

ELTE | LAW

ANNALES

UNIVERSITATIS SCIENTIARUM
BUDAPESTINENSIS DE ROLANDO
EÖTVÖS NOMINATAE
SECTIO IURIDICA

2024
BUDAPEST

ANNALES

UNIVERSITATIS SCIENTIARUM BUDAPESTINENSIS
DE ROLANDO EÖTVÖS NOMINATAE

SECTIO IURIDICA

TOMUS LXIII.

ELTE | LAW

Budapest, 2024

Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae
Established in 1959

Editor-in-Chief: Gábor Kajtár
Deputy Editor: Éva Gellérné Lukács

Advisory Board: Martin Ahrens (Georg-August-Universität Göttingen) • Krisztina Arató (Eötvös Loránd University) • Hugh Beale (University of Warwick) • Zoltán Csehi (judge, Court of Justice of the European Union) • Gábor Hamza (Eötvös Loránd University) • Péter Kovács (judge, International Criminal Court) • Gérard Legier (Université Paul Cézanne Aix-Marseille III) • Peter-Christian Müller-Graff (Ruprecht-Karls-Universität Heidelberg) • Péter Paczolay (judge, European Court of Human Rights) • László Trócsányi (Károli Gáspár University) • István Varga (Eötvös Loránd University) • Lajos Vékás (Eötvös Loránd University) • Andreas Voßkuhle (Albert-Ludwigs-Universität Freiburg) • Stephan Wittich (University of Vienna)

Contact: annales@ajk.elte.hu
Eötvös Loránd University, Faculty of Law
H-1053 Budapest, Egyetem tér 1–3., www.ajk.elte.hu/annales

All rights reserved. Material on these pages is copyright of Eötvös University Press or reproduced with permission from other copyright owners. It may be used for personal reference, but not otherwise copied, altered in any way or transmitted to others (unless explicitly stated otherwise) without the written permission of Eötvös University Press.

DOI: 10.56749/annales.elteajk.2024.lxiii

ISSN 0524-899X (Print)
ISSN 2939-6263 (Online)

orac KIADÓ

EÖTVÖS LORÁND
UNIVERSITY | BUDAPEST

Budapest, 2024
Published by ORAC Publishing House Ltd.
Website: orac.hu
E-mail: info@orac.hu
Responsible publisher: Ádám Frank, managing director
Editors: Ágnes Borsos-Szabó, Ildikó Bérci
Typesetting and technical editing by: Éva Harkai
Cover design by: Róbert Nagy

Contents

ARTICLES

Bak, Klára
Some remarks on the main characteristics of cooperatives – On the occasion of the International Year of Cooperatives 2025 7

Gombos, Katalin
New trends in the case law of the Court of Justice of the European Union – Focusing on the Hungarian experience of preliminary ruling procedures in the field of single market law 21

Kuneva, Mira
The implications of the Russo-Ukrainian war on Euro-Atlantic and Russian strategic cultures – A comparative study of the shifts in geopolitical locus of control 41

McCarthy, Jonathan
Wrong turns or paths not (yet) taken? The creation of an EU regulatory framework for digital finance 57

Švrčková, Nikola
Damages in public procurement within the framework of European Union law 81

Szalay, Gergely András
Forcible protection of third-country nationals abroad in international law 103

Faránki-Szalay, Róbert Zsolt
The market economy operator principle (MEOP) in EU State Aid Law 125

Szeibert, Orsolya
What is 'divorce mediation' in Hungary? – An analysis based on Hungarian scientific mediation-related literature 139

Szegedi, László
Independence and transparency of EU expert bodies in the automobile sector – Ten years after Dieselgate, before the European e-car revolution, are emission measurements still hidden and unclear? 153

Villegas Ramirez, Paola Andrea
Analysis of the 10 years of the FTA between the EU and Colombia, Peru, and Ecuador: opportunities and challenges 177

HABILITATIO

Antal, Attila
Governance by extraordinary measures and the age of crises 203

Gellérné Lukács, Éva
Health insurance-related rules of EU law and their implementation into Hungarian national law 215

Simon, István
Constitutional foundations of Hungarian tax law 237

Sulyok, Katalin
Do we have a right to live unsustainably? Judicial strategies to protect the rights and needs of future generations in environmental and climate litigation 263

BOOK REVIEW

Kollonay, Csilla
Review of Sára Hungler's "Social Justice, Welfare and EU Law: Integration in the Visegrád Countries" 285

Somody, Bernadett
Review of István Hoffman's "The Recent Past and Present of Local Self-Government Through the Lens of Human Public Services" 289

ARTICLES

Bak, Klára*

Some remarks on the main characteristics of cooperatives – On the occasion of the International Year of Cooperatives 2025

Abstract

Cooperatives, as unique enterprises, are not just about financial gains. They are designed to provide a range of other benefits for their members. International documents also highlight the effectiveness of cooperatives in contributing to sustainable development goals. Recognising the significant role of cooperatives in global social and economic development, the UN General Assembly declared 2025 the International Year of Cooperatives. This article aims to present the regulatory characteristics that underscore the global significance of cooperatives in the 21st century, as recognised by the UN. The analysis examines regulatory examples in international relations, including Hungarian cooperative law.

Keywords: International Year of Cooperatives; international cooperative principles; cooperative regulations; Hungarian cooperative law; unique features

Introduction

Cooperatives have spread across all sectors of the economy since their founding.[1] According to currently published data, the number of cooperative members is approximately 12% of the world's population or 1 billion people, while about 280 million people worldwide work within a cooperative framework.[2] The figures suggest that this form is globally popular and is chosen by many. Cooperatives are present in

* Bak, Klára PhD, Assistant Professor, Eötvös Loránd University Faculty of Law Department for Agrarian Law.

[1] The first modern cooperative was founded in England, in Rochdale, in 1844. See for the history of the development of cooperatives, J. Birchall, *The International Co-operative Movement* (Manchester University Press, Manchester and New York, 1997); see also: M. Réti, Über die wirtschaftlichen, gesellschaftlichen und ideologischen Fundamente der ungarischen und einigen internationalen Genossenschaftsregelungen, über die Merkmale und die Bewertung dieser Regelungen, (2010) (51) *Annales Universitatis Scientiarum Budapestinensis De Rolando Eötvös Nominata, Sectio Iuridica,* 281–308.

[2] See for the data, https://www.ica.coop/en/cooperatives/facts-and-figures (last accessed: 31.12.2024.).

DOI: 10.56749/annales.elteajk.2024.lxiii.1.7

the economic sectors of the competitive market and are typically preferred by small and medium-sized market players who carry out their activities by pooling common interests and risks, taking advantage of cooperatives' prosperity to achieve excellent results.[3] They also appear in the 'intermediate sector', organised to balance and solve social and employment problems from the last decade of the 20th century.[4] In the latter sector, cooperatives provide entrepreneurial-, work-, and income-generating opportunities for those who would have a great deal of difficulty or would not be able to get by on their own in the competitive market, or they offer social services to those who need them.[5]

Regardless of whether cooperatives operate in a competitive market or the intermediate sector, and regardless of the sector of the economy in which they operate, they share certain common characteristics. These characteristics collectively make cooperatives distinct from other enterprises, especially commercial companies. Besides the financial advantages for their members, these features enable cooperatives to provide other benefits for their members and to be versatile enterprises; moreover, to fulfil a diverse role for both members and society in general.

These are the positive characteristics of cooperatives that lead to global benefits and achievements in many contexts. In accordance with this, the UN General Assembly declared 2025 the 'International Year of Cooperatives',[6] recognising the contribution of cooperatives to social and economic development around the world.[7] By declaring the International Year of Cooperatives, the UN aims to promote cooperatives worldwide, raise awareness of the contribution of cooperatives to achieving the Sustainable Development Goals[8] and encourage governments to support cooperatives.

[3] The turnover of the TOP 300 cooperatives was 2,409,41 billion USD in 2023. For the data see fn 2.

[4] This intermediate sector is also called the 'social economy sector' in economic literature. The term was published by the French economist Charles Dunoyer in his work 'Essay on Social Economy' in 1830. See, A. A. Grigore, Social Economy Entities: A Worldwide Overview, (2013) 6 (2) *Review of Applied Socio-Economic Research,* 111–120. According to the concept of the social economy, the market economy is divided into three sectors, one of which is the social economy sector. The overall objective of the social economy sector is to strengthen social cohesion, for example, by creating jobs and bringing together those who are disadvantaged and on the periphery of society.

[5] Nowadays, these cooperatives appear as an independent type in the cooperative law of many countries. See for the role of cooperatives in the social economy, social and employment policy, K. Bak and M. Réti, Die Rolle der Genossenschaften in der Sozial- und Beschäftigungspolitik, die Tendenz der internationalen und der ungarischen genossenschaftlichen Rechtsgebung [A szövetkezetek szociál-/foglalkoztatáspolitikában betöltött szerepéről, a nemzetközi és a magyar szövetkezeti jogalkotás irányairól], (2013) (115) *Agrár- és Környezetjog,* 5–38.; see also: Réti M., A szövetkezetről, mint a szociális gazdaság legmeghatározóbb tényezőiről, in Bobvos P. (szerk.), *Reformator iuris cooperandi, Tanulmányok Veres József 80. születésnapja tiszteletére,* (Pólay Elemér Alapítvány, Szeged, 2009).

[6] UN General Assembly A/RES/78/175.

[7] It is worth noting that the UN had previously designated the year 2012 the International Year of Cooperatives, which was proclaimed by the UN General Assembly in Resolution A/RES/64/136.

[8] See, https://sdgs.un.org/goals (last accessed: 31.12.2024.).

An important precedent for the proclamation of the International Year of Cooperatives is that the UN General Assembly, in the Resolution *Transforming our World: The 2030 Agenda for Sustainable Development* adopted in September 2015[9] (hereinafter: Agenda), designates 17 global goals as *'Sustainable Development Goals',*[10] recognises the role of private sector enterprises in achieving these goals, and refers to the cooperative form independently. In connection with the provisions of the Agenda, the International Cooperative Alliance (hereinafter: ICA) and the International Labour Organization (hereinafter: ILO) jointly published a document entitled *Cooperatives and the Sustainable Development Goals,*[11] which deals with the specific role of cooperatives in achieving the Sustainable Development Goals, associating examples of cooperatives with each goal. The joint document of the ICA and ILO, for example, highlights the role of agricultural cooperatives in the fight against poverty, mentioning specific examples from Tanzania, Egypt, and Ethiopia.[12] It also highlights the undeniable importance of agricultural cooperatives in ensuring food security. The document also states that cooperatives facilitate access to quality education through financial support and by establishing schools within the African region. Additionally, cooperatives contribute to ensuring lifelong learning opportunities. Health cooperatives play a valuable role in many countries, including Japan, Canada, the United States, and Nepal. Energy cooperatives should also be highlighted, which are organised to provide renewable energy, for example, in the United States, England and Germany. The document also emphasises the importance of cooperatives in the field of employment, using examples.[13] *The ICA-ILO document clearly and distinctly highlights that the cooperative form effectively contributes to achieving the Sustainable Development Goals.*

The aim of this article is to highlight the regulatory characteristics that determine the operation of cooperatives, which, in synergy with one another, establish their significance in 21st-century global processes, as recognised by the UN.

[9] UN General Assembly A/RES/70/1.

[10] Concerning the implementation of the goals, the Agenda contains a global action plan for the period 2015–2030.

[11] ILO and ICA, *Cooperatives and the Sustainable Development Goals: A Contribution to the Post-2015 Development Debate,* (2014), the document is available online: https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=1247&menu=1515 (last accessed: 31.12.2024.).

[12] According to the document, approximately four million farmers in Egypt derive their income from selling agricultural products through agricultural marketing cooperatives. See ILO and ICA, *Cooperatives and the Sustainable Development Goals,* 6.

[13] See ILO and ICA, *Cooperatives and the Sustainable Development Goals,* 6–12.

I. International Guidelines for the International Harmonisation of Cooperative Regulations

The first characteristic to highlight is that cooperatives share a common feature worldwide. *Namely, a system of guidelines developed by a non-governmental international organisation, the ICA, as 'soft law' affects their regulation and operation.* The ICA,[14] which represents cooperatives internationally, carries out international legal unification activities to harmonise cooperative regulations and practices globally. The aim of this activity is to ensure that the characteristics that give rise to the cooperative form are reflected in current cooperative regulations and practices and that cooperatives operate based on legal regulations that truly give effect to their specific economic and social content. The organisation also aims to promote the idea that cooperatives can adapt to current social and economic challenges while preserving their unique features.

In the guideline, the organisation has developed a definition and international cooperative principles,[15] as well as defined cooperative values.[16] There are currently seven international cooperative principles in force: Principle 1, *'Voluntary and Open Membership',* Principle 2, *'Democratic Member Control',* Principle 3, *'Member Economic Participation',* Principle 4, *'Autonomy and Independence',* Principle 5, *'Education, Training, Information',* Principle 6, *'Cooperation between Cooperatives',* and Principle 7, *'Concern for Community'*.[17]

One of the important results of the ICA's legal unification activity is that legal systems consider the ICA's concept of the cooperative as a model and the content of the international cooperative principles as regulatory criteria for guaranteeing compliance. When developing cooperative regulations, both the concept and the content of the principles are typically taken into account by the legislator. The strong impact of the organisation's legal unification activities is demonstrated, for example, in Portugal. In *Portugal,* the Cooperative Code (Lei no. 119/2015, de 31 de Agosto,

[14] The ICA has consultative status with the United Nations Economic and Social Council (ECOSOC) and general consultative status with the ILO. See https://unsse.org/about/observers/international-co-operative-alliance-ica/ (last accessed: 31.12.2024.). See also ILO and ICA, *Memorandum of Understanding between the International Labor Organization,* (Geneva, 24 June 2019) Article 6, paragraph 1. The document is available online: https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---coop/documents/genericdocument/wcms_711530.pdf (last accessed: 31.12.2024.). The ICA has also been in partnership with the Food and Agriculture Organization of the United Nations since 2018. See https://www.fao.org/partnerships/civil-society/news/news-article/es/c/1414725/ (last accessed: 31.12.2024.).

[15] The international cooperative principles have been published by the ICA since the 1930s.

[16] The cooperative values are the following: self-help, self-responsibility, democracy, equality, equity, solidarity, honesty, openness, social responsibility and caring for others. See ICA, *Statement on the Cooperative Identity,* (September 22, 1995).

[17] The current international cooperative principles were published by the ICA in the following document: *Statement on the Cooperative Identity* (September 22, 1995).

Code Cooperativo) that entered into force in 2015 outlines the cooperative principles under the title '*Principios cooperativos*' by listing and defining them.[18] With this regulatory solution, the Portuguese legislator ensures the enforcement of the provisions of the ICA guidelines. In addition to Portugal, a similar regulatory approach may be observed in Serbian cooperative regulation. Article 4 of the *Serbian* Cooperative Act[19] lists the cooperative values and principles, along with their meanings. In Hungary, since the amendment of Act X of 2006 on Cooperatives in 2023, the Preamble to the *Hungarian* Cooperative Act has listed the international cooperative principles, indicating that these principles are enforced by cooperatives during their operation.[20] Outside Europe, the regulation on cooperatives of Canada, which has a significant cooperative tradition, is worth mentioning in this regard. The *Canadian* Cooperative Act, like the Hungarian regulatory approach, refers to the principles in the Preamble. The Canadian Cooperative Act does not list the principles but stipulates that cooperatives conduct their business activities based on internationally recognised cooperative principles.[21] The *Spanish* Cooperative Act implements a slightly different regulatory solution, as it defines cooperative principles as conceptual elements in the following way: cooperatives operate in accordance with the principles defined by the International Cooperative Alliance.[22] The *Catalan* Cooperative Act emphasises the importance of the principles even more strongly than the Spanish Cooperative Act since it states[23] that the principles shall be incorporated into the regulation and applied as criteria in the interpretation of the law.[24]

[18] For the characteristics of Portuguese cooperative regulation, see, R. Namorado, Chapter 29. Portugal, in D. Cracogna, A. Fici, and H. Henrÿ (eds), *International Handbook of Cooperative Law,* (Springer Verlag, Berlin and Heidelberg, 2013) 635–652.

[19] Serbian Cooperative Act No. 112/2015 of 30 December 2015, available online in English: https://www.apr.gov.rs/upload/Portals/3/Zakoni/LAW%20ON%20COOPERATIVES%2008042016%20II.pdf (last accessed: 31.12.2024.).

[20] Amended by Act XXXIV of 2023, Article 2 (2 July 2023).

[21] Canada Cooperatives Act Preamble, available online: https://laws-lois.justice.gc.ca/PDF/C-1.7.pdf (last accessed: 31.12.2024.).

[22] Spanish Cooperative Law: Ley 27/1999, de 16 de julio, de Cooperativas Article 1, Section 1.

[23] Catalan Cooperative Law: Ley 12/2015, de 9 de julio, de cooperativas Article 1, Section 2.

[24] For an analysis of Spanish regulations, see: Cooperatives Europe, *Legal Framework Analysis National Report: Spain,* (ICA-EU Partnership, 2022), in particular, 5. available online: https://coops4dev.coop/sites/default/files/2021-06/Spain%20Legal%20Framework%20Analysis%20Report_0.pdf (last accessed: 31.12.2024.).

II. On the Complex Objectives of the Cooperative

The aim of the cooperative organisation, as defined by the ICA, is to provide exemplary expression of those characteristics of a cooperative that embody the essence of the cooperative, as we have already mentioned. The related definition is as follows: *'A cooperative is an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise."*[25] Among the definitional elements, we consider the multiple objectives of the cooperative to be noteworthy, which are its *'differentia specifica'*. The cooperative always operates for the benefit of its members and provides them with versatile advantages, including economic benefits as well as social, cultural and natural ones. The multifaceted nature of cooperatives is highlighted by several analysts, including Professor Domé Mária.[26] *The complex objective system is one of the characteristics of the cooperative that makes it suitable for contributing to social and economic development in general and to the achievement of the Sustainable Development Goals set by the UN.*

In connection with the concept developed by the ICA, it is worth mentioning that the ILO[27] relies on this concept in its Recommendation No. 193 on the *Promotion of Cooperatives,* which also defines the concept of a cooperative, reflecting its complex goals.[28] One of the significant aspects of the Recommendation is that in 2002, the organisation made specific proposals for governments to support and strengthen cooperatives, thereby supporting the balancing of certain economic and social problems in countries by leveraging the advantages derived from the cooperative form.[29]

The complex goal, as a conceptual element, also appears in the definition of cooperatives in several legal systems. In the *Hungarian* context, where the basic rules governing cooperatives, including the definition of cooperatives, are outlined in Act V

[25] See ICA, *Statement on the Cooperative Identity*.

[26] See Domé M., A szövetkezetek jogi szabályozásának múltja, jelene és jövője, in *Tanulmányok Veres József egyetemi tanár 70. születésnapjára,* (Szeged, 1999) 79–92.

[27] In view of the outstanding importance of cooperatives in job creation, the ILO adopted the above-mentioned Recommendation on 3 June 2002. See http://www.ilo.org/ (last accessed: 31.12.2024.).

[28] The definition is the following: "2. For the purposes of this Recommendation, the term 'cooperative' means an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise." See, ILO: *Recommendation 193 – Promotion of Cooperatives,* available online at: 2002., https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12010:0::NO: (last accessed: 31.12.2024.).

[29] The content of the Recommendation is analysed by: Bak, K. and Réti, M., Áttekintő elemzés az aktuális nemzetközi tendenciákról, (2015) (1) *Szövetkezés,* 150–164. From a Hungarian perspective, it is important that the Hungarian Parliament adopted No. 193. ILO Recommendation with its resolution 128/2003. (XI. 26.).

of 2013 on the Civil Code (hereinafter referred to as the Civil Code),[30] the Civil Code defines the complex objective system as a key characteristic of cooperatives. According to the latter definition, a cooperative is a legal entity that carries out activities aimed at satisfying the economic and social needs of its members.[31] In Slovakia, the rules for the establishment and operation of a cooperative are laid down in the Commercial Act. According to the *Slovak* Commercial Act,[32] a cooperative is a community that undertakes activities aimed at satisfying the economic, social, and other needs of its entrepreneurs or members. In Germany, where the legal relations of a cooperative have been regulated by a sui generis act since the end of the 19th century, the *German* Cooperative Act[33] states that the purpose of a cooperative is to support the economic, social or cultural needs of its members through a joint enterprise. In this regard, it is important to point out that the definition was modified in the context of a large-scale revision of the German Cooperative Act in 2006. With the overall novel amendment[34] that entered into force on 18 August 2006, the cultural objective of the cooperative was introduced. The German legislator wanted to emphasise the role of the cooperative in promoting cultural progress for its members in addition to its economic and social objectives. According to the *Portuguese* Cooperative Act, cooperatives also aim to meet the economic, social or cultural needs of their members and to achieve their aspirations.[35] The *Spanish* Cooperative Act states that a cooperative carries out business activities to satisfy the economic and social needs and aspirations of its members. In terms of the European context,[36] it is also important to mention Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a *European Cooperative Society* (SCE) (hereinafter: Council Regulation). Its Preamble, in Point 10, explicitly emphasises that the objective of an SCE is complex – namely, as follows: *'A European cooperative society (hereinafter referred to as "SCE") should have as its principal object the satisfaction of its members' needs and/or the development of their economic and/or social activities…'*.[37]

[30] It is worth highlighting that in addition to the Civil Code, Act X of 2006 on Cooperatives also sets out general rules governing cooperatives, and the act also defines special rules for certain types of cooperatives.
[31] Hungarian Civil Code 3:325. § (1).
[32] Slovak Commercial Act [Obchodný (513/1991)] Section 221(1).
[33] German Cooperative Act: Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften §1.
[34] The German Cooperative Act was extensively revised with this amendment after a long time; the previous general revision was in 1973. See, Lang and Weidmüller, *Genossenschaftsgesetz, Kommentar* (De Gruyter Recht, Berlin, 2006) 7.
[35] Portuguese Cooperative Law: Lei N.º 119/2015, de 31 de Agosto, Article 2(1).
[36] Spanish Cooperative Law: Ley 27/1999, de 16 de julio, de Cooperativas Article 1 Section 1.
[37] See for a detailed analysis of the provisions of the Council Regulation, Réti M., Az Európai Szövetkezet (SCE) Statútumáról szóló tanácsi rendeletben foglalt általános jellemvonásokról és egyes előírásokról, figyelemmel a szövetkezetekről szóló 2006. évi X. törvényre, (2007) (1) *Európai Jog,* 33–42.

III. On the Decision-Making Mechanism: on Voting Rights Independent of the Size of Financial Contribution

A key feature of a cooperative is also closely tied to its decision-making mechanism. In the case of a cooperative, the voting rights of members are independent of the size of their financial contribution. This feature is reflected in the principle of *Democratic Member Control*. The principle establishes the proposition that 'one member, one vote' applies in cooperatives.[38] The reason is that member's activities within the cooperative, personal contribution, and use of the cooperative's services outweigh any financial contribution. *So, one of the essential manifestations of democratic operation in a cooperative is that the opinion of every member is taken into account equally during decision-making, with one vote.* In this context, it is worth referring to the point of view of Gyula Tellér, a Hungarian sociologist. He strikingly illustrates the operational essence of cooperatives. According to him, *the observance of the principle 'one member – one vote' ...ensured that equality related not to capital, but to persons prevailed in decision-making...'.*[39] In a general sense, the principle expresses that cooperatives operate democratically through self-management, and the role of membership is fundamental to the cooperative's operation, as members participate in management, control, and, of course, decision-making. However, it should also be pointed out that, according to the relevant declaration of the ICA, the principle of 'one member, one vote' characterises primary cooperatives – i.e., those cooperatives that exclusively include natural persons or natural and legal persons and are not, for example, considered to be cooperatives founded by cooperatives. The principle of one member, one vote is still included in the acts of many legal systems regarding cooperatives. Specifically, the guidelines of the ICA are followed, for example, in Norwegian cooperative law regarding voting rights. The *Norwegian* Cooperative Act [Lov om samvirkeforetak (samvirkelova)] establishes the principle of one member, one vote, as the primary rule in decision-making.[40] In *Hungarian* cooperative law, according to

[38] It is worth drawing attention to the fact that the principle of 'one member, one vote' has determined the operation of cooperatives from the very beginning. The statutes of the first cooperative in the modern sense, the so-called Rochdale cooperative (founded in 1844), after its amendment in 1845, provided that each member in the cooperative should have only one vote. See Kuncz Ö., A Rochdale-i elvek és a szövetkezet jogi fogalmának körülírása, in *Küzdelem a gazdasági jogért II. kötet, Dr. Kuncz Ödön Összegyűjtött kisebb dolgozatai,* (Királyi Magyar Egyetemi Nyomda, Budapest, 1941) 425.

[39] See Tellér Gy., Megjegyzés a szövetkezetről, (2015) (1) *Szövetkezés,* 13.

[40] Article 38, Norwegian Cooperative Act. It is worth noting that the Norwegian Cooperative Act lays down special rules for secondary cooperatives and allows for derogation from the one-member-one-vote principle. According to Article 4(2) of the Norwegian Cooperative Act, a secondary cooperative is one that is exclusively owned by cooperative members or in which cooperatives have a controlling influence.

Section 3:337 (1) of the Civil Code, the principle of one member, one vote in cooperatives is enforced and of a mandatory nature. In Europe, for example, the Czech and Serbian regulations are also similar to the Hungarian regulatory approach. According to Section 631 of the *Czech* Cooperative Act,[41] each member of the cooperative has one vote when voting in the governing body of the cooperative. The *Serbian* Cooperative Act establishes the principle of equality of voting rights among members in Article 33, specifically stating that each member has one vote in the text of the act.[42] Outside Europe, the *Canadian* Cooperative Act provides in Article 7 that each member or representative in the cooperative has one vote.[43]

In accordance with the cooperative decision-making mechanism, it is essential to consider an additional regulatory solution that has been established and is enforced in the cooperative laws of certain legal systems. This is the institution of multiple voting rights. Multiple voting rights basically means that cooperative members whose personal contribution to the cooperative is exceptionally large may be granted more than one vote in cooperative decision-making. So, it is not the member's financial contribution that is of decisive importance, but rather their personal contribution. This regulatory solution appears, for example, in the *German* Cooperative Act.[44] In German law, multiple voting rights are limited. Namely, the act defines a numerical and proportional limit regarding voting rights. Another valuable example of the regulation of multiple voting rights may be found in the Council Regulation.[45] However, in the case of multiple voting rights, the principle of one member, one vote also prevails as the governing decision-making rule. Still, there is an opportunity to diverge from this.

IV. On the Main Property-Rights Characteristics

Among the special characteristics of the property relations of a cooperative that are recorded in the principle *'Member Economic Participation',* several should be emphasised. One of them is that cooperative members make a financial contribution upon foundation and entry as a condition for establishing their membership. However, the personal contribution of the members is of decisive importance in a cooperative. This view is reinforced by the ICA in its Guidance Notes, which interpret the international cooperative principles. According to the Guidance Notes, the criterion

[41] See the Czech Cooperative Act, https://www.zakonyprolidi.cz/cs/2012-90 (last accessed: 31.12.2024.).
[42] See the Serbian Cooperative Act, https://www.apr.gov.rs/upload/Portals/3/Zakoni/LAW%20ON%20COOPERATIVES%2008042016%20II.pdf (last accessed: 31.12.2024.).
[43] See Canada Cooperatives Act Preamble, https://laws-lois.justice.gc.ca/PDF/C-1.7.pdf (last accessed: 31.12.2024.).
[44] German Cooperative Act, Section 43(3).
[45] Council Regulation Article 59.

that must prevail is that the required financial contribution shall be affordable for those who need the cooperative's services. The amount of financial contribution should not be an obstacle or hindrance to establishing cooperative membership. The *Hungarian* regulation harmonises with the provisions of the guidelines. According to the Hungarian Civil Code, a member's obligation towards the cooperative is to make a personal contribution; however, it also states the necessity of making a financial contribution without specifying a limit.[46]

The principle of 'Member Economic Participation' also entails that if the cooperative is profitable, it is worth distributing the profit, taking several aspects into account. On the one hand, dividends may be paid from it, namely in the form of a limited dividend. It is important to state that the payment of dividends is not mandatory according to the position of the ICA. Regarding the remaining part of the profit, the principle sets out further alternative proposals. Considering that cooperatives operate for the benefit of their members, cooperative development goals are mentioned first by the ICA, for example, establishing a reserve fund.[47] In terms of reserve formation, the cooperative laws of many European countries follow the recommendations of the ICA. To ensure the long-term sustainability of operations, cover potential losses, and overcome challenging economic periods, the formation of reserves is recommended. An example of this is the *Serbian* cooperative law, which, under the title of a 'cooperative fund', ensures that a separate asset is available to the cooperative for investment purposes and to increase operating capital.[48] In addition to establishing the cooperative fund, a reserve fund may also be created, with the primary purpose of covering the cooperative's potential losses.[49] In *Hungarian* law, the possibility of forming a fund is also provided, but its purpose is to support cooperative members and their relatives.[50] This is the so-called Community Fund.

Profits may also be distributed in proportion to the member's personal contribution; members may benefit in proportion to their transactions. In cooperative law literature, the principle of this special distribution is known as the principle of *'distribution of the surplus as dividend on purchases'*. This special property law principle has been applied to cooperatives since the beginning.[51] In practice, cooperative members primarily benefit from the after-tax profit to the extent that they utilise the cooperative's services or contribute to its operations. In European and non-European

[46] Hungarian Civil Code Section 3:325, paragraph (1).
[47] See ICA, *Statement on the Cooperative Identity.*
[48] Serbian Cooperative Act Article 58.
[49] Serbian Cooperative Act Article 58.
[50] Hungarian Civil Code 3:334. §.
[51] For the operational characteristics of the cooperative, see, Kuncz Ö., A szövetkezeti visszatérítés problémája jogi szempontból (1940), in *Küzdelem a gazdasági jogért, II. kötet,* (Királyi Magyar Egyetemi Nyomda, Budapest, 1941) 465–471.; Domé, A szövetkezetek jogi szabályozásának múltja, jelene és jövője, 79–92.

cooperative regulations, the principle of refund is fundamental. The *Hungarian* Civil Code contains a mandatory provision stating that if the members of the cooperative decide to divide the profit, half of this shall be distributed among the members in proportion to their personal contributions.[52] The *Council Regulation* also declares the principle of refund in proportion to personal contributions.[53]

V. On the Principle of Education, Training and Information

The principle of 'Education, Training and Information' expresses that the continuous training, education and information of cooperative members should be among the fundamental tasks of the cooperative. In relation to the context of this issue, it is essential to highlight the report *Cooperatives and Employment*: *A Global Report*[54] published by the International Organization of Industrial and Service Cooperatives (hereinafter: CICOPA), which defines the stable role and sustainable operation of cooperatives, especially worker cooperatives, social cooperatives and other types of cooperatives that promote employment. The analysis emphasises that these cooperative types play a key role by assisting their members with education and training.[55] In connection with this, it is essential to note that cooperatives, in general, often provide financial support to their members, enabling them to pursue training and education opportunities. In Hungarian law, for example, in the case of school cooperatives and cooperatives for people with small children, the Cooperative Act specifies the educational objective in terms of the special cooperative fund, the community fund.[56]

VI. On Cooperation between Cooperatives

'Cooperation between cooperatives' is particularly significant. The ICA's guidelines propose cooperation between cooperatives as follows: "Cooperatives serve their members most effectively and strengthen the cooperative movement through local, national, regional, *and international cooperation*." It clearly seems that cooperation

[52] Hungarian Civil Code 3:356. § (2).
[53] Council Regulation Article 66: "The statutes may provide for the payment of a dividend to members in proportion to their business with the SCE, or the services they have performed for it."
[54] B. Roelants, E. Hyungsik and E. Terrasi, *Cooperatives and Employment: A Global Report,* (CICOPA, 2014), https://www.cicopa.coop/wp-content/uploads/2018/03/cooperatives_and_employment_a_global_report_en__web_21-10_1pag.pdf (last accessed: 31.12.2024.).
[55] The report also notes democratic decision-making in the cooperative and the horizontal integration of cooperatives as additional important features.
[56] Hungarian Cooperative Act, Section 13/B and Section 42.

between cooperatives helps them to operate more efficiently. Cooperatives may be more economically efficient by joining forces, achieving greater cost-effectiveness due to the advantages of economies of scale. Because of the effects of globalisation and digitalisation, this kind of cooperative practice manifested in collaboration and cooperation is of international significance in relation to market competition.[57] The regulatory imprint of the principle is already visible in the cooperative law of many legal systems. Cooperative regulations specifically mention the possibility of establishing secondary cooperatives or higher-level cooperatives resulting from the cooperation of cooperatives, and some legal systems have already introduced special provisions regarding the cooperative form of cooperatives. For example, the Norwegian Cooperative Act lays down special rules for secondary cooperatives related to the establishment and termination of cooperative membership, voting rules and property law, compared to the general rules.[58] The Portuguese Cooperative Code also contains special provisions in certain regulatory areas regarding so-called higher-level cooperatives.[59] In Hungarian law, Section 2 of the Cooperative Act outlines the concept of secondary cooperatives; however, no additional special provisions have been established regarding secondary cooperatives established exclusively by cooperatives.

VII. Concern for Community

The principle of *'Concern for Community'* states that *'the members of cooperatives work to maintain the continuous and lasting development of their community based on principles accepted by them'*. Although the principle was officially declared in 1995 as a cooperative principle, its fundamental content was prevalent in the practice of cooperatives from the outset.[60] As we have already pointed out in the context of the starting points, since the official declaration of the international cooperative principle, the view that cooperatives serve as a tool for promoting global sustainable development in addition to local development has been strengthened. This view is supported by the joint document of the ICA and the ILO, as previously mentioned. It is also worth mentioning that the Guidance Notes, which contain detailed guidance on the current

[57] See ICA, *Guidance Notes to the Co-operative Principles* (2015) 74–82, especially 74–76, available online at: https://ica.coop/sites/default/files/2021-11/ICA%20Guidance%20Notes%20EN.pdf (last accessed: 31.12.2024.)

[58] See Norwegian Cooperatives Act, Articles 14, 20, 33, 38, 135.

[59] An example of the special rules concerning secondary cooperatives is the minimum number of members in a secondary cooperative. According to the Portuguese Cooperative Code, the general rule is three persons, but in the case of higher-level cooperatives, it is fewer: two persons [Article 11(1) Portuguese Cooperative Code].

[60] It is worth noting that the principle 'concern for community' also appeared in the 1966 list of principles of the ICA, but not as an independent principle, but as part of the principle 'Cooperation between cooperatives'.

meaning of the international cooperative principles, also highlight the connections between the principle of *'Concern for Community'* and the concept of sustainable development. The Guidance Notes explore in detail how cooperatives may contribute to promoting social, economic and environmental sustainability.[61] Cooperatives are well-suited to implementing the principle of 'Concern for Community' due to their complex goals and diverse activities, which aim to benefit their members. Due to their goals and diverse activities, cooperatives have proven to be a suitable form for addressing and possibly solving global and local problems since the mid-19th century, thereby helping achieve the goals associated with the realisation of sustainable development locally or globally. According to the social role of cooperatives, the ICA itself stated in its message for International Cooperative Day in 1998[62] that cooperatives perform many tasks that are not only economic in nature. Their social and environmental impact also goes beyond the scope of economic activity.[63]

Closing Remarks

The analysis clearly shows that cooperatives are unique enterprises with features that make them well-suited to provide diverse benefits for their members and the broader society. Their common global regulatory and operational guidelines, complex goals, the democratic operating mechanism of 'one member, one vote', special property law characteristics, and their relevance in education and sustainability establish the contribution of cooperatives to the Sustainable Development Goals of the UN. Cooperatives are expressly valuable enterprises, and through their activity and role, they have earned the accolade of 2025 being designated the International Year of Cooperatives.

[61] See ICA, *Guidance Notes to the Co-operative Principles,* 86–87.

[62] Cooperatives celebrate International Cooperative Day every year worldwide, specifically on the first Saturday of July, a tradition that began in 1923. On the mentioned day, the annual message of the ICA to cooperatives and the cooperative community is announced.

[63] Message of the ICA for the 76th International Cooperative Day (4 July 1998): A szövetkezetek és a gazdaság globalizációja, (1998) 19 (2) *Szövetkezés,* 25.

Gombos, Katalin*

New trends in the case law of the Court of Justice of the European Union – Focusing on the Hungarian experience of preliminary ruling procedures in the field of single market law

Abstract

Cooperation between the Court of Justice of the European Union and national courts is based on the preliminary ruling procedure. In particular, there has been a large number of preliminary rulings in the area of the internal market. Hungary has been a Member State of the European Union for 20 years. Based on the experience with the Hungarian preliminary ruling procedures, clearly visible changes and shifts in emphasis in the case law of the Court of Justice can be traced. Three of these trends are presented in this paper.

First, it is argued that the preliminary ruling procedure has undergone a transformation, shifting its focus from the interpretation of EU law itself to assessing the compatibility of national legislation, as well as national administrative and judicial practices, with EU law. Second, the adoption of the Charter of Fundamental Rights, and in particular, its elevation to the status of a primary source of law by the Treaty of Lisbon, has resulted in the strengthening of the fundamental rights approach in preliminary ruling procedures. Further reinforcement of this new approach is expected with the evolving division of responsibilities between the CJEU and the General Court. Third, the CJEU is required to respond to the new challenges of the 21st century in the context of the Digital Single Market, and public authority activity shall at least be as much focused on law enforcement (mainly related to digital data) as it is on market surveillance with regulatory functions.

Keywords: Preliminary ruling procedure; Charter of Fundamental Rights; argumentation technique; Digital Single Market; Hungary

DOI: 10.56749/annales.elteajk.2024.lxiii.2.21

I. Introduction

The European Union – in other words, the European integration project – is more than a simple commercial cooperation[1] between Member States.[2] The EU aims to enable EU citizens to study, live, shop, work, and retire in any EU country and enjoy products from all over Europe.[3] The EU is a union in many ways: on the one hand, it is a union of the four freedoms,[4] but on the other hand, it is a union of justice.[5] Hungary has been a member of the European Union for 20 years. Hungarian judges were the first among the countries that joined in 2004 to submit preliminary ruling questions to the Court of Justice of the European Union (CJEU) and they still play a very active role in this cooperation.[6] Between 1 May 2004 and 31 December 2023, 280[7] references for preliminary rulings were made to the CJEU by Hungarian courts. Of the 280 requests for preliminary rulings, the Curia (formerly the Supreme Court) only initiated 43, which shows that Hungarian lower courts also make use of the referral mechanism. Compared to other Member States, Hungarian courts have been very active in this area. These references also clearly illustrate the shifts in emphasis that characterise the case law of the CJEU today. Looking back over the last 20 years, one can clearly observe visible changes and shifts in emphasis in the jurisprudence of the CJEU. It is contended that the preliminary ruling procedure has undergone a transformation, shifting its focus from the interpretation of EU law itself to assessing the compatibility of national legislation, as well as national administrative and judicial practices, with EU law. It is further argued that the role of preliminary rulings in the context of internal market

* Gombos, Katalin Professor at University of Public Service.

1 J. H. H. Weiler, The Transformation of Europe, (1991) (8) *Yale Law Journal,* 2403–2483.

2 C. Barnard and J. Scott, *The Law of the Single European Market: Unpacking the Premises* (Hart, Oxford and Portland, Oregon, 2002).

3 T. Jaeger, *Introduction to European Union law: foundations – institutions – enforcement – internal market rules* (Wien Facultas, Vienna, 2021).

4 C. Barnard, *The substantive law of the EU: the four freedoms* (Oxford University Press, Oxford, 2019); M. Egan, *Single Markets: Economic Integration in Europe and the United States* (Oxford University Press, Oxford, 2015); F. Schuhmacher, *Europarecht. II, Binnenmarkt, Grundfreiheiten, Wettbewerbsrecht* (LexisNexis, Vienna, 2018); L. Vogel, *Les fondamentaux du droit du marché intérieur* (LawLex and Bruylant, Paris and Brussels, 2020).

