-19.

In addition to these preventive measures, there is a special body tasked with detecting undue influence related to lobbying. Although the intention at the time of its establishment was not only to protect against corruption as a result of lobbying, this segment of activity contributed to the establishment of another independent body of the EC – the European Anti-Fraud Office (OLAF).[103] OLAF conducts external investigations into cases of fraud, corruption, and other illegal activities affecting the EU budget, as well as internal investigations in the EU institutions, bodies, offices, and agencies in order to detect serious misconduct by EU officials which may lead to disciplinary or criminal proceedings.[104] Since the European Public Prosecutor's Office (EPPO) started operations on June 1, 2021, OLAF has been cooperating with the EPPO by providing information, analysis, expertise, and operational support. Although OLAF was established as an independent body of the EC, the financial resources for its work depend on the decisions of the EC.[105] For example, OLAF's budget for 2023 totaled 63.5 million euros[106]. In essence, the budget depends on the scope of investigations that were concluded in that particular year. Additionally, OLAF has no powers to prosecute or discipline, only to make recommendations.

In addition to the EU institutions and the tools at their disposal, civil society also monitors corruption as a result of lobbying in the EU institutions and member states.

In the context of ensuring transparency, it should be noted that organizations such as Corporate Europe Observatory (CEO) and Transparency International operate in the EU to detect and act against inappropriate access and influence of corporations and their lobbyists in the EU institutions. Therefore, they also contribute to monitoring the activities and effects of lobbying in the EU institutions. The Alli-

---

103 OLAF was established by Decision of the Commission of the European Communities of 28 April 1999 establishing the European Anti-Fraud Office (OLAF) notified under document number SEC (1999) 802), 1999 OJ L 136, p. 20. In December 2020 was adopted the revised Regulation 883/2013 (the so-called OLAF Regulation). Revised Regulation 883/2013 available at http://data.europa.eu/eli/reg/2013/883/2021-01-17, Accessed 31 March 2025.

104 Regulation (EU, EURATOM) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, 2013 OJ L 248/1.

105 Thus, Art. 18 of Regulation No. 883/2013 determines that the total amount of budgetary resources for the work of OLAF, as well as the establishment plan, depend on the decision of the EC. For Regulation (EU, EURATOM) No 883/2013 see *supra*, note 85.

106 Available at:
[https://anti-fraud.ec.europa.eu/investigations/olaf-figures_en], Accessed 21 March 2025.

ance for Transparency and Ethical Regulation of Lobbying (ALTER-EU) had also been working with the same purpose until recently.[107]

Efforts to ensure lobbying transparency are aimed at preventing the negative effects of lobbying, which manifest themselves as undue influence or corruption. Independently of the EU, European countries rank favorably in terms of corruption compared to other countries in the world. For example, according to Transparency International, eight of the ten least corrupt countries in the world are from Europe (Denmark, Finland, Norway, Sweden, Switzerland, the Netherlands, Germany and Luxembourg). However, Croatia is only in 57th place.[108]

7. CORRUPTION AS A CONSEQUENCE OF UNDUE INFLUENCE

In the General Anti-Corruption Report, the EC defined corruption as any "abuse of power for private gain".[109] So, how does lobbying turn into corruption? Lobbying within the meaning of Art. 11 TEU is participatory democracy in practice. Contrary to this purpose of lobbying is the realization of private gain of stakeholders in the process of participatory democracy through the abuse of power.

In fact, according to the Eurobarometer, the perception of corruption in general, both at the European level and at the level of its member states, is extremely high even though there is no proof of widespread corruption. For example, data for 2023 shows that almost three-quarters of Europeans (70%) believe that corruption is very or quite widespread, and the perception of corruption has even increased compared to 2022 (by 2%), with 45% of Europeans assessing that corruption has increased even more compared to the previous three years, although the vast majority of Europeans do not personally know anyone who has given or received a bribe (88%). In the case of Croatia, Eurobarometer data for 2023 shows that the Croatian public perceives corruption in their country as even more widespread (96%), with an increase compared to 2022 (by 2%), and the perception of an increase in corruption compared to the previous three years (69%) is higher

---

107 Information on the discontinuation of ALTER-EU available at: [https://www.alter-eu.org/] Accessed, 21 March 2024.

108 Available at Transparency International, the Global Corruption Barometer, [https://www.transparency.org/en/cpi/2023?gad_source=1&gclid=EAIaIQobChMIpcGSovGFhQMVDGtBAh0ctQQBEAAYASAAEgKFq_D_BwE], Accessed 21 March 2025.

109 Peirone, F., *Another Brick in the Building of the EU Rule of Law: Anti-Corruption*, The Italian Review of International and Comparative Law, Vol. 3, No. 2, 2023, p. 521.

than the European average, although three-quarters of respondents do not personally know anyone who has given or received a bribe (74%).[110]

Although the perception of corruption at the European level and the Croatian level is exceptionally high according to Eurobarometer data, the results of the same 2023 survey show that very few people have been in a situation where they have been asked for additional money, service, or gift for the provision of a service to which they are entitled. For example, at the European level only 1%[111] of people have experienced situations of this kind. At the Croatian level, the percentage of people who have been exposed to such situations is also exceedingly low; it turns out, however, that Croats have had experiences related to corruption in almost all areas of social life – in the area of police and customs (2%), tax institutions (1%), courts (1%), the work of politicians at the national, regional or local level (1%), public procurement procedures (1%) or obtaining a building permit (2%).[112]

However, Eurobarometer data does not contain indicators that could be used to conclude how widespread corruption is as a result of the undue influence of interest groups on decision-makers in the EU. The majority of EU citizens (78%, and in Croatia 85%) believe that too close links between business and politics lead to corruption.[113] Various affairs, such as Qatargate in 2022, and before it Dalligate in 2012[114] or Cash for Amendments in 2011, contribute to this strong impression of the presence of corruption.

According to recent events, it seems that the Transparency Register Secretariat was not successful in conducting investigations. The European Ombudsman's Decision recommends that future investigations be conducted in a thorough and meaningful manner.[115] The Court of Auditors also concluded that the EU Trans-

---

110 Special Eurobarometer 534 Citizens' attitudes towards corruption in the EU in 2023, Annexes, Fieldwork: April – May 2023, QA5, QA6, QA8:
[https://europa.eu/eurobarometer/surveys/detail/2968], Accessed 16 March 2025.

111 *Ibid.*, note 110.

112 *Ibid.*, note 110.

113 Special Eurobarometer 534 Citizens' attitudes towards corruption in the EU in 2023, Annexes, Fieldwork: April – May 2023, QA15 available at:
[https://europa.eu/eurobarometer/surveys/detail/2968], Accessed 26 March 2025.

114 See: Transparency of lobbying at EU level, Briefing, December 2015, European Parliament available at:
[chromeextension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/572803/EPRS_BRI(2015)572803_EN.pdf], Accessed 29 March 2025.

115 Decision European Ombudsman on how the Secretariat of the EU Transparency Register acted on complaints related to information provided by two entities related to food industry lobbying, para. 25, available at:
[https://www.ombudsman.europa.eu/en/decision/en/181765], Accessed 25 March 2025.

parency Register provides useful but limited information on lobbying activities.[116] Therefore, it appears that the EU legal framework governing lobbying does not provide sufficient preventive supervision over lobbying, nor the efficient tools to sanction undue influence. For the time being, it seems that this situation can only encourage interest groups to circumvent established lobbying rules. Thus, it remains to be seen whether the recently adopted EC Decisions (EU) 2024/3081 and 2024/3082 will have any significant effect.[117]

8. CONCLUSION

Considering that lobbying is a human activity that boils down to the skill of convincing others, specifically the decision-makers, it is difficult to imagine that such a phenomenon would not have found its role and place in European societies and countries, and consequently in the EU, even before it was regulated through EU legislation. Public recognition and acknowledgment of this phenomenon in the EU political and legal system came quite recently, only in the late 1980s.

However, owing to the creation of the common market and the strengthening of the role of the EU institutions, lobbying found modalities for its adaptation and expansion within the most important EU institutions through an increasing number of interest groups and lobbyists. Ultimately, such developments caused legal regulation of lobbying to become a form of communication between interest groups and EU institutions, but also a form of ensuring oversight through the transparency of these activities.