5 A. Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, Oxford and New York, 2004); G. Steiner, *Une Certaine Idee De L'europe* (Actes Sud, Arles, 2005); P. Pescatore, The Doctrine of Direct Effect: An Infant Disease of Community Law, (1983) (8) *European Law Review,* (155–157) 157.

6 A number of Hungarian preliminary rulings have been related to the single European market concerning taxation, such as regarding VAT and other taxes, but mainly those concerning specific types of taxes, such as registration tax, business tax or retail sales tax; also, consumer protection law; free movement of workers, goods, services and capital; public procurement law; competition law; road transport issues; and the interpretation of the Charter of Fundamental Rights in the field of internal market.

7 Sources of these statistical data are the published annual reports and judicial statistics of the Court of Justice of the European Union.

law needs to be reinforced to ensure the protection of fundamental rights. Third, the CJEU is required to balance competing legal interests between internal market freedoms and data protection in the interest of the protection of the law.

The article examines the arguments described above primarily using Hungarian examples, with a particular focus on their impact on the internal market.

II. Changes in the nature of preliminary ruling procedures

The preliminary ruling procedure[8] is a form of cooperation between judges of national courts and judges of the CJEU.[9] Its essence is that a national court or tribunal can ask the CJEU for a preliminary ruling if it has doubts about the validity or interpretation of EU law.[10] Originally, the function of the preliminary ruling procedure [under Article 177 of the Treaty establishing the European Economic Community, Article 234 of the Treaty establishing the European Community, and Article 267 of Treaty on the Functioning of the European Union (TFEU)] was to ensure that national courts interpret and apply EU law correctly.[11] As prominent authors already noted in the early 2000s, the preliminary reference system, particularly in conjunction with the principles of primacy and direct effect, has redefined constitutionalism at the European level[12]

[8] See more: C. O. Lenz, The Role and Mechanism of the Preliminary Ruling Procedure, (1994) 18 (2) *Fordham International Law Journal,* 389–409., https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1409&context=ilj (last accessed: 31.12.2024.). For more detailed information on certain aspects of the preliminary ruling procedure, see the literature in Hungarian: Blutman L., *EU-jog a tárgyalóteremben: Az előzetes döntéshozatal [EU law in the courtroom: The preliminary ruling]* (KJK–KERSZÖV, Budapest, 2003); Simonné Gombos K., *10 éve az Európai Unióban: Az előzetes döntéshozatali eljárás magyar tapasztalatai [10 years in the European Union: the Hungarian experience of the preliminary ruling procedure]* (OPTEN Informatikai Kft., Budapest, 2014); Király L., *Az előzetes döntéshozatali eljárás a polgári jogvitákban, különös tekintettel a tagállami felelősség kérdésére [Preliminary ruling procedure in civil matters, in particular on the question of the liability of the Member State]* (OITH Magyar Bíróképző Akadémia, Budapest, 2008).

[9] See in this respect: S. Iglesias Sánchez, Preliminary Rulings before the General Court: Crossing the Last Frontier of the Reform of the EU Judicial System? *EU Law Live Weekend Edition,* No 125. (17 December 2022).

[10] M. Broberg and N. Fenger, *Preliminary References to the European Court of Justice* (Oxford University Press, Oxford, 2021).

[11] K. Lenaerts et al., *EU Procedural Law* (Oxford European Union Law Library, Oxford, 2023); R. Schütze, Judicial Powers I: (Centralised) European Procedures, in *European Constitutional Law* (Cambridge University Press, Cambridge, 2015) 343–393.

[12] See K. Tuori, European Constitutionalism, in R. Masterman and R. Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press, Cambridge, 2019) 521–553. DOI: https://doi.org/10.1017/9781316716731

and facilitated the redistribution of powers.[13] This issue can be examined on three levels: supranational, national, and within the judiciary itself. Looking at the judiciary, it can be observed that the focus of referrals has shifted significantly towards a form of revision[14] (and sometimes self-revision[15]) by the national courts in concrete cases compared to the original objective of preliminary rulings. This trend is particularly striking in the context of national jurisdictions[16] with regard to the relationship between lower and final instance courts.[17] Nowadays, in the vast majority of cases, judges (including Hungarian ones) use their references for preliminary rulings to clarify the compatibility of national legislation[18] with EU law through the interpretation of EU law by the CJEU.[19] In specific cases, the question of compatibility arises not in legislation but in relation to administrative practice[20] or judicial practice.[21]

It follows that the CJEU must respond differently to these changing submissions. In such cases, there is a tendency for the CJEU to draw the boundaries of its interpretation by distinguishing what it considers to be questions of law which now fall expressly within the jurisdiction of the national court.[22] In these cases, the CJEU, based on the principle of providing a useful answer,[23] formulates criteria for the

[13] T. Tridimas, Knocking On Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure, (2003) 40 (1) *Common Market Law Review,* 9–50. DOI: https://doi.org/10.54648/5115417

[14] Such revision often takes place following infringement proceedings. For an illustrative example, see the order of the Court of 20 June 2023 *SOLE-MiZo Zrt. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága,* C-426/22, ECLI:EU:C:2023:517, paragraph 10.

[15] Somssich R., *Egységes jog – Egységes értelmezés? Az uniós jog értelmezése a tagállami bíróságok szintjén [Uniform law – Uniform interpretation? Interpretation of EU law at national court level]* (ELTE Eötvös Kiadó, Budapest, 2016) 201–216.

[16] See: Judgment of the Court of 27 April 2023, *MJ v AxFina Hungary Zrt.,* Case C-705/21, ECLI:EU:C:2023:352.

[17] See: order of the Court of 9 January 2023, *A. T. S. 2003 Vagyonvédelmi és Szolgáltató Zrt. "f.a." v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága,* C-289/22, ECLI:EU:C:2023:26.

[18] Judgment of the Court of 12 September 2024, *SPAR Magyarország Kft. v Bács-Kiskun Vármegyei Kormányhivatal,* C-557/23, ECLI:EU:C:2024:737; Judgment of the Court of 23 November 2023, *J. P. Mali Kerékpárgyártó és Forgalmazó Kft. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága,* Case C-653/22. ECLI:EU:C:2023:912.

[19] R. Somssich and M. Z. Fehér, Magyar előzetes döntéshozatali eljárások 2004–2019 [Preliminary References from Hungarian Courts 2004–2019], (2019) 22 (3) *Európai Tükör,* (7–22) 13–14. DOI: https://doi.org/10.32559/et.2019.3.1

[20] Judgment of the Court of 16 November 2023, *Tüke Busz Közösségi Közlekedési Zrt. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága,* C-391/22, ECLI:EU:C:2023:892.

[21] Judgment of the Court of 2 September 2021, *JZ v OTP Jelzálogbank Zrt. and others,* C-932/19, ECLI:EU:C:2021:673.

[22] For an illustrative example, see the Judgment of the Court of 20 April 2023, *DIGI Communications NV v Nemzeti Média- és Hírközlési Hatóság Hivatala,* C-329/21, ECLI:EU:C:2023:303, paragraph 48.

[23] According to settled case law, the Court of Justice of the European Union may – if necessary, even by reformulating the questions referred to it – in the context of judicial cooperation, provide the national court, on the basis of material submitted to it, with an interpretation of EU law which may be useful

application of the law[24] but leaves to the national court the possibility[25] (and responsibility[26]) of examining the substance of the question.[27] Here, only those *de facto* referrals can be mentioned where the CJEU refers a decision back to the national judge for the interpretation of national law[28] while simultaneously defining the key points of interpretation.[29] In my view, where further factual examination is necessary[30] to answer the questions raised in the preliminary ruling procedure, this can only be described as a sham reference back.[31] In such cases, the CJEU effectively refuses to reply on the merits, citing that the factual basis has not been adequately presented.[32] This approach follows from judgments and orders in which the CJEU emphasises that its statements are confined to the facts as presented in the case.[33] If additional facts not provided by the referring court can influence the legal classification, the CJEU's interpretative guidelines are not applicable only in those situations. This technique also intends to avoid the misinterpretation of EU law due to insufficiently detailed factual foundations. It also allows the CJEU to depart in its subsequent case law from previous interpretative premises in similar but at least partially factually different cases.[34]

for assessing the effects of one or another provision of EU law (Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria,* Case C-83/14, ECLI:EU:C:2015:480, paragraph 71 and the case-law cited).

[24] For an illustrative example, see the Judgment of the Court of 1 August 2022, *HOLD Alapkezelő Befektetési Alapkezelő Zrt. v Magyar Nemzeti Bank,* C-352/20, ECLI:EU:C:2022:606, paragraphs 66–67.

[25] For an illustrative example, see the Judgment of the Court of 14 May 2020, *FMS and others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and others,* C-924/19. PPU. and C-925/19. PPU, ECLI:EU:C:2020:367.

[26] For an illustrative example, see the Judgment of the Court of 1 December 2022, *Aquila Part Prod Com SA v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága,* C-512/21, ECLI:EU:C:2022:950.

[27] See M. Varju and E. Várnay, After the Judgment: The Implementation of Preliminary Rulings in the Hungarian Judicial System 2004–2019 and Beyond, (2022) 59 (6) *Common Market Law Review,* 1743–1770. DOI: https://doi.org/10.54648/cola2022117

[28] See Judgment of the Court of 29 July 2019, *Hochtief Solutions AG Magyarországi Fióktelepe v Fővárosi Törvényszék,* C-620/17, ECLI:EU:C:2019:630.

[29] For an illustrative example, see the Judgment of the Court of 19 October 2023, *Központi Nyomozó Főügyészség,* C-147/22, ECLI:EU:C:2023:790.

[30] For an illustrative example, see the order of the Court of 3 June 2022, *Megatherm-Csillaghegy Kft. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága,* C-188/21, ECLI:EU:C:2022:444.

[31] There is a view that both situations should be treated as a reference back. See Várnay E., Az Európai Unió Bírósága visszautal a magyar bírósághoz [Deference from the European Court of Justice to the Hungarian Courts], (2019) 22 (3) *Európai Tükör,* 23–33. DOI: https://doi.org/10.32559/et.2019.3.2

[32] See Judgment of the Court of 27 April 2023, *MJ v AxFina Hungary Zrt.,* Case C-705/21, ECLI:EU:C:2023:352. paragraph 36.

[33] See Judgment of the Court of 20 October 2022, *Digi Távközlési és Szolgáltató Kft. v Nemzeti Adatvédelmi és Információszabadság Hatóság,* C-77/21, ECLI:EU:C:2022:805.

[34] See Judgment of the Court of 8 July 2021, C-178/20, *Pharma Expressz Szolgáltató és Kereskedelmi Kft. v Országos Gyógyszerészeti és Élelmezés-egészségügyi Intézet,* ECLI:EU:C:2021:551, in which case the Court drew the referring court's attention to the overall assessment of the facts on a case-by-case basis.

Several conclusions can be drawn from these changes. On the one hand, new methodological solutions are needed (especially in the technique of asking questions and providing answers), which may also entail new developments in argumentation techniques.[35]

On the other hand, however, we can also see that the guaranteed elements of the preliminary ruling mechanism remain unchanged. The preliminary ruling system, governed by Article 267 of the TFEU, involves a direct dialogue between courts, meaning it is independent of the judicial hierarchy established by national law.[36] The right to initiate a preliminary ruling procedure cannot be challenged by the application of rules or case law that make such a dialogue impossible because they would deprive the CJEU of its power to rule on cases involving questions of interpretation of EU law provisions.[37] However, the unlimited right to initiate a preliminary ruling procedure does not imply "freedom" since the responsibility for assessing the relevance and necessity of the request for a preliminary ruling[38] rests exclusively with the referring court.[39]

An essential element of vertical cooperation and communication between the CJEU and national courts is that parties in the national proceedings have a legitimate right to the application of EU law. Therefore, national courts must be allowed to make referrals to inquire about the content of EU law without restriction. The courts of the Member States, in cooperation with the CJEU, therefore, have a shared responsibility to ensure that the law is respected in the application and interpretation of the Treaties.[40]

---

[35] K. Lenaerts and J. A. Gutiérrez-Fons, To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice, (2013) (9) *Academy of European Law (AEL) European University Institute (EUI) Working Paper,* 1–48.

[36] Judgment of the Court of 12 February 1974, *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel,* Case C-146/73, ECLI:EU:C:1974:12, paragraph 3; Judgment of the Court of 16 January 1974, *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel,* Case C-166/73, ECLI:EU:C:1974:3, paragraph 4; Judgment of the Court of 16 December 2008, *CARTESIO Oktató és Szolgáltató Bt.,* Case C-210/06, ECLI:EU:C:2008:723, paragraphs 88 and 92–97.

[37] Judgment of the Court of 16 December 2008 *CARTESIO Oktató és Szolgáltató Bt.,* Case C-210/06, ECLI:EU:C:2008:723, paragraphs 96 and 97.

[38] Judgment of the Court of 24 November 2020, *Criminal proceedings against AZ* [Openbaar Ministerie; Forgery of documents], Case C-510/19, ECLI:EU:C:2020:953, paragraph 25, and the case law cited therein.

[39] Judgment of the Court of 22 June 2010, *Aziz Melki and Sélim Abdeli,* Case C-188/10 and Case C-189/10, ECLI:EU:C:2010:363, paragraph 63; Order of the Court of 16 July 2015, *Daniele Striani and Others v Union européenne des Sociétés de Football Association (UEFA) and Union Royale Belge des Sociétés de Football Association (URBSFA),* Case C-299/15, ECLI:EU:C:2015:519, paragraph 33.

[40] Judgment of the Court of 27 February 2018, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas,* Case C-64/16, ECLI:EU:C:2018:117, paragraph 33, and see, to that effect, Avis au titre de l'article 300, paragraphe 6, CE [Agreement establishing a unified patent litigation system] Opinion No 1/09 of 8 March 2011, ECLI:EU:C:2011:123, paragraph 69; Judgment of the Court of

An important starting point in this area is the *Cartesio* judgment,[41] in which the CJEU, on the Hungarian initiative and with regard to the specific features of the Hungarian system of legal remedies, took the position that no appeal is allowed against an order of a lower court to make a referral to the CJEU. These rights in the context of the preliminary ruling procedure are also essential in other respects for the exercise of fundamental rights.

III. The role of the Charter of Fundamental Rights

The European Union has its own catalogue[42] of fundamental rights:[43] the Charter of Fundamental Rights of the European Union (Charter). This is important, as the second hypothesis, closely related to the above, suggests that the role of preliminary rulings in the context of internal market law needs to be reinforced to ensure the protection of fundamental rights.[44] The interpretation of the rights declared in the Charter – which must be guaranteed in EU legislation – is a matter for both EU and national courts.[45] However, the Charter does not create a legal basis for the adoption of Union acts, nor does it create any new powers or tasks for the Union.[46] The Charter is primarily intended to codify the existing list of human rights standards which form part of the values on which the Union is founded and which are reflected in the principles governing its policies.[47] The Charter provides clarity and visibility to the list of fundamental rights. The rights, freedoms and principles enshrined in the Charter shall be interpreted in accordance with the general provisions set out in Title VII of the Charter, which governs its interpretation and application, and with due regard to the explanations referred to in the Charter that outline the sources of those provisions.[48] This means that the courts interpreting the provisions of the Charter must do so in the

3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council,* Case C-583/11 P, ECLI:EU:C:2013:625, paragraph 99.

[41] Judgment of the Court of 16 December 2008, *CARTESIO Oktató és Szolgáltató Bt.,* Case C-210/06, ECLI:EU:C:2008:723.

[42] See more G. de Búrca, The Road not Taken: The European Union as a Global Human Rights Actor, (2011) 105 (4) *American Journal of International Law,* 649–693. DOI: https://doi.org/10.5305/amerjintelaw.105.4.0649

[43] See more R. Schütze, Judicial Powers III: EU Fundamental Rights, in *European Constitutional Law* (Cambridge University Press, Cambridge, 2015) 429–470.

[44] See Judgment of the Court of 11 January 2024, *Global Ink Trade Kft. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága,* Case C-537/22, ECLI:EU:C:2024:6.

[45] See Judgment of the Court of 25 April 2024, *NW and others v Országos Idegenrendészeti Főigazgatóság and others,* Joint Cases C-420/22 and C-528/22, ECLI:EU:C:2024:344.

[46] Article 6(1) Treaty on European Union (TEU).

[47] See Judgment of the Court of 23 January 2023, *BE v Nemzeti Adatvédelmi és Információszabadság Hatóság,* Case C-132/21, ECLI:EU:C:2023:2.

[48] Article 6(1) TEU.

light of those explanations.[49] It is important to underline that the provisions of the Charter are addressed to the Member States (including central, regional and local authorities) in the context of the implementation of Union law.[50] However, the activities of Member States in areas of national competence fall outside the scope of the Charter. Consequently, the Charter can solely apply to the application or implementation of EU law by Member States.[51]

In my opinion, the adoption of the Charter, and in particular its elevation to the status of primary source of law by the Treaty of Lisbon,[52] has also provided an impulse which has led to a new aspect: the strengthening of the fundamental rights approach in preliminary ruling procedures. In addition, the judicial protection role of the procedure has been increased. The reference to the Charter has become increasingly frequent in the referrals, and its binding force has also been a decisive factor in developing the Court's argumentation on fundamental rights. The Charter has become an increasingly important element of European legal protection.[53] This is shown by the fact that, since 2010, the European Commission has adopted an annual report on the application of the Charter. Today, EU legal sources are required to present and justify their compliance with the relevant provision of the Charter. This change in legislative technique and the elevation of the Charter to the status of primary source of law has also meant that a reference to fundamental rights in the Charter is now an appropriate legal basis for referrals on its own, provided the matter has a cross-border element[54] or if the matter is related to one of the basic notions of EU law like the independence and impartiality of the courts.[55] Further, according to the latest jurisprudence, the jurisdiction of the

[49] See Judgment of the Court of 11 July 2024, *Financijska agencija v HANN-INVEST d.o.o. and others,* Joint Cases C-554/21., C-622/21. and C-727/21, ECLI:EU:C:2024:594; Judgment of the Court of 19 December 2024, *"Vivacom Bulgaria" EAD v Varhoven administrativen sad and others,* Case C-369/23, ECLI:EU:C:2024:1043.

[50] See Judgment of the Court of 22 May 2014, *Érsekcsanádi Mezőgazdasági Zrt. v Bács-Kiskun Megyei Kormányhivatal,* Case C-56/13, ECLI:EU:C:2014:352.

[51] See Judgment of the Court of 13 January 2023, *Marcas MC Szolgáltató Zrt. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága,* Case C-363/20, ECLI:EU:C:2022:21.

[52] K. Lenaerts and J. A. Gutiérrez-Fons, *Az Európai Unió Bíróságának jogértelmezési módszerei [Interpretation methods of the Court of Justice of the European Union]* (HVG-ORAC, Budapest, 2022); K. Lenaerts, Exploring the Limits of the EU Charter of Fundamental Rights, (2012) 8 (3) *European Constitutional Law Review,* 375–403. DOI: https://doi.org/10.1017/S1574019612000260

[53] See more I. Solanke, Fundamental Rights in EU Law, in *EU Law* (Cambridge University Press, Cambridge, 2022) 305–358. DOI: https://doi.org/10.1017/9781108913225.020

[54] See Judgment of the Court of 12 December 2024, *CN v Nemzeti Földügyi Központ,* Case C-419/23, ECLI:EU:C:2024:1016.

[55] Case C-204/21, *European Commission v Poland,* ECLI:EU:C:2023:442, para. 78: "the second subparagraph of Article 19(1) TEU, interpreted in the light of Article 47 of the Charter, which imposes on the Member States a clear and precise obligation as to the result to be achieved and which is not subject to any conditions, in particular as regards the independence and impartiality of the courts called upon to interpret and apply EU law and the requirement that those courts must be previously

CJEU is triggered if a completely national legal dispute involves national legislation based on EU law without having any cross-border elements.[56]

A good example of these conclusions can be found in case C-419/23,[57] which focused on the issue of internal market freedoms and the effectiveness of the Charter in cross-border situations. The background to this case was an infringement procedure in which the CJEU found that Hungarian legislation infringed the principle of the free movement of capital and the right to property guaranteed by the Charter.[58] New legislation was adopted to enforce the infringement judgment. In this way, the Charter has been able to have a direct impact on cross-border legal relations. In Case C-564/19,[59] the Court of Justice interpreted Article 47 of the Charter and Article 267 TFEU, concluding that EU law prohibits the initiation of disciplinary proceedings against a national judge on the grounds that they have referred a question to the Court of Justice for a preliminary ruling under Article 267 TFEU.

The European Union is based on a community of values.[60] The constitutional institutional principles that are unassailable in the Member States, such as democracy, the rule of law, the separation of powers, loyalty and subsidiarity, and the context in which they are expressed in the relationship between the individual and the EU, are clear. Fundamental rights are at the heart of the European Union's guiding values.[61] With the adoption of the Lisbon Treaty, the issue of fundamental rights has been given a new perspective, the clause of values has been expanded, and the principles of human dignity and equality have been added to the list of fundamental values that are

established by law, has direct effect which means that any provision, case-law or national practice contrary to those provisions of EU law, as interpreted by the Court, must be disapplied".

[56] In case C-58/22 NR (Judgement of the Court of 25 January 2024, ECLI:EU:C:2024:70), the CJEU confirmed that in case of a national rule which involves the implementation of an EU decision, the Charter is applicable even if the case has no cross-border element: "41. ...national law provisions ensure the transposition of Framework Decision 2003/568 into the Romanian legal order, and more specifically Articles 2 and 4 thereof. 42. Accordingly, and without it being necessary to rule on the possible relevance of the benchmarks set out in the annex to Decision 2006/928, the condition of the implementation of EU law, within the meaning of Article 51(1) of the Charter, is satisfied in the present case. It follows that the Charter applies in the main proceedings".

[57] Judgment of the Court of 12 December 2024, *CN v Nemzeti Földügyi Központ,* Case C-419/23, ECLI:EU:C:2024:1016.

[58] Hungary adopted legislation in 2013, which abolished usufructuary rights in favour of persons who are not closely related to the owner of the agricultural land concerned on its territory. In its judgment (C-235/17, EU:C:2019:432), the CJEU ruled that this was contrary to EU law.

[59] Judgment of the Court of 23 November 2021, *Criminal proceedings against IS,* Case C-564/19, ECLI:EU:C:2021:949.

[60] See on the importance of the community of values: Judgment of the Court of 16 February 2022, *Hungary v European Parliament and Council of the European Union,* Case C-156/21, ECLI:EU:C:2022:97.

[61] See more B. De Witte, The European Union in the International System of Human Rights Protection: Solo Singer or Voice in the Choir?, in E. Bribosia and I. Rorive (eds), *Human Rights Tectonics: global perspectives on integration and fragmentation* (Intersentia, Cambridge, 2018) 225–241, https://hdl.handle.net/1814/60159 (last accessed: 31.12.2024.).

protected, which clearly multiplies the EU's tasks in the field of the protection of rights. It is also clear from the growing body of case law that the CJEU is confronted with a huge number of fundamental rights problems and new challenges of the future may involve a multiplication of these.[62]

The application of the Charter has led to a renaissance of many of the fundamental constitutional issues of EU law.[63] As prominent authors put it, the Charter is a "shadow" of EU law.[64] Just as an object defines the contours of its shadow, the scope of EU law defines the scope of the Charter. The metaphor can be extended by saying that the sun that enables the creation of a shadow is, in our case, the transferred power.[65] This issue is closely linked to the double safeguard clause of identity and transfer of competence.[66] The analysis of this issue will certainly be a major task in the future, not only for academics but also for national courts and Constitutional Courts.

In my view, the CJEU has made a clear distinction between situations covered by the Charter and those not covered.[67] The replies to the Hungarian references also indicate that, in the CJEU's view, the applicability of EU law implies the applicability of the fundamental rights guaranteed by the Charter in the field of the internal market only in situations falling within the Charter's scope.[68] On the other hand, where a legal situation does not fall within the scope of EU law,[69] the CJEU has no jurisdiction to

[62] S. Greer, J. Gerards and R. Slowe, The Fundamental Rights Jurisprudence of the European Court of Justice in Human Rights, in *The Council of Europe and the European Union – Achievements, Trends and Challenges* (Cambridge University Press, Cambridge, 2018) 293–367. DOI: https://doi.org/10.1017/9781139179041.008

[63] R. Schütze, Limiting Powers: EU Fundamental Rights, in *European Constitutional Law* (Oxford University Press, Oxford, 2021) 451–496. DOI: https://doi.org/10.1093/he/9780198864653.003.0012

[64] Lenaerts and Gutiérrez-Fons, To Say What the Law of the EU Is, 3–61.

[65] K. Gombos, Hungary, in K. Alexander (ed.), *XXX FIDE (Fédération Internationale pour le Droit Européen) Congress in Sofia* 2023. *Vol. 1: Mutual trust, mutual recognition and the rule of law* (Ciela Norma, Sofia, 2023) 395–415.

[66] K. Gombos, Judicial independence in the case-law of the Court of Justice of the European Union, in K. Beliznai and Z. Megyeri-Pálffi (eds), *Guarantees of Judicial Independence* (Pátria, Budapest, 2024) 185–202.

[67] Lenaerts, Exploring the Limits of the EU Charter of Fundamental Rights, 375–403.

[68] See e.g. Judgment of the Court of 01 December 2022, *Aquila Part Prod Com SA v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága,* Case C-512/21., ECLI:EU:C:2022:950; Erdős et al. emphasized in relation to price regulation that "Despite the fact that the EU's primary sources of law include the Charter of Fundamental Rights – including the freedom to conduct a business (Article 16) and the right to property (Article 17), the CJEU's practice on price regulation is based on a more competence-based logic, and is founded on aim to ensure the functioning of the internal market." Cs. Erdős, V. Verebélyi and L. Knapp, The limits of restrictions on free competition in the state of emergency – the Hungarian fuel and food retail price maximisation in the light of the Hungarian constitutional court's, the Strasbourg court's and the Luxembourg court's jurisprudence, (2025) 7 *Frontiers in Political Science, Section Comparative Governance,* 10. DOI: https://doi.org/10.3389/fpos.2025.1542096

[69] For an illustrative example, see the Judgment of the Court of 27 June 2024, *FR v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága [Pinta],* C-225/23, ECLI:EU:C:2024:567. In this case, the

rule on it, and the provisions of the Charter that may be invoked cannot in themselves constitute grounds for such jurisdiction.[70]

However, the same case law has also demonstrated that the classical division of the two situations is not always sufficient. Indeed, there are grey areas at the edge of the shadow where it is difficult to determine – using my metaphor – where the darkness ends and the light begins.[71] The case law of these borderlands is currently being shaped by the case law of the CJEU, with its interpretation of European and national identity,[72] the objectives of the EU as a community of values,[73] and the renaissance of the doctrine of primacy[74] in the 21st century.[75]

IV. New trends in the 21st century

The decade of the 2000s brought to our attention significant changes in our social, economic, natural, and legal environments, as well as the need for global thinking and action in these areas.[76] The 21st century has presented the European Union with many new challenges that it had not faced before.[77] To give just a few examples, this was the first time that a Member State left the Union, opening a new chapter in EU law. The pandemic situation, with all its social and legal implications, had to be faced. The effects of climate change have a significant impact on our daily lives and activities. Artificial intelligence and modern technologies, in addition to their many positive

decisive factor was the personal scope of the interpretative directive, and since none of its provisions applied to a natural person, the application of Article 47 of the Charter was conceptually excluded.

[70] Order of the Court of 10 October 2013, *Nagy Sándor and Others v Hajdú-Bihar megyei Kormányhivatal and Others,* Joined Cases C-488/12 to C-491/12 and C-526/12, ECLI:EU:C:2013:703.

[71] M. Dougan, Judicial review of Member State action under the general principles and the Charter: Defining the "Scope of Union Law", (2015) 52 (5) *Common Market Law Review,* (1201–1245) 1201. DOI: https://doi.org/10.54648/cola2015102

[72] K. Lenaerts, The Court of Justice of the European Union and the Protection of Fundamental Rights, (2011) 31 *Polish Yearbook of International Law,* 79–106.

[73] See e.g. Judgment of the Court of 27 February 2018, *Associação Sindical dos Juízes Portugueses,* Case C-64/16., ECLI:EU:C:2018:117, paragraph 30.

[74] See Judgment of the Court of 10 March 2022, *"Grossmania" Mezőgazdasági Termelő és Szolgáltató Kft. v Vas Megyei Kormányhivatal,* Case C-177/20, ECLI:EU:C:2022:175; Judgment of the Court of 07 March 2024, *Die Länderbahn and Others Case,* C-582/22, ECLI:EU:C:2024:213, paragraph 61.

[75] See more: D. Augenstein, Disagreement – Commonality – Autonomy: EU Fundamental Rights in the Internal Market, (2013) 15 *Cambridge Yearbook of European Legal Studies,* 1–26. DOI: https://doi.org/10.5235/152888713809813549

[76] M. Bauer et al., Reinventing Europe's Single Market: A Way Forward to Align Ideals and Action, (2024) 11 *ECIPE Press Release Policy brief,* 1–28.

[77] E. Letta, *Much more than a market – Speed, security, solidarity.* Empowering the Single Market to deliver a sustainable future and prosperity for all EU Citizens (Enrico Letta's report presented to the European Council on 18 April 2024). Available: https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf (last accessed: 31.12.2024.).

effects, are creating serious fundamental rights challenges. Of these, the ongoing digitalisation of the Single Market is key,[78] based on four elements: (1) better connectivity; (2) a stronger industrial and technological presence in strategic parts of the supply chain (e.g. AI, cybersecurity, cloud infrastructure, 5G); (3) a true data economy and common European data spaces; and (4) a more equitable and facilitated business environment.[79]

A Digital Single Market[80] will benefit the economy, reduce environmental impacts and improve quality of life through e-commerce and e-government. As services shift from fixed to mobile platforms, this shift requires an EU framework for cloud computing, cross-border content access and seamless mobile data while ensuring privacy and cybersecurity. Digital services and digital markets laws will significantly transform the market in the coming years. As a result of the Digital Single Market, the case law of the CJEU has also seen an increase in cases related to digital space, digital consumer rights and related data protection issues.[81]

In the digital single market, the safeguarding of data protection in online transactions has become extremely important. The GDPR Regulation[82] as well as other EU laws[83] protect personal data, and digital service providers have an increased responsibility to safeguard such data. Additionally, the CJEU is increasingly required to balance competing rights. It must assess the intersection between the right to personal data and information society rights, and it often has to interpret autonomous concepts of EU law or at least define the scope of concepts in EU legal sources using EU methodology. Another important starting point is that EU law exists as an autonomous legal system,[84] and its rules are distinct from both international law and the internal legal systems of the Member States. It has its own legal terminology, autonomous legal concepts and its own method of interpretation.[85] The legal interpretation given by the CJEU has, therefore, a special significance.

---

[78] S. Garben and I. Govaere, *The Internal Market 2.0* (Hart, Oxford, 2020).

[79] See more: Letta, *Much more than a market – Speed, security, solidarity.*

[80] L. D. Dabrowski and M. Suska, *The European Union Digital Single Market* (Routledge, 2022).

[81] See: Annual Reports of Court of Justice of the European Union.

[82] 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).

[83] Examples in the area of the Digital Single Market are the DSA [Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on the Digital Single Market and amending Directive 2000/31/EC (Digital Services Act)] and DMA [Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on competitive and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Market Act)].

[84] See the Court's Opinion No 1/91 of 14 December 1991.

[85] Lenaerts and Gutiérrez-Fons, *Az Európai Unió Bíróságának jogértelmezési módszerei [Interpretation methods of the Court of Justice of the European Union],* 36–39.

EU law as a whole has an autonomous conceptual framework, and therefore, in particular, because of the obligation to apply the doctrine of direct applicability, direct or indirect effect, national courts must also use autonomous concepts in their own practice.[86] This may even mean leaving behind the conceptual framework of the Member States and adding EU legal content to the concepts used in an EU source. It may require open-minded thinking by practitioners, with the use of comparative methods as a key feature.[87] One possible approach to this would be to interpret EU law in accordance with different linguistic versions,[88] which can be derived from the multilingual nature of EU law. It can also be interpreted in the light of the Treaty,[89] legal principles,[90] precedents,[91] international treaties,[92] fundamental rights,[93] the common constitutional traditions of the Member States,[94] moral values,[95] and common legal traditions and practices.[96] The correct identification of the content of concepts often requires a complex interpretation and the simultaneous application of several methods.

Together with the above methodologies, the specificity of digitalisation at the intersection of data protection law, the freedom to provide services online and the involvement of supervisory authorities in the enforcement of the rules guaranteeing

[86] See Judgment of the Court of 8 November 2005, *Götz Leffler v Berlin Chemie AG,* Case C-443/03, ECLI:EU:C:2005:665 paragraphs 45–46.

[87] M. Andenas and D. Fairgrieve, *Courts and Comparative Law* (Oxford University Press, Oxford, 2015) 117–232.

[88] Judgment of the Court of 9 April 2014, *GSV Kft. v Nemzeti Adó- és Vámhivatal Észak-Alföldi Regionális Vám- és Pénzügyőri Főigazgatósága,* Case C-74/13, ECLI:EU:C:2014:243.

[89] Judgment of the Court of 23 September 2020, *WO v Vas Megyei Kormányhivatal,* Case C-777/18, ECLI:EU:C:2020:745. This case has great significance in other respects too. Here, the Court of Justice of the European Union has developed its own previous practice, and in this Hungarian case has set out a new doctrine in the field of cross-border health services. For more details on the significance of the case, see É. Gellérné Lukács, Prior and Subsequent Authorization of Cross-Border Healthcare under Directive 2011/24/EU, (2023) 11 (1) *Hungarian Yearbook of International Law and European Law,* 50–73. DOI: 10.5553/HYIEL/266627012023011001005

[90] Judgment of the Court of 14 May 2020, *T-Systems Magyarország Zrt. and others v Közbeszerzési Hatóság – Közbeszerzési Döntőbizottság,* Case C-263/19, ECLI:EU:C:2020:373.

[91] Judgment of the Court of 12 December 2024, *CN v Nemzeti Földügyi Központ,* C-419/23, ECLI:EU:C:2024:1016.

[92] Judgment of the Court of 4 October 2018, *Dooel Uvoz-Izvoz Skopje Link Logistik N&N v Budapest Rendőrfőkapitánya,* Case C-384/17, ECLI:EU:C:2018:810.

[93] Judgment of the Court of 31 March 2022, *Lombard Pénzügyi és Lízing Zrt. v PN,* Case C-472/20, ECLI:EU:C:2022:242.

[94] Judgment of the Court of 8 May 2024, *Asociația 'Forumul Judecătorilor din România' and others v Parchetul de pe lângă Înalta Curte de Casație și Justiție – Procurorul General al României,* Case C-53/23, ECLI:EU:C:2024:388.

[95] Judgment of the Court of 28 February 2018, *Sporting Odds Ltd v Nemzeti Adó- és Vámhivatal Központi Irányítása,* Case C-3/17, ECLI:EU:C:2018:130.

[96] Judgment of the Court of 29 July 2024, *Virgilijus Valančius v Lietuvos Republikos Vyriausybė,* Case C-119/23, ECLI:EU:C:2024:653.

the exercise of rights play a particularly important role. Consequently, the new challenge of interpretation of the law in the digital space could be a key factor in shaping the powers of these authorities.

In my view, the activity of public authorities in the 21st century should be at least as much focused on law enforcement (mainly related to digital data) as on market surveillance, which is intended to perform regulatory functions.[97] In modern economies, data has emerged as a key factor of production, often described as the "goldmine" of the single market in the 21st century. It is increasingly recognised as a potential fifth freedom, complementing the four fundamental freedoms of the EU.[98] Therefore, the role of data protection in the Digital Single Market for consumers has been upgraded.

A recent Hungarian case serves as a pertinent example of the latest decision of the CJEU in this regard. In case C-46/23, the CJEU ruled in favour of the Hungarian supervisory authority, deciding that it is entitled to order the erasure of unlawfully processed data, even in the absence of a prior request by the data subject.[99] In its judgment, the Court, interpreting the supervisory authority's powers of judicial protection, held that the national supervisory authority may do so, provided that such a measure is necessary for the performance of its task of ensuring full compliance with the GDPR. According to the Court, requiring a prior request would mean that the controller could retain the personal data in question in the absence of a request and continue to process them unlawfully. The CJEU has provided a legal interpretation which respects both the specificities of data protection and the balancing of competing rights in the interests of protection of the law. Of course, based on *maiore ad minus,* the supervisory authority may also order the erasure of unlawfully processed personal data in the case of a request directly from the data subject, but this cannot be required as a precondition in view of the foreseeability of the tasks of judicial protection.[100]

[97] Gombos K., Az adatvédelem és az online szolgáltatások kapcsolódási pontjai – A digitális reziliencia és az értelmezési elsődlegesség sajátosságai [The links between data protection and online services – The specificities of digital resilience and interpretive primacy], (2024) 13 (2) *In Medias Res,* 52–67. DOI: https://doi.org/10.59851/imr.13.2.4

[98] B. Martens, Research, innovation and data: a fifth freedom in the EU single market? Research and innovation should be at the top of the EU economic policy agenda, but cannot over-rely on public investment, Bruegel Analysis, (23 May 2024), https://www.bruegel.org/system/files/2024-06/research%2C-innovation-and-data%3A-a-fifth-freedom-in-the-eu-single-market%3F-9996_0.pdf (last accessed: 31.12.2024.).

[99] Judgment of the Court of 14 March 2024, *Újpesti Polgármesteri Hivatal,* Case C-46/23, ECLI:EU:C:2024:239.

[100] P. Bruyas, Données personnelles – Effacement en cas de traitement illégal, (2024) 5 *Europe,* comm. 199.

V. Observations

Almost 20 years of EU membership show that the possibility of having recourse to the preliminary ruling procedure is well integrated into the application of EU law in Hungary. This is indicated not only by the high number of referrals but also by the considerable activity of different levels of the judiciary; lower courts also make bold use of the referral option. Hungarian referrals cover a wide range of EU law, but in some areas – for example, in the field of the single market – they are particularly frequent and have become a significant shaper of Hungarian law, while in others, they have contributed to the dynamic development of EU law. The three arguments discussed earlier will now be elaborated on.

First, it is argued that, following years of referrals deemed inadmissible, the CJEU has recently accepted referrals concerning the compatibility of national law with EU law, marking a shift in the Court's attitude. The nature of the rules governing the four fundamental freedoms is based on a common pattern: EU law guarantees freedom of movement as a general rule and national restrictions introduce exceptions to this rule, and in the majority of cases, the legality of the restrictions must be assessed case by case in light of the principles of necessity and proportionality. However, a very high proportion of conflicting and frictional legal situations require the examination of the relationship between EU rules and national law or the assessment of the legality of national rules. Addressing such referrals cannot rely on the previously established reasoning methodology of the CJEU, as these referrals do not concern the interpretation of EU law and the content of EU law alone.

The change in the legal nature of the questions posed necessarily requires the CJEU to adopt a fundamentally different method of reasoning in order to provide a useful answer. In such cases, the CJEU must proceed with caution, precisely to preserve the coherence of EU law, because it must rule in a legally complex domain ('grey zone'). The CJEU must give its interpretative guidance in such a way that it does not stray into the territory of national law. Therefore, the need to apply comparative methods[101] is all the more important, and given the substantial differences between the legal systems of the Member States, only a sufficiently general interpretation of the law can be given. The CJEU, in these cases, as a main rule, merely formulates EU interpretative guidelines and principles, meaning that it sets out the framework for interpretation but refers the specific question back to the national court. The consequence of this technique is that the national judge makes their decision within

[101] See on the importance of the comparative method: M. de S.-O.-l'E. Lasser, *Judicial Deliberations – A Comparative Analysis of Transparency and Legitimacy* (Oxford University Press, Oxford, 2009); K. Lenaerts, The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice, (2010) 59 (2) *International and Comparative Law Quarterly,* 255–301. DOI: https://doi.org/10.1017/S0020589310000023

the framework provided by the CJEU, adhering to the guidelines. A good example of this is case C-51/17. In this case, the Court of Justice formulated this requirement as follows. "In that regard, although it is for the national court alone to rule on the classification of terms in accordance with the particular circumstances of the case, the fact remains that the Court has jurisdiction to elicit from the provisions of Directive 93/13, in this case, the provisions of Article 4(2) thereof, the criteria that the national court may or must apply when examining a contractual term."[102] The CJEU has also set out the criteria for the examination to be carried out by the national court.[103]

In addition, it should be pointed out that if the interpretation of the law given by the CJEU leads to the result that a Member State's legislation, which has been referred to it by the referring national court concerned, is not compatible with EU law, it may be necessary, as a matter of principle, for the CJEU to formulate the context of the interpretation precisely and if necessary to limit its "scope". Take the example of case C-290/05,[104] in which the CJEU ruled that a national tax rule that existed at a particular time was contrary to EU law. Following the conclusion of the preliminary ruling procedure, the Hungarian law adopted after the preliminary ruling procedure made it possible to recover the excess registration tax that had become unlawful under the CJEU judgment for those entities who had paid such tax during the period for which the infringement of EU law rules was apparent from the specific individual decision.[105]

It should be noted that the forthcoming major reform[106] of the preliminary ruling procedure[107] is also linked to this change in the nature of preliminary ruling

[102] Judgment of the Court of 20 September 2018, *OTP Bank Nyrt. and OTP Faktoring Követeléskezelő Zrt v Teréz Ilyés and Emil Kiss,* Case C-51/17, ECLI:EU:C:2018:750, paragraph 72.

[103] "In the present case, in the light of the foregoing, it is for the referring court to take into account, inter alia, the presence in the loan contract at issue of paragraph 10 thereof, entitled 'Declaration of notification of risk', the wording of which was set out in paragraph 19 of the present judgment, read in conjunction with any additional information provided before the conclusion of that contract. In that last regard, it is apparent from the information before the Court that the borrowers received, inter alia, an additional information sheet relating to the foreign exchange risk, containing examples of specific calculations of the risk in the event of a depreciation of the Hungarian forint in relation to the Swiss franc, which it is nonetheless for the referring court to ascertain." Judgment of the Court of 20 September 2018, *OTP Bank Nyrt. and OTP Faktoring Követeléskezelő Zrt v Teréz Ilyés and Emil Kiss,* Case C-51/17, ECLI:EU:C:2018:750, paragraph 77.

[104] Judgment of the Court of 5 October 2006, *Ákos Nádasdi v Vám- és Pénzügyőrség Észak-Alföldi Regionális Parancsnoksága* (C-290/05) and *Ilona Németh v Vám- és Pénzügyőrség Dél-Alföldi Regionális Parancsnoksága* (C-333/05), Joined cases C-290/05 and C-333/05, ECLI:EU:C:2006:652.

[105] This period covered the period from 1 May 2004 to 31 December 2005.

[106] C. Amalfitano, The Future of Preliminary Rulings in the EU Judicial System, (2022) (125) *EU Law Live Weekend Edition*.

[107] D. Petrić, The Preliminary Ruling Procedure 2.0, (2023) 8 (1) *European Papers, European Forum,* 25–42.

procedures.[108] According to the CJEU's statistics, the number of pending references for a preliminary ruling is growing dynamically,[109] and the references are often complex. Since references for a preliminary ruling must be dealt with in a timely manner in order to ensure that national courts can guarantee the right to an effective remedy, the Court of Justice has submitted a request for the amendment of Protocol No 3 on the Statute of the Court of Justice of the European Union[110] ("2022 reform proposal"),[111] pursuant to the second paragraph of Article 281 of the Treaty on the Functioning of the European Union (TFEU). In order to enable the Court to continue to fulfil its task of preserving and strengthening the unity and consistency of Union law, it has taken the initiative, in accordance with the possibility provided for in the first subparagraph of Article 256(3) TFEU, of allowing the General Court to rule on questions referred for a preliminary ruling under Article 267 TFEU in certain categories of cases.[112] These are the common system of value-added tax, excise duties, the Customs Code and the tariff classification of goods in the Combined Nomenclature. As a result of the reform, the General Court will therefore be empowered to rule on references for a preliminary ruling in the following areas of the single market: the determination of the taxable amount for the purposes of determining value added tax or the conditions for exemption from payment of that tax;[113] the interpretation of the general provisions on excise duty and the framework for the taxes on alcohol, alcoholic beverages, tobacco, energy products and electricity; the factors on the basis of which import or export duties are fixed in the context of trade in goods, such as the Common Customs Tariff, the origin and customs value of goods; import and export procedures, including the creation, determination and extinction of customs debt; special customs procedures; the duty relief system and the provisions of Annex I, Part I, Part II, to Council Regulation (EEC) No 2658/87 concerning the interpretation of certain tariff headings

[108] Regulation (EU, Euratom) 2024/2019 of the European Parliament and of the Council of 11 April 2024 amending Protocol No 3 on the Statute of the Court of Justice of the European Union.

[109] In statistical terms, the number of incoming preliminary references is about 500-600 yearly.

[110] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12008E/PRO/03 (last accessed: 31.12.2024.).

[111] https://data.consilium.europa.eu/doc/document/ST-15936-2022-INIT/en/pdf (last accessed: 31.12.2024.).

[112] Iglesias Sánchez, Preliminary Rulings before the General Court.

[113] R. García Antón, Reframing the Reform to Transfer Preliminary Rulings to the General Court with the Meaning of Judicial Cooperation: a Look into Recent VAT Preliminary Rulings, (2023) 12 May, *EU Law Live Institutional Law – Justice & Litigation – Tax*. https://eulawlive.com/op-ed-reframing-the-reform-to-transfer-preliminary-rulings-to-the-general-court-with-the-meaning-of-judicial-cooperation-a-look-into-recent-vat-preliminary-rulings-by-ricardo-garci/# (last accessed: 31.12.2024.).

and the criteria for the classification of certain goods in the Combined Nomenclature set out in Annex I to Council Regulation (EEC) No 2658/87.[114]

Second, as a result of the reform to be introduced, the CJEU will be better able to focus on cases involving the interpretation of the Charter of Fundamental Rights.[115] An important aspect of the division of jurisdiction between the CJEU and the General Court is that the CJEU should have exclusive jurisdiction to hear cases involving fundamental rights. The reform will enable the CJEU to engage in a more effective dialogue with the referring courts and, on the other hand, to have sufficient resources and time to provide high-quality answers to the questions of interpretation raised in cases involving complex theoretical problems, in particular questions involving the interpretation of the Charter as a primary source of law since the Lisbon Treaty.

Third, the CJEU shall respond to the new challenges of the 21st century.[116] Four areas of the Digital Single Market can be identified on the basis of the findings of the Letta Report, where we are confronted with new developments in both legislation and case law. The above-discussed Hungarian case on data protection illustrates that the challenges of the modern world require a holistic approach to the application and a dynamic interpretation of the law. My initial hypothesis was that public authority activity in the 21st century is at least as much law enforcement (mainly related to digital data) as it is market surveillance with regulatory functions. This case illustrates the partial shift[117] in the tasks of public authorities[118] and the emergence of a new approach to law enforcement with a view to data protection,[119] which is aimed at data protection compliance and which recognises user interests even ex officio – i.e., in this sense, law

[114] Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff.

[115] Lenaerts and Gutiérrez-Fons, *Az Európai Unió Bíróságának jogértelmezési módszerei [Interpretation methods of the Court of Justice of the European Union],* 167–170.

[116] A. Wallerman Ghavanini, Power Talk: Effects of Inter-Court Disagreement on Legal Reasoning in the Preliminary Reference Procedure, (2020) 5 (2) *European Papers – A Journal on Law and Integration,* 887–910. https://www.europeanpapers.eu/sites/default/files/EP_eJ_2020_2.pdf (last accessed: 31.12.2024.).

[117] P. G. Picht, CJEU on Facebook: GDPR processing justifications and application competence [EuGH, Urt. vom 4.7.2023: C-252/21], (26 July 2023) *Gewerblicher Rechtsschutz und Urheberrecht,* 1169–1172. DOI: https://dx.doi.org/10.2139/ssrn.4521320; A. Haberer, The neverending story: Neues zum Verhältnis von Kartell- und Datenschutzrecht [EuGH, Urt. vom 4.7.2023, C-252/21: Meta Platforms Inc. u.a./BKartA], (2023) 11 (10) *Neue Zeitschrift für Kartellrecht,* 546–549.

[118] See by analogy the analysis of the Meta-case: I. Graef, Meta platforms: How the CJEU leaves competition and data protection authorities with an assignment, (2023) 30 (3) *Maastricht Journal of European and Comparative Law,* 325–334. DOI: https://doi.org/10.1177/1023263X231205836

[119] F. Rizzuto, The implications of the Meta Ireland Platforms ruling for the powers of national competition authorities and national regulatory and supervisory authorities, (2023) 44 (12) *European Competition Law Review,* 532–538.

enforcement with a legal protection purpose.[120] Butterfly effects[121] can be assumed in a similar way in other areas of law in the digital internal market.

Both in the course of administrative supervision and in the application of the law by the courts, legal interpretation may be necessary for the purpose of legal protection, the doctrinal basis of which is the principle of interpretative primacy. Interpretative primacy implies, on the one hand, requiring the national courts to interpret a national law which has been drafted exclusively for the domestic situation in the case under examination in such a way that it is also applicable to the cross-border situation and, on the other hand, attributing an autonomous EU interpretation to the terms to be interpreted. The limitation of this interpretation must be that it cannot be a substitute for a legal prerequisite, i.e., the interpretative primacy cannot serve to create a substantive right itself.

Interpretative primacy is also closely linked to the principle of indirect effect (doctrine of interpretation), according to which the national court is obliged to interpret national law in accordance with the objectives and wording of the EU norm. The obligation to interpret in accordance with the purpose of EU law can only be limited by general principles of law. In particular, the principle of legal certainty must be respected in the sense that this obligation cannot be the basis for a *contra legem* interpretation of national law. In the interests of effective legal protection, the balancing of competing rights must be ensured, where necessary, by applying the test of necessity and proportionality.[122]

VI. Conclusion

Consideration of the two trends presented here – *(i)* the CJEU's increasing openness to accepting referrals in the grey zone of the internal market and providing interpretative guidelines for national courts regarding the application of national law, even beyond EU law, and *(ii)* the CJEU's objective of giving appropriate weight to the interpretation

[120] P. Nebbia, The interaction of competition, consumer and data protection laws: a few comments inspired by the recent case law of the Court of Justice of the European Union, (2023) 23 (4) *ERA-Forum: scripta iuris europaei,* 515–527. DOI: https://doi.org/10.1007/s12027-023-00733-0; M. Botta and K. Wiedemann, The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey, (2019) 64 (3) *The Antitrust Bulletin,* 428–446. DOI: https://doi.org/10.1177/0003603X19863590

[121] See details on the principle: K. Gombos, The European Butterfly Effect on the Right of Remedy in the New Hungarian Procedural Acts, in Somssich R. (ed.), *Ratio et mensura – Studia M. Király dedicata: Ünnepi tanulmányok Király Miklós 60. születésnapja alkalmából [Ratio et mensura – Studia M. Király dedicata: Festive essays on the occasion of Miklós Király's 60th birthday]* (ELTE Eötvös Kiadó, Budapest, 2021) 219–228.

[122] Gombos, Az adatvédelem és az online szolgáltatások kapcsolódási pontjai [The links between data protection and online services], 52–67.

of the Charter, which appears as a primary source of EU law in numerous cases – leads to the conclusion that this development also influences the argumentation technique employed by the CJEU, which has evolved in response to the need to balance fundamental freedoms and fundamental rights within the internal market.

The Court's case law is anticipated to remain dynamic, driven by the assessment of cases situated within the 'grey zone', where classic doctrinal questions – such as the transfer of jurisdiction, issues of identity, and the principle of primacy – continue to play a critical role.

Regarding the challenges of the 21st century in the context of the digital market, the CJEU has provided a legal interpretation which respects both the specificities of data protection and the balancing of competing rights in the interest of the protection of the law. The balancing of competing rights by the CJEU and the usage of interpretative primacy by national courts support the parties' legitimate rights to the application of EU law in national proceedings.

Kuneva, Mira*

The implications of the Russo-Ukrainian war on Euro-Atlantic and Russian strategic cultures – A comparative study of the shifts in geopolitical locus of control

Abstract

This study applies the concept of the culture of national security (security culture) to delve into the interests and priorities of the state members of the Euro-Atlantic community, as well as Russia, in the context of the ongoing war in Ukraine. Referring to interpretive and normative approaches alike, the research incorporates identity transformation as a dependent variable and evaluates it among more and less powerful states. It corroborates the argument that whereas a great power's identity may change gradually and slowly over time, under the pressure of domestic societal actors, a similar identity change may happen to a small state much more quickly, due to the imperative for survival in an anarchic environment. The study establishes that transitions in strategic culture within regional security communities happen in a differentiated way along new lines of subgroup division, yet these transitions are conditioned by opportunism rather than a rationalised metamorphosis of identity.

Keywords: strategic culture; Russo-Ukrainian war; Euro-Atlantic security community; rationality; identity

I. Introduction

The war in Ukraine has moved Europe's security perceptions and reflexes back to square one, that is, to the fundamentals of survival and self-help. Not until February 24, 2022, did the Europeans begin to problematise the "peace dividend"[1] as taken for granted. This led them to familiarise themselves with the fact that they are no longer living in a pluralistic security community – a community that has eliminated war and

* Kuneva, Mira, Associate Professor at University of Sofia.

[1] N. P. Gleditsch et al. (eds), *The Peace Dividend. Contributions to Economic Analysis* (Emerald Publishing Limited, 1996) 1–13.

DOI: 10.56749/annales.elteajk.2024.lxiii.3.41

the expectation of war within its boundaries via "processes of political communication, some machinery for rules enforcement, and the habits of compliance".[2] For more than three decades, since 1989, European integration appeared to have left the troubles of a confrontational European past far behind. But the war has reversed the debate on security, taking it back to its foundations.

Metrics of 'civilisation' have so far been established as the benchmarks when evaluating Russia's invasion of Ukraine, an incursion which quickly developed into a full-scale war, swinging between offensive and counteroffensive initiatives for more than three years now. The qualification of the Kremlin's aggressive act as barbarism draws a distinct red line between the two conflicting parties. At first glance, any attempt at civilising the discourse on war by linking it to the culture of national security may seem impertinent. A second glance, nonetheless, reveals the relevance of such an interpretation, especially with a view to the frequent disregard for rationality and black-and-white labelling in what is presumed to be cold-blooded power politics.

This study employs the strategic culture concept to analyse interests and strategic priorities, which, although independent variables in realpolitik policy-making, are determined by the complex interplay of exogenous structural factors. The war in Ukraine is a case in point for this critical event affects both the Russian and Euro-Atlantic strategic cultures. Referring to interpretive and normative approaches alike, the research incorporates identity transformation as a dependent variable and applies it among more and less powerful states. It corroborates the argument that whereas a great power's identity may change gradually and slowly over time, under the pressure of domestic societal actors, a similar identity change may happen to a small state much more quickly due to the imperative for survival in an anarchic environment. Therefore, it seeks answers to the following main research question: *What kind of impact does a systemic threat associated with the external security environment have on national security cultures and what are the differences in its implications – first, for the two parties in the conflict (Russia and Ukraine), and second, for several members of a related defensive alliance (NATO) and an integrative community (the European Union)?* The study applies a comparative method in combination with content analysis of strategic documents in the national security domain.

[2] O. Ditrych, Security community: A future for a troubled concept? (2014) 28 (3) *International Relations,* 351. DOI: https://doi.org/10.1177/0047117814545952 Ref. to: K. W. Deutsch et al., *Political Community and the North Atlantic Area. International Organization in the Light of Historical Experience* (Princeton University Press, Princeton, 1957).

II. Conceptual framework

Cultural approaches to security theory and practice have existed for centuries. Lantis, for one, traces the influence of culture on national security policy back to classic works, including the writings of Thucydides and Sun Tzu.[3] The evolution of the modern concept of strategic culture had its starting point in the first "national character studies" created after the end of the Second World War, which made correlations between culture and state behaviour by applying anthropological methods.[4] They were heavily criticised, though, for stereotyping, and further differentiated by political scientists during the behavioural revolution in international studies in the 1960s and 1970s in three categories: first, the cognitive one, which includes empirical and causal beliefs; second, the evaluative one, which consists of values, norms and moral judgments, and third, the affective one, which encompasses emotional attachments, patterns of identity and loyalty, and feelings of affinity, aversion, or indifference.[5] A breakthrough in the development of studies on strategic culture was Snyder's seminal research on Soviet nuclear strategy, which is presented through the prism of the socialisation process of a certain set of beliefs in the national security sphere.[6] This laid the groundwork for the first generation of positivist studies on strategic culture, which encompassed research on strategic orientations based on nationality, geography, and military capabilities (material factors).[7] Snyder's contribution resonated among constructivists and gave rise to the next post-positivist generation of studies on the culture of national security.

This study adopts the interpretative approach to strategic culture (interchangeably: culture of national security) advocated by Johnston, who has been positioned as Gray's symbolic opponent in the strategic culture academic debate. The culture of national security was gradually accredited the status of the dominant conceptual framework of social constructivism in the post-Cold War years, mainly due to Katzenstein's seminal volume.[8] As Onuf points out in his review, Katzenstein has broadened the traditional security concept, thus challenging "the normative

[3] J. S. Lantis, Strategic Culture: From Clausewitz to Constructivism, in J. L. Johnson, K. M. Kartchner and L. A. Larsen (eds), *Strategic Culture and Weapons of Mass Destruction. Initiatives in Strategic Studies: Issues and Policies.* (Palgrave Macmillan, New York, 2009), 33. DOI: https://doi.org/10.1057/9780230618305_3

[4] Lantis, Strategic Culture: From Clausewitz to Constructivism, 34.

[5] See, among others: R. D. Putnam, Political Culture: The Case of 'Ideology', (1971) 65 (3) *American Political Science Review,* cit. in Lantis, Strategic Culture: From Clausewitz to Constructivism, 34, footnote 7.

[6] J. Snyder, *The Soviet Strategic Culture: Implications for Nuclear Options* (Rand Corporation, Santa Monica, 1977), cit. in Lantis, Strategic Culture: From Clausewitz to Constructivism, 35.

[7] C. S. Gray, Strategic culture as context: the first generation of theory strikes back, (1999) (25) *Review of International Studies,* 49–69.

[8] P. J. Katzenstein (ed.), *The Culture of National Security: Norms and Identity in World Politics* (Columbia University Press, New York, 1996) 4.

underpinnings of security studies".[9] Katzenstein has transformed the descriptive denotation of the concept as the protection of the existential material vital needs of the state, i.e., its survival, giving it a new normative meaning – the culture of strategic planning and policy-making – by analysing the security narrative and symbolic gestures. The culture of national security according to the hereby adopted definition also encompasses, apart from rudimentary 'objective' components such as national interests, two groups of subjective elements: first, evaluative standards in the form of norms and shared expectations for future proceedings, and, second, cognitive standards in the form of role models "that define what social actors exist in a system, how they operate, and how they relate to one another".[10] The culture of national security, or strategic culture[11] for short, could thus account for cases of limited rationality (simplifying reality through stereotyping), cases of pragmatic rationality (narrowing the alternatives by prioritising), or cases of adaptive rationality (referring to historical analogies or metaphors). Notwithstanding all the conceptual controversies, the culture of national security contributes, on the one hand, to contextualising the discourse and practices in the field, and, on the other hand, to sensitising the public to the evolution of security threats and measures.

III. Russia's external locus of control against Ukraine's internal locus of control

Russian strategic culture seems to have conserved the Soviet identity, and since Vladimir Putin came to power in 1999, it has become even more retrograde. It relies on two seemingly antithetical, but in fact complementary tenets. The first tenet is related to a perceived and deep-seated vulnerability to external attack,[12] which necessitates control of the immediate geographical vicinity through the buildup of buffer zones, neutral regimes, and the pursuit of strategic depth "as the only way to guarantee its survival".[13] The obsession with preventing great-power rivals (Napoleonic France, Nazi

[9] N. Onuf, The New Culture of Security Studies. Reviewed Work(s): The Culture of National Security: Norms and Identity in World Politics by Peter J. Katzenstein, (1998) 42 (1) *Mershon International Studies Review,* 132. DOI: https://doi.org/10.2307/254450

[10] Katzenstein, *The Culture of National Security,* 6.

[11] A. I. Johnston, Thinking about Strategic Culture, (1995) 19 (4) *International Security,* 32–64. DOI: https://doi.org/10.1162/isec.19.4.32; J. S. Lantis, Strategic Culture and National Security Policy, (2002) 4 (3) *International Studies Review,* 87–113. DOI: https://doi.org/10.1111/1521-9488.t01-1-00266

[12] E. Götz and J. Staun, Why Russia attacked Ukraine: Strategic culture and radicalized narratives, (2022) 43 (3) *Contemporary Security Policy,* 484–485. DOI: https://doi.org/10.1080/13523260.2022.2082633

[13] F. Lukyanov, Putin's foreign policy: The quest to restore Russia's rightful place, (2016) 95 (3) *Foreign Affairs,* 30–37. http://www.jstor.org/stable/43946855 (last accessed: 31.12.2024.).

Germany or the imperialistic USA) establishing a foothold in Russia is reflected in the persistent othering of the so-called "collective West".[14] This is why all strategic documents (military doctrines and national security strategies), as well as the official political discourse,[15] have identified NATO's eastward 'expansion' and Western 'hegemony' as a potential danger *(opasnost).* Since 2013–2014 (the Euromaidan protests in Ukraine) and later in 2022 (Moldova's EU application), even the claims for a European perspective on behalf of the 'near abroad' have been securitised, which means that they are represented as an existential threat that requires urgent measures in response *(ugroza).*

Drawing an analogy with the Brezhnev doctrine, which justified the sometimes bloody (as in Hungary in 1956 and Czechoslovakia in 1968) suppression of the 'counter-revolutionary' movements within the Soviet sphere of influence during the Cold War, is simply inevitable. Moscow's recent claims for formal guarantees that former Soviet republics will not be accepted into NATO have actually objectified the neighbouring Ukraine, Moldova, and Georgia as legitimate pawns in its grandiose sphere of influence. Despite some misgivings that this bunker mentality is being cultivated on purpose in order to mobilise Russian society (and ironically, male citizens have regularly been mobilised in a literal sense since the beginning of the war), the defensive-offensive mindset is so deeply imprinted in popular conscience that it has become its inherent feature. Therefore, rational interests in Russian strategic culture remain subsidiary compared to the primacy of anti-Western hostility, which may be described as a case of limited rationality. This discourse of othering is a specific self-isolation technique that very much resembles the social distance fixation of the Kremlin authoritarian leader. Moreover, Russian strategic culture is institutionalised within the exclusive circles around Putin (the *camarilla,* including the 'nomenklatura', the clergy and the 'siloviki'), and the latter consistently reassert the external locus of control in the geopolitical misperceptions of the Russian people. The use of force is authorised top-down, without any democratic control, as in a repressive regime, through a single president's or his proxy's speech act.

Content analysis of the discourse[16] strikingly reminds one of Hitler's mentality with regard to self-determination by referendum (the Sudetenland plebiscite) and the

[14] A. Sunami, Non-realistic elements in the Russia / "collective West" conflict, (2023) 57 (2) *Социолошки преглед/Sociological Review in Serbian,* 519–540. https://www.ceeol.com/search/article-detail?id=1165138 (last accessed: 31.12.2024.).

[15] Cf.: *Военная доктрина Российской Федерации / Military Doctrine of the Russian Federation* (2014), Art. 12 a), http://static.kremlin.ru/media/events/files/41d527556bec8deb3530.pdf (last accessed: 31.12.2024.); *Стратегия национальной безопасности Российской Федерации / National Security Strategy of the Russian Federation* (2021), Art. 35, http://www.scrf.gov.ru/media/files/file/l4wGRPqJvETSkUTYmhepzRochb1j1jqh.pdf (last accessed: 31.12.2024.).

[16] Cf.: A parallel glossary on the justification of an invasion as a self-defense – Georgia, 2008: 'the Russian peacekeepers', 'a blitz-krieg, 'genocide', 'recognition by the Russian Federation of South

annexation of linguistically identical ethnicities *(der Anschluss).* The argumentation is focused on emotions stemming from WWII historical analogies such as the Great Patriotic War, and, therefore, adaptive rationality. There is an apparent dualism between the liberal and the conservative strands, but while the neoliberal critique is associated with the negative impact of Western decay, conservatism is recognised as the authentic root of Russia's 'sovereign democracy'. The problem with this sort of binary thinking was diagnosed nearly two decades ago by Putin's former key political adviser, Gleb Pavlovsky, as follows: "the enemy of Russia is a complex construct, and we have done very little to distinguish between friends and enemies".[17] Such entrenched discourse on national security is dichotomous in nature because it harks back to the Cold War security dilemma of bipolar antagonism.

The second tenet of Russian strategic culture is the quest for great power status, which, with the advance of the war in Ukraine, seems more like a strenuous effort. This great power quest resonates with Putin's constant call for a multipolar world, which, for the time being, is definitely asymmetrical in favour of China and India. Still, Russia has failed to become "a great (but normal!) Eurasian power in all its aspects"[18] or a bridge between the West and East, as the Russian former foreign minister Andrei Kozyrev (a co-author of the Budapest memorandum) optimistically prophesied in 1992. This failure is due to confrontational foreign policy ever since the Chechen war and the openly conflictual relations with Georgia and Ukraine. Since smaller states in 'the near abroad' equivocated in their acceptance of Russian hegemony, Russia has turned toward building the world-historical project of a Greater Eurasia that will bring together the emerging power of the non-Western international order.[19] The conventional idea of great power status contradicts claims of privileged interests in historically significant territories. It is more in line with the Eurasian geopolitical doctrine about

Ossetia's and Abkhazia's independence', President of Russia Official Site, *Statement by President of Russia Dmitry Medvedev* (The Kremlin, Moscow, August 26, 2008), http://en.kremlin.ru/events/president/transcripts/1222 (last accessed: 31.12.2024.). Ukraine, 2022: 'we have been doing everything possible to settle the situation by peaceful political means', 'that atrocity, that genocide of the millions of people', 'decision to recognise the independence of the Donbass people's republics', 'far-right nationalists and neo-Nazis in Ukraine', President of Russia Official Site, *Address by the President of the Russian Federation, Vladimir Putin* (Kremlin, Moscow, February 24, 2022), http://en.kremlin.ru/events/president/news/67843 (last accessed: 31.12.2024.).

[17] G. Pavlovsky, Sudorogi Rozhdenia Natsii, (2004) *Russkiy Zhurnal,* 2004. Cit. in S. Prozorov, *Understanding Conflict between Russia and the EU. The Limits of Integration* (Palgrave Macmillan, 2006) 8.

[18] A. Kozyrev, Russia: A Chance for Survival, (1992) 71 (2) *Foreign Affairs,* 1–16.

[19] See S. Karaganov and D. Suslov, *Protecting peace, earth, and freedom of choice for all countries. New ideas for Russia's foreign policy* (Higher School of Economics Publishing, 2020). Cit. in A. Krickovic and I. Pellicciari, From "Greater Europe" to "Greater Eurasia": Status concerns and the evolution of Russia's approach to alignment and regional integration, (2021) 12 (1) *Journal of Eurasian Studies,* 86–99. DOI: https://doi.org/10.1177/1879366521998808

the heartland and Dugin's quasi-occultist paradigm about 'russkiy mir'.[20] Such symbolic speech acts have led the Kremlin camarilla, the hardcore constituency and the post-Soviet people as a whole, to self-radicalization. As Herd puts it, Russia has "a very well-developed sense of historical entitlement, centred on its role at the heart of an exceptional world civilization".[21] Russian strategic culture can therefore be stereotyped as deeply historical because historical mysticism is the main driver of the state's existence.

The outlined strategic discourse has inflated Russia's national interests beyond its vital needs, which reminds us of a new (Eurasian) 'Lebensraum' in the context of an anti-pragmatic rationality. This is the reason why the facile targets of the aggressive actions are countries which, though situated entirely in Europe, through their annexation or submission could move Russia to NATO's eastern border in practical terms. The frozen conflicts in Transnistria and Abkhazia, as well as the political and economic dependence of Central Asian autocrats, keep Soviet reminiscence alive and kicking, and may ultimately lead to a return to Cold War-type brinkmanship in conceptual terms. To recap, for the last two decades, Russian strategic culture has encapsulated itself, both on the perceptual (the carefully cultivated sense of victimisation) and normative (the ethic of self-exclusion) level, which defines the defensive reasoning underlying its aggressive foreign policy.

What is astonishing in relation to Ukraine's counter-offensive against Putin's imperialistic aspirations is the country's tenacious resilience. Prior to 24 February 2022, Ukraine's culture of national security had vague conceptual contours and elusive policy aspirations. In the 1990s, Ukraine was still fence-sitting between adhering to its neutrality status, which was difficult to maintain as regards its geostrategic position, and engaging in a debate about a geostrategic U-turn involving becoming both a NATO and an EU member. The first option seemed the easier to accomplish because of the basic conditionality and the irrevocable stance of the pragmatist political élites around former president Kuchma who were wary of the possible erosion of their ties with Russia; at the same time, public opinion remained confused and ill-informed because the reformist élites sought to emulate the Baltic states' Euro-Atlantic reorientation, aside from the regional disparities.[22] Such a balancing exercise along the

[20] A. G. Dugin, Eurasianism as a Non-Western Episteme for Russian Humanities: Interviewed by M.A. Barannik, (2022) 22 (1) *Vestnik RUDN. International Relations,* 142–152. DOI: https://doi.org/10.22363/2313-0660-2022-22-1-142-152. Putin alludes to "Russia and Ukraine, [...] the parts of what is essentially the same historical and spiritual space" in his quasi-historical article published preceding the aggression. V. Putin, *On the Historical Unity of Russians and Ukrainians* (President of Russia, July 12, 2021), http://en.kremlin.ru/events/president/news/66181 (last accessed: 31.12.2024.).

[21] G. P. Herd, *Understanding Russian Strategic Behaviour. Imperial Strategic Culture and Putin's Operational Code* (Routledge, Oxon and NY, 2022) 36.

[22] T. Kuzio, Ukraine and NATO: The evolving strategic partnership, (1998) 21 (2) *Journal of Strategic Studies,* 1–30. DOI: https://doi.org/10.1080/01402399808437715

continuum of the political spectrum was hard to manage, but there was still a self-awareness of the need to maintain distance from the Russian sphere of influence because of the risk of direct control that was elevated at the time.

The initial geopolitical optimism in Ukraine's strategic documents of the early 1990s involved an entirely defensive direction for its security policy, and a non-nuclear status through the relinquishment of its nuclear arsenal in 1991 (wrongly perceived to be compensated by its inclusion into an all-European security system, OSCE, with Russia as the main veto player). These collective security guarantees (echoing the futile mutual guarantees of the 1925 Locarno Pact) were expected to become a substitute for nuclear deterrence, but some 30 years later, they proved to have hamstrung the country when confronted with a game of chicken involving the potential use of tactical nuclear weapons. Very much similar was Ukraine's post-2014 disenchantment with the anticipated demilitarisation of the Black Sea and its conversion into a nuclear-free zone.[23] Since the coloured revolutions, Ukrainian strategic culture has become more democratically oriented due to its commitment to the priority of sustaining human rights and freedoms, as well as more open-minded in relation to Euro-Atlantic integration. The territorial dispute in the Kerch Strait in 2004 urged Kyiv to become apprehensive of Moscow's challenges to its sovereignty, and to take practical steps in its security strategy that led to the prohibition of military bases in the Black Sea.

The year 2005 saw President Yuschenko's resolution to reevaluate Ukraine's status as a no-man's land by reinvigorating dialogue with NATO. However, constant internal turmoil aborted any coherent dialogue on security matters between the presidential and the governmental branch of power, which dissuaded some influential NATO members from extending their invitations after the announcement of the Membership Action Plan at the Bucharest Summit in 2008. An external shock that presumably further swayed the Euro-Atlantic partners was Russia's invasion of Georgia several months later; the situation further deteriorated with Yanukovych's election and the adoption of new strategic security documents in 2012, which pointed at specific threats emerging from Russia's foreign policy but considered an escalation into a regional war improbable.

However, the radical transformation of the perception of threats happened ipso facto after the flagrant violation of international law by Russia after the Crimea annexation and its intervention through hybrid operations in Donbass from 2014. President Petro Poroshenko enacted a new security strategy in 2015, which delineated Ukraine's existential needs for the next ten years – the protection of territorial integrity, the maintenance of inter-confessional dialogue and respect for human rights, as well as the pursuit of European prospects. The normative framework helps identify the salient

[23] H. Maksak, The security perception and security policy of Ukraine, 1991–2018, (2020) *Defense & Security Analysis,* DOI: https://doi.org/10.1080/14751798.2020.1831232

institutional shortcomings in the security sector, such as the inadequacy of the rule of law and the omnipotence of corruption, the shortage of military professionalism and inefficient democratic control, structural disparities, energy dependence, and cyber-vulnerabilities.[24] A second and more fundamental turning point came after Russia's large-scale invasion in February 2022, which prompted Ukraine to implement the reforms in the White Book on the Defence Policy of Ukraine[25] on the battlefield, while defending its own sovereignty.

This is how an external attack on the country's national security consolidated Ukraine's identity through the pooling of resources from EU and NATO partners, and by channelling nationalistic motivation under the charismatic leadership of President Volodymyr Zelenskyy in the context of pragmatic rationality. In comparison to Russia's strategic culture, Ukraine has crystallised under the external tangible pressure of an existential threat and has further developed regarding the need to safeguard its intrinsic characteristics of humanism and civilised coexistence, which are the legitimate elements of the international order. Besides this, Ukraine's radically transformed strategic culture has also reshaped the regional security structure.

IV. Old divergence or new convergence within the culture of national security in the Euro-Atlantic region?

Differentiation is what defines, in both essential and structural terms, any regional community, especially those that are evolutionarily aimed at achieving common goals and sharing values. Both the European Union and NATO fall under the rubric of pluralist regional communities because sensitive and even parochial issues often lead to the unbundling of the community of members when individual states seek to make sovereign decisions (e.g. Turkey's decision not to support the U.S.-led invasion of Iraq in 2003). On a community level, the European Union has toughened its discourse from soft through civilian to hard power: it had an open outlook on the international security environment in its European Security Strategy of 2003 and pursued the objective of an effective multilateralism; in 2016, the European Union Global Strategy tracked several ruptures in the 'fragile' security environment; the most recent Strategic

[24] O. Lytvynenko, P. Fluri and V. Badrack, *The Security Sector Legislation of Ukraine* (Third Edition, Center for Army, Conversion and Disarmament Studies, Kyiv, 2017), https://www.dcaf.ch/sites/default/files/publications/documents/Security%20Sector%20Legislation%20Ukraine%202017_eng.pdf (last accessed: 31.12.2024.).

[25] *The White Book 2021. Defence Policy of Ukraine* (Ministry of Defence of Ukraine, Kyiv, 2022), https://www.mil.gov.ua/content/files/whitebook/WhiteBook_2021_Defens_policy_of_Ukraine.pdf (last accessed: 31.12.2024.).

Compass for Security and Defence of 2022 depicts a murky world of 'conflicts, military build-ups and aggressions' where 'interdependence is increasingly conflictual' and war has returned to Europe.[26] NATO security concepts have also shifted their moving target since 1991 when the Alliance adopted a broader approach in terms of membership and issue-areas; the 2010 Strategic Concept iterated a cooperative security concept with an emphasis on a strategic partnership with Russia and deepened the issue areas with crisis management and risk governance; the latest 2022 Strategic Concept has narrowed the alliance to a traditional defensive union that tackles direct counterparts such as Russia and China and asymmetrical challenges in both military and non-military fields.[27] The differentiation within the Euro-Atlantic community is along the dividing line between Atlanticists and Europeanists.[28] The current study does not focus on the two regional communities as a whole, but rather on the dynamics among their members; all in all, an overlapping pattern of behaviour among NATO states who are predominantly EU members may be registered.

Atlanticism shapes decisions about resource allocation through three mechanisms of strategic culture, as Berger and Malesky see them: a shared normative understanding of a Western-led international order; a belief in the importance of the United States in European security (as a counter-weight to Trump's Eurosceptic rhetoric); and a preference for NATO as a platform for coordinating force planning and operational deployment. The quantitative metrics are grounded in so-called burden sharing or the assessment of the efficiency of collective action; the latter is based on the measurement of national military expenditure compared to that of the alliance (the minimum proportion required being 2%) and includes equipment, operating and maintenance, personnel, and infrastructure.[29] The variations in this economic data compared to aggregate expenditure can give some insights into qualitative criteria, such as boosted solidarity within the regional community.

Ever since the beginning of the war in Ukraine, the Atlantic trend in the strategic culture of most states has become the predominant one, whereas the European

[26] *European Security Strategy. A Secure Europe in a Better World* (2003), https://www.consilium.europa.eu/media/30823/qc7809568enc.pdf (last accessed: 31.12.2024.); *Shared Vision, Common Action: A Stronger Europe* (2006), https://www.eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf (last accessed: 31.12.2024.); *A Strategic Compass for Security and Defence* (2022), https://www.eeas.europa.eu/sites/default/files/documents/strategic_compass_en3_web.pdf (last accessed: 31.12.2024.).

[27] *Active Engagement, Modern Defence. Strategic Concept for the Defence and Security of the Members of NATO,* Adopted in Lisbon, 19–20 November 2010, https://www.nato.int/lisbon2010/strategic-concept-2010-eng.pdf (last accessed: 31.12.2024.); *2022 Strategic Concept*, https://www.nato.int/strategic-concept/ (last accessed: 31.12.2024.).

[28] This conceptual distinction is applied to the analysis of EU agency in the security area: O. Costa and E. Barbé, A moving target. EU actorness and the Russian invasion of Ukraine, (2023) 45 (3) *Journal of European Integration,* 431–446. DOI: https://doi.org/10.1080/07036337.2023.2183394

[29] J. Becker and E. Malesky, The Continent or the "Grand Large"? Strategic Culture and Operational Burden-Sharing in NATO, (2017) 61 *International Studies Quarterly,* 163–180.

trend has been an auxiliary characteristic of the non-military aspects of security. The European pursuit of strategic autonomy has proved to be no longer viable because this might damage transatlantic relations by establishing a cleavage between the European Union and the US[30] and thus entitle external adversaries to disrupt the Euro-Atlantic community as a whole. Moreover, European strategic autonomy suffers from susceptibility in terms of deficient resources and logistics that are not able to compensate for the military pre-eminence of the aggressor.

Looking for more operability to overcome their immediate exposure to the greater Eurasia strategy, the Baltic and the Nordic subregional groups, together with Poland, have made consistent efforts to militarily strengthen the northeastern flank by engaging NATO's capability to deter Russia. Contrary to the popular belief about alliances, a critical external event such as the invasion of Ukraine has not merely increased the coherence of interests but transformed the community's identity; member states have not rushed to deploy commonplace strategies such as balancing and jumping on the bandwagon, but have rather focused on leadership and assertiveness.

The Central European subgroup is perceived to be under the auspices of Germany, and the latter has been undergoing a slow but steady evolution in its national strategic culture in four areas. First, since the late 1990s, in the wake of the Kosovo crisis, Berlin has forsaken the rudimentary anti-militarism imposed by the denazification conditionality the country assumed after 1945. Former Foreign Minister Joschka Fischer changed the formula from 'never again war' to 'never again Auschwitz' in order to morally justify Germany's participation in wars, framed as aligned with its *Zivilmacht* strategy, undertaken for humanitarian reasons.[31] Second, the German culture of national security counts on multilateral decision-making and coalition-building, whereas unilateral measures, such as economic stimuli or sanctions, may question its legitimacy. This accounts for Germany's joint venture with France in relation to the Eurocentric approach in NATO; both countries accordingly insist on the EU's strategic autonomy, especially after the increased security liability after Brexit. Third, German strategic culture has a bedrock in the disavowal of the early 20th century's revanchist policy, which leads it into confrontation with the Kremlin's reactionary imperialistic policy on the basis of principles. During Merkel's chancellorship, relations with Putin were conducted in line with the stick and carrot logic, with the sanctions regime being the stick, and bargaining on energy megaprojects the carrot. After 24 February 2022, Olaf Scholz was faced with assuming the leadership role while at the same time taking into consideration small states' mistrust of Russia's

[30] G. Česnakas and J. Juozaitis (eds), *European Strategic Autonomy and Small States' Security. In the Shadow of Power* (Routledge, London and New York, 2023) 1–2.