REFERENCES

BOOKS AND ARTICLES

1. Barić., S.; Acinger., A., *Pravna regulacija položaja lobista u Sjedinjenim Američkim Državama*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 39, No. 2, 2018, pp. 897-920
2. Blom, T., *Conceptualising the Role of Expertise in EU Policy-Making* in: Abazi, V., Adriaensen, J., Christiansen, T. (eds.), The Contestation of Expertise in the European Union, Palgrave Macmillan, Cham, 2021, pp. 21-45
3. Bouwen, P., *The European Commission* in: Coen, D.; Richardson, J. (eds.) Lobbying the European Union: Institutions, Actors, and Issues, Oxford University Press, New York, 2009, pp. 19-38

[116] Special report of the Court of Auditors available at: [www.eca.europa.eu/ECAPublications/SR-2024-05/SR-2024-05_EN.pdf], Accessed 25 March 2025.

[117] *Supra*, note 97.

4. Chambers, A., *The Lobbying of the EU: How to achieve greater transparency*, London, Civitas: Institute for the Study of Civil Society, 2016, pp. 5-28
5. Coen., D.; Richardson, J., *Learning to Lobby the European Union: 20 Years of Change,* in: Coen., D., Richardson, J. (eds.), Lobbying the European Union: Institutions, Actors and Issues, Oxford University Press, Oxford, 2009, pp. 3-15
6. Cuesta Lopez, V., The Lisbon Treaty's provisions on democratic principles: A legal framework for participatory democracy, *European Public Law*, Vol. 16, No. 1, 2010, pp. 123-138
7. Gornitzka, A.; Sverdrup, U., Who Consults? The Configuration of Expert Groups in the European Union, *West European Politics*, Vol 31, No. 4, 2008, pp. 725–750
8. Guéguen, D., *Europsko lobiranje*, Micropictures i Novum, Zagreb, 2007
9. Kohler-Koch, B., Quittkat, Ch., *De-mystification of participatory democracy: EU-governance and civil society*, Oxford University Press, Oxford, 2013
10. Klüver, H., *Lobbying as a collective enterprise: winners and losers of policy formulation in the European Union*, Journal of European Public Policy, 2013, pp. 59-76
11. Laboutková, Sárka, Šimral, Vít, Vymětal, Petr, *Transparent lobbying and democracy*, Palgrave Macmillan, Cham, 2020
12. Lahusen, Ch., *European lobbying: An occupational field between professionalism and activism*, Routledge, London, 2023
13. Lobbying (eds.) in: Badie, B.; Berg-Schlosser, D.; Morlino, L., *International Encyclopedia of Political Science*, Vol. 1, SAGE Publications, Los Angeles, 2011, pp. 1458-1463
14. Macho, G., *Article 11 (Participatory Democracy)* in: Blanke, H-J.; Mangiameli, S. (eds.), The Treaty on European Union (TEU) A Commentary, Springer, Verlag Berlin Heidelberg 2013, pp. 449-465.
15. Mangiameli, S., *Article 2. (The Homogeneity Clause)* in: Blanke, H-J.; Mangiameli, S. (eds.), The Treaty on European Union (TEU) A Commentary, Springer, Verlag Berlin Heidelberg 2013, pp. 109-155.
16. Mezt, J., *Expert groups in the European Union: A sui generis phenomenon?* Policy and Society, Vol. 32, No. 3, 2013, pp. 267-278
17. Michalowitz, I., What determines influence? Assessing conditions for decision-making influence of interest groups in EU, *Journal of European Public Policy*, 2007, pp. 132-151
18. Peirone, F., *Another Brick in the Building of the EU Rule of Law: Anti-Corruption*, The Italian Review of International and Comparative Law, Vol. 3, No. 2, 2023, pp. 515-540
19. Radulova, E., Breuer, J., Spendzharova, A., *The European Commission's Expert Groups: Adapting to the Contestation of Expertise* in: Abazi, V., Adriaensen, J., Christiansen, T. (eds.), The Contestation of Expertise in the European Union Palgrave Macmillan, Cham, 2021, pp. 91-121
20. Ramirez, P., *Article 10 (Representative Democracy)* in: Blanke, H-J.; Mangiameli, S. (eds.), The Treaty on European Union (TEU) A Commentary, Springer, Verlag Berlin Heidelberg 2013, pp. 417-447
21. Robert, C., *Who Are the European Experts? Profiles, Trajectories and Expert 'Careers' of the European Commission*, French Politics, Vol. 8, No. 3, 2010, pp. 248-274

22. Van Schendelen, R.; *Machiavelli in Brussels: The Art of Lobbying the EU*, Amsterdam University Press, Amsterdam, 2002, pp. 21-317
23. Vidačak, I., Interest groups and lobbying in the European Union, *Croatian International Relations Review*, Vol. 9, No. 33, 2003, pp. 177-188
24. Wallace, H., Pollack M. A., Roederer-Rynning, Ch., Young A. R., *Policy-making in the European Union*, Oxford University Press, Oxford, 2020

LIST OF DOCUMENTS

1. Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2005] OJ L 264
2. "General principles and minimum standards for the consultation of interested parties" see: Communication from the Commission - Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52002DC0704], Accessed 17 March 2025
3. Commission Decision of 30.5.2016 establishing horizontal rules on the creation and operation of Commission expert groups Brussels [2016] C (2016) 3301 final; ANNEXES to the Commission Decision of 30.5.2016 establishing horizontal rules on the creation and operation of Commission expert groups, Brussels, [2016] C (2016) 3301 final ANNEXES 1 to 8
4. Commission Decision of 31 January 2018 on a Code of Conduct for the Members of the European Commission [2018] (2018/C 65/06)
5. Commission Decision of 6 June 2011 Establishing an EU Anti-corruption reporting mechanism for periodic assessment ("EU Anti-corruption Report") [2011] C (2011) 3673 final
6. Communication from the Commission - Follow-up to the Green Paper 'European Transparency Initiative' {SEC(2007) 360}, 21/3/2007 COM(2007) 127 final, [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52007DC0127], Accessed 17 March 2025
7. Decision (EU) 2024/3081 of 4 December 2024 on transparency measures concerning meetings held between Members of the Commission and interest representatives, and repealing Decision 2014/839/EU, [2024] OJ L 2024/3081
8. Decision (EU) 2024/3082 of 4 December 2024 on transparency measures concerning meetings held between Commission staff holding management functions and interest representatives, and repealing Decision 2014/838/EU, [2024] OJ L 2024/3082
9. Decision of the Commission of the European Communities of 28 April 1999 establishing the European Anti-Fraud Office (OLAF) notified under document number SEC (1999) 802), [1999] OJ L 136
10. Green Paper "European Transparency Initiative", Brussels, 3/5/2006 COM(2006) 194 final available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52006DC0194], Accessed 17 March 2025

11. Interinstitutional Agreements of 20 May 2021 between the European Parliament, the Council of the European Union and the European Commission on a mandatory transparency register, [2021] OJ L 207/1
12. Regulation (EU, EURATOM) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, [2013] OJ L 248/1
13. Treaty on European Union, [1992] 92/C 191/01

WEBSITE REFERENCES

1. ALTER-EU, A Year of Broken Promises: Big business still put in charge of EU Expert Groups, despite commitment to reform, available at:
[www.alter-eu.org/sites/default/files/documents/Broken_Promises_web.pdf], Accessed 24 March 2025
2. ALTER-EU, see:
[https://www.alter-eu.org/], Accessed 21 March 2025
3. Bureau Decision of 17 April 2023 on former Members of the European Parliament. For the decision, see:
[https://www.europarl.europa.eu/portal/en/search?planet=_all&searchQuery=Bureau+Decision+of+17+April+2023+on+former+Members+of+the+European+Parliament], Accessed 18 March 2025
4. Decision European Ombudsman on how the Secretariat of the EU Transparency Register acted on complaints related to information provided by two entities related to food industry lobbying, para. 25, available at:
[https://www.ombudsman.europa.eu/en/decision/en/181765], Accessed 25 March 2025
[https://anti-fraud.ec.europa.eu/investigations/olaf-figures_eng], 17 March 2025
[https://transparency-register.europa.eu/find-out-more/statistics_en], Accessed 25 March 2025
[https://www.tobaccotactics.org/article/tpd-dalligate], Accessed 1 June 2025
[https://corporateeurope.org/en/2024/02/bayer-and-monsanto-merger-what-role-did-revolving-doors-play], Accessed 1 June 2025
[https://corporateeurope.org/en/2022/09/revolving-door-public-officials-big-tech-lobbyists], Accessed 1 June 2025
5. Regulation 883/2013, available at: [http://data.europa.eu/eli/reg/2013/883/2021-01-17], Accessed 31 March 2025
6. Rules of Procedure of the European Parliament:
[https://www.europarl.europa.eu/doceo/document/RULES-10-2024-07-16-TOC_EN.html], Accessed 31 March 2025
7. Special Eurobarometer 534 Citizens' attitudes towards corruption in the EU in 2023, Annexes, Fieldwork: April – May 2023, QA5, QA6, QA8, available at:
[https://europa.eu/eurobarometer/surveys/detail/2968], Accessed 16 March 2025
8. Special report of the Court of Auditors available at:

[www.eca.europa.eu/ECAPublications/SR-2024-05/SR-2024-05_EN.pdf], Accessed 25 March 2025

9. Statistical Bulletin for Commission on 01/10/2024 there were 32758 employees of the EC. See [https://commission.europa.eu/about/organisation/commission-staff_en], Accessed 23 March 2025
10. Transparency International, the Global Corruption Barometer, available at: [https://www.transparency.org/en/cpi/2023?gad_source=1&gclid=EAIaIQobChMIpcGSovGFhQMVDGtBAh0ctQQBEAAYASAAEgKFq_D_BwE], Accessed 21 March 2025
11. Transparency of lobbying at EU level, Briefing, December 2015, European Parliament, [chromeextension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/572803/EPRS_BRI(2015)572803_EN.pdf], Accessed 29 March 2025

COURT OF JUSTICE OF THE EUROPEAN UNION

1. Case C-615/19-P John Dalli v European Commission [2021] ECJ ECLI:EU:C:2021:133
2. Case T-399/17 John Dalli v European Commission [2019] ECJ ECLI:EU:T:2019:384.
3. Case T-432/05 EMC Development AB v Commission [2010] ECR II-01629
4. Joined Cases C-404/12 P i C-495/12 P Stichiting Natur en Milieu and Pesticide Action Network Europe v Council of the EU and EC [2012] ECJ II
5. Case T-338/08 P Stichting Natuur en Milieu and Pesticide Action Network Europe v European Commission [2012] ECLI:EU:T:2012:300

Review article

CITY OF ZAGREB'S MODEL FOR MUNICIPAL WASTE COLLECTION: AN EXAMPLE OF BEST PRACTICE? (AN INTERDISCIPLINARY APPROACH)*

Marko Tomljanović, PhD, Associate professor
University of Rijeka, Faculty of Economics and Business
Ivana Filipovića 4, 51000 Rijeka, Croatia
marko.tomljanovic@efri.uniri.hr

Pavle Jakovac, PhD, Associate professor
University of Rijeka, Faculty of Economics and Business
Ivana Filipovića 4, 51000 Rijeka, Croatia
pavle.jakovac@efri.uniri.hr

Dejan Bodul, PhD, Associate professor
University of Rijeka, Faculty of Law
Hahlić 6, 51000 Rijeka, Croatia
dejan.bodul@pravri.uniri.hr

ABSTRACT

The aim of the paper is to analyse the model of providing the public service of municipal waste collection on the territory of the City of Zagreb. The level of public service that must be provided in order for the municipal waste collection system to fulfil its purpose, be economically viable and ensure the safety, regularity and quality of the public service is extremely difficult to achieve. A particular problem is posed by apartment buildings, where the spatial conditions make it very difficult to organize a sensible billing system in which individual users are billed according to the amount of waste produced. The analysis assumes that a fair balance must be struck between the interests of the individual and the community whereby the municipality has a certain degree of discretion in determining waste management measures. From a legal per-

* This research paper is part of the project: Jean Monnet Chair – EU business policies and contemporary challenges of European Integration - financed under ERASMUS + program – Jean Monnet Chair. "Co-funded by the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or EACEA. Neither the European Union nor the granting authority can be held responsible for them."
In addition, this work was funded within the project line ZIP UNIRI University of Rijeka, for the project ZIP- UNlRl-2023-6.

spective, the decision of the City of Zagreb must be assessed in the context in which it was taken and the objectives pursued. The current solutions seem to us to be largely acceptable. From an economic point of view, we believe that the imposition of a contractual penalty on service users who separate municipal waste in apartment buildings due to co-owners who do not do so is not made on objective and justified grounds. Therefore, the existing legal solution or justification in relation to the objective and effect of the measure under consideration is not considered in accordance with the principles common in democratic societies. The authors' tendency is to highlight the complexity of the problem through an interdisciplinary approach, to initiate a dialog on the quality of housing, the relevant role of the state, regional and local government and citizens, and on appropriate implementation mechanisms.

***Keywords**: healthy environment, municipal waste, public service, public interest, proportionality*

1. INTRODUCTION

In the case submitted to the European Court of Human Rights (hereinafter: ECHR), a violation of the right to respect for the home (Article 8) was found, as the Italian authorities have long been unable to ensure the proper functioning of the waste collection, processing and disposal service.[1] Since the principle of precedent and thus of case law as a formal source of law is confirmed by the ECHR, the adoption of the Decision on the Method of Providing the Public Service of Municipal Waste Collection in the Territory of the City of Zagreb (hereinafter: the Decision) is certainly to be welcomed.[2] The Decision itself consists of 23 chapters. The Decision was adopted in February 2022. It entered into force after eight days with the exception of Article 7 (7), Article 8 (3, 4, 6) and Article 23 which entered into force on October 1st, 2022. From a practical and empirical point of view this is an aggravating circumstance, since the *vacatio legis* is short, considering the complexity of its implementation.[3] We believe that the legislator should have chosen a relatively longer *vacatio legis* so that the addressees could better prepare for its application.

Although this Decision is quite comprehensive and has fundamentally changed the model of municipal waste collection, the public debate and the existing vagueness of the regulations clearly show which areas and topics urgently need to be regulated or reformed. The existing literature does not provide answers, useful explanations and suitable solutions to the problem of an adequate municipal waste

1 Judgment *di Sarno and Others v. Italy*. ECLI:CE:ECHR:2012:0110JUD003076508, April 10, 2012.

2 Decision on the Method of Providing the Public Service of Municipal Waste Collection in the Territory of the City of Zagreb, Official Herald of City of Zagreb, 07/22, 19/22, 33/22.

3 Effective spatial planning – including technically sound environmental impact studies, extensive consultation and public information – is no guarantee of success, but it is essential to combat the delay caused by the "not myproblem" attitude.

collection model. Therefore, this study will be the first systematic and scientifically sound analysis of the possible reform of the existing problem.

The aim of this analysis is to find an answer to the question of whether the existing legal framework complies with the relevant standards of EU law. Administrative protection was considered as the basic and primary legal protection (from the point of view of both individual and public interests) together with legal protection in court proceedings. Although the existence of the waste management system in itself fulfils the formal requirement of the rule of law, the question of the effectiveness of actions of the control bodies inevitably arises. The analysis points to the weakness of the procedural rules *per se* and with regard to the subsidiary application of the administrative procedural rules. In this context, it is essential to point out that, at the time of writing this paper, there was not enough practical experience available in order to analyze the aforementioned novelties from a critical point of view. Therefore, the authors will limit themselves to some problems based on previous experience in the management of apartment buildings, without a detailed consideration of numerous and diverse concrete specific solutions in municipal waste management that would go beyond the planned scope of this paper. The subject of this paper is not a detailed analysis of the Decision that follows the legal provisions. The analysis deals with those provisions that define mandatory terms (and where there is a need for improvement), but above all the analysis deals with provisions that are not fully harmonized with the economic laws of living in residential buildings. For the purpose of the analysis, telephone interviews were also conducted with the representatives of the co- owners. The interviews conducted with targeted respondents serve as an additional check on the credibility of the results of this analysis.

Following the presentation of the methodological and analytical framework of the study, the relevant legal sources for the management of apartment buildings and the separation of municipal waste are summarized in the second part. Furthermore, the role of the co-owners representative or other person authorized by the users of the service in certain municipal waste segregation tasks is analysed. This part of the paper also addresses some problems of placing the bins assigned to the service user within the service user's property as well as it examines the problem of video surveillance of bins in a multi-apartment buildings. The justification for imposing a contractual penalty on service users for non-compliance with the regulations is also analysed. The paper ends with recommendations suggesting possible solutions to the previously identified problems.