[31] P. Daehnhardt, German Foreign Policy, the Ukraine Crisis and the Euro-Atlantic Order: Assessing the Dynamics of Change, (2018) *German Politics,* 3. DOI: https://doi.org/10.1080/09644008.2018.1448386

go-getting stance. The initial response to Russia's aggression was defined as feet-dragging instead of taking control by giving support to Ukraine and exerting resistance against Russia. Still, the quick ripening in the perception of the scope of the threat to the survival of the international order has inverted several aspects of German strategic culture through the so-called *Zeitenwende.* For example, Germany withheld permission for opening Nord Stream 2 and thus revised its attitudes not only to its own geo-economic interests, but also to its reconciliatory identity via *Wandel durch Handel.* The unprecedented multi-billion rearmament of the *Bundeswehr* and the military assistance to Ukraine, hand in hand with collaboration with Poland within the tank coalition, has also shaken the stereotypical misperception of the Bundesrepublik as wedded to an anti-militaristic strategic culture. Germany has taken the informal leading role in this concerted Eurocentrism, as France, as a nuclear power, has always had more complicated relations with the US within NATO.

The Atlanticist informal leader within the Central European subgroup is Poland,[32] which maintains a self-conscious strategic interest in the preservation of Ukraine's territorial integrity. An advocate for NATO primacy in the security area, Poland is more sceptical regarding the homogeneity and operability of EU strategic autonomy since it recognises its restrictions as juxtaposed with those of the evolving great powers. The war in Ukraine has prompted Poland to intertwine strategic autonomy with energy independence and diversification, and to champion the modernisation of military potential. Poland is a staunch supporter of the self-help policy, especially in view of the 'Russian syndrome', which alludes to the painful historical memory of the three partitions of the Polish state.[33] Poland binds its security culture to 'national identity, rooted in [its] Christian heritage and universal values',[34] which emphasises the voluntarist component of its otherwise deterministic security strategy.

The Baltic subregional group, apart from being on the same Atlanticist page as Poland, reframes the significant topic of small borderland states' survival in the context of aggression from a neighbouring center of power. Long before the outbreak of the war in Ukraine (actually, since the collapse of the USSR), the main vulnerability of these states has been the risk of being manipulated via the Kremlin's hybrid narrative and activities – this refers as much to the socioeconomic grievances in Lithuania as the ethnic and linguistic segmentations in Estonia and Latvia. This vulnerability explains why all Baltic republics are predominantly concentrated on the internal locus of control

[32] I. Gajauskaitė, Poland's Resilient Atlanticism, in G. Česnakas and J. Juozaitis (eds), *European Strategic Autonomy and Small States' Security. In the Shadow of Power* (Routledge, 2022) 63–80.

[33] S. Zarobny, Changes in Polish Strategic Culture in the Context of Challenges and Threats of the 21st Century, (2020) (34) *Security Dimensions. International and National Studies,* 122–144. https://www.ceeol.com/search/article-detail?id=981397 (last accessed: 31.12.2024.).

[34] *National Security Strategy of the Republic of Poland* (Warsaw, 2020), https://www.bbn.gov.pl/ftp/dokumenty/National_Security_Strategy_of_the_Republic_of_Poland_2020.pdf (last accessed: 31.12.2024.).

through the buildup of societal security rather than seeking external shelter.[35] Estonia is a textbook example of how a nation can transform a drive for survival into the core of its national strategic culture, based on sovereignty. Such an interpretation of the strategic identity with respect to self-interest presents the state with a certain quandary when competencies are to be delegated to supranational institutions, e.g., the EU. The same ambivalence can be observed with Latvia – the country is quite reticent to support a monolithic European identity regarding common security policy because it perceives this as a manifestation of the German-French geostrategic vision. Lithuania is a peculiar case owing to its traditional historical ties with Poland and Ukraine, which are mirrored in the identity of its strategic culture. This proximity has refocused Lithuania's efforts towards the Eastern flank, which has been ostensibly neglected in the last few years and has grown closer to transatlantic partners. The Polish-Lithuanian link has gained strong traction due to the external threat, which has helped both states overcome negative sentiments based on national identity. At the same time, the three Baltic republics take into consideration the strategic utility of a common European policy against hybrid (non-military) threats.

The Nordic subregional group is a case in point regarding the role of neutrality as a stable attitude in strategic decisions about involvement in conflicts and military-political alliances. The non-alignment strategic culture has three variants. First, Denmark enjoys partial neutrality, being a NATO member state with a defensive identity, but it still remains neutral in terms of global commitments in accordance with its niche diplomacy of mediation and reconciliation (very much like Norway). Moreover, Denmark has taken advantage of the opt-out clause related to the European security and defence policy; however, following the 2022 referendum, Danish citizens relinquished this clause in the face of the most prominent threat to the European continent since the end of the Second World War. Denmark, together with Sweden, preserves its specific perspective on EU strategic autonomy – for example, its unanimity of decision-making makes it more of a European pillar in NATO. Second, Finland, relying on its principle of self-determination in the security sphere since Soviet times, successfully balanced its neutrality between the two superpowers during the Cold War. Its accession to NATO in 2023 turned this long-standing logic upside down. Third, Sweden maintained its neutrality by remaining on the bandwagon with the Western bloc prior to 1989.[36] After the onset of Russia's invasion, Sweden bid for fully

[35] M. Šešelgytė and N. Bladaitė, How to Defend Society? Baltic Responses to Hybrid Threats, in A.-M. Brady and B. Thorhallsson (eds), *Small States and the New Security Environment* (Springer, 2021) 84–85.

[36] D. Howlett and J. Glenn, Epilogue: Nordic Strategic Culture, (2005) 40 (1) *Cooperation and Conflict: Journal of the Nordic International Studies Association,* 133–134. DOI: https://doi.org/10.1177/0010836705049737

fledged NATO membership but was delayed by Hungary and Turkey due to their oscillating position between the two parties in the conflict.

Not only Hungary, but also Slovakia and Bulgaria, represent the ambiguities in European strategic culture. The narrative of the populist leaders is incongruous with the solidarity norm in the region. For Slovakia, this ambivalence can be attributed to the reshuffle of the domestic context, which brought the far-right nationalist Fico, with his strong anti-Western rhetoric, back to power in 2023. In Bulgaria, the conservative president Radev, with his outright pro-Russian sentiments, has been fiddling with the idea of neutrality, just like Orbán, and has persistently stated that Ukrainians should have 'not another bullet', just like Fico. The Bulgarian president and his two caretaker governments have professed a peace-making stance which echoes Putin's reasoning; for example, his criticism of the National Assembly's decision about the provision of additional military aid to Ukraine later in 2022 was based on the rhetoric of the so called 'warmongers', and thus, absurdly, passes the buck for the aggression to the assaulted country. Bulgaria's strategic culture does not stem from a solidified national identity since the political élites and societal actors have not reached a consensus on its nearly totemic Soviet past. Bulgaria's strategic culture has normative foundations in a few basic documents, such as the National Security Strategy[37]; however, the latter requires an update in terms of the clearer restructuring of threats and more precise strategic prioritisation of committed membership in both the EU and NATO, without free-riding.

V. Conclusion

The war in Ukraine has reconstructed nearly all European states' strategic cultures. It has demonstrated the preeminence of subjective factors in times of crisis. The limits to rationality can be deduced in three areas: first, the black-and-white generalisations in several populist leaders' speech acts and gestures; second, the pragmatic accelerated shifts in the Nordic states' security priorities; and third, the stability of adaptive rationality in historical stereotyping in Russia and the Baltic states alike. Probing the three hypotheses has verified them only partially. First, systemic shocks do exert pressure, but regimes of limited rationality still attribute everything to the structure of the system through the psychological mechanism of the external locus of control. Next, great powers seem to remain stable in the face of revolutionary changes in strategic culture compared to vulnerable small states. However, this correlation is heavily dependent on the openness of the domestic environment, which may allow for more

[37] *An Updated version of the National Security Strategy of Republic of Bulgaria* (2018), https://parliament.bg/bills/44/702-00-48_aktualizirana_Strategiya_NSRB_s_PR_za_priemane.PDF (last accessed: 31.12.2024.).

accelerated shifts through public discourse. Last but not least, transitions in strategic culture within regional security communities happen in a differentiated way, according to new subgroup-based lines of division (e.g. the Visegrád Four no longer functions in the same way), but these transitions are conditioned more by opportunism than sudden metamorphoses in identity.

To sum up, a counterfactual scenario of a perceived lack of a consolidated response to the Russian aggression in Ukraine would not only have weakened the Euro-Atlantic community strategically but also have delegitimised it through the prism of the integrity of its values. The factual course of events is unavoidable, and unfortunately, it forces the pluralist security community to return to basics, i.e., the security dilemma, where the accumulation of more and more power entrenches states in a vicious circle of insecurity. All in all, the principal dilemma of the affected countries is whether to be progressive by attempting to uphold the normative and institutional framework of the legitimate international order or to move counter-clockwise towards some conservative grand design coherent with a deeply polarised world of zero-sum games.

McCarthy, Jonathan*

Wrong turns or paths not (yet) taken? The creation of an EU regulatory framework for digital finance

Abstract

This article aims to take stock of the progress made through recent EU legislative initiatives on digital finance, specifically by discerning how the EU has pursued certain options for regulation but has seemingly shirked from addressing some emergent issues. The article describes the influence of the guiding principle of 'same activity, same risks, same rules' in the EU's legislative approach towards digital finance. This article focuses on the Markets in Crypto Assets Regulation (MiCAR) and the Digital Operational Resilience Act (DORA) as the key instances of the EU's legislative efforts to categorise differing 'risks'.

By reference to MiCAR and to DORA, the article highlights the contradiction at the essence of the 'same activity, same risks, same rules' outlook. The article evaluates the potency of MiCAR and DORA in enforcing against activities which are characterised by their elusively shapeshifting traits. The article reflects on the supposedly future-proof qualities of the new EU framework on digital finance by briefly pinpointing some examples of how the legislation remains exposed to changing innovations, which may eventually prompt further reforms to MiCAR and DORA.

Keywords: digital finance; FinTech; crypto-assets; cybersecurity

I. Introduction

For the last decade, financial services have been in the midst of perceptible changes in digitalisation and in the adoption of technological innovations (frequently referred to as 'FinTech'). The European Union has consequently sought to implement an architecture of rules to govern digital finance. At the time of writing, prominent examples of EU legislative intervention have entered into effect, and various aspects of the legislation are being supported by the introduction of regulatory technical

* McCarthy, Jonathan, Lecturer, School of Law, University College Cork, Ireland.

DOI: 10.56749/annales.elteajk.2024.lxiii.4.57

standards. The courage of the EU's approach in striving to confront unprecedented transformations and risks in the provision of modern financial services is not in doubt. However, as expressed in this article, there are persisting questions about the prudence and the likely efficacy of the interventionist stance taken by the EU.

This article aims to take stock of the progress made through the EU legislative initiatives on digital finance, specifically by discerning how the EU has pursued certain options for regulation but has seemingly shirked from addressing some emergent issues. From the outset, the article should acknowledge that it is early to make conclusive judgements as to what could be accomplished by this scale of legislative intervention. In view of the expanding scope of technological developments, it is highly probable that the EU's digital finance regulatory framework will prove capable of adapting to future challenges. The purpose of the article is not, therefore, to represent a dismissively knee-jerk and overly critical response to legislative measures which are currently being brought into force. Yet, it is only by recognising the manifest gaps and shortcomings that future reforms can be appropriately formulated.

The article commences by describing the guiding principle of 'same activity, same risks, same rules', which has sculpted the EU's legislative approach towards digital finance. For all of the ostensible fairness and consistency which is connoted by this principle, the article identifies the flaws of adhering to a 'same activity, same risks, same rules' mindset, particularly in how it inhibits the capacity of regulation to be tailored to emergent problems and legal ambiguities.

The article proceeds to demonstrate h ow the legislative pillars of the EU's framework are oriented towards categorising different forms of risk. By aiming to neatly classify types of risk, the paradox of the 'same activity, same risks, same rules' principle is that, in reality, the legislation is conceding that there are diffuse examples of risks which may require distinct approaches. This article focuses on the Markets in Crypto Assets Regulation (MiCAR)[1] and the Digital Operational Resilience Act (DORA)[2] as the key instances of the EU's legislative efforts to delineate between risks. There are also parallel examples of risk categorisation across other legislative measures which pertain to digital finance.

By reference to MiCAR and to DORA, the article highlights the contradiction at the essence of the 'same activity, same risks, same rules' outlook. The article contends that the original legislative objectives have ironically resulted in an uneven

[1] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937; OJ L 150/40. [hereinafter 'MiCAR']

[2] Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011; OJ L 333. [hereinafter 'DORA']

concentration of regulatory attention on particular elements of digital finance and a simultaneous neglect of the observable difficulties and nascent risks associated with other innovations.

The article evaluates the potency of MiCAR and DORA in enforcing the relevant laws against activities which are characterised by their elusively shapeshifting traits. Crypto-asset markets and cyber-threats have been notoriously averse to enforcement from existing regulatory regimes. The regulatory vacuum is ultimately a central motive for the introduction of EU legislative initiatives in respect of crypto-asset markets and operational resilience. However, will these legislative actions stand the test of time by sufficiently mitigating systemic risks in finance for the foreseeable future? Can the legislation avoid being a purely transient bulwark against a selected few risks of contemporary digital finance?

By culminating towards the conclusion, the article will reflect on the supposedly future-proof qualities of the new EU framework on digital finance by briefly pinpointing some examples of how the legislation remains exposed to changing innovations that may eventually prompt further reforms to MiCAR and DORA. The article will consider how a putative application of the 'same activity, same risks, same rules' principle has, all at once, exhibited degrees of bravery, a potentially disproportionate emphasis on discrete facets of finance, possible omissions, and a disregard of the complexities associated with ongoing patterns in crypto-assets and in cyber-risks.

II. Same activity, same risks, same rules

The September 2020 release of the European Commission's Digital Finance Strategy was the catalyst for a package of legislative measures in the interests of "a competitive EU financial sector that gives consumers access to innovative financial products, while ensuring consumer protection and financial stability".[3] The Commission's Strategy declared that the 'same activity, same risks, same rules' principle was to be paid "particular attention to" when addressing new challenges and risks resulting from digital transformation, not least to "safeguard the level playing field between existing financial institutions and new market participants".[4] By using 'same activity, same risks, same rules' as a guiding motif, the Commission affirmed that regulation and supervision should be proportionate by being especially cognisant of the risks of 'significant operators' in financial services. Aside from the introduction of fresh legislation, the preservation of financial stability and the protection of the rights of

[3] See the European Commission website, *Digital Finance Package* (24 September 2020), at: https://finance.ec.europa.eu/publications/digital-finance-package_en (last accessed: 31.12.2024.).

[4] European Commission Communication, *A Digital Finance Strategy for the EU,* COM(2020)591 final, 5.

consumers would be integral when adapting extant conduct and prudential legal rules.[5] Moreover, the Commission committed to a "future proof" legislative framework – built to last by means of regular legislative reviews and interpretative guidance – that "neither prescribes nor prevents the use of particular technologies while also ensuring that regulatory objectives continue to be met".[6]

Aspirational language and terminology can be pervasive in policy-making documents. Nonetheless, academic commentary and scholarship on the regulation of technological innovations is far from being unfamiliar with the logic for all-encompassing endeavours that apply uniform, standardised and rather 'traditional' requirements to novel and emerging practices.[7] The varied complexion of innovations – not just in financial services – can quickly frustrate attempts to utilise a blanket-like legal approach. As understood by Iris Chiu, the growth of financial regulation broadly has occurred through a "patchwork" of different approaches.[8] By critiquing the concept of 'same activity, same risks, same rules', Chiu asserts that the mantra is "prone to excluding nuances and differences in underlying objectives, risk characterisation and proportionality", as well as obscuring regulation "from considering if policy adjustments are needed in the face of innovative developments".[9] Chiu concludes that a functional approach, as epitomised by 'same activity, same risks, same rules', is "potentially vague and insufficient" and lacking in "clear guidance" for regulators.[10]

It is perhaps not entirely revelatory to observe that policy statements may often be easily criticised for their generalised wording or for being bereft of express guidelines. It is even debatable as to whether 'same activity, same risks, same rules' is too constrained. Academics and practitioners may have differing views on whether innovations in digital finance are worthy of specialised techniques of regulation. As articulated by Steven Schwarcz, a fundamental point of disagreement exists as to the level to which FinTech innovations are drastically altering finance, thus justifying the use of completely new forms of regulation.[11] Although there can be uncertainty and occasional scepticism about the true depth of digital transformation, there is a

[5] European Commission Communication, *A Digital Finance Strategy for the EU,* COM(2020)591 final, 15.

[6] European Commission Communication, *A Digital Finance Strategy for the EU,* COM(2020)591 final, 11–12.

[7] For example, see the discussion of 'coherentist' perspectives on the regulation of technologies in R. Brownsword, *Law 3.0: Rules, Regulation, and Technology* (Taylor & Francis, 2020).

[8] I. Chiu, An Institutional Account of Responsiveness in Financial Regulation – Examining the Fallacy and Limits of 'Same Activity, Same Risks, Same Rules' as the Answer to Financial Innovation and Regulatory Arbitrage, (2023) 51 (105868) *Computer Law and Security Review,* 7. DOI: https://doi.org/10.1016/j.clsr.2023.105868

[9] Chiu, An Institutional Account of Responsiveness in Financial Regulation, 9.

[10] Chiu, An Institutional Account of Responsiveness in Financial Regulation, 16.

[11] S. Schwarcz, Regulating Financial Innovation: FinTech, Crypto-Assets, DeFi, and Beyond, (2024) 79 (3) *The Business Lawyer,* 615.

prevailing acceptance among academics that some flexibility – stemming from a principles-based regulatory approach – is essential to striking a balance in carefully regulating for technological advancements in finance.[12] A calibrated principles-based treatment of digital finance could be encouraging of genuinely innovative activities, but, where necessary, enabling the "imposition of appropriate guardrails against risks and negative externalities".[13]

The 'same risks, same activity, same risks' principle is echoed in the wording of the legislation introduced in the aftermath of the Commission's Strategy. MiCAR explicitly corresponds to the 'same activity, same risks, same rules' goal and to the principle of 'technology neutrality'.[14] The aim of applying proportionate rules to myriad kinds of technologies is supported by the objective of lessening regulatory fragmentation through a harmonised EU framework.[15] DORA vindicates its format by stating that an EU Regulation – as opposed to a Directive – should be more effective in reducing regulatory complexity, in fostering supervisory convergence, and in increasing legal certainty, which can accordingly contribute to limiting compliance costs.[16] EU harmonisation is deemed to be warranted in response to legislative disparities and diverse approaches across Member States regarding operational resilience and ICT (information communications technology) security of financial entities.[17] According to DORA's requirements, financial entities should follow "the same approach and the same principle-based rules" when addressing ICT risk, but also take into account "their size and overall risk profile, and the nature, scale and complexity of their services, activities and operations".[18]

The Digital Finance Strategy also led to the enactment of a Regulation for a distributed ledger technology (DLT) pilot regime for securities market operators.[19] Due to the relatively narrower parameters of this Regulation to settlement and post-settlement processes in securities markets, a summary of the DLT pilot regime is beyond the focus of this article.[20] Nonetheless, the 'same activity, same risks, same

[12] See D. Arner, R. Buckley, K. Charamba, A. Sergeev and D. Zetzsche, Governing FinTech 4.0: BigTech, Platform Finance, and Sustainable Development, (2022) 27 (1) *Fordham Journal of Corporate and Financial Law,* 1.
[13] Arner, Buckley, Charamba, Sergeev and Zetzsche, Governing FinTech 4.0, 1., 36.
[14] MiCAR, Recital 9.
[15] MiCAR, Recital 5.
[16] DORA, Recital 14.
[17] DORA, Recital 9.
[18] DORA, Recital 13.
[19] Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology, and amending Regulations (EU) No 600/2014 and (EU) No 909/2014 and Directive 2014/65/EU; OJ L 151. [hereinafter 'DLT Pilot Regime Regulation']
[20] See further J. McCarthy, Distributed Ledger Technology and Financial Market Infrastructures: An EU Pilot Regulatory Regime, (2022) 17 (3) *Capital Markets Law Journal,* 288.

rules' ethos is equally evident in the legislative objectives. The DLT Pilot Regime Regulation reinforces its intention to be technologically neutral as regards the use of any particular technology over another[21] – a sentiment which seems somewhat incongruous with how the Regulation is unequivocally providing for a specialised regime for DLT as a specific technology. In addition to 'same activity, same risks, same rules' and technology neutrality, the Regulation is expressly grounded in the need to maintain proportionality and a level playing field for market participants.[22]

As a parallel legislative initiative to the measures provided for by the Digital Finance Package, it should be noted that the EU's Artificial Intelligence Act[23] is similarly informed by the 'same activity, same risks, same rules' principle. The AI Act intends to preclude the fragmented divergence of national rules on AI within the EU market[24] and to nurture a level playing field for operators and market participants.[25] However, in a similar manner to the DLT Pilot Regime Regulation, it could be suggested that this push for a uniform approach is undermined by how the AI Act deliberately categorises AI systems by levels of risk (such as how AI systems' creditworthiness assessments of prospective borrowers in the review of loan applications would be classified as high-risk).[26]

As clarified in the article introduction, the focus of this article is on MiCAR and DORA as the foremost examples of legislation from the Digital Finance Package. For sheer exemplary impact, MiCAR and DORA are ambitiously framed models for other jurisdictions. By grasping the nettle of regulating crypto-asset markets through MiCAR, the EU is placing itself in the position of being a standard-setter internationally.[27] As Matthias Lehmann explains, "[w]hile most countries are still weighing their options or experimenting with the application of existing laws to crypto-assets, the EU has forged ahead with an extremely granular set of rules …".[28] DORA has established rules surrounding the management of cyber-risks, the reporting of incidents, and testing for threats. The regulatory framework that DORA has created

[21] DLT Pilot Regime Regulation, Recital 9.
[22] DLT Pilot Regime Regulation, Recital 10.
[23] 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) [hereinafter 'AI Act'].
[24] See AI Act, Recital 3.
[25] See AI Act, Recital 82.
[26] AI Act, Annex III.
[27] F. Annunziata, An Overview of the Markets in Crypto-Assets Regulation (MiCAR), (2023) (158) *European Banking Institute Working Paper Series,* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4660379 (last accessed: 31.12.2024.).
[28] M. Lehmann, MiCAR – Gold Standard or Regulatory Poison for the Crypto Industry?, (2024) 61 (3) *Common Market Law Review,* 699, 700.

for financial entities should serve as a case study for other spheres of economic activity and organisations, not just within the EU but internationally. An escalation in cyber-risks, cyber-attacks and threats to cybersecurity is being evinced within EU Member States and internationally.[29]

Both MiCAR and DORA declare that their provisions are anchored to the 'same activity, same risks, same rules' precept. When scrutinising the details of the legislation, it is arguable as to how closely aligned the requirements of MiCAR and DORA are to this motto. As outlined in the next section of the article, MiCAR's definition of crypto-assets is oriented around DLT-type systems and applications. By confining the legislative lens to DLT-based crypto-assets, MiCAR risks wrapping itself in a "regulatory straitjacket" which fails to encompass certain emergent forms of crypto-assets.[30] The initial commentary around MiCAR has found it difficult to separate the legislation from a mood of regulatory apprehension about the prospect of globalised 'stablecoins', or asset-referenced tokens[31] – a categorisation of crypto-assets which will be discussed below. The stringency[32] of MiCAR's rules on asset-referenced tokens weakens the illusion of MiCAR being a wholly proportionate and uniform regime, guided by 'same activity, same risks, same rules'.

For DORA, there are inherent complications in defining a cyber-risk or a cyber-threat. International standard-setting agencies and authorities, such as the Financial Stability Board, have significantly contributed to designing recognised terminology relating to cyber-risks.[33] However, there is a strongly subjective element to definitions of cyber-risks. The absence of a coherently objective definition of a cyber crisis can delay or confuse the implementation of an organisation's crisis management processes.[34] A legal obligation to report incidents and threats is increasingly challenging to practically implement if there is little clarity as to what constitutes a definitive 'incident' or 'threat'.[35] As with MiCAR's categorisations of crypto-assets, the onus is placed on legislation – and accompanying regulatory technical standards – to proffer additional guidance regarding the risks to be managed, reported, and tested for. Otherwise, in sharp contrast to the tenor of 'same activity, same risks, same rules', similar risks will result in diverging internal procedures being followed by financial

[29] ENISA (European Union Agency for Cybersecurity), *ENISA Threat Landscape 2024 (July 2023 to June 2024)* (September 2024).
[30] Lehmann, MiCAR – Gold Standard or Regulatory Poison for the Crypto Industry?, 699, 711.
[31] See Lehmann, MiCAR – Gold Standard or Regulatory Poison for the Crypto Industry?, 699.
[32] See Annunziata, An Overview of the Markets in Crypto-Assets Regulation (MiCAR).
[33] See the FSB Cyber Lexicon (November 2018) at: https://www.fsb.org/2018/11/cyber-lexicon/ (last accessed: 31.12.2024.).
[34] European Systemic Risk Board (ESRB), *Advancing Macroprudential Tools for Cyber Resilience – Operational Policy Tools,* (April 2024), 30.
[35] See generally J. McCarthy, Cyber-Risks in Modern Finance: Building Operational and Regulatory Resilience, (2023) 38 (7) *Journal of International Banking Law and Regulation,* 233.

entities. In sum, an analysis of the substance of MiCAR and DORA casts doubt on whether both initiatives are the most authentic specimens of the 'same activity, same risks, same rules' principle.

III. Everything in its right place: Risk categorisations

1. MiCAR

A shared feature of MiCAR and DORA is the quest for categorisation, principally to differentiate between forms of risk and to allow for varying obligations. In looking to MiCAR, firstly, a cornerstone of the legislation is its classification of separate types of crypto-assets. For the purposes of MiCAR, a 'crypto-asset' is defined as "a digital representation of a value or right that is able to be transferred and stored electronically using distributed ledger technology or similar technology".[36] For the sake of clarity, it should be stressed that – as the title indicates – MiCAR is directed at the markets in issued crypto-assets, rather than trying to be a grand bespoke regime for all legal aspects of crypto-assets. MiCAR is fully applicable to EU Member States from 30 December 2024.

By stipulating that a crypto-asset should have an identifiable issuer in order to fall within the ambit of MiCAR,[37] the legislation does not make provision for 'decentralised' currencies which lack a single point of issuing authority. MiCAR is automatically excluding forms of crypto-based activities which have gained considerable public awareness and media coverage in recent times, especially decentralised finance (DeFi) and non-fungible tokens (NFTs).[38] Even the most famous of decentralised digital currencies, Bitcoin, cannot be adequately captured by the scope of MiCAR. If a crypto-asset platform or provider plans to offer Bitcoin or another pre-existing cryptocurrency – which were admitted to trading before 30 December 2024 – the formalities for offerings (as summarised in the next section) would not have to be complied with until 31 December 2027.[39]

By excluding crypto-assets which are not directly issued by a central offeror, MiCAR's fixation on crypto-asset issuance may hint at an anachronistic perception that most crypto-assets are akin to Initial Coin Offerings (ICOs). In other words,

[36] MiCAR, Article 3(1)(5).
[37] MiCAR, Recital 22.
[38] At a rudimentary level, DeFi involves protocol-based transactions with tokens which may regularly be backed by other digital tokens (stablecoins pegged to fiat money) as security. NFTs are effectively digital representations of owned items, such as photos, videos, music, etc.
[39] MiCAR, Article 143(2)(b).

MiCAR could be fighting the regulatory battles which needed to be fought several years ago in relation to the ICO bubble,[40] rather than comprehending the far more complex and interlinked markets which are now in existence. Even though MiCAR is hamstrung by plainly stating that it cannot regulate for decentralised crypto-based activities, the shortcomings of MiCAR in capturing the steady emergence of DeFi are a blatant omission. DeFi market participants cannot be regarded as crypto-asset service providers under MiCAR, irrespective of how prevalent DeFi activities become within the EU and internationally.[41] As time progresses, the rationale for regulating for DeFi should become more compelling. Linkages between mainstream financial institutions ('traditional' finance) and DeFi platforms may deepen, and, with increased consumer demand for DeFi (thus leading to greater consumer susceptibility to losses from fraud), there may be an increase in demand for regulation.[42]

A contrary perspective would suggest that MiCAR's omission of DeFi can be forgiven. It could be argued that regulators should cautiously look before they leap when regulating for an array of crypto-based activities. Whether it is DeFi, NFTs or commonly known cryptocurrencies like Bitcoin, some commentators adjudge that the 'dress-up clothes' worn by crypto are feeble attempts to play at being genuine financial activity.[43] Much crypto activity continues to be linked to criminal conduct, fraudulent schemes, gambling, and game-like applications.[44]

However, the disputes about categorising what is meant by true 'finance' can merely disclose a fallacy of thinking about financial regulation. As astutely conveyed by Saule Omarova, there can be a 'master narrative' of the financial market as a presumptively socially beneficial mechanism and as an indispensable tool for economic growth. The reality is that private transactions in secondary markets – which are essentially geared towards individualised profit-making – occur at a high frequency and contribute to the development of technological innovations.[45]

---

[40] On the controversies and regulatory difficulties of ICOs, see D. Zetzsche, R. Buckley, D. Arner and L. Föhr, The ICO Gold Rush: It's a Scam, It's a Bubble, It's a Super Challenge for Regulators, (2019) 60 (2) *Harvard International Law Journal,* 267, and A. Gurrea-Martínez and N. Remolina León, The Law and Finance of Initial Coin Offerings, in C. Brummer (ed.), *Cryptoassets: Legal, Regulatory, and Monetary Perspectives* (Oxford University Press, 2019).

[41] I. Chiu, The Application of the Markets in Crypto-Asset Regulation to Decentralised Finance, (2023) 38 (12) *Journal of International Banking Law and Regulation,* 432.

[42] See particularly M. Aquilina, J. Frost and A. Schrimpf, Decentralized Finance (DeFi): A Functional Approach, (2024) 10 *Journal of Financial Regulation,* 1.

[43] T. Baker, Let's Stop Treating Crypto as If It Were Finance, (December 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4287185 (last accessed: 31.12.2024.).

[44] For a 2024 snapshot, see Chainalysis, *2024 Crypto Crime Report,* https://go.chainalysis.com/crypto-crime-2024.html (last accessed: 31.12.2024.).

[45] S. Omarova, Financial Innovation: Three Fallacies in the Debate, in S. Omarova, A. Andhov and C. Hill (eds), *Hidden Fallacies in Corporate Law and Financial Regulation. Reframing the Mainstream Narratives* (Bloomsbury Professional, 2025).

MiCAR provides for three categories of crypto-assets: crypto-assets other than asset-referenced tokens or electronic money tokens (as governed by Title II of MiCAR); asset-referenced tokens (including 'significant' asset-referenced tokens) (governed by Title III); and e-money tokens (governed by Title IV). E-money tokens are largely subject to the equivalent rules for e-money by virtue of Directive 2009/110/EC, but the crucial distinction between MiCAR's e-money tokens and e-money generally is that MiCAR-governed tokens are issued on the basis of DLT or a similar cryptographical technology. The 'other' category of crypto-assets, within Title II of MiCAR, archetypally relates to utility tokens which are instrumental to accessing services, software, games, etc. As but one instance of a lacuna which is set to materialise in the years ahead, MiCAR does not ascertain whether NFTs that possess utility functions can still be subsumed within the Title II requirements of the legislation.[46]

MiCAR construes asset-referenced tokens as purporting "to maintain a stable value by referencing another value or right or a combination thereof, including one or more official currencies".[47] The raison d'être of an asset-referenced token, or stablecoin, is to signify an alternative to the dramatic price volatility of decentralised currencies that are not tied to any real-world reserves of fiat currency. MiCAR's preoccupation with asset-referenced tokens could be attributed to the alarm generated among regulators by the vista of a powerful technological company, or a social media platform, launching its own stablecoin for users.[48] The previous Facebook proposal for a Libra global stablecoin (later re-named Diem) indelibly shaped regulators' attitudes towards the systemic risks presented by large-scale tokenised projects which would be pegged to fiat currency stored with financial institutions and banks.[49]

A global – or even quasi-global – stablecoin arrangement would fit MiCAR's categorisation of a 'significant' asset-referenced token. Chapter 5 of Title III of MiCAR separately classifies significant asset-referenced tokens in accordance with a list of criteria in Article 43. Chapter 2 of Title IV is applicable to significant e-money tokens. As reiterated in the next section, MiCAR expressly curbs the growth of significant tokenised projects by restricting the issuance of asset-referenced tokens

[46] See Annunziata, An Overview of the Markets in Crypto-Assets Regulation (MiCAR), 32.
[47] MiCAR, Article 3(1)(6).
[48] On the context of regulatory fears about the implications of global stablecoin arrangements, see Lehmann, MiCAR – Gold Standard or Regulatory Poison for the Crypto Industry?, 699, 704. For updated recommendations on internationally coordinated responses to global stablecoins, see the FSB's *High-Level Recommendations for the Regulation, Supervision and Oversight of Global Stablecoin Arrangements. Final Report* (July 2023), https://www.fsb.org/2023/07/high-level-recommendations-for-the-regulation-supervision-and-oversight-of-global-stablecoin-arrangements-final-report/ (last accessed: 31.12.2024.).
[49] See E. Nicolle, Ghosts of Facebook's Libra Haunts Stablecoin Rules Five Years Later, *Bloomberg Crypto Newsletter,* (16 April 2024), https://www.bloomberg.com/news/newsletters/2024-04-16/ghost-of-facebook-s-libra-haunts-stablecoin-rules-five-years-later (last accessed: 31.12.2024.).

and e-money tokens that are found to have an estimated quarterly average number of transactions higher than 1 million and an average aggregate value higher than €200,000,000 per day.[50]

The attention devoted towards asset-referenced tokens and stablecoin arrangements erodes the semblance of MiCAR exhibiting an even-handed style in regulating all crypto-assets. Yet, even in MiCAR's provisions on asset-referenced tokens, there are certain omissions. For example, algorithmic stablecoins do not appear to be reined within MiCAR's definition of tokens "referencing another value or right or a combination thereof".[51] Algorithmic stablecoins tend to claim to be able to preserve a stable valuation by use of algorithmic adjustments. To date, algorithmic stablecoins have not lived up to this pioneering promise and have instead garnered public interest due to high-profile collapses of stablecoins such as Terra and Iron Finance.[52]

2. DORA

By comparison with MiCAR, DORA does not set out distinct definitions for types of cyber-risks, threats, or attacks. Nonetheless, DORA does shift responsibility towards financial entities to implement effective frameworks and processes for the management of ICT risks. Fully applicable from 17 January 2025, DORA concentrates on enhancing 'digital operational resilience', as "the ability of a financial entity to build, assure and review its operational integrity and reliability", which can be ensured "either directly or indirectly through the use of services provided by ICT third-party service providers" and which can cover "the full range of ICT-related capabilities needed to address the security of the network and information systems which a financial entity uses, and which support the continued provision of financial services and their quality, including throughout disruptions".[53]

ICT risk management is the focus of Chapter II (Articles 5 to 16) of DORA, whereby financial entities are required to have internal governance and control frameworks for the "prudent and effective" management of ICT risks.[54] An 'ICT risk' is given a wide definition in DORA as "any reasonably identifiable circumstance in relation to the use of network and information systems" which, if materialised, can

[50] MiCAR, Articles 23 and 58(3).
[51] For a similar analysis, see Schwarcz, Regulating Financial Innovation, 615.
[52] For media coverage of the Terra collapse, see A. Chow, The Real Reasons Behind the Crypto Crash, and What We Can Learn from Terra's Fall, *Time,* (17 May 2022), https://time.com/6177567/terra-ust-crash-crypto/ (last accessed: 31.12.2024). For an economic study, see J. Liu, A. Schoar and I. Makarov, Anatomy of a Run: The Terra Luna Crash, (2023) (31160) *National Bureau of Economic Research Working Paper*.
[53] DORA, Article 3(1).
[54] DORA, Article 5(1).

result in the compromise of "the security of the network and information systems, of any technology dependent tool or process, of operations and processes, or of the provision of services by producing adverse effects in the digital or physical environment".[55] Internal organisational procedures are paramount to risk management, since financial entities' management bodies are given the responsibility for maintaining these frameworks.[56] Updated ICT systems, protocols and tools should be used and maintained by financial entities.[57] To adequately protect ICT systems and to have response measures at the ready, financial entities should continuously monitor and control the security and functioning of systems and tools.[58] Prompt detection of 'anomalous activities' should be facilitated by mechanisms enabled by an entity's incident management process.[59] Crisis communication plans will be required by DORA for the "responsible disclosure of, at least, major ICT-related incidents or vulnerabilities to clients and counterparts as well as to the public, as appropriate".[60]

As will be examined in the next section, in terms of enforcement, the hefty responsibilities of incident reporting and testing for threats are carried by financial entities, rather than by external authorities. Even if DORA allocates burdens towards regulated entities, the layering of obligations should assist in financial entities' construction of the lines of defence, which are vital to an organisation's cybersecurity strategy. As outlined by the ESRB,[61] for financial stability, the first barrier against risks and threats should be financial institutions' detection and defence capabilities. These capabilities can be directly aided by DORA's requirements. From the ESRB's vantage, the second line of defence is a systemic mixture of protections – consisting of standardised practices – and precedes a third line of coordinated action capabilities that have EU-wide applicability and that are instructed by globally accepted guidelines. The second and third barriers may necessitate a higher extent of pan-European collaboration than what is presently afforded through DORA. As elaborated on in the next section, there are proposals and propositions which may be more adept than DORA in significantly bolstering these second and third lines of cyber defence. However, DORA's decisive impact in respect of preliminary detection and defence should not be underestimated, especially through its requirements on third-party risk.

Within Chapter V of DORA (Articles 28 to 44), financial entities are obliged to complete an assessment of 'concentration risk' from their contractual arrangements with third-party service providers.[62] Given that outsourcing is commonplace in

[55] DORA, Article 3(5).
[56] DORA, Article 5(2).
[57] DORA, Article 7.
[58] DORA, Article 9.
[59] DORA, Article 10.
[60] DORA, Article 14.
[61] ESRB, *Advancing Macroprudential Tools for Cyber Resilience.*
[62] DORA, Article 29.

cybersecurity services, a pivotal step taken by DORA is to obligate mandatory contractual provisions in arrangements between financial entities and third-party ICT service providers.[63] Supplementary requirements are provided for in contracts with providers of "critical or important functions".[64] Critical ICT third-party service providers are to be formally designed by European Supervisory Authorities (ESAs) through the auspices of a Joint Committee-established Oversight Forum.[65]

The guidance to be yielded through regulatory technical standards could easily form the basis of several other articles and texts on DORA. For now, the import of DORA's provisions is to show that standardised responses are being expected in relation to cyber-risks. Although it can seem to cleanly conform to the 'same activity, same risks, same rules' stance, the most telling reflection of DORA's fitness for purpose will be in how the risks can actually be combatted through the enforcement of the legislative provisions.

IV. Chasing shadows? The potency of enforcement mechanisms

1. MiCAR

By enacting a dedicated regime for markets in crypto-assets, the EU is pursuing a paradigm of enforcement by prescriptive legislative rules. This differs from an approach of piecemeal sanctions – operating on a case-by-case footing of 'regulation by enforcement'[66] – which has become emblematic of some jurisdictions, such as in the United States through the Securities and Exchange Commission (SEC). Much of MiCAR displays a grafting of standard market rules to the somewhat shadowy realm of crypto-asset issuance. MiCAR's steadfast adherence to existing financial regulatory rules could even instigate accusations of a "copy and paste approach".[67] It remains to be seen whether crypto-asset markets are too shifting or precarious to be the foundations for this transplantation.[68]

When issued crypto-assets – including asset-referenced tokens and e-money tokens – are being offered to the public or are seeking admission to a platform, a white paper must be drawn up and subsequently notified to the relevant competent authority

[63] DORA, Article 30.
[64] DORA, Article 30(3).
[65] DORA, Article 31.
[66] C. Brummer, Disclosure, Dapps and DeFi, (2022) 5 (2) *Stanford Journal of Blockchain Law & Policy,* 137.
[67] Lehmann, MiCAR – Gold Standard or Regulatory Poison for the Crypto Industry?, 699, 707.
[68] See J. McCarthy, Cryptocurrencies. Digital Money and Regulatory Damage, (2022) 37 (8) *Journal of International Banking Law and Regulation,* 282.

of the issuer's home EU Member State.[69] The European Securities and Markets Authority (ESMA) is responsible for maintaining a register of notified crypto-asset white papers. The inclusion of white paper requirements for issued crypto-assets is decidedly a signal of MiCAR's intent to galvanise transparency and disclosure. However, in practice, the force of these requirements may be diluted by the fact that competent authorities' advance approval of a crypto-asset white paper will not be necessary.[70]

MiCAR's inclination towards market rules, which are already known to be reasonably effective in enforcement, is further demonstrated by MiCAR's provisions on the authorisation and operating conditions for crypto-asset service providers and by provisions on the prevention of market abuse. Title V of MiCAR includes obligations for prudential safeguards, based on minimum capital requirements and a quarter of the calculated fixed overheads for the preceding year.[71] As an illustration of MiCAR's interventionist position with regards to the organisational structures of crypto-asset issuers, the legislation provides that the governance arrangements of issuers of asset-referenced tokens and crypto-asset service providers must ensure that members of management "be of sufficiently good repute and possess the appropriate knowledge, skills and experience, both individually and collectively, to perform their duties".[72] The provision specifies that management members must have convictions relating to terrorist financing or money laundering or "any other offences that would affect their good repute".[73] The legislation proceeds to make provision for a requirement capable of rather expansive interpretation that management members "demonstrate that they are capable of committing sufficient time to effectively perform their duties".[74]

MiCAR obliges "adequate arrangements" to be made for the safekeeping of clients' crypto-assets and funds,[75] while crypto-asset service providers must establish and maintain "effective and transparent" procedures for the "prompt, fair and consistent" handling of complaints (in addition to publishing descriptions of the procedures).[76] Crypto-asset service providers must implement and maintain policies to identify, prevent, manage and disclose conflicts of interest.[77]

Title VI of MiCAR extends the imposition of 'normal' market rules by comprising provisions on the prevention and prohibition of market abuse involving crypto-assets. The rules consist of requirements on the public disclosure of inside

[69] MiCAR, Articles 6, 19 and 51.
[70] An insight reiterated in relation to the Commission's initial MiCAR proposal in McCarthy, Cryptocurrencies. Digital Money and Regulatory Damage, 282, 290.
[71] MiCAR, Article 67.
[72] MiCAR, Articles 34(2) and 68(1).
[73] MiCAR, Articles 34(2) and 68(1).
[74] MiCAR, Articles 34(2) and 68(1).
[75] MiCAR, Article 70.
[76] MiCAR, Article 71.
[77] MiCAR, Article 72.

information,[78] the prohibition of insider dealing (arising from the possession and use of insider information),[79] and the prohibition of market manipulation.[80]

Even though Title VII of MiCAR lists a range of powers accorded to competent authorities (including to require provision of information and documents, to suspend, prohibit or order immediate cessation, and to undertake inspections and investigations), it is a matter of conjecture as to how rigorously these powers can be enforced against crypto-asset service providers. The genesis of crypto-assets is rooted in a cyber-libertarian vision of peer-to-peer transactions within decentralised, or 'consensus'-driven, networks.[81] The arrival of a new era of robust EU requirements and obligations could be something of a culture shock for members of the management bodies of crypto-asset issuers.

A plausible by-product of MiCA's implementation is that the EU is about to embark on finding a mini-lateral or regional solution to a globalised phenomenon.[82] As Lehmann argues, the EU could be fastened to a 'Fortress Europe' strategy,[83] buttressed by the armoury of powers that MiCAR gives to competent authorities. A disproportionate weighting of enforcement powers could have the counterproductive result of frightening away crypto-asset service providers from establishing themselves within the EU. Lehmann identifies an apt example of MiCAR's potentially inhibiting effect in the provision for restricting issuance of significant asset-referenced and e-money tokens beyond upper limits on transactions and user numbers. As tersely remarked on by Lehmann, "[o]ne can only surmise how the market is going to react to such a measure. Perhaps it will start enthusiastically about the stablecoin, but then quickly lose interest because of the danger of it becoming "too successful".[84]

The enforcement attributes of MiCAR will be profoundly tested by the absence of clarity on the status of 'financial instruments' and by the failure to bring DeFi satisfactorily within the reach of the legislation. The legislation itself states that MiCAR does not apply to crypto-assets that qualify as financial instruments[85] and which are capable of being traded on securities markets in accordance with Article 4(1)

[78] MiCAR, Article 88.
[79] MiCAR, Article 89.
[80] MiCAR, Article 91.
[81] As most famously encapsulated in the Bitcoin white paper (Bitcoin, *A Peer-to-Peer Electronic Cash System*) of 'Satoshi Nakamoto' (widely reckoned to be a pseudonym), released in 2008; available at: https://bitcoin.org/en/bitcoin-paper (last accessed: 31.12.2024).
[82] On the need to stimulate greater collaboration and coordination between regional blocs, see Y. Yadav, Fintech and International Financial Regulation, (2020) 53 (3) *Vanderbilt Journal of Transnational Law,* 1109.
[83] Lehmann, MiCAR – Gold Standard or Regulatory Poison for the Crypto Industry?, 699.
[84] Lehmann, MiCAR – Gold Standard or Regulatory Poison for the Crypto Industry?, 699, 719.
[85] MiCAR, Article 2(4)(a).

of the second Markets in Financial Instruments Directive (MiFID II).[86] At the time of writing, as per its mandated role in MiCAR,[87] ESMA has released a final report on its guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments.[88] Irrespective of the timing of the issued guidelines being in such close proximity to the date on which MiCAR is due to fully come into force (30 December 2024), it is likely that the courts will retain crucial clout in deciphering whether a crypto-asset can be regarded as a tradeable financial instrument.

As DeFi is, in effect, excluded from the span of MiCA's enforcement powers, there could be legitimate concerns as to how EU regulatory frameworks can address and respond to the risks, vulnerabilities, speculative practices, and fraudulent conduct which are being manifested in DeFi markets. Events over the past two years attest to the innate volatility and interconnectedness of DeFi markets and the broader crypto-asset industry. The much-publicised downfall of the FTX platform and the problems experienced in DeFi platforms were factors in a 'Crypto Winter' from 2022 to 2023, which only further raised calls for more resolute regulatory action.[89] Even though the Commission's MiCAR proposal predated the turmoil of the Crypto Winter, it is difficult to analyse the introduction of MiCAR in isolation from the severe fluctuations and turbulence of DeFi and crypto markets from late 2022 onwards. The fault lines which the Crypto Winter has unveiled are underscoring the benefits of improved cross-border collaboration, including proposals for fresh international standard-setting agencies for digital finance.[90]

If there are paths worth exploring in future amendments to MiCAR, a possibility is to make provision for systems of 'embedded supervision' in DLT- and blockchain-based platforms.[91] As a concept postulated by Raphael Auer, information could be directly at the disposal of regulators that are essentially integrated as network participants in decentralised applications. As prescriptive legislative obligations on

[86] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast); OJ L 173/349.

[87] MiCAR, Article 2(5).

[88] ESMA, *Final Report: Guidelines on the Conditions and Criteria for the Qualification of Crypto-Assets as Financial Instruments* (December 2024) (ESMA75453128700-1323), https://www.esma.europa.eu/document/final-report-guidelines-conditions-and-criteria-qualification-crypto-assets-financial (last accessed: 31.12.2024.).

[89] See particularly D. Arner, D. Zetzsche, R. Buckley and J. Kirkwood, The Financialisation of Crypto: Designing an International Regulatory Consensus, (2024) 53 (105970) *Computer Law & Security Review,* DOI: https://doi.org/10.1016/j.clsr.2024.105970

[90] See the case made for the merits of new global agencies (such as a Digital Stability Board) in Arner, Buckley, Charamba, Sergeev and Zetzsche, Governing FinTech 4.0, 1.

[91] R. Auer, Embedded Supervision: How to Build Regulation into Blockchain Finance, (2019) (811) *Bank for International Settlements Working Paper,* https://www.bis.org/publ/work811.pdf (last accessed: 31.12.2024.).

transparency and disclosure may not always be straightforward to practically enforce, a real-time flow of information through an embedded network would be tantamount to an expedient means for regulators of viewing crypto market activities as they happen.[92] However, it would take time for such an idea to come to fruition. Even if embedded supervision is technically viable, regulators could be criticised for expecting service providers to shoulder the burden of implementing the necessary changes to existing systems.

It could be asserted that a more opportune direction for legislative reforms would be towards the monitoring of social media-generated hype around various crypto-asset offerings.[93] The supply of 'non-formalised' information – and, often, misinformation and disinformation – about crypto-assets can proliferate among 'FinFluencers' on social media. In the minds of prospective users of crypto-asset services, this information can quickly take precedence over any of the details contained in the white papers of crypto-asset issuers. On the other hand, it should be accepted that there are well-documented quandaries in attempting to supervise the dissemination of content on social media platforms. Moreover, as with other enforcement challenges of MiCAR, the potency of the legislation in its current incarnation could be stymied by the pace of developments in crypto-asset markets and the appearance of new kinds of crypto-assets.

2. DORA

Within Chapter III of DORA (Articles 17 to 23), financial entities are required to "define, establish implement" ICT-related incident management processes to "detect, manage and notify" ICT-related incidents.[94] An 'incident' is defined as a "single event or a series of linked events unplanned by the financial entity that compromises the security of the network and information systems, and have an adverse impact on the availability, authenticity, integrity or confidentiality of data, or on the services provided by the financial entity".[95] The processes must have early warning indicators in place,

[92] Regulatory authorities are already becoming accustomed to use of RegTech and SupTech applications in assisting with supervisory functions, as discussed in P. Batista and W. Ringe, Dynamism in Financial Market Regulation: Harnessing Regulatory and Supervisory Technologies, (2021) 4 (2) *Stanford Journal of Blockchain Law & Policy,* 1 and J. McCarthy, The Regulation of RegTech and SupTech in Finance: Ensuring Consistency in Principle and in Practice, (2023) 31 (2) *Journal of Financial Regulation and Compliance,* 186.

[93] A recommendation enunciated in D. Zetzsche, R. Buckley, D. Arner and M. van Ek, *Remaining Regulatory Challenges in Digital Finance and Crypto-Assets After MiCA,* Study for the Committee on Economic and Monetary Affairs (ECON), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament (2023).

[94] DORA, Article 17(1).

[95] DORA, Article 3(8).

have procedures to identify, track, log, categorise, and classify incidents, have roles and responsibilities assigned within the entities, and have plans set out for communications to staff, external stakeholders and media.[96]

Incidents should be classified and their impact determined by reference to criteria, such as: the number and/or relevance of clients or counterparts affected, and, where applicable, the amount or number of transactions affected, and whether the incident has caused reputational damage; the duration of the incident; the geographical spread; data losses (in relation to availability, authenticity, integrity or confidentiality); the criticality of the services affected; and the economic impact.[97] Further guidance has been provided by the ESAs' final report on draft technical standards, submitted to the European Commission in January 2024.[98] However, it should be gleaned from the provisions that the focal decision-making as to what constitutes a notifiable incident will be a matter for the entity itself and its incident management process.

Voluntary notifications of incidents are permitted,[99] but all "major ICT-related incidents" must be reported to the relevant competent authority.[100] A 'major' incident is defined as one which "has a high adverse impact on the network and information systems that support critical or important functions of the financial entity".[101] Financial entities must inform clients "without undue delay" where a major incident occurs and when it impacts clients' financial interests.[102]

DORA sets a course for an assessment of how to centralise major incident reporting, specifically through a single EU hub.[103] A joint ESAs report is to "explore ways to facilitate the flow of ICT-related incident reporting, reduce associated costs and underpin thematic analyses with a view to enhancing supervisory convergence".[104] The provision is envisaging a necessary step towards the coordination of incident reporting. The obvious impediment to a smoothly designed central locus of incident reports is that a hub could become overloaded with submitted notifications from entities. Reporting overload could be especially prompted if the meaning of a major incident – as a subjective evaluation by an entity under its own risk management processes – is clouded in ambiguities. Furthermore, while the detection and reporting of incidents may show DORA's appreciation of the necessity for emergency responses, DORA is not advancing

[96] DORA, Article 17(3).
[97] DORA, Article 18(1).
[98] ESAs, *Final Report on Draft Regulatory Technical Standards specifying the criteria for the classification of ICT related incidents, materiality thresholds for major incidents and significant cyber threats under Regulation (EU) 2022/2554* (January 2024) (JC 2023 83).
[99] DORA, Article 19(2).
[100] DORA, Article 19(1).
[101] DORA, Article 3(10).
[102] DORA, Article 19(3).
[103] DORA, Article 21.
[104] DORA, Article 21(1).

solutions to tackle the potentially systemic repercussions of a major cyber incident and crisis affecting a gamut of financial entities across the EU.

By narrowly charting a route towards strengthening financial entities' standards of operational resilience, DORA may have overlooked the merits of joining its provisions with the work of current cross-sectoral collaborative networks, such as EU-CyCLONe. EU-CyCLONe is a cooperation arrangement between the national authorities of EU Member States for the management of cyber crises. Since its informal creation in 2020, EU-CyCLONe is now a fully-fledged liaison network, legally recognised through the second Network and Information Security (NIS) Directive.[105] A foremost aspect of EU-CyCLONe's activities is engagement in preparing cross-border incident reporting mechanisms and crisis response planning. In a financial context, as a complementary layer of coordination of incident reporting to DORA, the ESRB has recommended the establishment of a pan-European systemic cyber incident coordination framework (EU-SCICF). EU-SCICF is proposed to enable designated points of contact for the ESAs, the European Central Bank (ECB) and the competent authorities within each EU Member State.[106]

Within Chapter IV of DORA (Articles 24 to 27), financial entities are expected to "establish, maintain, and review a sound and comprehensive" testing programme for "the purpose of assessing preparedness for handling ICT-related incidents, of identifying weaknesses, deficiencies and gaps in digital operational resilience, and of promptly implementing corrective measures".[107] Certain types of tests are specified in the legislation, such as vulnerability assessments and scans, open source analyses, scenario-based testing, performance testing, and penetration testing.[108] By prescribing some tests as being more appropriate than others, it could be queried whether DORA is showing itself to be capable of adjusting to future refinements in testing techniques.[109]

With exceptions,[110] financial entities must carry out advanced threat-led penetration testing at least every three years, but competent national authorities may

[105] Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive); OJ L 333/80.

[106] Recommendation of the ESRB of 2 December 2021 on a pan-European systemic cyber incident coordination framework for relevant authorities (ESRB/2021/17). For a summary of the proposal, see also ESRB, *Advancing Macroprudential Tools for Cyber Resilience,* Box 3, 31.

[107] DORA, Article 24(1). Article 24(4) stipulates that testing should be undertaken by independent parties, "whether internal or external".

[108] DORA, Article 25(1).

[109] McCarthy, Cyber-Risks in Modern Finance, 233, 238.

[110] Microenterprises are excluded from this requirement, but Article 16 of DORA also provides for exclusions for small and non-interconnected investment firms, payment institutions and e-money institutions who are exempt through the second Payment Services Directive (Directive (EU) 2015/2366) and the second e-Money Directive (Directive 2009/110/EC), exempted institutions

request reductions or increases in this frequency of testing.[111] Threat-led penetration testing must "cover several or all critical or important functions of a financial entity" and be performed "on live production systems supporting such functions".[112] DORA's standards for threat-led penetration testing are to be devised in accordance with the TIBER-EU (Framework for Threat Intelligence-based Ethical Red Teaming) procedures for testing.[113] Team-centred simulation exercises, or 'war games', of conducting test threats and attacks on cyber defences are fundamental testing methods in modern cybersecurity practices. However, as with numerous measures in the digital finance legislation, the winds of change are beginning to be felt in cybersecurity. As contemplated in the final section, MiCAR and DORA will be judged for their ability to withstand and adapt to these changes.

V. Future-proofed? Or shaped by the next gust of innovations?

In light of the avowed aim of the Commission's 2020 Digital Finance Strategy to implement a "future-proof" legislative framework, this article's evaluation of the current state of EU digital finance regulation concludes by reflecting on some salient features which may be especially affected by future developments.

MiCAR marks a bold progression of the EU's treatment of crypto-assets. Regardless of whether the intervention can be viewed as being hasty or overdue, there are omissions to the scope of MiCAR. As recognised in the preceding sections, MiCAR could fall behind an impetus of market developments in DeFi, crypto lending and staking, and tokenisation. For commentators such as Lehmann, MiCAR is simply not future-proofed, and an updated 'MiCAR 2.0' should be reasonably anticipated.[114] Aside from the threat of MiCAR beginning to prematurely show its vintage and being out of touch with crypto-asset innovations, there could be ramifications for present-day crypto activities within EU Member States. If MiCAR can, in retrospect, be seen as an "overly zealous" interference in crypto-asset markets, the EU's standing within the global crypto landscape could be diminished.[115] Other jurisdictions may take a comparably more lenient view of crypto activities and take a more supportive line

through the Credit Institutions Directive (Directive 2013/36/EU), and small institutions which make provision for occupational retirement.

111 DORA, Article 26(1).

112 DORA, Article 26(2).

113 See ECB, *TIBER-EU Framework. How to Implement the European Framework for Threat Intelligence-based Ethical Red Teaming* (May 2018).

114 Lehmann, MiCAR – Gold Standard or Regulatory Poison for the Crypto Industry?, 699, 710.

115 Lehmann, MiCAR – Gold Standard or Regulatory Poison for the Crypto Industry?, 699, 700.

towards ventures such as stablecoin/asset-referenced token projects. The number of crypto-asset issuers who choose to establish within the EU could thereby be limited.

Tokenisation carries significant promise in transforming the efficiency of core components of financial services. There are 'legitimate' or antiquated functions of finance – as epitomised by the older antecedents of ledger recording – to which modern innovations can be applied. The rate of adoption of tokenised methods within 'traditional' areas of financial practice remains negligible. There are unresolved concerns over the practical feasibility of DLT tokenisation, including market demand, interoperability hurdles, suitability for multiple transactions, and questions as to the applicable legal and regulatory frameworks.[116] Tokenisation and DLT have become engulfed in connotations of crypto-assets, stablecoins, cryptocurrencies and DeFi. Yet, clearing and settlement processes could be radically accelerated and made more cost-effective by the 'atomic' qualities of DLT-based tokenised systems.[117] The evolution of tokenisation can also dovetail with the ongoing plans for the imminent launch of a digital euro, as an ECB digital currency, whereby tokenised platforms may be trialled for the digital euro.[118] A burgeoning of efficient EU financial services could be harmed if MiCAR has the unintended effect of stifling the growth and credibility of tokenisation. An EU-centric regulatory mentality could also be overtaken by a prevailing momentum towards relatively more conducive regulatory approaches towards tokenisation, as exemplified by the potential policies of the Trump presidency in the United States.[119]

The environmental consequences of the intensified digitalisation of financial services have already become a policy dilemma. The energy consumption of blockchain technologies, AI, and advanced data analytics poses a stark question as to how regulatory frameworks can seek to actively promote innovative technologies, while still claiming to be acting with environmentally beneficial and sustainable practices to the fore. Under MiCAR, the white papers of the issuers of crypto-asset tokens, asset-referenced tokens and e-money tokens must contain information "on the principal

[116] See further FSB, *The Financial Stability Implications of Tokenisation* (October 2024).

[117] Bank for International Settlements and Committee on Payments and Market Infrastructures, *Joint Report to G20: Tokenisation in the Context of Money and Other Assets: Concepts and Implications for Central Banks* (October 2024).

[118] See the ECB digital euro website at: https://www.ecb.europa.eu/euro/digital_euro/html/index.en.html (last accessed: 31.12.2024.); ECB, *Second Progress Report on the Preparation Phase of a Digital Euro* (2024); and European Commission, Proposal for a Regulation of the European Parliament and of the Council on the Establishment of the Digital Euro, COM(2023)369 final.

[119] See B. Munster, Trump's Courting of the Crypto Industry Could Spell Trouble for Europe, *Politico,* (24 July 2024), https://www.politico.eu/article/donald-trump-courting-technology-crypto-industry-alarm-europe/ (last accessed: 31.12.2024.). For academic commentary on the direct involvement of the Trump family in DeFi tokenisation, see D. Krause, The Risks of the Trump-Backed WLFI Governance Token, *Oxford Business Law Blog,* (17 December 2024), https://blogs.law.ox.ac.uk/oblb/blog-post/2024/12/risks-trump-backed-wlfi-governance-token (last accessed: 31.12.2024.).

adverse impacts on the climate and other environment-related adverse impacts of the consensus mechanism used".[120] The inclusion of this requirement was moderately welcomed as an indication of the legislation's cognisance of environmental factors, albeit opined to be a requirement which could have gone further.[121] As the energy costs of the blockchain/DLT and AI efflorescence continue to mushroom,[122] more restrictive and detailed rules on reporting and on limiting environmentally detrimental expenses should be considered for addition to MiCAR, sooner rather than later.

Like MiCAR, DORA went to great lengths to introduce a series of requirements, notably for financial entities' risk management, incident reporting and testing. As with MiCA, DORA has valiantly gone about creating a sophisticated apparatus of risk detection structures for EU financial services in the interests of operational resilience. The importance of this legislative endeavour should not be discounted. In all probability, similar standards will incrementally be brought to bear on other spheres of economic activity, beyond finance, by following the DORA example. However, the net effect of DORA's requirements is to place a sizeable burden on financial entities to comply with the legislation by implementing risk management processes, determining the internal organisational procedures for incident reporting, and conducting advanced testing.

When the onus is on financial entities to make the necessary overhaul for legislative compliance, it should be realised that suitably rigorous cybersecurity will hinge on the ability of financial entities to pay the costs and to hire qualified staff. As appraised by the ESRB, keeping pace with evolving cyber risks and threats will demand additional investment "to build cyber expertise and capability".[123] Increased resources and skilled personnel are inevitably centrifugal to strengthening cybersecurity and operational resilience. Only time will reveal what the side effects of the rise in compliance requirements will be for EU-based financial entities.

As financial entities cope with the practicalities of compliance and make budgetary adjustments, there are experimental possibilities for financial institutions that are already adopting a new generation of AI and machine learning systems. Generative AI has the capabilities to be used in operational resilience contexts. By processing vast volumes of data, generative AI and other AI models can be directed towards detecting risks and

[120] MiCAR, Article 6(1)(j), Article 19(1)(h), and Article 51(1)(g).

[121] M. Demertzis, Is MiCA the End of the Crypto Wild West? (Bruegel, 5 July 2022), https://www.bruegel.org/comment/mica-end-crypto-wild-west (last accessed: 31.12.2024.).

[122] For example, see E. Kolbert, The Obscene Energy Demands of AI, *The New Yorker,* (9 March 2024), https://www.newyorker.com/news/daily-comment/the-obscene-energy-demands-of-ai (last accessed: 31.12.2024.). For a more optimistic perspective on the future energy consumption costs, see T. Papandreou, Who Wins the Energy Race: AI Data Centers, EVs, or Bitcoin Mining? *Forbes,* (30 August 2024), https://www.forbes.com/sites/timothypapandreou/2024/08/30/who-wins-the-energy-race-ai-data-centers-evs-or-bitcoin-mining/ (last accessed: 31.12.2024.).

[123] ESRB, *Advancing Macroprudential Tools for Cyber Resilience,* 39.

vulnerabilities.[124] Progress will relentlessly be made towards AI systems acting more autonomously as 'agents', rather than 'tools' per se, particularly in facilitating incident reporting and testing.[125] Team testing could occur through AI agents, rather than having humans participating in simulations of cyber threats against ICT systems. Much-vaunted predictions of a 'superintelligence' future of AI advancements are not only captivating for the imagination of the general public.[126] The predictions about how AI could conceivably infiltrate a variety of aspects of financial services can be grounded in relatively logical estimates. Against a backdrop of spiralling investment into laboratory research of AI technologies – even when widespread adoption of AI is only nascent or gradual – the stakes are getting higher in terms of ever more advanced outcomes.

EU regulators will therefore have to be alert to the need for DORA – and MiCAR – to cross-refer and link to parallel legislative initiatives on AI. For example, this may entail specialised DORA provisions on the use of AI in threat-led testing, which explicitly refer to corresponding provisions in the AI Act. In future, the task may not be so much as to future-proof digital finance legislative frameworks as detached units, but instead to cohesively knit together a fabric of EU legislation to weather impending changes and innovations.

VI. Conclusion

This article has portrayed the creation of the EU's regulatory framework on digital finance by reference to its origins in the 'same activity, same risks, same rules' principle. By specifically focusing on MiCAR and DORA, the article argues that the principle is not as consistently formative to the legislation as the Commission initially proclaimed. MiCAR and DORA are oriented around risk categorisations, whether it be in the classification of types of crypto-asset tokens or in the definitions of ICT risks to be addressed within financial entities' management processes. The article identified how both examples of legislation opt to concentrate on requirements relating to certain risk categories, even though there are patent omissions to the scope of the legislative frameworks in view of contemporary developments in crypto-asset markets and

[124] J. Crisanto, C. Benson Leuterio, J. Prenio and J. Yong, Regulating AI in the Financial Sector: Recent Developments and Main Challenges, (2024) (63) *Bank for International Settlements – Financial Stability Institute Insight on Policy Implementation,* https://www.bis.org/fsi/publ/insights63.pdf (last accessed: 31.12.2024.).

[125] See I. Aldasoro, S. Doerr, L. Gambacorta, S. Notra, T. Oliviero and D. Whyte, Generative Artificial Intelligence and Cyber Security in Central Banking, (2024) (145) *Bank for International Settlements,* https://www.bis.org/publ/bppdf/bispap145.pdf (last accessed: 31.12.2024.).

[126] See L. Aschenbrenner, *Situational Awareness. The Decade Ahead,* (June 2024), https://situational-awareness.ai/ (last accessed: 31.12.2024.).

cybersecurity. Put simply, the 'same activity, same risks, same rules' adage is not readily evident from the finished products of MiCAR and DORA.

The article considered the undoubted enforcement challenges faced by MiCAR and DORA. Crypto-asset markets and cyber risks are almost defined by their very elusiveness and tendency to be averse to, or immune from, existing regulatory regimes. Although the requirements of MiCAR and DORA were synopsised, the article pointed towards the limitations and deficiencies of the legislative measures in vociferously enforcing their provisions against modern patterns in crypto-asset usage and in cybersecurity threats. The article progressed to briefly reflecting on how well the legislation is 'future-proofed' against ongoing changes in technologies. The candid conclusion must be that MiCAR and DORA will have to be versatile in being reconfigured towards continuing and emerging issues and innovations. To symmetrically repeat a statement in the article's introduction, the article does not eagerly spring to an undue criticism of the legislative initiatives, but rather, has openly admitted the flaws and the room for augmenting the present requirements of MiCAR and DORA.

This article's title may give the impression that the EU has made clear-cut and dichotomous choices in regulating for digital finance, but the regulatory picture is more nuanced than that. It would be altogether too harsh to intimate that 'wrong' approaches were taken. The legislative intervention has shown how ambitious and intrepid the EU is in responding to regulatory problems in digital finance. There are omissions. There are also paths which can still be taken – and which, as contended in this article, must be taken in future. Wide-ranging, laden with intricacies, and with gruelling phases of implementation and technical standards, the legislative road which has been taken thus far can only be good enough for now.

Švrčková, Nikola*

Damages in public procurement within the framework of European Union law

Abstract

This study examines the role of damages in public procurement under European Union (EU) law, with a focus on the *lost chance* doctrine as a remedy for hypothetical losses suffered by aggrieved bidders. Analysing approaches applied in countries like France and Germany, the paper addresses challenges in proving causation and the likelihood of success, as well as key barriers to successful damage claims. This study emphasises the Court of Justice of the European Union's (CJEU) focus on equivalence and effectiveness principles, as seen in the *INGSTEEL* (C-547/22) case. While the *lost chance* doctrine may enhance fairness in procurement, it also risks overcompensation and inconsistency across Member States, signaling a need for greater harmonisation of EU compensatory remedies.

Keywords: Damages; public procurement; European Union law; loss of profit; loss of chance; legal remedies; Equivalence and effectiveness; Court of Justice of the European Union

I. Introduction

Public procurement is governed under European Union law by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, which repeals Directive 2004/18/EC (Public Procurement Directive or Directive 2014/24/EU).[1] Public buyers must conduct procurement processes transparently, for example by publishing notices, providing information to bidders, and ensuring openness throughout the process. Additionally, efficiency and effectiveness are emphasised to achieve the best value for money. The Public

* Švrčková, Nikola, currently serves as a judicial assistant at the Supreme Court of the Slovak Republic. Previously held a position at the Slovak Office for Public Procurement with a focus on administrative law and public sector regulation.

[1] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC. Official Journal of the European Union, L94, 28/03/2014, 65–242.

DOI: 10.56749/annales.elteajk.2024.lxiii.5.81

Procurement Directive also mandates remedies and review processes, granting suppliers the right to challenge procurement decisions. This includes a standstill period, which allows unsuccessful bidders to challenge the decision after the contract award, and review by national authorities or courts if suppliers believe the process was unfair.[2]

The EU's public procurement law relies heavily on two foundational principles: equivalence and effectiveness. The principle of equivalence requires that EU-based claims are treated no less favorably than comparable national claims. This ensures equal standing for EU rights within national judicial frameworks. Meanwhile, the effectiveness principle mandates that EU rights must be practically enforceable, meaning national procedures must not make it excessively difficult or virtually impossible to exercise these rights. These principles guide Member States' implementation of EU directives, especially in public procurement, and ensure that EU law remains accessible and actionable across jurisdictions.[3]

The EU Public Procurement Directives do not mandate awarding damages for violations of directly effective provisions. Some cases lack compensation because national courts have found either no direct obligation between the authority and plaintiff or deemed the plaintiff's loss a foreseeable economic risk. In other situations, awarding damages is seen as a constraint on authorities' ability to legislate or make administrative decisions in good faith to protect public interests.

Under the Remedies Directive (Directive 89/665/EEC for the public sector and Directive 92/13/EEC for utilities), complainants seeking damages must show that the contracting entity violated procurement rules, directly causing them loss or damage. However, many Member States do not require proof of a violation if a prior administrative ruling has already annulled the award decision. If there is evidence of a procedural breach, damages for bid preparation costs are usually awarded. However, for lost profits, complainants must demonstrate that they would have secured the contract without the violation.

Individuals harmed by EU procurement law violations are entitled to full restitution, including compensation for actual loss, lost profits, and interest from the time of harm until payment. Member States must enable effective compensation claims, with the option to require the challenged decision to be invalidated first. As per Article 2(1)(c) of the Remedies Directive, review procedures must allow for damages. Article 2c also clarifies that compensation is corrective, not punitive, and does not substitute for other penalties.[4]

---

[2] Ibid.

[3] European Commission, Report on the Effectiveness of the Remedies Directives (2007/66/EC).

[4] C. Bovis, Damages in Public Procurement: Triple Damages Claims Available for Breaches of Public Procurement Law, (2024) 19 (2) *European Procurement and Public-Private Partnership Law Review,* 104–109., https://epppl.lexxion.eu/current_issue/EPPPL (last accessed: 31.12.2024.).

For the needs of this article, we will focus more closely on compensatory damages, which are monetary awards given to an injured party in a lawsuit to compensate for actual losses, damages, or injuries caused by another party's negligence or unlawful conduct. These can also be divided in other ways, as stated above in relation to actual damages and general compensatory damages. Actual damages are intended to replace what was lost and cover economic losses such as medical bills, rehabilitation expenses, lost wages, property repair costs, or transportation expenses. On the other hand, there are general compensatory damages, which are more complex and do not represent a specific monetary expenditure but include non-economic losses. For example, mental anguish, disfigurement, future medical expenses, long-term physical pain and suffering, loss of enjoyment of life, and loss of opportunity.[5]

Legal causation is mostly based on the fact that harm must result from a culpable act; the defendant's action need not be the sole cause, but must be more than minimal, there cannot be a new intervening act breaking the chain of causation and the defendant must take the victim as they find them. Finally, courts assess compensatory damages proportionately according to the chances rather than using an all-or-nothing balance of probabilities approach. If the chance is low, a small proportion of the value of the chance is awarded; if the chance has a high probability of success, a larger percentage is awarded.[6]

II. Enforcement and remedies in EU public procurement

The enforcement of European Union law in public procurement involves both private and public mechanisms. Private enforcement is pursued by individuals at the Member State level through damages claims and other remedies. Under Articles 258 and 260 of the Treaty on the Functioning of the European Union (TFEU), the Commission can bring infringement actions for violations of procurement rules. The Remedies Directives provide an expedited infringement mechanism as a complement to these Treaty articles. Public enforcement offers advantages, such as low financial risk and anonymity for complainants. However, the high number of complaints and limited resources significantly restrict the number of complaints that can be actively pursued.

The Remedies Directives set rules for quick and effective national reviews in procurement. Directive 2007/66/EC amended these directives, enhancing transparency and fair competition in EU procurement processes. These directives, among others,

[5] A. Burrows and E. Peel (eds), *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th ed., Oxford University Press, 2011).

[6] As for example in *Barker v Corus (UK) Plc.,* where damages were awarded proportionately to the "material increase in risk" of a disease, which equates to a loss of a chance.

establish a ten-day grace period between the award of the contract and the signature of the public contract. The guidelines also require that all applicants be informed of the outcome of the selection process. Also, there are granted further measures relating to remedial measures or the prevention of further damages, annulment of unlawful decisions, award of damages, as well as a period for preliminary remedies, sanctions for "ineffectiveness" and the possibility of introducing alternative sanctions by way of assistance or limitation of the duration of the contract are granted. On the other hand, there are directives and legal traditions associated with the region of the European Union and their procedural autonomy.[7]

The Commission, in its report on the effectiveness of remedies directives, came to the conclusion that:

> "Based on the evaluation, the Commission concludes that the Remedies Directives, in particular the amendments introduced by Directive 2007/66/EC, largely meet their objectives in an effective and efficient way although it has not been possible to quantify the concrete extent of their cost/benefits. Even if specific concerns are reported in some Member States, they usually stem from national measures and not from the Remedies Directives themselves. In general, qualitative terms, the benefits of the Remedies Directives outweigh their costs. They remain relevant and continue to bring EU added value.
>
> Despite the overall positive conclusion of the evaluation, certain shortcomings were identified.
>
> First, the Commission acknowledges that certain provisions of the Remedies Directives are not entirely clear. In particular, despite the update introduced by the new legislative package on public procurement, some additional needs for clarification have been identified. For instance, references to 'contract notice' in the Remedies Directives do not reflect the fact that new Directive 2014/24/EU permits the use of a prior information notice, instead of a contract notice, to call for competition in certain circumstances. It could also be clarified how the Remedies Directives apply to modifications of public procurement contracts and concessions, to the termination of such contracts, and to the light procurement regime.
>
> Furthermore, the Commission concludes that in most Member States, information on national remedies systems has not been collected in a structured manner and has been rarely used for policy making purposes. This makes the assessment of the performance of the Directives more difficult.
>
> Finally, the Commission has concluded that, in general terms, first instance administrative review bodies are more effective than first instance judicial instances in terms of the duration of procedures and standards of review."[8]

[7] European Commission. (n.d.). *Remedies Directives*. Single Market Economy, https://single-market-economy.ec.europa.eu/single-market/public-procurement/legal-rules-and-implementation/remedies-directives_en (last accessed: 31.12.2024.).

[8] Report from the Commission to the European Parliament and the Council on the Effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, as Modified by Directive 2007/66/EC, Concerning Review Procedures in the Area of Public Procurement, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017DC0028 (last accessed: 31.12.2024.).

A frequent argument for the opinion against legislative intervention in relation to damages is that aggrieved tenderers do not want to claim damages.[9] This argument is based on the belief that tenderers do not want to litigate against a counterparty of their business.

At first glance, this may seem like a relevant argument, but the low number of actions that have been brought suggests another explanation. Damages claims are not perceived as viable, and the reluctance of aggrieved bidders to pursue them stems from doctrinal problems rather than the reasons mentioned above.

The few damage claims might result from the difficulty of bringing such claims, rather than indicating their superfluous nature. Another issue is that damage claims have stagnated without development.[10] The question remains whether public procurement damages claims face inherent legal structural obstacles that, if left unaddressed, will always make such claims difficult. Additionally, specific doctrinal legal criteria often render successful damages claims impossible or limit the claimable damages to an extent that does not outweigh the risks of litigation.

[9] European Commission. (n.d.). European Commission Conference on 'Remedies in Public Procurement', https://single-market-economy.ec.europa.eu/single-market/public-procurement/legal-rules-and-implementation/remedies-directives_en (last accessed: 31.12.2024.).

[10] See in Commission Staff Working Document, Annex to the Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC CEE with regard to improving the effectiveness of review procedures concerning the award of public contracts, Impact Assessment Report – Remedies in the field of public procurement, SEC(2006)557 (4 May 2006), 12.

"4.3. Inherent Limits of Damages Action

An aggrieved supplier faced with a signed public contract, is often deterred from bringing a damages action for the following reasons:

– actions in damages have no real corrective effect. Even if the public contract already signed is held to have been awarded illegally, in the great majority of cases it remains in force when it has already been signed. Hence, even if the damages action is successful and some (limited) financial compensation is granted, the economic operator will ultimately not win the public contract and may also feel that he has compromised his future business with the Awarding Authority. This also limits the deterrent effect.

– damages actions are hampered by practical difficulties. Actions are rarely successful as a result of the practical difficulty of needing to prove that the economic operator was genuinely a tenderer who had a serious chance of winning the contract. If this is not proved, no compensation for lost business opportunities is awarded to the complainant and often, in practise, any financial award is limited to the reimbursement of costs incurred in bidding for the contract and may not even cover the legal costs of bringing the action. Such actions are even more difficult to bring for a potential tenderer who has not been able to participate in a public procurement procedure as a result of the lack of transparency.

– the process is lengthy and costly. In all Member States, damages is an action on the merits before ordinary Courts (and not by way of interlocutory procedures as in the case of interim measures) which may therefore last for years. Furthermore, given the requirements of proof, the process can be somewhat protracted, and may incur high litigation costs for both parties (economic operators and Awarding Authority)."

III. The CJEU's perspective on damages under the general EU law

In light of the heightened requirements for damages in public procurement legislation, the CJEU plays a pivotal role in defining EU standards for damages claims. This study will briefly explore the general principles of EU law developed by the CJEU that guide national courts in adjudicating damages.

Under the Remedies Directive, the CJEU and national courts collaborate in ensuring the effective enforcement of public procurement rights, with national courts able to request preliminary rulings from the CJEU to clarify the application of EU law in specific damages cases. This decentralised structure means that national courts act within a framework defined by EU principles, balancing procedural autonomy with the need for consistency across Member States.