2. LEGAL SOURCES FOR THE MANAGEMENT OF APARTMENT BUILDINGS AND THE SEPARATION OF MUNICIPAL WASTE

The management of apartment buildings is regulated by law, in particular by the Act on Ownership and Other Proprietary Rights – hereinafter: AOO.[4] The abovementioned law regulates the mutual relations between the co-owners of a building or other type of property. All other laws determine what, how and when coowners have to do in the management and maintenance of their own building or property.[5] As clear as it is that the AOO (in principle) has the status of a general law and the Waste Management Act – hereinafter: WMA[6] that of a special law, the example of these two laws does not exclude cases in which the conclusion is reversed or at least clearly different.[7] The WMA thus regulates issues, relationships and legal institutions that are of common interest to all waste management activities or relate to several types of waste. Issues related to waste regulation at local and regional level are regulated by specific resolutions, but it seems that many "com-

[4] There is no uniform definition of the term "residential building" in Croatian legislation. The Construction Act (Official Gazette, No. 153/13-125/19) defines two types of buildings. Accordingly, buildings are enclosed and/or roofed structures intended for human habitation, housing animals, plants and things (a building is not considered a single building within the infrastructural building system). A building for public purposes is a building or part ofa building used by a public authority to carry out its activities, a building or part of a building for communal housing and a building or part of a non-residential building in which several people live or which serves a largernumber of people. The Ordinance on the Energy Inspection of Buildings and the Issuance of Energy Performance Certificates (Official Gazette, No. 88/17-45/21) defines a residential building as a building that is entirely (or more than 90% of the gross floor area) intended for residential purposes, i.e., that has no more than 50 m² of net floor area for other purposes. A building with apartments in a tourist area is also considered a residential building. A reference to the term "residential building" without uniform terminology and concrete definition canalso be found in the: Act on Energy Efficiency (Official Gazette, No. 127/14-41/21), the Act on Reconstruction (Official Gazette, No. 24/96-98/19), the Act on Reconstruction of Earthquake Damaged Buildings in the City of Zagreb, Krapina-Zagorje County, Zagreb County, Sisak-Moslavina County and Karlovac County (Official Gazette, No. 21/23), the Act on Renting Apartments (Official Gazette, No. 91/96-105/20), the Act on Real Estate Tax (Official Gazette, No. 115/16, 106/18) and the Act on Lease and Sale of Business Premises (Official Gazette, No. 125/11-112/18).

[5] For example, the Enforcement Act (Official Gazette, No. 112/12-06/24) regulates the mandatory collection of reserves, the Act on Energy Efficiency (Official Gazette, No. 127/14-41/21) regulates some issues regarding renovation of the facades of apartment buildings, andthe Heat Energy Market Act (Official Gazette, No. 80/13-86/19) regulates some issues of changing the heating model of an apartment building.

[6] Waste Management Act, Official Gazette, No. 84/21-142/23.

[7] The provisions of the WMA establish a waste management system and measures to prevent or reduce the harmful effects of waste on human health and the environment. The main objective (ratio legis) of the adoption of the WMA was the further obligation to harmonize Croatian legislation with the European Union acquis in order to create a harmonized and more detailed prescribed and regulated system and responsibilities in waste management.

prehensive" national plans ignore the reality "on the field", resulting in the quality and coherence of waste management plans being implemented very differently at different levels of government. Responsibility for municipal waste management at regional level is generally decentralized and delegated to cities and municipalities. Since both regulations (WGA and the Decision) intervene in (co-)ownership relations, the WMA is certainly important as a general (*lex generalis*) regulation. At the same time, it should be taken into consideration that it is one of the most complex laws in the Croatian legal system, both because of its internal structure and because of the extremely sensitive nature of the subject it deals with. It is a systemic organic law characterized by a pronounced internal coherence and interplay of its provisions. However, the analysis of the existing regulations, including the Decision, in the area of housing regulations shows that a high housing quality cannot be achieved in the long term without appropriate state measures, i.e., without the adoption of a new regulation governing both housing and maintenance of residential buildings.[8]

2.1. The role of the co-owners representative or other person authorized by the service users in certain municipal waste separation tasks

It is significant that the administrator of the building is not mentioned anywhere in the Decision, as he is a legal or natural person registered for administrative functions and managing the building on behalf of the co-owners (Articles 44, 45, 378 and 379 of the WMA). It would be legally logical for him to have some jurisdiction in relation to the issue in question, especially when experience shows that a large number of buildings do not have co- owner representatives (because they are not legally obliged) but must have an administrator (because they are legally obliged). Furthermore, in accordance with the provisions of the WMA, the local self-government unit appoints an administrator of the building if the co- owners have elected an administrator within the (transitional) period specified in Article 385 of the WMA (i.e., within 12 months of the entry into force of the WMA, therefore, by January 1st, 1998. According to the provisions of Article 93 of the

[8] When it comes to housing, there are numerous topics in the literature, so there is no doubt that the issue of housing quality encompasses a much larger number of topics that are no less important than those mentioned here. It is therefore hoped that the potential Act on Management and Maintenance of Residential Buildings will reflect a systematic, practical and coherent approach to housing issues, given the elaboration of the subject, and eliminate the harmful consequences of inconsistent definitions of residential buildings that affect legal certainty. The draft of the Act on Management and Maintenance of Residential Buildings is available from the authors and represents the draft published by the Ministry of Construction and Physical Planning in February 2020. See: Bodul, Dejan, *"Towards a new regulation of housing conditions in the Republic of Croatia: an adequate standard of civilization?"* Anali Pravnog fakulteta Univerziteta u Zenici, No. 26, 2020, pp. 165-188.

WMA, the administrator may be appointed outside this period either by the co-owners of the building or by the court, as the appointment of the administrator outside the transitional period is not provided for.

However, the Decision talks about the representative of the co-owner and this person is authorized to represent the other co-owners in relation to the administrator, i.e., third parties, and the limits of his powers are determined by the agreement between the owners, which is governed by the provisions of the AOO. His/hers appointment is decided exclusively by the co-owners by majority vote. In practice, it is a person who is the link between the administrator and the co-owners of the building, and since the legislator has not defined a specific name for the person who represents the co-owners *vis-à-vis* the administrator and third parties, the usual name is "representative of the co-owners" or "representative of the tenants". The co-owners in the co-ownership contract should determine the powers and duties of the representative (and whether he is responsible to the co-owners), as the AOO does not contain such a provision. Since the person who lives in the building must be a co-owner in order to perform this task, i.e., they must be the owner or co-owner of the apartment in which they live. A tenant who lives in an apartment in the building and is not the owner or co-owner of that apartment cannot be a co-owner representative. The co-owners of the building may freely appoint one or more representatives and freely determine the nature and scope of the powers they confer on these representatives. The same co-ownership contract should define the rights and powers of the deputies of these representatives. If these powers are not expressly set out in the contract between the owners, it is assumed that the substitutes have the same powers as the representatives they may replace. In any case, it would be useful to specify in the co-ownership contract the conditions under which the deputies will represent the co-owners, in particular the circumstances of how long the absence of the representative must last for the deputy to assume the power of representation. However, as already mentioned, the building does not have to have a co- owner representative, but an administrator, so the question arises as to what happens if the building does not have a co-owner representative. Indeed, the Decision speaks of "the representative of the co-owners or another person authorized by agreement by the users of the service" (Article 14 (8) or Article 19 (4) of the Decision). Therefore, it is not clear who this other person is, does it have to be the owner/co-owner, by what agreement did they set it up and by what majority of the co-ownership shares? Is this person perhaps a representative of the administrator? In this sense, we refer to the position of the Constitutional Court of the Republic of Croatia[9] on the quality of legal norms

[9] Decision of the Constitutional Court of the Republic of Croatia No.: U-I-722/2009, Official Gazette, No. 44/2011.

in the light of the rule of law, which states: *"(...) the requirements of legal certainty and the rule of law in Article 3 of the Constitution demand that the legal norm be accessible to the addressees and foreseeable for them, i.e., in such a way that they can actually and concretely know their rights and obligations in order to be able to behave towards them. (...) However, the requirement of certainty and precision of a legal norm is not fulfilled if citizens, as conscientious and reasonable persons, speculate about its meaning and content and practitioners often judge its interpretation and application differently in individual cases (...)."*