In the EU legal framework, national courts function as the primary enforcers of EU law, acting as "juge de droit commun" or ordinary judges of EU law, while maintaining national procedural autonomy.[11] This principle, developed in foundational cases like *Flaminio Costa v. E.N.E.L.,* affirms that EU law must be uniformly applied across Member States, overriding any national laws that conflict with it. The standstill period in public procurement, during which contracting authorities must pause before finalising a contract, serves as a critical mechanism to allow effective remedies and ensure that EU procurement rules are respected.[12] The *Rewe/Comet* case later clarified that, in the absence of specific EU procedural guidelines, each Member State may set its own procedural rules, provided they uphold two key principles: equivalence and effectiveness. Equivalence ensures that EU-based claims are treated no less favorably than similar national claims, while effectiveness requires that these rules do not make it "practically impossible" or "excessively difficult" to exercise EU rights.[13] Recent CJEU case law and academic discussions emphasise that, while respecting procedural autonomy, national procedural rules must still not compromise the protection of EU rights. The *Ferrovial* case, for instance, underscored that procedural rules in Member States should facilitate rather than obstruct access to justice under EU law, reinforcing consistency across the EU. National courts are therefore expected to navigate this

[11] K. Lenaerts, The Rule of Law and the Coherence of the Judicial System of the European Union, (2007) 44 (6) *Common Market Law Review,* 1645.

[12] Case C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 00585, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61964CJ0006 (last accessed: 31.12.2024.).

[13] Case C-33/76 *Rewe-Zentralfi nanz AG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 01989, para 5, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61976CJ0033 (last accessed: 31.12.2024.).

balance, applying their rules without undermining the substantive protections guaranteed by EU law.[14]

Member States maintain procedural autonomy in establishing rules for procurement claims, as long as they align with the EU principles of equivalence (equal treatment for EU and national claims) and effectiveness (ensuring practical enforceability of EU rights). If it is about equivalence, domestic claims cannot receive preferential treatment over claims based on EU law. This principle involves navigating complexities related to discrimination-based tests, including finding appropriate comparators. Effectiveness as a principle has been subject to debate due to its vague requirements. It outlines EU expectations for national rules that are not explicitly defined in relation to the national context. For crystallising EU requirements related to damages, the effectiveness limb is particularly relevant. Overall, damages claims in national courts must align with the requirements of equivalence and effectiveness.

While the classifications of effectiveness and equivalence as "descriptive" and "analytical" accounts offer important insights, they can be synthesised to emphasise their operational implications. Historically, the principle of effectiveness ensures that national procedural rules do not make EU rights practically impossible or overly challenging to enforce. Equivalence requires that procedures for EU-based claims are treated no less favorably than similar national claims.[15]

The van Schijndel/Peterbroeck balancing approach remains central to the CJEU's interpretation of these principles. This test allows for a contextual analysis, assessing national procedural rules based on their function, context, and potential impact on the application of EU law. This approach has proven critical in cases where procedural autonomy intersects with EU requirements, permitting deviations from strict adherence when justified by legitimate national interests, such as legal certainty or the orderly administration of justice.[16]

Recent scholarship has emphasised that the principle of effectiveness has evolved to address practical barriers within national systems. This shift has clarified the evaluation of discrimination claims and access barriers, as the CJEU now considers whether national procedural rules indirectly hinder access to EU remedies. This refined perspective encourages national courts to ensure that procedural rules, even when autonomous, do not obstruct substantive EU rights.[17]

---

[14] Case C-719/20 *Ferrovial Agroman SA v Comune di Lerici,* EU:C:2022:372.

[15] H. Schebesta, *Damages in EU Public Procurement Law* (Studies in European Economic Law and Regulation, vol. 6.) (Springer International Publishing, 2016). 32–35.

[16] Joined Cases C-430/93 and C-431/93 *Van Schijndel / Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705, para 19; Case C-312/93 *Peterbroeck, Van Campenhout & Cie / Belgian State* [1995] ECR I-4599.

[17] T. Lock, The doctrine of effective judicial protection in CJEU case law. *Academy of European Law,* Applying the Charter Seminar, 21–22 June 2021., https://era-comm.eu/charter_of_fundamental_rights/kiosk/pdf/Lock_Effective_judicial_protection_EN.pdf (last accessed: 31.12.2024.).

The principle of effectiveness has dual functions in EU law. First, as a standard, it ensures that national procedural rules make EU rights reasonably accessible and not excessively difficult to enforce.[18] Second, it serves as a balancing exercise, where the CJEU weighs national procedural autonomy against the need for consistent application of EU law. The CJEU has revived the van Schijndel/Peterbroeck test, emphasising a balancing approach. As a result, the debate over whether 'procedural autonomy' constitutes a normative claim for national rules has intensified. The effectiveness/equivalence test now requires assessing the procedural autonomy of Member States in relation to the effectiveness of EU law.[19] A recent example that underscores this balancing of national procedural rules with EU law requirements is the Ferrovial case, which further affirmed that procedural rules at the national level must not hinder the enforceability of EU rights, even in complex public procurement disputes.

In Ferrovial, the CJEU reaffirmed that effective judicial protection remains a guiding principle when assessing procedural rules within Member States. This case emphasised that procedural autonomy is not absolute; instead, it is circumscribed by EU obligations to ensure that individuals have access to remedies when there are breaches of EU law. Specifically, Ferrovial highlighted the need for national courts to apply procedural norms in a way that does not impede the realisation of substantive EU rights, particularly in contexts where the claimant's access to damages is impacted.[20]

The principle of judicial protection finds dual grounding in the EU Charter of Fundamental Rights and the European Convention on Human Rights (ECHR).[21] The ECHR and the EU Charter of Fundamental Rights provide the foundation for effective judicial protection. Article 6(1) of the ECHR ensures a fair and timely hearing, while Article 13 guarantees effective remedy. Article 47 of the Charter[22] reaffirms the right to a fair trial and an effective remedy. Article 19 of the Treaty on European Union (TEU) delineates competences between the EU and national courts in enforcing EU law. Historically, the *Johnston* case underscored judicial protection as integral to

[18] R. Widdershoven and A. Prechal, Redefining the Relationship between "Rewe-effectiveness" and Effective Judicial Protection, (2011) 4 (2) *Review of European Administrative Law,* 31. DOI: https://doi.org/10.7590/REAL_2011_02_03

[19] Case C-246/09 *Bulicke* [2010] ECR I-7003.

[20] Case C-719/20 *Ferrovial Agroman SA v Comune di Lerici,* EU:C:2022:372.

[21] Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1663.

[22] Article 47 – Right to an effective remedy and to a fair trial: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

EU law, while *Kadi* established that EU measures must comply with fundamental rights, reinforcing judicial safeguards.[23]

More recent cases like *Kadi II*[24] and *LM*[25] have strengthened these protections, emphasising procedural fairness and judicial independence as critical to maintaining effective judicial protection across Member States. These cases underscore that EU law requires a balance between national autonomy and compliance with core EU principles to ensure uniform rights protection.

At first, the CJEU developed the Rewe/Comet formula, which later became known as the principle of procedural autonomy. This concept of procedural autonomy is often framed in a negative context, and it represents what remains within the boundaries of equivalence and effectiveness demands. Essentially, procedural autonomy emerges as a consequence of the absence of specific Community rules.[26] Procedural autonomy becomes a legally relevant concept only when the area delimited by 'equivalence' and 'effectiveness' can also make claims independently. This is also the reason why it is necessary to establish a positive description.

Indeed, the concept of procedural autonomy has evolved from being merely descriptive to becoming increasingly prescriptive. It now has the potential to protect national rules from the effectiveness requirements imposed by European law. Even if it is already possible to confirm the existence of this doctrine, its meaning is not yet so clear.[27] Namely, when applying procedural autonomy, the CJEU faces several uncertainties as to whether procedural autonomy is descriptive or normative and what it specifically prescribes.

Procedural autonomy, especially when considering the effectiveness aspect, significantly influences judicial reasoning in cases involving damages. The CJEU has consistently applied the procedural autonomy doctrine to damages claims. Notably, even in the realm of public procurement, legislative action regarding damages has been withheld due to respect for the procedural autonomy of Member States.[28]

[23] Joined cases C-104/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission,* EU:C:2008:461.

[24] Case C-584/10 P, C-593/10 P, and C-595/10 P *Commission, Council, United Kingdom v Yassin Abdullah Kadi,* EU:C:2013:518 (commonly referred to as *Kadi II*).

[25] Case C-216/18 PPU *Minister for Justice and Equality v LM,* EU:C:2018:586.

[26] S. Prechal, Community Law in National Courts: The Lessons from Van Schijndel, (1998) 35 (3) *Common Market Law Review,* 682 fn. 3.

[27] B. Krans and A. Nylund, Aspects of Procedural Autonomy, in B. Krans and A. Nylund (eds), *Procedural Autonomy Across Europe* (Intersentia, 2020) 1–12.

[28] Commission Staff Working Document, Annex to the Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC CEE with regard to improving the effectiveness of review procedures concerning the award of public contracts, Impact Assessment Report – Remedies in the field of public procurement, SEC(2006)557 (4 May 2006), 12 in Schebesta, *Damages in EU Public Procurement Law*. 42.

Due to procedural autonomy and the absence of requirements of EU law, it remains for us to replace the damages governed by the domestic legal system, but this does not mean that, due to the absence of regulation through secondary legislative instruments, there are no requirements of the European Union. For example, the effectiveness of EU law must always be ensured if there is a breach of EU law, and the CJEU created a remedy for violations of EU law by Member States (under the general principles of the Treaty). These damage claims are possible under Member State liability.[29]

The *Frankovich*[30] and *Brasserie du Pêcheur*[31] cases established the foundational principles for Member State liability under EU law. These rulings highlight three key criteria for establishing such liability: (1) a breach of EU law, (2) a sufficiently serious breach, and (3) a direct causal link between the breach and the damages incurred.

In light of recent developments, the Ferrovial case illustrates the CJEU's evolving stance on liability, emphasising that national laws limiting the recovery of damages must align with EU principles to ensure effective enforcement of rights. This scrutiny reinforces the necessity for Member States to maintain standards that uphold the fundamental objectives of EU law.[32]

The previous section of the study illustrated how general EU law is relevant to procurement. When adjudicating damages claims for EU law breaches, the CJEU faces doctrinal constraints within the evolving EU legal framework. Present EU law sets forth requirements for national damages claims. Procedural autonomy is a fundamental principle that allows Member States to regulate their judicial systems; however, it must operate within the bounds of effectiveness. This means that while national courts have the freedom to establish their own procedures, these must not hinder the enforcement of EU rights. Recent legal analyses indicate a shift in the CJEU's approach toward a more positive definition of procedural autonomy, recognising its limits. The Court is increasingly aware that when national procedures risk obstructing EU rights, such limitations cannot be justified. This evolving perspective underscores the necessity for Member States to balance their procedural autonomy with the overarching goal of ensuring effective judicial protection for individuals under EU law.[33]

[29] Case C-352/98 P *Bergaderm and Goupil/Commission* [2000] ECR I-5291.
[30] C-479/93 *Andrea Francovich v Italian Republic* [1995] ECR I-03843, para 35.
[31] Joined Cases C-46/93 and C-48/93 B*rasserie du Pêcheur v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte Factortame and others* [1996] ECR I-1029, para 31.
[32] Case C-719/20 *Ferrovial Agroman SA v Comune di Lerici,* EU:C:2022:372.
[33] Krans and Nylund, Aspects of Procedural Autonomy, 1–12.

IV. The National Perspectives

Within the scope of the availability of damages for the violation of EU law in the field of public procurement, two main legal systems were further analysed in relation to different legal families. Germany for the Germanic tradition, and France for the Roman tradition.

1. France

The legislative implementation measures for Directives 89/665, 92/502, and 2007/663 in France did not contain specific provisions for damages claims. This can be explained by the fact that damages claims for aggrieved tenderers have long been recognised under French administrative law.[34] French law distinguishes between administrative and civil law jurisdictions. This separation also applies to the law of damages and liability of private entities. Generally, administrative courts deal with all contracts under the Public Procurement Code and are competent at the place of contract execution.

French public procurement law falls under administrative law. It highlights the evolving position of aggrieved bidders over the past decade. Various legal avenues are available for aggrieved parties to challenge contracting authorities, including pre-contractual and contractual procedures, as well as proceedings challenging contract validity and abuse of power. Aggrieved bidders can pursue damages claims either independently or within a contract validity challenge procedure.

French case law has progressively expanded the standing and recourse options for aggrieved bidders in public procurement. Landmark cases like *Tropic Travaux* introduced the possibility for third parties to challenge public contracts, allowing them to seek damages for procurement violations. The Département de Tarn-et-Garonne decision further broadened this standing by permitting any third party with a direct interest in a public contract to challenge it, provided they demonstrate potential harm. Together, these cases established a framework for third-party recourse and clarified the conditions under which aggrieved bidders could pursue claims for both contractual and extra-contractual liability.[35]

[34] F. Lichere, Damages for Violation of the EC Public Procurement Rules in France, (2006) (4) *Public Procurement Law Review,* 171–178, citing the cases CE, 19 February 1930, *Société Est et Sud Piketty, lebon,* 196. for 'bid cost' and 'lost profit', and CE, 13 May 1970, *Sieur Monti c/ Commune de Ranspach, lebon,* 322.

[35] E. Langelier, L'évolution du contentieux des contrats administratifs : à quand l'acte IV ?, 47 (2014) *La Semaine juridique Administrations et Collectivités territoriales,* 31–37.

Legal claims against the government, departments, municipalities, and public institutions must be filed within a four-year timeframe. This period begins on the first day of January of the year subsequent to the claimant's awareness of the violation.

In French law, there is a well-established tradition of holding public bodies liable for illegal actions under the strict liability doctrine. This doctrine requires three elements: illegality as fault, harm, and a causal link between the two. Unlike EU law, there is no need to assess the seriousness of the breach; any illegal act automatically implies fault. However, there must be a direct and certain causal link between the fault and the harm suffered. This excludes potential or hypothetical factors from consideration. The principle of full compensation is strongly upheld.[36]

In cases of public procurement violations, there is essentially an 'objective liability' system, where any breach of procurement law automatically satisfies the requirement of fault. Recent court decisions have also linked causality to the concept of lost opportunity. However, there is ongoing debate about the extent of this new reasoning in establishing causality between specific violations and resulting losses.[37]

Regarding damages for aggrieved bidders in public procurement, French case law focuses less on fault, harm, and causal links, and more on the likelihood of a bidder winning the contract. The concept of 'the lost chance' plays a central role in determining recoverable losses and has been developed through judicial decisions.

In public procurement cases, courts use a two-step test to assess a tenderer's chances of winning a contract. The first step determines if the tenderer had any chance; if not, no compensation is granted. If yes, the second step evaluates the seriousness of the chance. A 2003 judgment clarified that a tenderer with no chance receives no compensation, while those with serious chances may receive reimbursement for bid costs and lost earnings.

French courts use a structured approach to evaluate an aggrieved bidder's chances of winning a public procurement contract. This evaluation involves a two-step test:

1. Determining if the Bidder Had Any Chance: The first step examines whether the bidder was "devoid of any chance" due to factors such as failing to meet qualification criteria or submitting an invalid bid. If the bidder had no chance, no compensation is granted.[38]

2. Evaluating the Seriousness of the Chance: If the bidder had some chance, courts then assess its seriousness. Courts consider factors including: *(i)* Bid Evaluation Criteria – the weighting of criteria like price, quality, and other contract-specific

[36] W. Müller-Stoy, *Schadensersatz für verlorene Chancen – Eine rechtsvergleichende Untersuchung* (Albert-Ludwigs-Universität zu Freiburg, 1973) 6, referring to Mazeaud-Tuno and Tourneau.
[37] CAA Bordeaux, 27 October 2011, *SARL Arts & Batiment,* 10BX00835.
[38] Lichere, Damages for Violation of the EC Public Procurement Rules in France, 172, citing a case 4 June 1976.

metrics; *(ii)* Competitor Comparisons – the quality and validity of competing bids; *(iii)* Bid Acceptability – whether the bid was realistically acceptable to the contracting authority based on price and feasibility.

A "serious chance" entitles the bidder to claim lost profits, while a "not serious" chance limits recovery to bid costs. For example, in *Golf de Cognac,*[39] a non-serious chance led to compensation only for bid costs. Conversely, a serious chance may lead to full recovery of lost profits, as seen in *Groupement entreprises solidaires ETPO Guadeloupe.*[40] This approach is further illustrated by the *Commune de la Rochelle* case, where courts relied on technical evaluations to assess bid quality.[41]

In various legal systems, damages claims typically aim for full compensation. While there are nuances regarding the comprehensiveness of compensation, this is considered a fundamental principle in liability and damages law.

A. The Lost Chance: Courts use the lost chance doctrine to determine the level of compensation based on the likelihood of the aggrieved bidder winning the contract. A serious chance enables claims for both lost profits and bid costs, while a non-serious chance restricts compensation to bid costs. This principle streamlines the compensation process, linking the probability of success with corresponding damages.[42]

B. Bid Costs and Lost Profit: When an aggrieved bidder is found to have had some chance of winning, they may claim bid costs. However, only those with a "serious chance" may also claim lost profits, a principle established in a 1980 case and consistently upheld since.[43] For example, in Groupement entreprises solidaires ETPO Guadeloupe, the court allowed lost profits when the original bidder was found to have a serious chance of securing the contract. Courts typically rule that bid costs are included in lost profits unless specified otherwise in the tender. A 2003 ruling by the *Conseil d'État* further clarified that bid preparation costs are generally the bidder's own responsibility, barring specific provisions from the contracting authority.[44]

In France, procurement damages cases involving valuation methods are numerous. Damages quantification typically involves estimating turnover and applying a profit rate. Lost profit is calculated based on net profits specific to the market, rather than overall gross profits.[45] A ruling by the Conseil d'Etat emphasised the importance of correctly calculating lost profits, overturning a lower court's decision to use gross margin instead of net profits.[46] Overheads are generally not compensated, but the

[39] CE 23 March 1994, *Golf de Cognac,* 1/4 SSR.
[40] Schebesta, *Damages in EU Public Procurement Law.* 145.
[41] CE, 8 February 2010, *Commune de la Rochelle.*
[42] CE, 27 January 2006, *Commune d'Amiens.*
[43] Commune de la Rochelle, above n 34.
[44] CE 4 June 2003, N° 249630, *Groupement entreprises solidaires ETPO Guadeloupe, Sté Biwater et Sté Aqua TP.*
[45] Lichere, Damages for Violation of the EC Public Procurement Rules in France, 177.
[46] CE, 11 février 2011, communauté de communes du pays d'Arlanc.

ability of an aggrieved bidder to secure subsequent contracts does not negate their claim for a lost contract. The level of damages is influenced by competition intensity. Profit rates are determined based on market characteristics, with recent cases accepting relatively generous percentages. Courts are increasingly moving towards the concrete quantification of damages rather than abstract assessment.[47] Once liability for lost profits is established, damages may cover both material and immaterial losses. For immaterial damages like damage to business reputation, market characteristics, such as competition level, are considered. In one case, the severity of competition limited the benefits expected from contract execution, reducing the claim for damages.[48]

2. Germany

A. The Cascaded System of Sources of Law: Germany's public procurement law, integrated with competition law in 1999, follows a layered, "cascaded" system. Key regulations include the Ordinance on the Award of Public Contracts (VgV) and the Procurement Regulations (VOB/A, VOL/A, VOF). This system has raised concerns regarding its alignment with constitutional principles and European Union law, yet significant reforms have not been implemented.[49] The inclusion of procurement provisions into the the German Act against Restraints of Competition (GWB) splits German public procurement into national and EU-governed realms, leading to differing levels of judicial protection.[50]

B. Implementation of Directive 2007/66: Directive 2007/66 prompted significant changes in German procurement law, especially after the CJEU's ruling against Germany's "budgetary solution", which blocked court enforcement for aggrieved tenderers. Legal protections were subsequently realigned under the Vergaberechtsmodernisierungsgesetz in 2009.

C. Jurisdiction and Remedies: Special procurement senates handle public procurement disputes overall, but claims for damages as a remedy after a contract are decided by regular civil courts in accordance with §13 of the Courts Constitution Act (GVG), as outlined in §104(3) of GWB. Remedies include primary (such as contract awards) and secondary (damages actions). Damages can be pursued under §126 GWB, §280 of the Civil Code (*Bürgerliches Gesetzbuch,* 'BGB'), and other bases, depending on the nature of the procurement breach.

[47] Lichere, Damages for Violation of the EC Public Procurement Rules in France, 177.
[48] CE, 28 March 1980, *Centre Hospitalier de Seclin.*
[49] M. Knauff, Das Kaskadensystem im Vergaberecht – ein Regelungsmodell mit Zukunft? (2010) *NZBau,* 661.
[50] C. Braun and C. Hauswaldt, Vergaberechtliche Wirkung der Grundfreiheiten und das Ende der Inländerdiskriminierung? Zugleich eine Anmerkung zum EuGH-Urteil Coname, (2006) 17 (6) *EuZW,* 176.

Damages Under GWB: This statute provides a basis for expectation damages for violations affecting a genuine chance of contract award. It covers bid preparation costs but limits recoverable losses to "negative interest" unless broader liability applies. To qualify, a claim must meet three elements: a protective provision breach, a "real chance" of contract award, and no need for fault, as per Federal Court of Justice (BGH) rulings. While GWB focuses on negative interest, other bases, like culpa in contrahendo, may allow positive interest claims, depending on pre-contractual relationships and implied duties.[51]

Culpa in Contrahendo: This doctrine, recognised under BGB, supports claims where a trust relationship or implied duty is breached, offering additional grounds for damages if the GWB criteria are not fully met. Though challenging to prove, it enables broader damages recovery in cases of pre-contractual trust breaches.

Tortuous Liability: Tort claims under BGB are possible but limited due to the Schutznorm doctrine, which requires statutory norms to protect specific rights. While claims are theoretically possible, especially if a bidder is unjustifiably excluded, such cases are rare.[52]

D. Other Liability Bases: Claims may also arise from German State Liability for breaches by state employees, individual employee liability, and competition law violations, such as discriminatory practices by contracting authorities under §20 GWB.[53]

E. Compensation Principles and Types of Recoverable Damages: Germany's liability law focuses on restoring parties to their pre-damage state (per §249 BGB). Under §126 GWB, recoverable costs include bid preparation and participation costs, not lost profits. However, reliance damages under culpa in contrahendo may cover additional costs if unjustified contract denial occurs. Positive interest claims are possible if a contract had been awarded under normal circumstances.

Damages claims typically follow a three-year prescription period from the date of damage awareness. Courts have discretion under §287 Code of Civil Procedure (ZPO) to estimate damages when amounts are uncertain, easing the claimant's burden of proof compared to §286 ZPO. Contributory negligence may reduce claims, particularly if the contracting authority argues procedural flaws, but bidders are generally not responsible for legality checks.[54]

[51] Schebesta, *Damages in EU Public Procurement Law*. 120–124.
[52] K. Stockmann, §126 GWB, in U. Immenga and E. J. Mestmäcker (eds), *Wettbewerbsrecht: GWB* (5th edition, München, C. H. Beck, 2014) mn 25.K.
[53] A. Drügemöller, *Vergaberecht und Rechtsschutz. Der inter- und supranationale Rahmen und seine Ausgestaltung in Deutschland* (Berlin, Springer, 1999) 308.
[54] LG Stade 6 civil Senate, 19.12.2003, 6 O 405/02.

V. The lost chance doctrine

The *lost chance* doctrine offers a potential solution for bidders in public procurement who face hypothetical losses due to procedural breaches. Typically, claimants struggle with two main obstacles – proving causation and demonstrating a realistic likelihood of winning the contract. Additionally, the range of recoverable damages is often limited by these uncertainties, as bidders must establish not only a breach but also its direct impact on their bid's success. The *lost chance* doctrine provides a framework that could address these challenges, either by adjusting causality requirements or allowing for proportional compensation, depending on the legal system's interpretation.[55]

The lost chance doctrine is often perceived as a dynamic legal concept, embodying various forms such as a head of damage, a burden of proof alleviation, or proportional liability. The divergence in understanding and application of the lost chance is evident from country studies, which reveal three main theoretical interpretations:

1. The lost chance as a relaxation of the burden of proof, wherein demonstrating the possibility, even a significant one, of a favorable outcome without the breach suffices. While this lowers the threshold for proving causation, the compensation value remains aligned with full compensation. For instance, if there is a serious chance of receiving €1,000, compensation would equal €1,000.

2. Proportional or relational liability views the lost chance as a portion of the potential total loss, determined by the probability of the advantageous event occurring. Compensation is calculated by multiplying the hypothetical situation's value without the breach by the likelihood of the event happening. For instance, a 10% chance of winning €1,000 would result in compensation of €100.

3. In a robust interpretation, the lost chance theory redefines the loss of opportunity itself as a compensable damage. Grounded in a subjective-relational theory of value, it considers patrimony as the positive relationship between an individual and valuable aspects of life. Damage to this relationship, even in potential scenarios like buying a lottery ticket, constitutes a loss. This autonomous type of loss, while challenging accepted principles of liability, is sometimes quantified using proportional liability, particularly in situations with uncertain probabilities.[56]

Overall, the lost chance doctrine challenges conventional notions of causality, compensation, and recognised types of losses. Legal systems vary in their acceptance and application of different loss of chance arguments.

In relation to the lost chance, there is a strong tendency to differentiate according to specific areas of law, such as medical law. Abstract arguments about the lost chance

[55] J. T. Oskierski, *Schadensersatz im Europäischen Recht: Eine vergleichende Untersuchung des Acquis Communautaire und der EMRK* (Nomos, Baden-Baden, 2010).

[56] H. Möller, *Summen- und Einzelschaden. Beiträge zur Erneuerung der Schadenslehr vom Wirtschaftsrecht aus* (Berlin, de Gruyter, 1937), 124.

theory are often influenced by its application in particular legal fields, which have recurring typologies and factual situations that shape the doctrine's implications. This is evident in public procurement, where each legal system has developed unique interpretations of the lost chance that deviate from the general doctrine.

The lost chance doctrine in public procurement law allows bidders to claim damages when they lose a significant opportunity due to procedural errors or violations, even if they cannot definitively prove they would have won the contract. This doctrine aims to address hypothetical damages by assessing the probability of success and awarding partial compensation based on this likelihood. In public procurement, this doctrine is particularly useful for aggrieved bidders facing challenges in proving direct causation between the violation and the loss of a contract. Application of the lost chance doctrine varies widely across EU Member States, as each country interprets it according to national legal frameworks.[57]

In various jurisdictions, the implementation of the lost chance doctrine in public procurement disputes varies significantly. France applies the lost chance doctrine quite extensively, including in public procurement. French courts often consider a "serious chance" of securing a contract as sufficient for awarding damages, aligning compensation proportionally to this chance, even if a contract ultimately is not awarded. This reflects France's broader acceptance of the doctrine as a legitimate head of damage in various legal areas, including public procurement.[58] On the other hand, in Germany, the lost chance doctrine is not formally recognised in public procurement, as the legal system emphasises strict causation requirements. Only once a contract has actually been awarded might a claimant be entitled to damages for lost profits. German law prioritises legislative provisions over the lost chance doctrine, which is limited to isolated cases with specific legislative backing.[59]

There are two approaches to the doctrine of loss of chance. The first is based on doctrinal principles of compensation, examining how the constitutive criteria of liability relate to each other and fitting the concept of chance within this framework. The second approach is a bottom-up, fact-based perspective that considers the nuanced versions of chances in different situations. This method allows for justice-based arguments, taking into account the recurring disadvantages faced by certain parties, who might otherwise be systematically excluded from successful damages claims through a rigid doctrinal application of the law.

[57] K. Lenaerts, The Rule of Law and the Coherence of the Judicial System of the European Union. (2007) 44 (6) *Common Market Law Review,* 1645. DOI: https://doi.org/10.54648/cola2007138

[58] Conseil d'État (France), Judgment of 18 December 2020 – Société Architecture Studio, No. 429768, published in Recueil Lebon, https://www.legifrance.gouv.fr/ceta/id/CETATEXT000042701983?init=true&page=1&query=429768&searchField=ALL&tab_selection=all (last accessed: 31.12.2024.).

[59] Federal Court of Justice (BGH), Judgment of 8 December 2020 – Case No. XIII ZR 19/19, https://datenbank.nwb.de/Dokument/849520/ (last accessed: 31.12.2024.).

In the EU, the predominant approach to damages is the all-or-nothing method,[60] granting full compensation only when causation is definitively established. This binary system can result in starkly different outcomes with minimal changes in certainty, often perceived as unfair. To address this, some legal systems incorporate proportionality, aligning compensation with the probability of causation. The lost chance doctrine attempts to navigate this uncertainty by recognising partial causation. However, this approach varies across legal systems, categorised under causality or as a head of damage. The lost chance doctrine arises from a desire to mitigate the injustices of the all-or-nothing approach, acknowledging the difficulties in proving causation and aiming to prevent unjust results. Despite resistance due to concerns about excessive claims and overcompensation, the doctrine serves as a compromise to balance fairness and practicality.[61]

The lost chance theory faces significant criticism on several fronts. Firstly, it undermines the fundamental principle of causality in liability by disconnecting the direct link between action and consequence.[62] Secondly, it breaches the principle of full compensation by either providing partial compensation when unwarranted or leading to overcompensation. Thirdly, it relies on statistical probabilities to predict outcomes, which opponents argue is inappropriate for determining liability. Critics maintain that liability should be based on the specific details of each case rather than generalised probabilities.

Comparative analyses of the lost chance doctrine often group cases involving competition, such as legal malpractice, career advancement, and medical malpractice. The acceptance and practicality of this doctrine are heavily influenced by the specific legal context and factual scenarios.[63] Key factors include whether the claim is contractual or delictual, the material versus procedural conditions, and judicial discretion in damage evaluation. The doctrine typically excludes minimal or speculative chances and is often used only when no other damage claims are possible. Critics like Savatier accept the doctrine in specific contexts, such as competitions or legal processes, but reject it in situations like medical accidents where probabilities are less appropriate.[64] Public procurement shares similarities with competitions, offering structured indicators that make outcomes more predictable and thus suitable for applying the lost chance theory.[65]

[60] Oskierski, *Schadensersatz im Europäischen Recht*.
[61] A. Bénabent, *La Chance et le Droit* (Libraire Générale de Droit et de Jurisprudence, 1973) 191, fn. 4, as cited in Müller-Stoy, *Schadensersatz für verlorene Chancen,* fn. 96.
[62] R. Savatier, Une faute peut-elle engendrer la responsabilité d'un dommage sans l'avoir causé? (1970) *Dalloz,* 123.
[63] Müller-Stoy, *Schadensersatz für verlorene Chancen*.
[64] Savatier, Une faute peut-elle engendrer la responsabilité d'un dommage sans l'avoir causé?
[65] H. Reece, Losses of Chances in the Law, (1996) 59 (2) *The Modern Law Review,* 188–209, https://www.jstor.org/stable/1097413 (last accessed: 31.12.2024.).

There are three main interpretations of the 'loss of chance' doctrine – *(i)* as an autonomous type of damage, *(ii)* a means to alleviate causality, and *(iii)* a form of proportional liability. This conceptual distinction is particularly significant at the EU level, where the term lacks a precise definition and varies across national legal systems, leading to potential misalignments in EU law implementation.[66] Within individual legal systems, there is also internal inconsistency regarding the best application of the doctrine, which is further complicated when compared across countries. While some jurisdictions, like France, broadly accept the doctrine in public procurement claims, others, like Germany, have specific legislative frameworks, and the doctrine is largely overlooked. Thus, there is no unified tradition of the lost chance doctrine in public procurement across EU Member States.

Reich outlines several key arguments for making procurement damages more accessible: compensating bidders for unjust losses, restoring confidence in procurement processes, and creating a deterrent effect.[67] He advocates for a proportional approach to the lost chance doctrine, as seen in the English Harmon case, and suggests reversing the burden of proof. This would mean that if a material breach is proven, the court would estimate the bidder's chance of winning the contract and award damages accordingly. Reich proposes that the aggrieved bidder should be presumed to have had a 100% chance of winning, with the contracting authority having the opportunity to provide contrary evidence. While this method is straightforward and efficient, it faces criticism for potentially violating principles of full compensation and causality and may lead to excessive litigation.[68]

The *lost chance doctrine* is significant in public procurement, particularly where bidders face procedural breaches leading to hypothetical losses. In CJEU Case *C-547/22,* the Slovak Supreme Court addressed whether EU law mandates compensation for lost opportunity in public procurement disputes. The case involved a Slovak bidder, INGSTEEL, who was unlawfully excluded from a procurement contract, seeking damages based on lost opportunity – a concept not recognised in Slovak law for public procurement cases. This led the Slovak court to request a preliminary ruling from the CJEU on whether Directive 89/665/EEC requires Member States to compensate for loss of chance in such situations.[69]

[66] G. Ajani, L. Lesmo, G. Boella, A. Mazzei and P. Rossi, Terminological and Ontological Analysis of European Directives: Multilingualism in Law, (2007) *International Conference on Artificial Intelligence and Law Journal,* 43. DOI: https://doi.org/10.1145/1276318.1276327

[67] A. Reich and O. Shabat, The Remedy of Damages in Public Procurement in Israel and the EU: A Proposal for Reform, SSRN eLibrary (2013) at http://ssrn.com/abstract=2244909 (last accessed: 31.12.2024.), 28–29.

[68] L. W. Gormley (ed.), *Gordian Knots in European Public Procurement Law: Government Procurement Agreement: Standards, Utilities, Remedies* (Bundesanzeiger, Koln, 1997), 5.

[69] Case C-547/22 *INGSTEEL,* https://curia.europa.eu/juris/error.jsf;jsessionid=85BC5011D56A35919CBC6A6FFF1D0A06?cid=5244576 (last accessed: 31.12.2024.).

As part of the intervention, the European Commission, the Czech Republic, Austria, and France participated in the proceedings.

The European Commission argued that Article 2(1)(c) of Directive 89/665/EEC obliges Member States to ensure that remedies are effective, accessible, and equitable. The Commission emphasised that while Member States retain procedural autonomy in defining specifics, these remedies must align with equivalence (equal treatment with similar domestic claims) and effectiveness (non-restrictive access to EU rights). According to the Commission, denying compensation for lost opportunity where a material breach has occurred would conflict with the directive's goal to protect bidders' rights and ensure competitive public procurement processes.[70]

Czech Republic and Austria argued that Directive 89/665/EEC establishes minimum requirements for review procedures but does not compel Member States to recognise lost opportunity claims in public procurement damages. They both have similar legal frameworks for compensation for damages as Slovakia; their legal systems do not recognize the "lost chance doctrine" in the context of damages caused in public procurement. The Slovak legal system recognises the "lost chance doctrine" only in the context of compensation for damages in medical disputes, because in medicine, it is often difficult to precisely prove that a specific error by a doctor directly caused harm to the patient.

France, where the lost chance doctrine is more common compared to other EU countries, asserts that in the absence of explicit EU provisions, it is up to Member States' legal systems to define criteria for identifying and assessing damages from breaches of EU public procurement laws, adhering to the principles of equivalence and effectiveness. These principles ensure that remedies for breaches are not less favorable than those for similar domestic claims and do not render the exercise of EU rights practically impossible or excessively difficult. Article 2(1)(c) of Directive 89/665 requires Member States to ensure effective remedies, including compensation for damages caused by breaches of procurement law. However, it does not explicitly define "damages" regarding loss of opportunity or lost profits. The French government interprets that assessing such damages, including lost profits, falls within the national legal systems' purview, provided they adhere to equivalence and effectiveness principles. Compensation for lost profits due to loss of opportunity involves evaluating damages under national procedures, ensuring they meet EU standards. Member States must provide legal instruments within their frameworks to compensate bidders unlawfully excluded from procurement processes. The Directive emphasises the need for effective and rapid remedies and judicial protection for economic operators, balancing effective legal protection and legal certainty. The French government highlights the economic implications of annulling a contract and the EU law's priority on legal certainty. This is

[70] European Commision opinion in Case C-547/22.

supported by the *MedEval* case and reflected in Directive 2007/66/EC. While the Directive mandates compensation for damages, including potential lost profits, it leaves the specific criteria and extent of such compensation to national jurisdictions, provided they respect EU principles.[71]

The Advocate General recommended that Directive 89/665/EEC does not explicitly prescribe specific types of damages, such as loss of opportunity. However, it does require that Member State laws provide effective remedies in line with EU principles. The Advocate General's opinion supported allowing national courts discretion to apply lost chance principles if national law permits, while maintaining the equivalence and effectiveness principles. They advised that the CJEU could clarify that excluding lost opportunity claims could infringe on effective judicial protection under Article 47 of the EU Charter if it impedes legitimate claims.[72]

The CJEU confirmed that under Article 2(1)(c) of Directive 89/665/EEC, damages for loss of opportunity must be considered a legitimate head of damage if an unlawful exclusion causes a tenderer to miss the chance to win a contract. This interpretation aligns with the Directive's intent to ensure effective remedies. Although the CJEU did not specify a required standard of proof for such claims, it left room for national courts to set this standard within the bounds of the effectiveness and equivalence principles. This judgment strengthens the enforceability of public procurement rights by acknowledging lost opportunity as compensable. It also suggests that while national law can set the proof standard for lost opportunity, it must be feasible enough to ensure effective judicial protection for affected parties in public procurement cases.[73]

VI. Conclusion

The *INGSTEEL* judgment introduces a significant challenge for EU Member States regarding damages in public procurement cases, particularly where the concept of loss of opportunity is concerned. The Court's decision mandates that Member States must permit damages claims for lost opportunity if an unlawful exclusion has denied a tenderer the chance to compete for a contract. This judgment emphasises that Directive 89/665/EEC should be interpreted broadly to include all types of damages associated with infringements, not limited to actual losses or lost profits.[74]

[71] Opinion of France in Case C-547/22.
[72] Opinion of Advocate General in Case C-547/22, https://curia.europa.eu/juris/document/document.jsf?text=&docid=280442&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5578759 (last accessed: 31.12.2024.).
[73] Case C-547/22 *INGSTEEL spol. s. r. o. v Úrad pre verejné obstarávanie,* EU:C:2024:478.
[74] K. Strømsnes, New CJEU Judgment on Damages for Breach of EEA Public Procurement Law Contract: Vindication for the EFTA Court's About-Turn in Fosen-Linjen, *EFTA Studies,* (Aug 26,

The decision could force many Member States to re-evaluate their procurement damages frameworks. Traditionally, legal systems which limit claims to actual losses or lost profits when the contract has already been awarded often require a high probability of success to substantiate such claims. These systems might now need adjustments to accommodate claims for lost opportunities without imposing overly restrictive proof requirements. The CJEU left it to Member States to determine the standard of proof for lost opportunity claims, which could lead to variability in implementation. While some countries may apply a lower threshold, others may continue using higher proof requirements, potentially creating inconsistencies across the EU. Critics suggest this could complicate efforts toward uniformity in the EU procurement regime and may raise concerns over legal certainty, especially in countries with stricter causation principles. For countries like Germany, where the loss of opportunity is unsuitable for compensation, this ruling may be challenging. German law, for example, generally confines compensation in procurement cases to participation costs and lost profits when causation is clear. With the *INGSTEEL* ruling, such systems must navigate a balance between ensuring effective protection of tenderers and avoiding speculative claims, possibly by adopting new standards for probabilistic or proportional damages.

This ruling will likely drive broader harmonisation across the EU, compelling Member States to ensure effective remedies that include lost opportunity. However, adapting national laws to fit this framework could strain legal systems that traditionally exclude hypothetical damages. As each Member State interprets and applies this doctrine within its procedural rules, the practical challenges of maintaining uniform EU-wide standards may require additional guidance or future judgments from the CJEU.[75]

2024), https://www.efta-studies.org/post/new-cjeu-judgment-on-damages-for-breach-of-eea-public-procurement-law-contract-vindication-for-the (last accessed: 31.12.2024.).

[75] Bovis, Damages in Public Procurement. 104–109.

Szalay, Gergely András*

Forcible protection of third-country nationals abroad in international law

Abstract

In our fragile world order, there is a growing need to conduct evacuation operations. Legal theory approaches these operations mostly through the protection of nationals doctrine. However, there are many evacuation operations in which states also rescue foreign nationals. The aim of this publication is to introduce the basic practical characteristics and legal issues related to these events. To this end, firstly, the practices and doctrines of states and international organisations are examined. After this, the possible legal titles for such actions are assessed. These include UN Security Council authorisation, host state consent, the protection of nationals abroad doctrine, the non-refoulement principle, asylum (etc.). The conclusion of the paper is that there is no general legal justification for the forcible protection of nationals abroad, and that legal theory should focus more on evacuation operations such as the 2021 Kabul evacuation than on Entebbe-style hostage rescues.