Furthermore, the Article 26 of Decision states: *(...) "If the bins cannot even be placed within the service user's property, the service user or, in the case of apartment buildings, a representative of the co-owner or another person authorized by the service users by mutual agreement, must submit a written request to the service provider to obtain an opinion on the need to place a bin in a public area. In relation to the request from paragraph 3 of this article, the service provider, through its employees, together with the service user, i.e., a representative of the co-owner or a person authorized by the service users sharing the bin, must inspect the location of the settlement point to determine the possibility of placing the bins assigned to the service user within the service user's property (...)."* However, the question remains as to whether this is the work of ordinary or extraordinary administration in the management of a residential building? According to the AOO (Article 41), the co-owners decide on matters relating only to ordinary administration by majority vote (whereby this majority is calculated according to the co-ownership shares and not according to the number of co-owners). At the same time, it should be emphasized that if the required majority cannot be reached and it is necessary to carry out some work of ordinary administration in order to maintain the operation, the decision is made by the court at the request of one of the co- owners. The consent of all co-owners is required for tasks of extraordinary administration (e.g., changing the purpose of the property, major repairs, additions, extensions, conversions, sale of the entire property, renting or leasing the entire property for more than one year, creating a mortgage on the entire property or pledging a movable property, creating real and personal easements, encumbrances in rem or building rights on the entire property) and for their execution. When it comes to solving problems of interpretation, the criterion that stands above all other criteria is the criterion of justice. Therefore, the wording of the Decision (Article 26 (4)): *"based on the request from paragraph 3 of this article, the service provider, through its employees, together with the service user, i.e., a representative of the co-owner or a person authorized by the service users sharing the bin, shall examine the location of the settlement point in order to determine the possibility of placing the tanks allocated to the service user on the service user's property"* must be interpreted in accordance with the applicable national rules on (co- or

joint) ownership, which determine a sufficient majority of votes of the co- owners of the building, calculated according to co-ownership shares. Therefore, we consider that this is a system of ordinary management within the meaning of the provisions of the Article 86 of the AOO. We are aware that this legal reasoning will not be acceptable to everyone, but we believe that it is also supported by the principle of diligence and honesty, which is ultimately inherent in the concept of justice. We believe that the practice of applying the solution in question will lead to predictable circumstances and situations, so that no new questions will arise regarding the interference with (co-)ownership rights in the field of housing that will not be answered. In other words, there will be answers that will correspond to the modern concept of property rights and the right to peaceful enjoyment of property.

We say this because it is an indisputable fact (of life and experience) that the (co-) ownership of buildings is in most cases extremely complex (buildings with multiple entrances are particularly problematic). In addition, the ownership structure is unclear (hence the land register) and the education and participation of co-owners in important decisions are often at the lowest level. Therefore, any housing model, in order to be viable in the long term, must assume that the system should be sustainable, which ultimately means that this type of solution regarding necessary permits will make the separation of municipal waste only less problematic.

2.2. Some problems with the placement of bins allocated to the service user within the service user's property

Even leaving aside the fact that not all multi-family dwellings are architecturally adapted or designed for certain things, a problem may also arise in the solution "*via the installation of the bins allocated to the service user within the service user's property"* (Article 26 of the Decision), as this may lead to harmful imissions (e.g., odour nuisance). Protection against imissions is in fact regulated by the provisions of the AOO regarding the protection of property rights against disturbances (provisions of Article 167 and the provisions on neighbourly relations of Articles 100 to 113 of the AOO). The latter also include the provision of Article 110 of the AOO, which refers specifically to imissions. Neighbouring rights are the powers granted to the owner of a property and authorize him, in the exercise of his right of ownership, to demand that the owner of another property tolerates, refrains from or does what is legally determined in his interest on his property (Article 100 (1) of the AOO). Among other things, the owner is entitled to demand that the owner of another property does not expose his property to any (illegal) imissions.

Imissions control is somewhat broader in scope than the general protection of property against nuisance. The special feature of imissions control is that, in addition to means of a real legal nature, it is also achieved through mandatory legal norms, above all through the provisions on the demand to eliminate the risk of damage[10] and the provisions on non- contractual liability for damage. First of all, the property owner is not obliged to tolerate direct imissions, i.e., that someone disturbs him without authorization by directly transmitting any imissions to his property with special devices or in any other way, so that he is entitled to demand the cessation of this nuisance and compensation for the damage caused (Article 110 (4) of the AOO). If excessive indirect imissions arise from an activity for which the competent authority has issued a permit, the exposed property owners do not have the right to demand the activity cease for the duration of the permit. However, they can demand compensation for the damage caused by the imissions and the adoption of appropriate measures to prevent or reduce excessive imissions in the future (Article 110 (3) of the AOO).[11] The ECHR has also created a new right - the right to live in a healthy environment. For example, in the Oluić v. Croatia case, when dealing with the violation of a protected right (the right to respect for the home), the ECHR stated: *"... it includes not only the right to a specific physical space, but also to the undisturbed use of that space ... the undisturbed use of the home and violations of the right to respect for the home are not limited to physical violations (e. g. trespassing)...but also include odours or other forms of disturbance."*[12]

The problem of video surveillance of bins in apartment buildings

There could also be a problem related to the regulation of video surveillance systems in residential buildings to control the proper use of containers by users of public services (see Article 26 of the Decision). On April 27th, 2018, the Republic of Croatia adopted the Act on Implementation of General Data Protection Regulation (hereinafter: GDPR Act), which entered into force on May 25th, 2018.[13] Since the present case concerns video surveillance of residential buildings, the provisions of Article 31 of the GDPR Act are applicable. In particular, Article 31 stipulates that the installation of video surveillance in residential or commercial buildings requires the consent of the co-owners representing at least 2/3 of the co-

[10] See: Article 1047 of the Civil Obligations Act – hereinafter: COA (Official Gazette, No. 35/05-155/23).

[11] See: Mihelčić, G., Marochini Zrinski, M., *Suživot negatorijske zaštite od imisija i prava na život u zdravoj životnoj sredini,* Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 39, No. 1, 2018, pp.241-268.

[12] Omejec, J., *Zaštita okoliša u praksi Europskog suda za ljudska prava,* in Barbić, J. (ed.), Upravnopravna zaštita okoliša - gdje smo bili, a gdje smo sada?, Hrvatska akademija znanosti i umjetnosti (HAZU), 2015, Zagreb, p. 80.

[13] Act on Implementation of General Data Protection Regulation, Official Gazette, No. 42/18.

ownership shares. In addition, paragraph 2 of the same article stipulates that video surveillance may only cover access to entrances and exits of residential buildings as well as common rooms of a residential building. The most important information, namely information on the processing purposes, the identity of the data controller and the existence of the data subject's rights, as well as information on the main impact of the processing or processing that could surprise the data subject, the co-owners of the residential building can arrange by written co-ownership agreement in accordance with Article 85 (4) of the AOO in compliance with the GDPR Act and relevant provisions of Regulation (EU) 2016/679[14] on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. As a result, on December 12th, 2022, the Croatian Personal Data Protection Agency (hereinafter: CPDPA) adopted the Decision on Video Surveillance of Common Parts of Buildings Where Common Waste Garbage Bins are Located for the Purpose of Processing Personal Data of Tenants Who Illegally Dispose of Waste in Common Bins. The decision by the CPDPA[15] points out that when installing the video surveillance system, attention must be taken to ensure that the public area is not affected. The provision of Article 32 of the GDPR Act states that the surveillance of public areas by means of video surveillance is only permitted for public authorities, legal entities with public authority and legal entities providing public services only if required by law, if it is necessary for the performance of the tasks and duties of the authorities or for the protection of human health and property.

2.3. Imposing a contractual penalty on the service user for non-compliance with the regulations

Since the Decision states that "*the provisions of the COA apply to issues of contractual penalty that are not regulated in the WMA*" (Article 23 of the Decision), and since the WMA mentions but does not clarify the concept of contractual penalty, we consider it important to clarify the concept and purpose of contractual penalty in

[14] 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, OJ L 119, May 4, 2016, pp. 1-88.

[15] See: Croatian Personal Data Protection Agency (CPDPA), *Videonadzor zajedničkih dijelova zgrade u kojima se nalaze zajednički spremnici za otpad u svrhu obrade osobnih podataka stanara koji neovlašteno odlažu otpad u zajedničke spremnike*, available at: [https://azop.hr/videonadzor-zajednickih-dijelova-zgrade-u-kojima-se-nalaze-zajednicki-spremnici-za-otpad-u-svrhu-obrade-osobnih-podataka-stanara-koji-neovlasteno-odlazu-otpad-u-zajednicke-spremnike/].

accordance with the COA.[16] The basic definition of the contractual penalty can be found in the provision of Article 350 (1) of the COA according to which a contractual penalty is a contractual provision (or an independent agreement) by which the debtor undertakes to pay the creditor a certain amount of money or to obtain another material benefit if he: a) does not fulfil his (main) contractual obligation, b) fulfils it late or c) does so irregularly. A contractual penalty: a) arises by agreement of the parties, b) it provides for a negative pecuniary consequence (usually a sum of money, but it can also be other material things), c) disorganizes the contracting party (debtor) who does not perform its obligation or does not perform it on time, and d) arises on condition that this party, i.e., the debtor, is guilty of non-performance, late performance or irregular performance of the contractual obligation. As this is a mandatory provision, the creditor can only demand payment of the contractual penalty if all of the above conditions are cumulatively met. As this is a question of *ius cogens*, the contracting parties can only agree a contractual penalty for the cases expressly provided for in the COA (non-performance, default and irregular performance).[17] The stipulation of a contractual penalty for any other case would be ineffective. In this specific case, we are dealing with a contractual relationship in which one of the contracting parties is the public sector.

In this context, it is an indisputable fact that additional initiatives for successful service users and tougher sanctions for non-compliance and poor service users (as well as better public information campaigns to involve the local population) are needed to create momentum at a local level. Therefore, the solution "*where the service user is found to have committed several acts for which the obligation to pay a penalty is prescribed under this Article, the service provider shall levy and collect a penalty for each of those acts"* (Article 23 of the Decision) is certainly justified. If the debtor fails to pay the penalty due and determined in money, he shall owe default interest thereon in accordance with Article 29 (1) of the COA. The contractual penalty owed is a monetary obligation like any other monetary obligation. In this context, it should be noted that the provisions on the method of determining the total contractual penalty are dispositive and it is up to the contracting parties to adapt the contractual penalty to their needs and wishes. In addition, the COA has left the possibility of regulating or correcting the amount of the contractual penalty through judicial

[16] It should be mentioned that the contractual penalty also exists in employment relationships. The Labor Act – hereinafter: LA (Official Gazette, No. 93/14-64/23) recognizes the statutory (Article 101 of the LA) and contractual non- competition clause (Articles 102-106 of the LA) between employees and employers. In the event of non- compliance with the contractual non-competition clause, the LA provides for the possibility of agreeing a contractual penalty (Article 106 of the LA). The basic rules for contractual penalties also apply in this case and the LA provides for some special features.

[17] See: Topić, G., *Ugovorna kazna prema Zakonu o obveznim odnosima*, Pravo i Porezi, No. 4, 2022, p. 80.

intervention in order to prevent the debtor from being punished too harshly, with the aim of protecting the principles of diligence and honesty, fairness and the prohibition of abuse of rights in the application of this legal institution.

The solution according to which… *if several users of the service use a common bin, the resulting obligation to pay a contractual penalty in the event that the responsibility of a single user is not established shall be borne by all users of the service who use a common bin in proportion to the shares in the use of the bin*... may turn out to be controversial. First, it must be examined whether this type of solution (i.e., punishment) is proportionate/necessary with regard to the legitimate objective pursued (i.e., better collection of municipal waste). It follows from the constitutional and administrative procedural principle of proportionality that the content of this principle can be determined by three elements: 1) legitimacy of the measure, 2) the necessity of the measure and 3) determination of proportionality in the strict sense, which is reflected in the search for a balance between the measure that restricts the guaranteed rights in order to achieve a specific objective and the permissible degree of interference with the guaranteed rights. If one of these questions is answered in the negative, the restriction of rights is generally considered unjustified, i.e., it is not proportionate to the objective pursued.

However, we will not go into this analysis, as the Constitutional Court of the Republic of Croatia[18] has already ruled in a substantially similar case[19], which states:

---

[18] Decision of the Constitutional Court of the Republic of Croatia No.: U-II-2492/2017, Official Gazette, No. 31/2021.

[19] On May 25th, 2017 the Government of the Republic of Croatia adopted the Municipal Waste Management Regulation – hereinafter: Regulation (Official Gazette, No. 50/17) which entered into force on November 1st, 2017. On September 5th, 2019 it was amended (Official Gazette, No. 84/2019) and entered into force on September 14th, 2019 (with the exception of Article 7 which entered into force on January 1st, 2020). The 2017 Regulation and its 2019 amendment were challenged by numerous complainants, on the one hand by consumer protection associations and natural persons, and on the other by local government units and their utility companies, requesting that the Regulation's compatibility with the Constitution and the law be examined. At the meeting of March 23rd, 2021, the Constitutional Court decided to repeal Article 4 (1) (7) in part "which are divided into the category of household users and subcategories of non-household users", Article 4 (8-9), Article 14 (11-12), Article 20 (2) in part "and the price of the contractual penalty", Article 20 (10-11) and Article 24 of the Regulation. The repealedarticles of the Regulation expired on September 15th, 2021. See also the transitional provision (Article 41) of theOrdinance on Waste Management (Official Gazette, No. 106/22). It is worth mentioning that the Constitutional Court concluded that, although the Regulation and the Sustainable Waste Management Act – hereinafter: SWMA (Official Gazette, No. 94/13-98/19) prescribe the obligation of the user of the public service to act in accordance with the law and the regulations issued on the basis of the law, as well as the responsibility for handling waste and bins (at the settlement point and in the common bin), it follows that the manner in which the contractual penalty is prescribed as part of the price structure of the public service (as prescribed in the Regulation) does not comply with the powers conferred on the Government of the Republic of Croatia by the SWMA.

"Article 20 (9) of the Regulation, as amended, reads that if several users of the service use a common container, the resulting obligation to pay a contractual penalty in the event that the responsibility of a single user is not established shall be borne by all users of the service who use the common container, in proportion to the shares in the use of the container. Within the meaning of Article 7 (5) of Regulation the petitioners state that most apartment buildings do not have suitable areas for the placement of garbage bins within the co-owner's building, but that the garbage bins are located in a public area and are therefore accessible to anyone, and that the joint and several liability of all tenants of the apartment building is imposed, although it is not specified whether it is joint or several liability, and that it is evident that all co- owners of an apartment building are responsible for the actions of a single person. The petitioners state that the Regulation does not impose the obligation on local government units to provide co-owners with lockable waste bins to prevent unauthorized persons from having access to the disposed waste. Since the Regulation provides for the responsibility of the co- owner of an apartment building for any illegal waste treatment, this in turn results in the co- owner being punished for the actions of third parties and not for his own. The petitioners also believe that it is incomprehensible why a co-owner should be responsible for the actions of another co-owner who refuses to cooperate with the communal administrator in order to avoid paying a fine and thus pass on the cost of the penalty to other co-owners. The petitioners believe that the contractual relationship between an individual user and a service provider is unrelated to the contracts of other users and service providers, and that one user cannot be charged for obligations that another user has not fulfilled at the same billing date.

The Constitutional Court notes that the petitioner's objections based on the unconstitutionality of this provision refer to the fact that certain conditions for the equitable application of this provision have not been established (i.e., regarding the responsibility of the public service user for handling waste, the responsibility for handling third parties, the lack of sufficient equipping of users with appropriate bins obligation to pay a contractual penalty as a result of the irresponsible behaviour of the public service user). Therefore, based on this aspect of the petitioners' objections, which question the application of said provision and, in this sense, question its unconstitutionality, the Constitutional Court considers that these reasons do not indicate that said provision would be controversial nor that the provision of Article 7 (5) of the Regulation (in conjunction with Article 20 (9) of the Regulation) is incompatible in this sense with the Constitution and the relevant provisions of the WMA."

In this context, the practice of the Constitutional Court (in each country) is particularly important, which must be as consistent as possible, which essentially

means that it decides in accordance with previous decisions in the same or substantially similar cases. This is also important because we are bound by Constitutional Court's interpretation of the law, which it expresses in the reasons for its decisions.[20] In cases where the position on an important point of law is changed, it is necessary to explain in detail (i.e., clearly and precisely) the reasons for such a position and why the circumstances of the specific case differ from all previous cases in which the position on an important point of law was applied. Otherwise, the opposite approach could lead to legal uncertainty and undermine public confidence in the judiciary, which is contrary to the principle of the rule of law. Since a certain subjectivism and an interpretation of value based on it cannot be avoided, we believe, in connection with the previous explanation of the concept of contractual obligation, that (...*if several users of the service use a common bin, the resulting obligation to pay a contractual penalty in the event that the responsibility of a single user is not established may be borne by all users of the service using the common bin in proportion to the shares in the use of the bin*, Article 23 of the Decision) it cannot be said (in connection with the agreed contractual penalty) that the debtor is guilty of non-performance or improper performance of the contractual obligation. The wording *contractual penalty* is the amount stipulated in the Decision, which the user of the service must pay in the event of non-performance or improper performance of the obligation (Article 2 (1) (21) of the Decision). It is in fact contradictory to the wording ...*if several users of the service use a common bin, the resulting obligation to pay a contractual penalty in the event that the responsibility of a single user is not established shall be borne by all users of the service using the common bin in proportion to the shares in the use of the bin* (Article 23 of the Decision), since the concept of the debtor is unclear.