Keywords: evacuation; foreign nationals; *jus ad bellum;* protection of nationals, hostage rescue

I. Introduction

There is a fiery debate among international law scholars about the doctrine of protection of nationals abroad.[1] This controversial theory assumes that states can protect their nationals who are in danger in a foreign country, even if this action is not approved by

* Szalay, Gergely András, PhD student, Eötvös Loránd University, Faculty of Law, Department of International Law.

1 T. Ruys, The 'Protection of nationals' doctrine revisited, (2008) 13 (2) *Journal of Conflict & Security Law,* 233. DOI: https://doi.org/10.1093/jcsl/krn025; F. Grimal and G. Melling, The Protection of Nationals Abroad: Lawfulness or Toleration? A Commentary, (2012) 16 (3) *Journal of Conflict & Security Law,* 542. DOI: https://doi.org/10.1093/jcsl/krr021; S. E. Salako, Forcible Protection of Nationals Abroad and Humanitarian Intervention: Might or Right?, (2016) 5 (1) *International Law Research,* 154–155. DOI: https://doi.org/10.5539/ilr.v5n1p152; K. E. Eichensehr, Defending Nationals Abroad: Assessing the Lawfulness of Forcible Hostage Rescues, (2008) 48 (2) *Virginia Journal of International Law,* 452–453.; R. Alcala and H. Nasu: The Protection of Nationals Abroad

DOI: 10.56749/annales.elteajk.2024.lxiii.6.103

the host state or authorised by the UN Security Council.[2] It is hard to assess whether scholars who are for or against this theory form the majority,[3] but it is safe to say that during these debates, the Entebbe incident became the textbook example of this doctrine.[4]

A lot has happened since the raid on the Entebbe airfield in 1976.[5] For example, in recent years, there has been a growing need to conduct evacuation operations, or more specifically, non-combatant evacuation operations. From the perspective of international law, these operations lead to many intriguing, often interrelated issues. One of these is the fact that, as will be discussed in more detail later, states often evacuate foreign nationals alongside their own citizens. For example, during the recent 2021 Afghanistan evacuation, host state nationals made up the majority of the evacuees.[6] This is an important observation that can have a profound impact on how the protection of nationals abroad doctrine should be approached.

Upon closer examination, the evacuation of foreign nationals is a complex topic in and of itself. For example, these nationals can range from the citizens of allied or third countries to host state nationals. There are even examples of the protection or evacuation of persons due to national or religious ties to the evacuating state. Although this topic has not been subject to more serious legal scrutiny, it has clear connections to other international law subjects, such as humanitarian intervention or refugee law.

The purpose of this publication is to provide an introduction to the basic practical characteristics and legal issues concerning situations in which states protect foreign nationals abroad. To this end, it first examines the practice and doctrine of states and international organisations. Then, the relevant dogmatic questions will be assessed, and the topic's relation to other international law issues will be identified. In this part, the possible legal titles for such actions will be elaborated. Finally, the implications of the previous conclusions will be reflected in the debate, centring around the protection of nationals abroad theory.

---

and Non-Combatant Evacuation Operations in Times of Crisis, (2024) 14 (1) *Journal of National Security Law & Politics,* 1–2.

[2] Grimal and Melling, The Protection of Nationals Abroad: Lawfulness or Toleration? 546.

[3] Ruys, The 'Protection of nationals' doctrine revisited, 236.

[4] D. J. Gordon, Use of force for the protection of nationals abroad: The Entebbe incident, (1977) 9 (1) *Case Western Reserve Journal of International Law,* 127.; Ruys, The 'Protection of nationals' doctrine revisited, 248.; Eichensehr, Defending Nationals Abroad, 478.; Salako, Forcible Protection of Nationals Abroad and Humanitarian Intervention: Might or Right?, 159.; Alcala and Nasu, The Protection of Nationals Abroad and Non-Combatant Evacuation Operations in Times of Crisis, 4.

[5] See further: Britannica: *Entebbe raid,* https://www.britannica.com/event/Entebbe-raid (last accessed: 31.12.2024.).

[6] A. Dawl, The Massive, Costly Afghan Evacuation in Numbers, *VOA News,* (18 February 2022), https://www.voanews.com/a/the-massive-costly-afghan-evacuation-in-numbers/6449553.html (last accessed: 31.12.2024.).

1. Terminology

Due to the novel nature of the topic, clear terminology needs to be established.

This article will focus mainly on the evacuation of third-state and host-state nationals. The 'host state' is the country on whose territory the operation is taking place. The term 'third-state national' means persons who are neither the nationals of the country conducting the evacuation nor the host state. 'Host-state nationals' are the citizens of the host state. The term 'foreign nationals' can be easily misunderstood, as it can be interpreted from the perspective of the host state or the state conducting the operation. In this article, the term will be used from the perspective of the state conducting the operation, thus including both host-state and third-state nationals.

This publication uses the protection of nationals doctrine in a more restrictive sense. Some scholars (e.g., Tom Ruys,[7] Kristen E. Eichensehr[8] and Natalino Ronzitti[9]) use the term in a more general sense to refer to cases in which states generally protect their nationals endangered in a foreign country. This interpretation does not address the possible legal justification for such operations. It does not distinguish the situations in which the host state or the UN Security Council consents to the operation from controversial cases, such as when the state conducting the operation bases its actions on self-defence (or another possible legal basis). It is the present author's opinion that the restrictive approach, which excludes the undoubtedly lawful cases (host state consent and UN SC authorisation), is more appropriate because it provides a clearer way to approach the topic.

Additionally, the terms 'citizen' and 'national' are used interchangeably.

II. State practice

Investigating the relevant state practices associated with topics like this is a challenging endeavour. Publicly available information is often limited, and the resources available are frequently not specific or detailed enough. However, the military doctrines of certain states and historical examples provide ample material to create well-founded observations. In other cases, concrete examples are known when states (or international organisations) have evacuated persons who were not their citizens (or citizens of their member states). The subsequent analysis will be based on the available information.

[7] Ruys, The 'Protection of nationals' doctrine revisited, 234.
[8] Eichensehr, Defending Nationals Abroad, 463.
[9] N. Ronzitti, Rescuing Nationals Abroad Revisited, (2019) 24 (3) *Journal of Conflict & Security Law,* 432. DOI: https://doi.org/10.1093/jcsl/krz030

1. Historical examples

Evacuation operations are not new challenges. Indeed, there have been numerous instances in the past when states have conducted such operations, even for safeguarding persons who were not their own nationals.[10] The following is a summary of such events. These cases were selected to illustrate certain recurring or special characteristics, not to provide an exhaustive list.

Although its combat troops left Vietnam in 1973, by 1975, due to the North Vietnamese advance, the United States started evacuation operations. Firstly, some 2,600 Vietnamese orphans were transported to the United States under 'Operation Babylift'. Concurrently, the evacuation of US citizens and their Vietnamese-born dependents commenced. As the situation deteriorated, the President of the United States authorised the evacuation of at-risk Vietnamese individuals. Following April 29, in the dramatic last two days of the American involvement in Vietnam, only helicopters could be used to conclude the evacuation. This operation became known as 'Operation Frequent Wind'. Ultimately, thousands of American citizens and tens of thousands of Vietnamese individuals, in total more than 50,000 people, were evacuated.[11]

In 1978, the French Foreign Legion launched an airborne assault on the city of Kolwezi (located in the Democratic Republic of Congo). The city, with more than 2,000 Europeans inside it, had been captured by rebels just a few days prior. The operation was successful, resulting in the rescue of the majority of the Europeans by the French troops.[12] Although this operation was conducted with the consent of the legitimate government, it is one of the rare examples of a hostage rescue (or evacuation) operation that involved direct assault on the actors endangering the foreigners. The author is only aware of a few similar operations, although all of them were much smaller in scale. The Entebbe raid (1976) is a notable example of a successful operation, while the Larnaca incident (1978)[13] and Operation Eagle Claw (1980)[14] ended in failure. The

[10] G. Fuentes, Afghanistan Exit Latest in Long History of U.S. Noncombatant Evacuation Missions, *USNI News,* (17 August 2021), https://news.usni.org/2021/08/17/afghanistan-exit-latest-in-long-history-of-u-s-noncombatant-evacuation-missions (last accessed: 31.12.2024.).

[11] Air Force Historical Support Division, *1975 – Operation Babylift and Frequent Wing,* https://www.afhistory.af.mil/FAQs/Fact-Sheets/Article/458955/1975-operation-babylift-and-frequent-wind/ (last accessed: 31.12.2024.).

[12] Foreign Legion Info, *1978 Battle of Kolwezi,* (19 May 2024), https://foreignlegion.info/battle-of-kolwezi/ (last accessed: 31.12.2024.).

[13] The Larnaca Incident, *The Washington Post,* (23 February 1978), https://www.washingtonpost.com/archive/politics/1978/02/24/the-larnaca-incident/7193e2e0-62d9-4031-9206-dfb812fabb8e/ (last accessed: 31.12.2024.).

[14] L. Lambert, Operation Eagle Claw, *Britannica,* (14 December 2024), https://www.britannica.com/event/Operation-Eagle-Claw (last accessed: 31.12.2024.).

Mayaguez incident (1975) nearly resulted in disaster, too.[15] As the primary focus of all four of these operations was the protection of the implementing states' own nationals, a more detailed examination of them is beyond the scope of this study.

Another example of an evacuation operation conducted exclusively to help foreign nationals is the story of the Ethiopian Jews. The ancient Jewish community, known as 'Beta Israel', was in danger during the Ethiopian Civil War. Many of its members fled to Sudan, where they faced terrible conditions in refugee camps. Israel started evacuating these refugees in secret from 1979, and in 1984, a decision was made to scale up the operation. This required the assistance of the United States and the consent of the Sudanese government. In 1985, after the airlifts had carried 7,800 people to safety, Sudan halted the evacuation. Later in the same year, after successful negotiations, approximately 500 remaining Jews were airlifted to Israel by the United States.[16] In 1991, the Israeli Air Force successfully airlifted over 14,000 Jews directly from Ethiopia in just 48 hours. This operation had the support of the United States, which convinced Ethiopia to authorise the airlifts.[17]

A salient feature of these operations is that Israel and the United States orchestrated the airlifts exclusively for individuals who were not their nationals. Clearly, these operations were executed due to the religious affiliations of the evacuees with the Jewish state.

In the early months of 2011, when Libya descended into a state of civil war, the United Kingdom deployed its military forces to evacuate civilians who were in danger. A part of this operation was executed in secrecy, involving special forces travelling around the country and extracting British and foreign nationals.[18] During the course of this operation, a frigate belonging to the Royal Navy was also deployed to pick up civilians. In the end, hundreds were rescued, the majority of whom were not citizens of the United Kingdom.[19] Officially, no questions were raised about the legality of these

[15] National Museum of the United States Air Force, *Final Combat: The Mayaguez Incident at Koh Tang,* https://www.nationalmuseum.af.mil/Visit/Museum-Exhibits/Fact-Sheets/Display/Article/196018/final-combat-the-mayaguez-incident-at-koh-tang/ (last accessed: 31.12.2024.).

[16] M. Bard and H. Lenhoff, Ethiopian Jewry: America's Role in the Rescue of Ethiopian Jewry, *Jewish Virtual Library,* https://www.jewishvirtuallibrary.org/america-s-role-in-the-rescue-of-ethiopian-jewry (last accessed: 31.12.2024.).

[17] Operation Solomon: Israel airlifts 14,000 Ethiopian Jews to safety in unparalleled mission, *World Jewish Congress,* (24 May 2023), https://www.worldjewishcongress.org/en/news/this-week-in-jewish-history--operation-solomon-israel-airlifts-14000-ethiopian-jews-to-safety-in-unparalleled-mission-5-3-2020 (last accessed: 31.12.2024.).

[18] Grimal and Melling, The Protection of Nationals Abroad: Lawfulness or Toleration? 541. and 544.

[19] Ministry of Defence, Prime Minister praises military effort in Libyan evacuations, *UK Government's official website,* (28 February 2011), https://www.gov.uk/government/news/prime-minister-praises-military-effort-in-libyan-evacuations (last accessed: 31.12.2024.).

operations, and both Libya and the international community tolerated the British actions.[20]

Nearly 20 years of US involvement in Afghanistan came to a chaotic end in August 2021. The Taliban quickly and successfully gained ground, and the Afghan state and its security forces collapsed.[21] Tens of thousands of desperate Afghans tried to get to safety, and many states started evacuation operations. Some states (like Switzerland, Türkiye, Ireland, and India) mainly evacuated their own citizens who were in the country. However, states that had been militarily involved in the conflict mostly evacuated foreign (specifically host state) nationals. Some examples include the USA, Italy, France and Hungary.[22]

In the case of the United States, the evacuees were mainly persons who, in some capacity, worked for the US government, as well as their families. This included interpreters, embassy staff, and even intelligence operatives. However, a significant number of Afghans who had no prior connection with the US managed to board the planes leaving the country.[23]

One of the latest examples we must take into consideration is the evacuation operation codenamed 'Operation Sagittarius'. This operation was conducted in 2023 by the French military during the Sudanese Civil War. As violence erupted in April, many foreigners had no way to escape the country. In this situation, France, after consulting the two sides involved in the conflict, secured the Wadi Seidna airfield and airlifted civilians out of the country. France evacuated these civilians regardless of their nationality. Individuals from many different African and European countries were evacuated by French aircraft. The secured airstrip was also utilised by different countries (like Spain, Britain, Türkiye, etc.) to conduct their own evacuations. During the operation, France in total airlifted 538 people, out of whom only 209 were French nationals.[24]

This summary has mainly focused on evacuation operations conducted for the purpose of safeguarding foreign nationals. There are other examples of more general evacuation operations or the invocation of the protection of national doctrine that are not addressed here.[25]

[20] Grimal and Melling, The Protection of Nationals Abroad: Lawfulness or Toleration? 545.
[21] J. B. Murtazashvili, The Collapse of Afghanistan, (2022) 33 (1) *Journal of Democracy,* 40., https://www.journalofdemocracy.org/articles/the-collapse-of-afghanistan/ (last accessed: 31.12.2024.).
[22] Evacuations form Afghanistan by country, *Reuters,* (30 August 2021), https://www.reuters.com/world/evacuations-afghanistan-by-country-2021-08-26/ (last accessed: 31.12.2024.).
[23] G. Kessler, Numbers behind Afghanistan evacuation come into focus, *The Washington Post,* (25 May 2022), https://www.washingtonpost.com/politics/2022/05/25/numbers-behind-afghan-evacuation-come-into-focus/ (last accessed: 31.12.2024.).
[24] S. Pedder, How France led the evacuation of foreigners from Khartoum, *The Economist,* (3 May 2023), https://www.economist.com/sudanrescue (last accessed: 31.12.2024.).
[25] See e.g. Ruys, The 'Protection of nationals' doctrine revisited, 238–253.

2. State doctrines

a) United States

The United States has extensive experience in conducting evacuation operations. Therefore, it is not a surprise that this state has established detailed regulations dealing with this subject. The two main sources that should be referenced are the Department of Defense Directive 3025.14[26] and the US military's official doctrine on non-combatant evacuation operations (NEO).[27]

The provisions of DoD Dir. 3025.14 provide comprehensive regulation for the different personal categories of evacuees, which include non-US citizens. These persons may include civilian employees of US government agencies and their dependents, as well as foreign national dependents of US citizens.[28] It should also be noted that, based on the NEO doctrine, host-country and third-country nationals are evacuated on a case-by-case basis at the discretion of the US government.[29]

This can be interpreted in a way that there are predetermined personal categories that define which foreign nationals can be evacuated. However, based on a political or diplomatic decision, additional foreign nationals (such as the nationals of allied nations) can also be evacuated.

The JP 3-68 doctrine also includes provisions regarding refuge or asylum requests:

> "International law and customs have long recognized the humanitarian practice of providing temporary refuge to anyone, regardless of nationality, who may be in imminent physical danger. It is the policy of the United States to grant temporary refuge in a foreign country to nationals of that country or to TCNs solely for humanitarian reasons when extreme or exceptional circumstances put in imminent danger the life or safety of a person, such as pursuit by a mob. The officer in command of an aircraft, ship, station, or activity decides which measures can prudently be taken to provide temporary refuge."[30]

b) United Kingdom

The NEO doctrine of the United Kingdom (UK) explicitly states that foreign nationals may be eligible for evacuation if the UK government or the most senior diplomat in the country accepts responsibility for them. The eligibility of these persons is assessed by

[26] Department of Defense Directive 3025.14, Evacuation of U.S. Citizens and Designated Aliens from Threatened Areas Abroad, 2013, the version in force from 2017. 11. 30. (hereinafter: DoD Dir. 3025.14).
[27] Joint Publication 3-68, Joint Non-combatant Evacuation Operations, 2022 (hereinafter: JP 3-68).
[28] DoD Dir. 3025.14, 13.
[29] JP 3-68, I-1. a.
[30] JP 3-68, VI-16. d.

the Foreign, Commonwealth & Development Office or the Border Force.[31] Consequently, under this doctrine, the evacuation of foreign nationals is mainly a political decision. Furthermore, the document also addresses the political and logistical challenges posed by allied evacuees.[32]

This doctrine also states that, based on experiences gained in past operations (for example, in Kabul), during NEOs it is unlikely that states will be acting independently. Therefore, coordination between the various states conducting an evacuation is imperative.[33]

c) Brazil

The NEO doctrine of Brazil has some of the most detailed rules regarding the evacuation of foreign nationals. In the document, the definition of non-combatants clearly states that previously designated foreign nationals can be evacuated.[34] The different statuses of the evacuees are also specifically characterised. According to this, the prioritisation of the evacuees is the following:

1. Brazilian citizens.
2. Non-Brazilians who are close relatives of Brazilian citizens.
3. Non-Brazilians working for the Brazilian government.
4. Non-Brazilians who are seriously sick or wounded, or whose lives are in imminent danger.
5. Others (as indicated by the Ambassador or the Commander of the Joint Command).[35]

These rules are similar to the ones previously mentioned for the United States. Brazil primarily evacuates foreign nationals who have some connection to the country. This may include foreign nationals working for Brazil or the relatives of its citizens. However, based on the decision of the ambassador or the military leader, additional persons can also be evacuated.

An interesting addition is Category 4, which includes foreign nationals not affiliated with Brazil yet facing imminent danger. This situation may be similar to granting asylum; however, the doctrine does not include more specific rules on this topic.[36]

[31] Joint Doctrine Publication 3-51, Non-combatant Evacuation Operations, (3rd Edition, dated 2023) 1.2.
[32] JDP 3-51. 4.11.
[33] JDP 3-51. 3.27
[34] MD33-M-08 Manual De Operações De Evacuação De Não Combatentes (hereinafter: MD33-M-08), 64.
[35] MD33-M-08 5.5.1. TABELA 1. (translated using DeepL).
[36] Political asylum is referenced as a planning question in one of the annexes, without further elaboration. MD33-M-08, Annexe D, 2.30.

d) Spain

Similarly to the already mentioned states, the NEO doctrine of Spain differentiates between Spanish nationals, citizens of the European Union, and other persons authorised by the diplomatic staff.[37]

The Spanish doctrine also addresses the question of asylum seekers, making reference to international law and customs and specifically stating that asylum seekers can be transported to Spain. However, until this decision is made, they must be given assistance and cannot be released to another country.[38] This last part could be included to comply with the non-refoulement principle, which will be discussed later in greater detail.

e) Other states

Many states do not have publicly available doctrines or other documents regulating evacuation operations. However, this does not mean that they have not conducted such operations or rescued foreign nationals.

For instance, both China and Russia have evacuated foreign nationals. During the Yemen civil war in 2015, 279 foreign nationals were saved by Chinese forces.[39] Furthermore, Russian soldiers took part in the 2021 Kabul evacuation, alongside Russian citizens, evacuating people from Afghanistan, Belarus, Kyrgyzstan, Tajikistan, Uzbekistan and even Ukraine.[40]

In 2011, during Operation Mobile, Canada also evacuated foreign nationals. This evacuation was conducted in Libya and resulted in the evacuation of 61 Canadians alongside 130 people from different states. After the UN Security Council established a no-fly zone over Libya, this NEO transitioned into a real combat mission.[41]

Although Hungary does not have an official doctrine on non-combatant evacuation operations, Hungarian forces participated in both the 2021 Afghanistan and 2023 Sudan evacuations. In Afghanistan, the Hungarian Defence Forces airlifted 540 individuals, predominantly Afghan nationals, but the Hungarian aeroplanes also carried citizens of the United States and Austria. The evacuated Afghans had worked

[37] PDC-3.4.2., 0102.
[38] PDC-3.4.2 0519-0521.
[39] C. Hurst, Compelling Reasons for the Expansion of Chinese Military Forces, (2017) (November–December) *Military Review,* https://www.armyupress.army.mil/Journals/Military-Review/English-Edition-Archives/November-December-2017/Compelling-Reasons-for-the-Expansion-of-Chinese-Military-Forces/ (last accessed: 31.12.2024.).
[40] Russia flies nationals out of Afghanistan on Putin's orders, *Reuters,* (25 August 2021), https://www.reuters.com/world/asia-pacific/russia-evacuate-more-than-500-citizens-afghanistan-interfax-2021-08-25/ (last accessed: 31.12.2024.).
[41] Operation MOBILE, *Official website of the Government of Canada,* (22 January 2024), https://www.canada.ca/en/department-national-defence/services/operations/military-operations/recently-completed/operation-mobile.html (last accessed: 31.12.2024.).

for the Hungarian forces previously, for example, as interpreters or security guards.[42] In 2023, Hungary also participated in the evacuation of civilians from Sudan, with a total of 32 individuals being evacuated, of whom only 7 were Hungarian nationals.[43]

3. International Organisations

a) NATO

A joint doctrine is dedicated to the specialised category of non-combatant evacuation operations by NATO. These operations ultimately fall under the responsibility of the member states, so this doctrine's principal role is to regulate a theoretical NATO-led operation and to provide guidance to member states.[44]

Although this document does not explicitly regulate the evacuation of non-NATO nationals, there are relevant provisions in the text concerning foreign nationals. For example, the definition of the term 'evacuation contingency plan' clearly states that it is the diplomatic mission's responsibility to create a plan for the evacuation of citizens and designated foreign nationals.[45]

Additionally, the doctrine contains provisions about considerations in cases of requests for political asylum or temporary refuge. These provisions stipulate that, in accordance with the rules of international law, there is a practice to provide temporary refuge to anyone who is in clear danger. If temporary refuge is granted, that individual may only be released with the authorisation of the Supreme Allied Commander Europe. However, political asylum can only be granted by a head of mission.[46]

b) European Union

During the 2021 Afghanistan evacuation, even the EU played an active role, with the deployment of a crisis cell to Kabul and the provision of assistance to the evacuations conducted by the member states. The crisis cell assisted the evacuation of 13,400 Afghan and 4,100 EU nationals. Hundreds of local EU staff were also successfully evacuated, with the assistance of the member states.[47]

---

[42] Szórád T., Várd a váratlant, *Air Base Blog,* (30 November 2021), https://airbase.blog.hu/2021/11/30/vard_a_varatlant_128 (last accessed: 31.12.2024.).

[43] Antal F., Szalay-Bobrovniczky K.: 32 embert, köztük 7 magyart sikerült kimenekíteni Szudánból, *Honvédelem.hu,* (27 April 2023), https://honvedelem.hu/hirek/szalay-bobrovniczky-kristof-32-embert-koztuk-7-magyart-sikerult-kimenekiteni-szudanbol.html (last accessed: 31.12.2024.).

[44] AJP-3.4.2 Allied Joint Doctrine for Non-combatant Evacuation Operations 2013, (hereinafter: AJP-3.4.2.) 1010 b.

[45] AJP-3.4.2. Part II., Terms and Definitions.

[46] AJP-3.4.2., 0504. I.

[47] Evacuation of Afghan nationals to EU Member States, *Think Tank: The European Parliament's official website,* (8 November 2021), https://www.europarl.europa.eu/thinktank/en/document/EPRS_

4. Summary of state practice

Chart 1. Summary of state practice[48]

States and organisations	Evacuation of foreign nationals	Reference to refugee law
EU	Based on practice	
NATO	Case-by-case decision	Temporary refuge and political asylum
USA	Designated statutes and case-by-case decisions	Temporary refuge and political asylum
China	Based on practice	
Russia	Based on practice	
UK	Based on practice	
Canada	Yes	
Brazil	Designated statuses and case-by-case decisions	
Spain	EU citizens and a case-by-case decision	Political asylum
Hungary	Based on practice	
France	Based on practice	

Although the analysis of each and every relevant operation that has occurred in the past is beyond the scope of this article, it is safe to say that evacuation operations (which evacuate foreign nationals) are far more common than hostage rescue operations, such as the Entebbe incident. While there are multiple examples of states evacuating foreign nationals alongside their own citizens, there are only a handful of examples of kinetic hostage rescues. It is also important to note that the majority of the mentioned operations were conducted with the specific consent, or at least the knowledge, of the host state.

Additionally, based on the official documents and practical examples, each studied state is ready to evacuate foreign nationals with whom they have a connection. This can include both host state and third state nationals. The evacuation of specific persons can be based on predetermined categories and diplomatic or political decisions made on a case-by-case basis.

BRI(2021)698776 (last accessed: 31.12.2024.).

[48] The author's own chart.

A categorisation of the evacuated foreigners reveals three distinct categories. Firstly, it is clear practice to save foreigners working for the state conducting the evacuation. Secondly, the evacuation of the dependents of nationals is also a standard practice. Thirdly, the evacuation of the nationals of allied states is well-established.

It is evident that the evacuation of both host state nationals and third-country nationals is a well-established practice. Furthermore, as was demonstrated in the preceding paragraph, these persons often form the majority of the evacuees.

III. Legal justifications for the protection of foreign nationals

The most important dogmatic issue raised by the evacuation of foreign nationals is that of the possible legal justification for such operations. From a jus ad bellum perspective, these justifications traditionally include host state consent, authorisation by the UN Security Council, the 'protection of nationals doctrine', and humanitarian intervention. However, as can be seen in the relevant doctrines, there are subtle references to refugee law, diplomatic asylum and the non-refoulment principle in state practice. The present analysis will examine these issues.

The legal assessment of these possibilities is dependent on the precise characteristics of a particular evacuation mission. Specifically, whether foreigners are protected in conjunction with the intervening state's own citizens, or whether the operation is exclusively conducted for their protection. Where relevant, this issue will be addressed.

1. Host state consent and UN SC authorisation

It is not contested that a state can give its consent to another state to conduct an evacuation operation on its territory.[49] Additionally, the UN Security Council, acting on its powers enshrined in Article VII, Paragraph 42 of the UN Charter, can authorise an evacuation operation, although there is currently no example of such a decision.[50] These cases can also provide a legal basis for the evacuation of foreign nationals, provided that the consent or authorisation includes them. Therefore, the real question arises when none of these possibilities is available.

[49] Ruys, The 'Protection of nationals' doctrine revisited, 235.
[50] Ronzitti, Rescuing Nationals Abroad Revisited, 445.

2. Protection of (foreign?) nationals abroad

The notion of expanding the protection of nationals abroad concept to include foreign nationals may appear irrational at first. Yet, considering the analysed state practice, it becomes evident that there is a substantial rationale for addressing this subject. There are a few prior references to the protection of foreign nationals in relation to this doctrine. For instance, Special Rapporteur Dugard wrote during the drafting of the Articles on Diplomatic Protection that:

> "(...) In an emergency situation, it will be both difficult and unwise to distinguish sharply between nationals and non-nationals. There should be no objection to the protecting State rescuing non-nationals exposed to the same immediate danger as its nationals, provided the preponderance of threatened persons are nationals of that State. (...)"[51]

Based on this, Tom Ruys, as a *de lege ferenda* proposal, states that:

> "[non-combatant evacuation operations] may extend to the evacuation of other threatened foreigners, as long as the preponderance of threatened persons are nationals of the intervening state."[52]

Other authors have also made reference to the fact that states often evacuate foreign nationals alongside their own. However, they also consider a state's own nationals to be the primary focus of the protective actions.[53] In essence, the idea is that when a state launches an operation to protect its nationals, it may incidentally rescue a few others.

There is an important starting point before it can be determined whether the current understanding of the 'protection of nationals abroad' doctrine can be expanded enough to provide the necessary legal title for the protection of foreign nationals. In principle, the 'protection of nationals' doctrine must be regarded as lawful in its own right.

The protection of nationals abroad is a highly debated concept. There are many different legal rationales that try to support the lawfulness of this doctrine, with the expansion of the right of self-defence established in Article 51 of the UN Charter arguably being the most popular.[54] However, there are two distinct approaches through which the concept of self-defence can be expanded to encompass this doctrine.

[51] J. R. Dugard, *First report on diplomatic protection (Document A/CN.4/506 and Add. 1.),* 220., https://web.archive.org/web/20241125055135/https://legal.un.org/ilc/documentation/english/a_cn4_506.pdf (last accessed: 31.12.2024.).
[52] Ruys, The 'Protection of nationals' doctrine revisited, 268.
[53] Eichensehr, Defending Nationals Abroad, 462.; Ronzitti, Rescuing Nationals Abroad Revisited, 432.
[54] Ruys, The 'Protection of nationals' doctrine revisited, 235–236. and 259–260.

The starting point of the first approach is the specific wording of Article 51 of the UN Charter, more specifically the term 'inherent right'. Before the UN Charter, actions undertaken to protect nationals abroad were undoubtedly lawful; therefore, this doctrine states that they still fall under the scope of self-defence as an inherent right. Consequently, this view is based on customary international law.[55] A popular argument used to reinforce this claim suggests that states were mostly protesting the specific invocations of the right, rather than its general existence.[56]

However, a more thorough analysis of the issue reveals that the validity of these arguments is questionable. While a few – mostly Western – states have consistently invoked this doctrine, at least the same number of states are against the protection of nationals abroad. Even more, there are instances when states raised their voices against the doctrine. Examples of this include the deliberations surrounding the drafting of the Articles on Diplomatic Protection, and debates in the UN Security Council and General Assembly. Based on these circumstances, the protection of nationals abroad cannot be considered a customary right.[57]

There is another approach that seeks to expand the boundaries of self-defence. This logic suggests that an armed attack can be committed not only against a state's territory but also against its nationals.[58] However, for a situation to be considered this way, a number of prerequisites must be met. For example, the nationals must be endangered because of their ties to their respective state. Even more, the attack on them must be grave enough, based on the International Court of Justice's Nicaragua judgment.[59]

The primary issue with this concept is its ill-defined nature. The prohibition on the use of force is the cornerstone of international peace and security, a jus cogens norm of international law. However, when authors attempt to expand the concept of armed attack, they fail to provide aptly clear boundaries for doing so. For example, they reference Derek Bowett,[60] who writes: "there may be occasions when the threat of danger is great enough, or wide enough in its application to a sizable community abroad, for it to be legitimately constructed as an attack on the state itself".[61] However, this reasoning can hardly be considered a clear legal argument; it appears to be more of an interesting thought experiment, as it is difficult to imagine a situation in which this

[55] Ibid., 235–236.
[56] Eichensehr, Defending Nationals Abroad, 460.
[57] See Ruys, The 'Protection of nationals' doctrine revisited, 256–264.
[58] Ibid., 235–236.
[59] Grimal and Melling, The Protection of Nationals Abroad: Lawfulness or Toleration? 549.; Eichensehr, Defending Nationals Abroad, 467–470.
[60] Eichensehr, Defending Nationals Abroad, 468.; Ronzitti, Rescuing Nationals Abroad Revisited, 468–470.; Gordon, Use of force for the protection of nationals abroad, 129.; Alcala and Nasu, The Protection of Nationals Abroad and Non-Combatant Evacuation Operations in Times of Crisis, 18.
[61] D. W. Bowett, *Self-defense in international law* (Praeger, New York, 1958) 93.

threshold could be undoubtedly met. Additionally, there is no documented instance of such a characterisation being generally accepted by the international community.[62]

Therefore, as the protection of nationals doctrine is not a lawful principle under international law, it cannot provide a legal basis for any type of military operation.

Obviously, the protection of a state's own citizens is a key feature of this doctrine. As demonstrated, the different legal arguments that try to establish the legality of the protection of nationals abroad rely heavily on the relationship between a state and its own nationals. Consequently, even if the protection of nationals doctrine is deemed lawful, it could only be used for the protection of foreign nationals when the intervening state's own citizens form the majority of the rescued persons. While this consideration may appear self-evident, it will have significant implications later.

3. Humanitarian intervention

Some authors consider the protection of nationals abroad to be a type of humanitarian intervention. However, these are two completely different concepts, and they should not be confused. The aim of humanitarian intervention is to protect foreigners who are being persecuted in their home countries. Doing so often involves a regime change in the targeted country.[63] Therefore, humanitarian intervention is mostly driven by humanitarian intentions, while the protection of nationals abroad is aimed at protecting a state's own interests.

However, in situations when a state is aiming to protect mostly foreign nationals, more specifically the nationals of the host country, this clear difference could seem somewhat blurred. A good example of this is the evacuation of the Ethiopian Jews that has already been mentioned. Nevertheless, the interests of the intervening state, namely the protection of persons that are somehow related to the latter, usually outweigh humanitarian intentions in most of the discussed cases. Therefore, it is possible to separate the two concepts even in these situations.

Although the legality of humanitarian intervention is a fiercely debated topic, it is also challenging to establish a clear right for this type of action in international law.[64] Therefore, as proposed by some scholars, the international community should move towards peaceful means, such as the responsibility to protect.[65]

[62] O. Corten, *The Law Against War, The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, Oxford, 2021) 400–401. DOI: https://doi.org/10.1093/ejil/chr088

[63] Eichensehr, Defending Nationals Abroad, 461–463.

[64] A. Ryniker, The ICRC's position on "humanitarian intervention", (2001) 83 (842) *International Review of the Red Cross,* 530. DOI: https://doi.org/10.1017/S1560775500105826

[65] G. Sulyok, Understanding the Responsibility to Protect: Textual Anomalies and Interpretative Challenges in the 2005 World Summit Outcome, (2014) *Hungarian Yearbook of International Law and European Law,* 207–208.

4. Refugee law

The question of whether refugee law can be applied to the protection of foreign nationals is a complex one. Based on the 1951 Refugee Convention, only a person outside of their country of nationality can be entitled to refugee status.[66] Therefore, this definition cannot be expanded to include host country nationals while they are still awaiting evacuation. The inclusion of third-country nationals is also not a viable proposition, since the definition of a refugee also includes that the person in question is "unable or, owing to such fear, is unwilling to avail himself of the protection of that country" (the country of nationality).[67]

While there may be some theoretical cases in which this convention could be applied, the protection of refugees cannot provide a legal basis for an intervention. Of course, once the foreign nationals are evacuated to another country, they can apply for refugee status or complementary protection there.[68]

5. Diplomatic and naval asylum, human rights and the non-refoulment principle

As the highly debated concept of diplomatic asylum is featured in some of the analysed military doctrines, it is also necessary to discuss this topic.

The 1975 report of the Secretary General on diplomatic asylum defines this concept as follows:

> "The term »diplomatic asylum« in the broad sense is used to denote asylum granted by a State outside its territory, particularly in its diplomatic missions (diplomatic asylum in the strict sense), in its consulates, on board its ships in the territorial waters of another State (naval asylum), and also on board its aircraft and of its military or para-military installations in foreign territory."[69]

This definition is of particular interest, as it includes concepts such as naval asylum, which could be tailor-made for the protection of foreign nationals through military means. However, this report, while it provides a detailed collection of state practices

[66] The 1951 Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951, Article 1 Paragraph 2., see further at *A guide to international refugee protection and building state asylum systems* (UNCR, 2017) Chapter 6.

[67] The 1951 Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951, Article 1, Paragraph 2.

[68] *A guide to international refugee protection and building state asylum systems,* 147.

[69] Part II. Report of the Secretary-General Prepared Pursuant to Operative Paragraph 2 of General Assembly Resolution 3321 (XXIX) (1975), https://www.unhcr.org/publications/question-diplomatic-asylum-report-secretary-general-0 (last accessed: 31.12.2024.).

relevant at that time, was never elaborated further by the United Nations and consequently lacked legal authority.[70]

The concept of naval asylum is reliant on the theory of extraterritoriality, a legal fiction that posits a warship as constituting the territory of its flag state. Prior to 1945, scholars accepted this theory, and there are even practical cases (mainly from the 19th century[71]) for its application.[72] However, contemporary international law no longer considers state vessels to be an extraterritorial extension of the flag state; rather, they merely enjoy immunity.[73]

It is important to note that the 1954 Caracas Convention on Diplomatic Asylum[74] includes provisions pertaining to asylum granted by a foreign military entity. Article I of the convention explicitly stipulates that:

> "Asylum granted in legations, war vessels, and military camps or aircraft, to persons being sought for political reasons or for political offenses shall be respected by the territorial State in accordance with the provisions of this Convention."[75]

This definition is not limited to 'war vessels' but also includes military camps and aircraft. This is important because, as has been seen, warships are no longer the most common military asset deployed for evacuation operations. Therefore, diplomatic asylum can provide a legal basis for the protection of foreign individuals during an evacuation operation in relation to South American states that are party to this convention.

However, there is an important and relevant limitation to this right. Diplomatic asylum is a strictly limited concept; it cannot involve the use of force or an intervention in the territory of the host country.[76] Therefore, this article can only be applied when an evacuation, with the necessary legal prerequisites, is already underway and a person at risk for political reasons seeks refuge with the military units conducting the operation.

For states that are not a party to this convention, the legality of diplomatic asylum cannot be established by customary international law.[77] However, some authors

[70] P. Behrens, The Law of Diplomatic Asylum – a Contextual Approach, (2014) 35 (2) *Michigan Journal of International Law,* 323.
[71] Part II. Report of the Secretary-General Prepared Pursuant to Operative Paragraph 2 of General Assembly Resolution 3321 (XXIX) (1975), 17–21.
[72] Ibid., 328–336.
[73] The 1982 United Nations Convention on the Law of the Sea, signed in Montego Bay, on 10 December 1982, Articles 32., 96. and 236.
[74] Signed in Caracas on 28 March 1954.
[75] Convention on diplomatic asylum, signed in Caracas on 28 March 1954, Article I.
[76] Behrens, The Law of Diplomatic Asylum, 357.
[77] S. K. Banton, Diplomatic Asylum as a Tool for Extraterritorial Protection of Human Rights: Balancing the Vienna Conventions with Human Rights Concerns, (2022) 54 *Journal of International Law and Politics,* 1048.

have pointed to the fact that states are bound by different obligations under international law, which could come into play in a situation when an individual seeks protection for political reasons at a diplomatic mission.[78] In the present author's opinion, these positions can be expanded, with the necessary caution, to include situations arising during evacuation missions.

Diplomatic asylum is specifically assessed in relation to the provisions outlined in the 1961 Vienna Convention on Diplomatic Relations, notably, in relation to the prohibition of interference in the internal affairs of the host state and the rule that the premises of diplomatic missions cannot be utilised in a manner that is incompatible with their functions.[79] These provisions are hardly applicable if a threatened person seeks protection from military personnel conducting an evacuation operation. Still, general rules of international law, such as territorial sovereignty[80] and the principle of non-intervention[81] do apply in these cases, even if the evacuation itself is lawful.

This view is further reinforced by the International Court of Justice's judgement in the Asylum case when it states that:

> "In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case."[82]

The basic premise is that, during a request for asylum, two conflicting interests come into play. Firstly, the prohibition of intervention and the territorial sovereignty of the host state are implicated, as granting asylum can violate these principles.[83]

On the other hand, however, the sending state (or the state conducting the evacuation) may be subject to *erga omnes* legal obligations (self-determination[84] or human rights obligations such as the non-refoulment principle[85]). These obligations may compel the state to protect individuals facing prosecution for political reasons.[86]

[78] Behrens, The Law of Diplomatic Asylum, 324.
[79] Ibid., 325–327.
[80] Ibid., 351.
[81] M. Wood, Non-Intervention (Non-interference in domestic affairs), *Encyclopedia Princetoniensis,* https://pesd.princeton.edu/node/551 (last accessed: 31.12.2024.).
[82] *Asylum case (Colombia v Peru),* Judgment, 20 November 1950, International Court of Justice, 12–13.
[83] Banton, Diplomatic Asylum as a Tool for Extraterritorial Protection of Human Rights, 1042. and 1047.
[84] Behrens, The Law of Diplomatic Asylum, 337–338.
[85] Banton, Diplomatic Asylum as a Tool for Extraterritorial Protection of Human Rights, 1042
[86] Behrens, The Law of Diplomatic Asylum, 324., 336–341.