As already mentioned, the contractual penalty also arises on condition that this party, i.e. the debtor, is guilty of non- performance or improper performance of the contractual obligation. Since this is a mandatory provision, the creditor can only demand payment of the contractual penalty if everything has been cumulatively fulfilled. Consequently, it is indisputable that the debtor/user of the ser-

[20] Article 31 (1), Article 76 (1) and Article 77 (2) of the Constitutional Act on the Constitutional Court of the Republic of Croatia (Official Gazette, No. 99/99-49/02), which expressly provide that the competent judicial or administrative body, the body of local and regional government or the legal person with public powers, when adopting the new law, is obliged to observe the legal positions of the Constitutional Court expressed in the decision on the repeal of the law that violated the constitutional right of the proponent of the constitutional complaint. Furthermore, decisions of a declaratory nature bind all state authorities, including the courts, which are obliged to take all measures within their jurisdiction that are necessary to remedy the violations of constitutional rights identified by the Constitutional Court and set out in its reasoning. See, for example, the Decision of the Constitutional Court of the Republic of Croatia (Official Gazette, No. 124/2011).

vice is obliged to pay a contractual penalty in the event of non-performance or improper performance of contractual obligations. However, we consider that the debtor cannot be determined by the wording *all users of the service*, i.e., the user of the service cannot be the entire residential building (which is neither the debtor nor the building *ipso iure* has legal personality).[21] Due to the uncertainty it creates, the imprecision of its content and the unpredictability of its effects, such an obligatory breach of contract puts the users of the service who comply with their obligations in a significantly less favourable legal position *vis-* à-vis the other contracting party (the provider of the public service), which is unacceptable. In the authors' opinion, this is contrary to the principles of diligence and good faith, as it constitutes an obvious inequality in the rights and obligations of the parties to the detriment of the service user who sorts the municipal waste. It also remains unclear whether a contractual penalty can be imposed on the service user if it fails to fulfil its obligations under the decision in a timely manner. It should be noted that the creditor has the right to demand a contractual penalty only for the case for which it was contractually agreed. For example, if it has been agreed for the case of non-performance, it cannot be demanded for the case of improper performance or default, or if it has been agreed for the case of default, the creditor cannot demand it for the case of non-performance. Furthermore, the debtor is not liable if the impossibility or default (i.e., the improper performance) has occurred not only due to *force majeure* but also due to the impossibility of performance not being attributable to either party, if there is only fault on the part of the creditor and in all cases in which the debtor is not responsible. In this sense, the debtor is only liable if he is responsible for the non- performance, late performance or improper

[21] Positive law does not recognize the legal capacity of a residential building as such. The provisions of the AOO, which link legal capacity to the status of a natural or legal person, clearly deny legal personality to a residential building. Without denying the inextricable link between substantive and procedural legal relationships arising in connection with the management of residential buildings, it should be noted that where substantive law is conditionally restrictive, the rules of procedural law offer certain solutions. The decisions of the Civil Procedure Act - hereinafter: CPA (Official Gazette, No. 4/77-155/23), Article 77 (3), provide that *"the civil court may exceptionally recognize the party status and the forms of associations that would otherwise not have party status with legal effect in a given legal dispute if it finds that they essentially meet the essential requirements for acquiring party status in relation to the subject matter of the dispute, in particular if they have enforceable assets".* In contrast to the AOO, which does not permit the possibility of new persons with legal capacity, the CPA thus leaves the circle of persons with party capacity open. See: Dika, M., *Stranke, njihovi zastupnici i treći u parničnom postupku*, Narodne novine, 2008, Zagreb, p. 31. In addition, Article 77 (3) of the CPA stipulates that the court "may" (i.e., does not have to) recognize party capacity in any form, even if the necessary requirements are met, which is a practical problem given the need to standardize court practice and create predictable criteria for party capacity. However, regardless of the reasoning behind the court decisions in a particular case, one gets the impression that the party's capacity for residential buildings is often not recognized. See: Bodul, D., *Should a residential building acquire de jure legal personality,* Informator, No. 6530, 2018, p. 3.

performance, and his fault is presumed.[22] Therefore, if the technical requirements for the execution of the Decision are not met, the debtor cannot be held liable. Therefore, we ultimately believe that the Constitutional Court will change the point of view applying the evolutionary method[23] of interpreting constitutional values and starting from the fact that their content is understood and accepted by a modern state and a developed democratic society at the time of interpretation.[24]

3. IN LIEU OF A CONCLUSION

Doctrine and practice show that the "polluter pays" principle is a simple and logical rule that, in its original sense, means that the person who produced the waste must also bear the costs of its collection, transportation and disposal. It becomes problematic when it comes to finding a fair, accurate and equitable way of calculating the costs of waste management. However, it seems an impossible puzzle to apply a simple rule to the complex reality of a country full of different circumstances in a relatively small area. A particular problem is posed by multi-family dwellings, where the space available makes it very difficult to organize a sensible billing system in which individual users are charged according to the amount of waste they produce, which inevitably requires the organization of shared bins. If everyone disposes their waste in common bins, then the common price for the public service is paid, which subsequently demotivates those who invest additional effort in separating individual types of waste, i.e., it exposes them to the possibility of paying the contractual penalty jointly. From an economic and legal perspective, the context in which the Decision was made and the objectives pursued must be taken into account when evaluating it. The current solutions seem to us to be largely acceptable. We take this view, although we respect the extraordinary and notorious complexity of the choice taken and accept the fact that in such complex and multi-faceted issues there are arguments for both options. In addition, we respect that the final commitment will depend on the factors attributed to both sets of arguments, although it can be argued that the determination of these factors is a subjective and seemingly arbitrary act. Time will indicate whether the Decision would pass the "sieve" of the constitutional courts if someone initiates

---

22 Gorenc, V. *et al.*, *Komentar Zakona o obveznim odnosima,* Narodne novine, 2014, Zagreb.

23 The original constitutional authority for the evolutionary interpretation and active action of the Constitutional Court is derived from Article 3 of the Constitution of the Republic of Croatia (Official Gazette, No. 56/90-5/14). It states: *"Freedom, equality, national equality and gender equality, peacekeeping, social justice, respect for human rights, inviolability of property, protection of nature and the human environment, the rule of law and a democratic multi-party system are the highest values of the constitutional order of the Republic of Croatia and the basis for the interpretation of the Constitution."*

24 See: Bodul, D., *Some questions related to municipal waste collection: the decision of the City of Zagreb as an example of good practice for apartment buildings?,* IUS INFO, October 4, 2022, p. 6.

a constitutional review proceeding or initiates an administrative proceeding. The decision to impose a contractual penalty on service users who separate municipal waste in apartment buildings because the co-owners do not do so seems doubtful for the time being. It is therefore undisputed that by agreeing on a contractual penalty, the contracting parties strengthen their binding relationship and at the same time create a mechanism for quick, efficient and undisputed compensation in the event of non-performance or defective performance of the contractual (i.e., main) obligation. However, we consider that the imposition of a contractual penalty on service users who separate municipal waste in apartment buildings due to co-owners who do not do so is not based on objective and justified grounds. By doing so, the existing legal solution or justification in relation to the objective and effect of the measure in question is not taken into account in accordance with the principles usually prevailing in democratic societies. An indication of this is also the Decision of the Constitutional Court of the Republic of Croatia[25] which annulled the provision of the WMA, according to which the utility company can impose a fine on all co- owners using a common tank if it cannot be determined who does not separate this waste. The Constitutional Court also concluded that the disputed legal solution and the provision that when a common tank is used by several users, the resulting obligation to pay a contractual penalty in the event that the liability of a single user is not established is borne by all users of the service who use the common tank in proportion to their usage share. In addition, the Constitutional Court argues that the determination of a single user liable for breaches of the contract for the use of a public service is particularly difficult in multi- apartment buildings where there may be a significant number of individual users of a public service. It is the same in cases where individual multi-apartment buildings do not have sufficient space to accommodate the storage tank within the enclosed part of the co-owner's building, but the tanks are located in a public area, so they are accessible to all, not just the users of a particular tank. In addition, the Constitutional Court decision disturbs the balance of the objective legal order, as the user of the service can be punished twice for unlawful conduct: 1) with a fine/ contractual penalty resulting from the breach of the contract itself (Article 23 of the Decision of the Constitutional Court); 2) with a penalty resulting from his liability for an administrative offense (Article 164 (1) (42) of the WMA in conjunction with Article 23 of the afore-mentioned decision). Telephone interviews with the representatives of the co-owners were also conducted for the analysis. The data collected indicates practical problems in the implementation of certain legal solutions in the initial phase of the application of the new legislation. The views of

[25] Decision of the Constitutional Court of the Republic of Croatia No.: U-I-2934/2022, Official Gazette, No. 142/2023

the individual interviewees are based on the knowledge and experience they have gained in the practice of applying the previously applicable legislation on municipal waste management, (which is certainly an important factor in assessing the improvement), but also the degree of optimization of the existing legal framework for municipal waste management at the level of the City of Zagreb.

ACKNOWLEDGEMENT

This research paper is part of the project: Jean Monnet Chair – EU business policies and contemporary challenges of European Integration - financed under ERASMUS + program – Jean Monnet Chair

"Co-funded by the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or EACEA. Neither the European Union nor the granting authority can be held responsible for them."

In addition, this work was funded within the project line ZIP UNIRI University of Rijeka, for the project ZIP- UNlRl-2023-6.

REFERENCES

BOOKS AND ARTICLES

1. Bodul, D., *Should a residential building acquire de jure legal personality*, Informator, No. 6530, 2018, pp. 1-4
2. Bodul, D., *Towards a new regulation of housing conditions in the Republic of Croatia: an adequate standard of civilization?,* Anali Pravnog fakulteta Univerziteta u Zenici, No. 26, 2020, pp. 165-188
3. Bodul, D., *Some questions related to municipal waste collection: the decision of the City of Zagreb as an example of good practice for apartment buildings?,* IUS INFO, October 4, 2022, pp. 1-8
4. Dika, M., *Stranke, njihovi zastupnici i treći u parničnom postupku*. Narodne novine, 2008, Zagreb
5. Gorenc, V. *et al., Komentar Zakona o obveznim odnosima.* Narodne novine, 2014, Zagreb
6. Mihelčić, G., Marochini Zrinski, M., *Suživot negatorijske zaštite od imisija i prava na* ***život*** *u zdravoj* ***životnoj*** *sredini,* Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 39, No. 1, 2018, pp. 241-268

7. Omejec, J., *Zaštita okoliša u praksi Europskog suda za ljudska prava.,* In *Upravnopravna zaštita okoliša - gdje smo bili, a gdje smo sada?*, in Barbić, J. (ed.), Upravnopravna zaštita okoliša - gdje smo bili, a gdje smo sada?, Hrvatska akademija znanosti i umjetnosti (HAZU), 2015, Zagreb, pp. 71-99
8. Topić, G., *Ugovorna kazna prema Zakonu o obveznim odnosima*, Pravo i Porezi, No. 4, 2022, pp. 78-85

EU LAW

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, OJ L 119, 4.5.2016. pp. 1-88

ECHR

1. Judgment *di Sarno and Others v. Italy*. ECLI:CE:ECHR:2012:0110JUD003076508, April 10, 2012

LIST OF NATIONAL REGULATIONS, ACTS AND COURT DECISIONS

1. Act on Energy Efficiency (Zakon o energetskoj učinkovitosti), Official Gazette, No. 127/14-41/21
2. Act on Implementation of General Data Protection Regulation (Zakon o provedbi Opće uredbe o zaštiti podataka), Official Gazette, No. 42/18
3. Act on Lease and Sale of Business Premises (Zakon o zakupu i kupoprodaji poslovnog prostora), Official Gazette, No. 125/11-112/18
4. Act on Ownership and Other Proprietary Rights (Zakon o vlasništvu i drugim stvarnim pravima), Official Gazette, No. 91/96-94/17
5. Act on Real Estate Tax (Zakon o porezu na promet nekretnina), Official Gazette, No. 115/16, 106/18
6. Act on Reconstruction (Zakon o obnovi), Official Gazette, No. 24/96-98/19
7. Act on Reconstruction of Earthquake Damaged Buildings in the City of Zagreb, Krapina- Zagorje County, Zagreb County, Sisak-Moslavina County and Karlovac County (Zakon o obnovi zgrada oštećenih potresom na području Grada Zagreba, Krapinsko-zagorske županije, Zagrebačke županije, Sisačko-moslavačke županije i Karlovačke županije), Official Gazette, No. 21/23
8. Act on Renting Apartments (Zakon o najmu stanova), Official Gazette, No. 91/96-105/20
9. Civil Obligations Act (Zakon o obveznim odnosima), Official Gazette, No. 35/05-155/23
10. Civil Procedure Act (Zakon o parničnom postupku), Official Gazette, No. 4/77-155/23
11. Constitution of the Republic of Croatia (Ustav Republike Hrvatske), Official Gazette, No. 56/90-5/14

12. Constitutional Act on the Constitutional Court of the Republic of Croatia (Ustavni zakon o Ustavnom sudu Republike Hrvatske), Official Gazette, No. 99/99-49/02
13. Construction Act (Zakon o gradnji), Official Gazette, No. 153/13-125/19
14. Decision of the Constitutional Court of the Republic of Croatia No.: U-I-722/2009 (Odluka Ustavnog suda Republike Hrvatske, broj: U-I-722/2009), Official Gazette, No. 44/2011
15. Decision of the Constitutional Court of the Republic of Croatia No.: U-III-3063/2007 (Odluka Ustavnog suda Republike Hrvatske, broj: U-III-3063/2007), Official Gazette, No. 124/2011
16. Decision of the Constitutional Court of the Republic of Croatia No.: U-II-2492/2017 (Odluka Ustavnog suda Republike Hrvatske, broj: U-II-2492/2017), Official Gazette, No. 31/2021
17. Decision of the Constitutional Court of the Republic of Croatia No.: U-I-2934/2022(Odluka Ustavnog suda Republike Hrvatske, broj: U-I-2934/2022), Official Gazette, No. 142/2023
18. Decision on the Method of Providing the Public Service of Municipal Waste Collection in the Territory of the City of Zagreb (Odluka o načinu pružanja javne usluge sakupljanja komunalnog otpada na području Grada Zagreba), Official Herald of City of Zagreb, 07/22, 19/22, 33/22
19. Enforcement Act (Ovršni zakon), Official Gazette, No. 112/12-06/24
20. Heat Energy Market Act (Zakon o tržištu toplinske energije), Official Gazette, No. 80/13-86/19
21. Labor Act (Zakon o radu), Official Gazette, No. 93/14-64/23
22. Municipal Waste Management Regulation (Uredba o gospodarenju komunalnim otpadom), Official Gazette, No. 50/17
23. Ordinance on Waste Management (Pravilnik o gospodarenju otpadom), Official Gazette, No. 106/22
24. Ordinance on the Energy Inspection of Buildings and the Issuance of Energy Performance Certificates (Pravilnik o energetskom pregledu zgrada i energetskom certificiranju zgrada), Official Gazette, No. 88/17-45/21
25. Regulation Amending the Municipal Waste Management Regulation (Uredba o izmjenama Uredbe o gospodarenju komunalnim otpadom), Official Gazette, No. 84/2019
26. Sustainable Waste Management Act (Zakon o održivom gospodarenju otpadom), Official Gazette, No. 94/13-98/19
27. Waste Management Act (Zakon o gospodarenju otpadom), Official Gazette, No. 84/21-142/

WEBSITE REFERENCES

1. Croatian Personal Data Protection Agency, Videonadzor zajedničkih dijelova zgrade u kojima se nalaze zajednički spremnici za otpad u svrhu obrade osobnih podataka stanara koji neovlašteno odlažu otpad u zajedničke spremnike,
2. [https://azop.hr/videonadzor-zajednickih-dijelova-zgrade-u-kojima-se-nalaze-zajednicki-spremnici-za-otpad-u-svrhu-obrade-osobnih-podataka-stanara-koji-neovlasteno-odlazu-otpad-u-zajednicke-spremnike/], Accessed March 6, 2024