Furthermore, states may have additional obligations under specific human rights regimes, particularly if they apply extraterritorially.[87]

Again, this concept can only be applied to evacuation operations if specific conditions are met. Firstly, the evacuation operation must already be in progress, as humanitarian reasons cannot provide a justification for armed intervention. Secondly, the individual in question must be under the effective control of the state conducting the evacuation operation.[88] Thirdly, the specific conditions of the prevailing obligation must also be fulfilled.

Furthermore, even if all the prerequisites are established, the conflict with the prohibition of intervention remains unresolved. International law is currently unable to provide a solution to this conflict. In relation to diplomatic asylum, some scholars have proposed different methods, but these cannot be considered part of the law.[89]

This finding is of particular pertinence given that, in accordance with a case-by-case analysis, the strict conditions may be applicable. As demonstrated in the section addressing state practice, doctrines recognise the possibility that a prosecuted national of the host country may seek assistance from the military personnel conducting an evacuation operation. This could result in obligations, including the non-refoulement principle, being triggered.

IV. Conclusions

More than forty years have passed since the Entebbe incident. It is easy to understand why this gripping event attracted so much legal scrutiny in the past. However, things have changed since then, and it can be questioned whether similar hostage rescue operations are still common in state practice. Based on previous analysis, it can even be argued that the few similar operations were just extraordinary events, and never the norm.

The Entebbe incident is the most clear-cut example of a hostage rescue operation conducted for the protection of a state's own citizens. However, based on the analysis of state practice, it is concluded that evacuation operations are more common than hostage rescue operations, and states often evacuate foreign nationals alongside their own. These types of operations are well established both in military doctrine and actual state practice. The operations in Kabul or Wadi Seidna are just two current examples.

It is evident that the protection of nationals abroad doctrine is not applicable in cases where a state seeks to protect foreign citizens. It should be noted that the doctrine's

[87] Ibid., 341–343.
[88] Banton, Diplomatic Asylum as a Tool for Extraterritorial Protection of Human Rights, 344–348.
[89] See: Banton, Diplomatic Asylum as a Tool for Extraterritorial Protection of Human Rights, 352–364.

intention has never been to achieve this outcome; however, this remains a significant argument supporting its illegality.

For example, in relation to the customary law argument, it can be demonstrated that this hypothetical customary right is not in conformity with a significant portion of real state practice. Indeed, evacuation operations are considerably more complicated than the more straightforward protection of nationals rationale. Secondly, this assessment complicates the expansion of the definition of armed attack to a state's citizens. This theory is dependent on the idea that nationals form an immanent part of a state.[90] However, this logic cannot incorporate the protection of foreign nationals, even in instances where they are somehow connected to the intervening state. Clearly, both of these rationales must be taken into consideration along with the previously mentioned arguments, and they can provide a potential explanation why only a few states have previously referred to this doctrine.[91]

It is this author's opinion that the idea that an operation can also save foreign nationals if most of the evacuees are from the intervening state is not a satisfactory solution to the problem. This argument cannot be applied to most of the cases that have been mentioned, because state practice has a completely different logic. The fact that foreign nationals often form the majority of the evacuees is merely the tip of the iceberg. More importantly, states do not just incidentally evacuate third-country nationals who are in danger. Quite the opposite is true, as their protection is often the objective of these operations from the start.

In the majority of cases, the application of alternative legal titles is not possible. The 1954 Caracas Convention can be invoked in certain circumstances, but this is subject to significant constraints. Apart from the authorisation of the UN Security Council or the consent of the host state, no other general alternative can be identified to provide a legal basis. However, this does not necessarily constitute a problem. In reality, these findings highlight the shortcomings of the discourse on the protection of nationals doctrine. State practice deviates to a certain extent from legal theory, and scholars should focus more on issues other than the *jus ad bellum* questions of forcible actions taken in Entebbe-style hostage rescues. It is therefore recommended that the debates on the protection of nationals doctrine move away from the Entebbe-style approach and focus more on Kabul or Wadi Seidna-style evacuations.[92]

A clearer framework should be established to address the main questions of evacuation operations, including the protection of foreign nationals. It is essential to distinguish between the legality of an operation and any potential legal challenges that may arise on the ground during its execution. Firstly, much more attention should be

[90] Ruys, The 'Protection of nationals' doctrine revisited, 235–236.
[91] Ibid., 259–263.
[92] Cf. Ruys, The 'Protection of nationals' doctrine revisited, 263–270.

shifted towards host state consent and UN Security Council authorisation for such operations. As evidenced by historical operations, securing host state consent is, in reality, less challenging than the protection of nationals doctrine suggests. Evacuation operations are much more tolerated by the international community than hostage rescues; therefore, securing consent is a viable possibility.[93]

If the host state does not provide consent for the operation, the UN Security Council can still authorise forcible action based on its powers stipulated in Article 42 of the UN Charter. Clearly, a healthy scepticism can be raised against this solution, and it might take the Security Council an unnecessary amount of time to act.[94] This legal basis, however, creates clear legitimacy for an operation and can lawfully enable the protection of foreign nationals.

Secondly, much more attention should be paid to the possible issues that may be raised by foreign nationals on the ground. These issues encompass third-country nationals needing an evacuation, as well as host-country nationals seeking asylum. Legal scholarship should direct its focus to these issues by establishing clear frameworks, given that the decision to evacuate an individual can only be made on the basis of the particular circumstances of the operation in question. The exact legal foundation (i.e. the extent of the host state's consent or the mandate of the UN Security Council) serves as the starting point of every case-by-case analysis. Without these sources, the obligations of the intervening state under international or human rights law must be considered. It can be established that, apart from the application of the 1954 Caracas Convention, diplomatic (or naval) asylum cannot be considered lawful under international law. However, the non-refoulement principle or other *erga omnes* obligations may be invoked, depending on the particular circumstances of each case.

[93] Ibid., 264.
[94] See e.g.: Gordon, Use of force for the protection of nationals abroad, 130–131.

Faránki-Szalay, Róbert Zsolt*

The market economy operator principle (MEOP) in EU State Aid Law

Abstract

Article 107(1) TFEU prohibits granting state aid as a rule of thumb. However, TFEU remains silent regarding the notion of state aid and the possible justification of public financing through which states may prove that measures do not constitute state aid. However, soft law and case law provide the market with some solutions, inter alia, the Market Economy Operator Principle (MEOP/MEIP) test, the due running of which may prove state financing to be state-aid free, therefore escaping the prohibition of the TFEU. In this case, financing is not to be confused with a completely different scenario in which a measure does constitute state aid but is deemed compatible with the internal market (e.g., in the case of some subsidies).

Keywords: MEIP; MEOP; state aid; pricing

I. Background

Market Economy Operator (MEO)-conformable financing is the most frequent and typical resort of a state that is keen on providing financial support to undertakings but not willing to do so according to the provisions that justify granting state aid under Article 107(2)(3) TFEU. A State cannot provide such amounts of money without restrictions, as aid such as this could easily distort competition in the internal market as set out in Article 107(1) TFEU. On the other hand, as Article 354 TFEU declares property ownership systems as neutral under EU law, stemming from the equal treatment principle, states cannot be prohibited from engaging in and undertaking financial activities like any other entity,[1] as they may function in a 'dual capacity', with no difference made between the investments of public and private entities.[2]

* Faránki-Szalay, Róbert Zsolt, EU Lawyer at MFB Hungarian Development Bank, PhD student and external lecturer at ELTE Law, Department of Private International Law and European Economic Law.

1 C. Quigley, *European State Aid Law and Policy* (Third Edition, Hart Publishing, Oxford and Portland, Oregon, 2015) 153.

2 *Alfa Romeo* case C-305/89 (para 17).

DOI: 10.56749/annales.elteajk.2024.lxiii.7.125

States cannot, however, give support to the detriment of the free competition on the internal market, as the assets, the *actio radius,* and the economic power of states are usually beyond what individual market entities possess. Keeping in mind that some undertakings are certainly more significant actors than some states,[3] generally, states are always more resourceful – not to mention their exclusive capability to legislate, by which they can easily overcome any obstacles, not to mention their inexhaustible power of printing banknotes. I am deeply convinced that state aid rules exist not only to protect market economy competitors, but also to protect the competitors of smaller states, and smaller states themselves from larger states' competitors (and the larger states themselves). It does not take much imagination to envisage the outcome of a battle between a Hungarian company and its German counterpart, with the backing of their governments. There is not much debate about what advantage this would mean for the German company compared to the Hungarian one if the former enjoyed the limitless support of its government. Germany's real GDP per capita is about 2.5 times greater than Hungary's,[4] and its nominal GDP (so to speak, the total GDP at their disposal) is about 23 times bigger than Hungary's.[5] In a simplified way, this means that if the German government wanted a certain company to overpower its Hungarian competitor, it would have 23 times more assets to back it up, resulting, in my opinion, in the total destruction of the competing Hungarian company. Due to this simple logic, I am convinced that state aid rules, first and foremost, benefit smaller Member States (if we talk about the issue's national economic dimension) and may save them from the unimaginably huge and relatively inexhaustible resources of the larger Member States. In terms of the second dimension, certainly, the core of state aid rules is to prevent any kind of distortion in the internal market to the detriment of all undertakings of any background, and, consequently, to the detriment of the whole European economy, which ongoing distortion it may lead to if not regulated and monitored duly. This is why I strongly claim that state aid rules are not a matter of law, but rather a matter of the natural symbiosis of economic reality and politics that is clearly visible from the imprint of the General Court's and the Commission's decisions. Further, also from the fact that state aid law is, exaggeratedly, basically the billion-page long legal branch of three paragraphs of the TFEU comprising thousands of cases and hundreds of soft law communications, along with some opinions and recommendations, corroborating the claim that it was developed case by case, always reflecting the *Zeitgeist* and economic reality. Additionally, along with massive political contemplations, only about 1 percent of it and its *raison d'être* are laid down in actually binding legal sources,

[3] https://www.investopedia.com/news/apple-now-bigger-these-5-things/ (last accessed: 31.12.2024.).
[4] https://ec.europa.eu/eurostat/databrowser/view/sdg_08_10/default/table?lang=en (last accessed: 31.12.2024.).
[5] https://ec.europa.eu/eurostat/databrowser/view/NAMA_10_GDP/default/table?lang=en&category=na10.nama10.nama_10_ma (last accessed: 31.12.2024.).

unlike in the case of criminal law, procurement law, or civil law, etc. The truth be told, even this 1 percent blends politics and economic reality. To mention just one point: even according to the TFEU's explicit and already mentioned provision *ex lege, per se,* the TFEU makes it compatible with the rules on the common market to grant aid to remedy the consequences of the division of Germany, but not to remedy explicitly the economic divisions of Italy's south and north, Ireland's east and west, or regions of Hungary or Poland or Romania or the Slovak Republic. While these imbalances may be remedied indirectly by the GBER or de minimis regulations, they are not directly based on the TFEU itself. However, the TFEU provides a variety of cases in which it considers aids compatible with the internal market and also enables the Commission to establish detailed rules and legal bases, thereby leaving the door open to granting state aid if justified by the reality of economic dictates, and, plainly put, when political games play a role. However, there is a balance to be struck between law, politics, and economics, just like there are developments in other fields of competition law – for instance, balancing the positive outcomes of the restriction of competition with the need for regulation and market behaviour restrictions.[6]

However, the state can act – just as any other market player may – because, as the *communis opinio* holds, if a private actor would undertake the same action and the state merely steps in to do it instead, no harm is done. What is dictated by fair market rules and does not confer uneven advantages is, essentially, not wrongful. The hardship of assessing what a market economy player would and would not do and on what terms is a shaky and highly hypothetical task, albeit still the core of state financing. However, predicting what a market economy operator would do remains guesswork. Such guesswork – that must be corroborated almost as if it had actually occurred – forms the basis of this entire concept. It is grounded in 'what if' scenarios that, in criminal law, would render the matter entirely inadmissible. Yet, interestingly, this constitutes the centrepiece of this field of state aid law – or 'state financing law' – governing and deciding the fate of billions of euros and shaping the present and future of the internal market in economic terms, all based on a hypothetical. This 'what if', therefore, has to become an 'it is' and an 'it is not' – rock hard – mainly without the specifics being defined by consistent case law. The State acts out of its market economy operator character "whenever…(it) makes available to an undertaking funds which in the normal course of events would not be provided by a private investor applying ordinary commercial criteria and disregarding considerations of a social, political or philanthropic nature",[7] when the recipient "receives an economic advantage which it would not have

[6] Papp M., Immanens versenykorlátozások az Európai Bíróság joggyakorlatában, *Állam- és Jogtudomány,* (2014) 55 (4) 52.

[7] *Spain v Commission* case, C-278/92 (*Hytasa* Case), Opinion of Advocate General Jacobs delivered on 23 March 1994 (para 28).

obtained under market conditions"[8] due to the fact that the State has engaged in a transaction that a market economy operator would never have.[9] This approximation applies to all kinds of transactions, which is why some jurisconsults believe that the basis of this kind of acting is the 'market economy operator principle' (MEOP),[10] and specific ramifications of it, like the 'market economy investor principle' (MEIP). The latter concerns when the transaction is about investing, or the 'private debtor principle/ market economy debtor principle' (MEDP), when the State acts in the character of a debtor, triggering different regimes to assess its behaviour (as the core premise is that the state cannot repay or recover more than it duly should, manifesting for the first time explicitly in 2019 in a Polish case concerning motorway concessions[11]). There are, however, dissenting opinions about this, as well. In private correspondence on 9 August 2022, Professor Phedon Nicolaides stated the following to me about the relation between MEOP and MEIP: "There is no consensus in the profession or the case law. They are treated as synonymous. However, the Commission tends to use MEO to assess the management of infrastructure and the MEIP to assess injections of capital or provision of loans. But the logic is exactly the same." The logic I intend to follow in this paper is that I consider MEIP a subcategory of MEOP in connection with investments. What we do know for sure, however, is that the MEIP first appeared and immediately became of landmark importance in 1984 when the Commission issued its Communication on Government Capital Injections,[12] and ever since, the Commission has brought it up as an exception to general TFEU-stipulated state aid provisions. Recently, however, it has stated that it considers MEIP a general test rather than an exception, making it a vital part of state aid law and representing the constantly changing character of this branch of law.

There are various tools in the hands of economic actors (and ultimately, in the hands of the Commission) to help them decide whether a transaction is in line with the MEO criteria. In my opinion, one of the most insightful examples of this is the case of Milan Airport,[13] in which the Commission identified significant criteria that must be met to align with the MEO standard (and its special form, MEIP). These conclusions were approved by the General Court and later the Court as well, after a lost annulment procedure and a similarly unsuccessful appeal. The specialty of the three decisions is not only the harmony manifesting on all three levels but also that, by reading the decision of the Commission, we can easily identify what criteria should have been met

[8] *SFEI v La Poste* case, C-39/92 (para 60).
[9] *Cityflyer Express v Commission* case, T-16/96 (para 51).
[10] *Land Burgenland v Commission* case, T-268/08 (para 48).
[11] *Autostrada Wielkopolska v European Commission* Case, T-778/17 and P. Nicolaides, First Case of a "Private Debtor" Test? *State Aid Uncovered Blog, Lexxion,* (14 December 2021), https://www.lexxion.eu/stateaidpost/first-case-of-a-private-debtor-test/ (last accessed: 31.12.2024.).
[12] EC 9-1984.
[13] *Milan Airport* case, 2015/1225 and C-160/19/P.

to determine if the measure in question was in line with MEIP terms (in this specific case, the Council of the City of Milan, Italy, was found to have been acting in a way that was incompatible with the character of MEO). It overstepped its economic borders and hence granted state aid, which activity, in the absence of any justification (as mentioned before), was found to be incompatible with the common market. The definition of MEI (market economy investor) behaviour in this case is outlined as not necessarily the attitude of a normal investor who invests capital for the purpose of realising a profit in a relatively short time. It must, however, at least be the conduct of a private holding company or a group of private undertakings which is pursuing a general or sectoral structural objective and has longer-term prospects of profitability in mind. A private investor may provide capital to ensure the survival of an undertaking that is experiencing temporary difficulties but is still capable of recovery. However, when the capital injected by a public investor does *not* have long-term prospects of profitability, the capital injection may be considered aid in line with the meaning of Article 107 TFEU. It is then necessary to go back in time to the point at which the financial support measures were taken to assess whether the State's behaviour was economically rational, and judgements should not be based on the situation that subsequently developed. The recent decision of the Court concerning Wizzair in Romania[14] also emphasised the need to scrutinise the situation at the time of the decision and whether the decision maker made an *ex ante* forecast or not.

II. MEIP in practice: the *Milan Airport* case

I hereby detail the seven aspects I observed that the investment failed to meet, but would have been necessary for the state to have been aligned with the MEIP standard in the *Milan Airport* case.

First, it lacked a multi-annual loss coverage strategy as part of the strategic business plan. As Italy argued, while the decisions to cover losses were formally taken on an annual basis, the multi-annual strategy to cover losses over the restructuring period could not have been renegotiated annually, and the results thereof could only be assessed over a multi-annual period. The Commission's reaction thereto was that, given that the preparation of a new business plan normally involves an assessment of the company's business strategy to determine whether the company should continue to follow a pre-existing strategy or change it, it could have been revised at any time to take account of market developments. Italy argued furthermore that the closure of Alitalia's hub airport in 2007 had serious consequences for the activities of SEA Handling (a subsidiary of the company operating the airport, which is more than 99 per cent state-

[14] *Carpatair v Commission* case, Case T-522/20.

controlled). The consequences that had an impact on the financial performance of the company were exacerbated by the economic downturn, forcing SEA (the 99% State-controlled company operating the airport) to reassess the viability of the hub model and to assess the possibility of opting for a different business model. Instead of outsourcing ground handling services, SEA finally created a new business model. The new model required the tight control of ground handling activity, which demonstrated that SEA had made a rational decision to continue to cover the operating losses of its subsidiary, SEA Handling, to restore the profitability of its ground-handling business. The Italian authorities upheld that the unforeseen external circumstances fully justified the revision of SEA's strategy for its subsidiary and that it did not, in any way, jeopardise SEA's plan to restore the long-term profitability of its ground handling business. The Commission counter-argued however, by stating that while the existence of a multi-annual strategy for loss coverage by the Italian authorities had been noted, the Commission still considered that this strategy would not correspond to the behaviour of a prudent private investor because while any restructuring process may take several years to achieve results, a prudent private investor would not make a multi-annual commitment in the absence of a clear vision (but would try to decide each year whether to inject new capital into the company, taking into account the results of the restructuring process and the prospects of future viability). In the present case, a private investor would certainly have reassessed the strategy in 2003 or 2004, when it was already clear that the objective of restoring profitability by 2005 was simply not feasible, but in any event, at the latest in 2005, once it became convincingly clear that the objective originally pursued had not been achieved. A private investor pursuing a long-term loss cover strategy, assuming in any event the absence of binding legal constraints, would have reviewed the strategy each time it was asked to provide funds to cover SEA Handling's losses. Furthermore, a decision of such importance as a capital injection, which requires the approval of the general meeting, cannot be considered simply a step in the implementation of a general decision to cover future losses – and decisions to cover future losses over several years are not mentioned in SEA Handling and SEA's strategic business plans. SEA's governing body did not make a formal, binding commitment, based on a business plan, that SEA would make specific capital injections over a specified number of years. The decisions were mostly concerned with restructuring SEA Handling and not the coverage of losses over several years. In any event, a private investor would not have undertaken to cover losses over several years without at least a preliminary estimate of the total costs.

Second, making a capital injection without a detailed business plan for an undertaking in difficulty would not be acceptable for an MEI. The core of the issue is that where public authorities provide capital to an undertaking in financial difficulty, it shall automatically be considered likely that providing the funds involves state aid, given the risks involved, as such investments very rarely yield returns that are acceptable

to private investors in a market economy. Such capital injections must, therefore, be notified in advance to the Commission for approval as State aid, as stipulated by Article 108(3) TFEU. In this case, the state's decision does not appear to have been based on a detailed business plan demonstrating that SEA Handling was in any way capable of improving its situation and restoring profitability within a reasonable timeframe. [1] A market investor would not have made these capital injections without a business plan based on sound and reliable assumptions and without sufficient details, which would have accurately described the measures necessary to restore the company's profitability, analysing possible scenarios and demonstrating that the investment (taking into account the inherent risks) would ever generate a satisfactory return for the investor in terms of dividends, increased shareholder value or other benefits. (The Italian authorities did not argue that the services are ones of general economic interest which the market could not provide.) [2] The business plans submitted were not sufficiently detailed to justify such a decision made by a private investor in a market economy. More precisely, the plans were not 'rescue plans' based on which a prudent private investor could make a significant capital injection into a company that had been in economic difficulty since its creation. The plans were not based on an in-depth analysis of the causes of the difficulties and the measures addressing them, nor did they assess the impact of improved productivity on the overall financial performance of the undertaking, nor did they set out specific measures to be taken. [3] There would have been alternatives. In particular, in a market with such low profit margins, instead of covering SEA Handling's losses, SEA should have taken much more radical measures to improve SEA Handling's efficiency and substantially reduce personnel costs, which, according to the Italian authorities, represented a significant part of the cost structure of operators in a sector subject to strong competitive pressure. A possible alternative would have been to outsource all or part of the services (different batches) and create a strategic alliance by selling the shareholding in SEA Handling to a strategic partner. Moreover, there was nothing to prevent SEA from trying to improve the efficiency of SEA Handling using more radical restructuring measures within a timeframe acceptable to a private investor, which it failed to do. Private companies' apparent lack of interest in SEA Handling as an investment indicates the company's lack of stable profitability prospects. [4] The calculations did not consider the significant costs that would have been incurred at SEA to cover losses, which could have been avoided by outsourcing part or all of its ground handling activities to a more competitive operator. It is possible that the outsourcing of certain business activities would have resulted in higher costs for SEA in view of the synergies resulting from combining those services with other activities within the organisation. Still, the overall benefit of outsourcing could have been positive. This argument alone does not support SEA's claim in its comments that there was no alternative to covering SEA Handling's losses. (On a personal note, American Airlines itself, for example, tried to achieve what it claimed

was cost rationalisation by reducing the amount of olives in each meal during in-flight service by one single olive, which interestingly proved to be an effective form of 'restructuring', yet the company was not an undertaking in serious difficulty.[15]) Some kind of cherry-picking was identified with regard to the outsourcing of all or part of the ground handling activities, as the Italian authorities first argued that the business was not intended to be acquired by any operator. This claim was not supported by concrete evidence, while several operators were authorised to provide services in Italy, particularly at Malpensa and Linate airports.

Third, (un)foreseeable expectations in the business plan were not duly detected and evaluated. Given that for Alitalia, Milan airport is a hub, it is not possible to avoid assessing the situation of the airline, especially in the context of air transport liberalisation. In this respect, the Italian State and the airline have concluded a large number of contracts. However, since it was to be expected that the liberalisation of the sector would eventually lead to a reduction in prices, the Commission did not consider SEA's claim that ticket price reduction was an 'unforeseen adverse event' to be well-founded. The business plan was therefore not based on realistic prospects. Moreover, the Commission considered that a private investor would have anticipated the change in the competitive environment brought about by the liberalisation of the sector and would not have pursued a strategy that made the restoration of profitability dependent primarily on an increase in turnover. This problem has been present since the 1990s, with increasing intensity. Yet, no action was taken to transform the airport until 2012, so not only was the fall in prices very predictable, but also the need to mitigate its consequences must have been obvious. Still, this did not happen during approximately 15 years, which would have been unthinkable for a private investor. The alternatives already mentioned could have remedied the foreseeable and even ongoing negative effects, so this lack of interest and misguided business reaction is also contrary to all the characteristics and rationality attributable to a private investor. A private actor looking at a business that has been loss-making since its establishment years earlier would have demanded thorough scrutiny and concrete action before investing such (or even any) resources in the business.

As a fourth element, anyone can become profitable through external influence. Given that SEA Handling's losses have been covered continuously for more than ten years, it is not surprising that it has finally become profitable again. Any firm that received the same financial support could restore its profitability with modest restructuring measures. However, this prospect would not be satisfactory for a private investor, as it would require at least a forecast that the expected return on the medium-

[15] https://www.aircraftinteriorsinternational.com/quiz/american-airlines-famously-saved-us40000-year-removing-one-olive-salad-first-class-much-money-northwest-airlines-reportedly-save-1987-cutting-limes-16-pieces.html (last accessed: 31.12.2024.).

to long-term loss-covering strategy (in the form of dividends, increased shareholder value, avoidance of loss of public image, etc.) would exceed the amount of capital injection to offset losses. A MEI, therefore, would never have acted this way.

Fifth, the duration of the 'support', its objective, and the tendering procedures were all poorly founded. SEA Handling did not face 'temporary difficulties' but serious structural problems, and its losses were not covered by SEA for only a limited period. Moreover, suppose the purpose of the loss cover was to enable the subsidiary to cease its operations under the best possible conditions. In that case, it should have been noted that SEA had only launched two tendering procedures since 2001, and the ideal conditions were not met within a reasonable period. In any case, the objective mentioned does not in itself prove that the measures satisfied the prudent private investor criterion.

As the sixth issue, the *ex-post* legitimisation regarding the absence of a business plan and quantification was found unacceptable. Italy argued that SEA Handling had claimed that its results had been adversely affected by unforeseen events, particularly the SARS virus, the terrorist threat following the outbreak of the Iraq war in 2003, and the eruption of the Eyjafjallajökull volcano in 2010. The Commission, however, challenged this by saying that the impact of these events on SEA Handling's traffic was only quantified in a study by RBB Economics dated 1 June 2011. However, the study merely reiterated SEA Handling's claims, namely that the terrorist threat following the SARS virus and the outbreak of the Iraq war in 2003 had led to a 3 percent drop in turnover, while the eruption of the Eyjafjallajökull volcano had led to a loss of EUR 1.5 million. The analysis of the situation without the granted aid was based on these assumptions and did not provide an opportunity to analyse the impact of these events in their reality. Moreover, the Commission considered that, even if SEA's unsubstantiated estimates could be considered reliable, the effects of the unforeseen events described in the RBB Economics study would not have realistically justified SEA's serial capital injections, which amounted to almost EUR 360 million from 2002 to 2010. The Commission also considered that an investor operating under market conditions would probably have carried out an investigation immediately after such events, rather than after several years, in order to assess their impact and to determine whether to modify its strategy, adapt its existing strategy, or change its business plan. However, since the RBB Economics study was carried out years after the decision to initiate the procedure, the Commission considered that it did not correspond to the behaviour of a prudent private investor but was carried out for the purposes of the present procedure to demonstrate ex post the alleged economic rationality of SEA's behaviour. Consequently, the study could not be taken into account when applying the MEIP test.

Finally, a comparison with the profitability of other operators would have been essential. The Commission rejected the argument that it was not possible to compare

the economic performance of other ground handling operators of a different nature. The Italian authorities refer to 'airport operators with accounting separation', 'airport operators with separate companies', 'airlines providing their own ground handling services' and 'external service providers', which may be both domestic and international network operators, or even SMEs. Thus, they were trying to artificially twist the details about the market as if there were no comparable companies. The operators with which the Italian authorities did not wish to compare SEA Handling are nevertheless actual or potential competitors. In fact, the Italian authorities' argument reduced to zero the number of competitors comparable to SEA Handling, since no single operator provided all the services that SEA Handling did at that time, even if that operator was identical, i.e., a company linked to an airport operator but operating as a separate company. The fact that other operators on the ground handling market may have suffered losses during the same period did not prove that SEA's behaviour was reasonable, but rather suggested the opposite, since an undertaking in economic difficulty tends to concentrate on its core activities and usually ceases investing in activities which generate structural losses or are less profitable, generating alternative costs. Accordingly, the procedure was not in line with the potential behaviour of an MEI.

III. MEIP in practice: The Klagenfurt Airport case

Another insightful example of the MEIP test is the *Ryanair-Klagenfurt*[16] case. Klagenfurt Airport was majority state-owned (in varying forms) and the aid granted to it consisted – on the one hand – of granting Ryanair all operating costs at a fixed price, i.e. for five plus five years in advance, without taking into account that the fees of other companies were subject to increase year by year in line with market prices. On the other hand, they also entrusted the airline with the operation of the London route, which was a high-profit one for Ryanair, and the prices were also fixed, so that six years later the company would been able to work at a lower price due to the increase in competition and the rise of low-cost airlines in general. Possession of the London route also automatically gave the airline better slots, so it could operate its other flights at a better time and price. Klagenfurt Airport did not have such a contract with other airlines, so their fares were significantly higher, and they did not operate routes under individual obligations. In the case of Ryanair, the conditions pertained to the London route, the demand for which was artificially created, while load factors remained abnormally low. Austria argued that it was not responsible for the activities of the municipality of Klagenfurt, which owned 80% of the airport. The other 20% was held by a federal ministry. This argument was, of course, immediately rejected by the CJEU. In

[16] T-448/18 ECLI:EU:T:2021:626.

particular, the acquisition of such a large share of the municipality's property required the consent of the federal government, which was granted, but even without it, Austria was to be held responsible, owing to the municipality's public nature, the CJEU pointed out, which is rather an issue of imputability and state resources. The Commission ran an MEIP test, which the CJEU agreed with: the conclusion of the contracts was not based on any impact studies, and Austria could not provide a single document showing that they had examined the competitors or the 10-year returns, or even the one-year returns. In other words, the contracts were simply concluded, probably based on some kind of backroom deal, running to about 15 pages long. Both grants were declared incompatible by the Commission, and the full amounts were ordered to be recovered, EUR 2.2 million. The Commission looked at the revenue generated each year, deducted the associated costs, and then deducted what would have been the real market price in that year based on expert assessment. The remaining amount was considered to be the prohibited state aid element. This case clearly proved that not only is financial capital relevant, but airline slots also have a financial value, which, if granted to one operator without justification (be it economic or legal), constitutes state aid.

IV. The MEIP test generally

Strictly speaking, there is no other way for a Member State to subsidise an undertaking apart from in line with certain titles and legal bases, as mentioned above. If the Member State still wishes to provide money to undertakings with no regard to these titles, it can only do so in line with the MEO/MEIP terms, and then we are no longer talking about granting aid or subsidising, but about providing financing, just like a market operator would, lacking any aid elements.

However, I consider several other important and widely applied methods to fall within the scope of MEO/MEIP-compliant financing, as recognized and supported in the *Notice on the notion of State aid*.[17] Paragraph 4.2. designates the so-called 'MEO test' as the main justification for financing, while Paragraph 4.2.3.2 describes a sub-method for establishing whether a transaction is in line with market conditions based on 'benchmarking or other assessment methods'. That being said, we immediately face a non-exhaustive list made by the Commission, leaving the door open to any suitable and reasonable methods feasible for corroborating the market-economy-conforming character of a deal.

[17] 2016/C 262/01.

In the meantime, we have to differentiate between the applicability of the MEIP test and actually applying it. As explained – inter alia – in the Larko case,[18] applicability means whether, in theory, the State could act as a private investor in the existing situation. Application, however, means actual evidence that the State acted as a private investor. It is for the Commission to examine the applicability of the MEIP, while the onus is on the Member State concerned to prove that it has, in fact, been applied. Consequently, if it is established that the private investor test is applicable, it is for the Commission to request the Member State concerned to provide all relevant information to enable it to establish whether the conditions for the application of the test are fulfilled.

All in all, in general, we may say that the economic behaviour of the state under normal market conditions should be compared to the actions of a prudent and diligent private investor[19] whose moves are reasonable: i.e., if the expected return on the investment exceeds its opportunity cost, which is the return that the investor would expect to obtain from other investments of comparable risk (and at least the return that it could obtain with the same financial risk on the financial market, which is the forward-looking return[20]). Return on investment is often calculated as an accounting return, where earnings are divided by the book value of capital (ROE), assets (ROA), or investment (ROI). However, these accounting rates of return are not usually considered the most adequate measures of the average return expected by an MEI. Market investors may use these methods for smaller and more manageable investments using data from management. However, the calculation of accounting profits is carried out on an annual basis, and a reasonable investor would take into account the project's entire lifespan. The most effective method of determining the average annual return on an investment is the IRR (internal rate of return). The IRR is not based on incomes for a given year but considers the future cash flow stream the investor expects throughout the project's lifespan. Based on the future cash flow, the IRR can be calculated using the following equation:[21]

$$-\text{Investment} + \sum_{i=1,\ldots,\infty} \frac{\text{Expected Cash Flow}_i}{(1+\text{IRR})^i} = 0$$

[18] *Larko* case, C-244/18 P and T-423/14.
[19] *Larko* case, C-244/18 P and T-423/14 (para 30).
[20] H. W. Friederiszick and M. Tröge, Applying the Market Economy Investor Principle to State Owned Companies – Lessons Learned from the German Landesbanken Cases, (2006) (1) *Competition Policy Newsletter,* 107
[21] Friederiszick and Tröge, Applying the Market Economy Investor Principle to State Owned Companies, 106.

The most important part of the IRR calculation is the correct estimation of the cash flow. In the case of capital investments, this means developing a realistic and detailed business plan. The revenues in the business plan should then be converted into cash flow figures, taking into account non-cash elements, such as depreciation or changes in working capital. Of course, the expected IRR of a capital investment could be over-optimistic or too pessimistic, as business plans can have a major impact on the expected return on an investment. Therefore, it is very important that the basic assumptions used in the forecasting process are realistic.[22] And this, in my mind, is the core of the behaviour of a market economy operator.

V. Conclusion

The MEOP/MEIP test varies by field, as there is a certain difference between the proximity of an investor and a guarantor in relation to the matter of their financing activity, as the status of an investor suggests and necessitates a closer and more imminent interest regarding the actual financing of a project. Therefore, specifying a definitive framework for implementing this test in every financing situation remains very challenging. To address this tangible difficulty, the Commission has adopted several soft law instruments to help financiers comply with less complicated criteria so they are able to provide financing through state aid freely, which I intend to introduce in future volumes.

[22] Staviczky P., A piaci magánbefektető elve az uniós joggyakorlat tükrében, (2012) 13 (1) *Állami Támogatások Joga,* (3–19., 9–10).

Szeibert, Orsolya*

What is 'divorce mediation' in Hungary? – An analysis based on Hungarian scientific mediation-related literature

Abstract

Mediation is a well-known institution in Hungary; there are many committed trainers, and those who intend to become qualified as mediators may choose among different forms of training. Mediation functions in several fields, and divorce mediation and family mediation are among the most typical. The Mediation Act was accepted in 2002, and although in the early 2000s the mediation literature was narrow, today there are many legal and non-legal mediation-related publications. As both the rules of civil law and civil procedural law have changed, the paper examines how the Hungarian mediation-related literature defines 'divorce mediation' and 'family mediation' and how these approaches serve the purpose of this kind of mediation, such as the mediators' tasks in this field. The aim is to conclude whether these approaches point in the same direction or diverge, and, primarily, specify whether there is harmony between the legal requirements associated with the dissolution of marriage and 'divorce mediation'. A topic to be discussed is whether the issues that accompany divorce, upon the spouses' mutual consent, can be arranged within the framework of 'divorce mediation'.

Keywords: divorce; divorce mediation; family mediation; mediation-literature; definitions

* Szeibert, Orsolya is a professor and head of department at ELTE Eötvös Loránd University, Faculty of Law, Department of Civil Law.

DOI: 10.56749/annales.elteajk.2024.lxiii.8.139

I. Introduction

1. Aim of the paper

This study deals with Hungarian mediation-related literature (as detailed below) only from a very restricted angle – how the latter defines 'divorce mediation', the goal of these kinds of mediation, the main tasks of the mediator as third neutral person in these proceedings and the relationship between 'family mediation' and 'divorce mediation'. A further aim of the paper is to identify how the authors, primarily mediators themselves, consider the connection between mediation ('divorce mediation' and/or 'family mediation') and the legal dissolution of marriage, the latter of which takes place exclusively before the court. The mediation-related literature to be analysed in further chapters of this paper is considered the 'classic' Hungarian literature on the field of mediation generally. These publications' purpose is primarily educational, has a professional basis, and is deeply committed to mediation as an excellent 'toolkit' for solving conflicts on the basis of the autonomy of the parties. The following subchapters summarise the phrases used by the authors regarding the envisaged issues.

2. Background – The emergence and literature of mediation in Hungary

Mediation has been discussed and used in Hungary for approximately thirty years now. After the change of the regime in the mid-1990s, the first steps were taken to institutionalise mediation.[1] Attorneys, communication experts, social workers, experts in child welfare[2] and judges were equally active in this field. In 1999, a parliamentary resolution[3] required the Ministry of Justice to develop regulations for the introduction of mediation procedures, and in 2002, the first and still effective Mediation Act was accepted by the Hungarian Parliament. At the same time, mediation-related endeavours could be seen in several legal and non-legal fields, and these mediations have been developing alongside each other since that time. Ten years after the 'first visible step', mediation became more well-known in the 2000s. In 2009, the Ministry of Justice and Order introduced a regulation on the professional training and further training of mediators, which regulates the requirements of being a mediator. Since that time, countless training courses have been held, and many people working in different legal and non-legal fields have shown an interest in mediation and mediation training.

[1] Pokol B., *Jogszociológiai vizsgálódások* (Rejtjel, Budapest, 2003) 42.
[2] Kardos F., *Gyermekközpontú közvetítés* (Kapcsolat 2000 Pszichológiai Betéti Társaság, Budapest, 2011) 90–91.
[3] Resolution of the Parliament No 102/1999. (XII. 18).

The first mediation-related literature was published in the very early 2000s, as there emerged a demand for professional guidelines on mediation. However, this meant only sporadic publications, and no Hungarian language literature in a traditional sense existed in the mid-2000s.[4]

The Mediation Act of 2002, which diverted a range of legal disputes to out-of-court and extrajudicial processes, belonged to the legislative reforms introduced after the change of the regime[5] and its articulated aim was to give a chance to a form of conflict resolution that avoids the court system.[6] In spite of this goal, court mediation as a new legal institution in Hungary was built into the Mediation Act in 2012, and the new provisions on court mediation entered into force in the summer of that year. This development gave new impetus to mediation-related literature. New studies and papers on mediation grew in parallel with the popularity of training on mediation. The mediation-related literature has grown since the first publications, and mediation is being dealt with from several perspectives, such as conflict theory, communication and participation theory, education, psychology and family therapy such as law, including many fields of it, from restorative justice to the conciliation methods. It is worth mentioning that almost all kinds of mediation-related literature refer to the first thin books on mediation published in the very early 2000s.

II. The dissolution of marriage according to the Hungarian Civil Code

Divorce is regulated in the Hungarian Civil Code (HCC), Act V of 2013, which entered into force in March 2014. The HCC replaced the previous family law, Act IV of 1952 on marriage, family and guardianship (the Family Act). Family law is contained in the Fourth Book of the effective HCC. Marriage terminates upon the death of either spouse or its dissolution by the court. Consequently, a divorce can only be obtained through a judicial process. No administrative procedure for the termination of marriage is allowed in Hungary. As regulated in the Family Act, the HCC states that the only grounds for divorce are the complete and irretrievable breakdown of married life. Either spouse may request the dissolution of the marriage if the marriage has completely and irretrievably broken down. Although earlier, Hungarian family law

[4] Sáriné Simkó, Á. (ed.), *A mediáció. A közvetítői tevékenység* (HVG-ORAC, Budapest, 2006) 232.

[5] Juhász E., Törvény a közvetítői tevékenységről, in Eörsi M. and Ábrahám Z. (eds), *Pereskedni rossz! Mediáció: a szelíd konfliktuskezelés* (Minerva, Budapest, 2003, 49–64) 49.

[6] Gyekiczky T., A határtalan egyezségkötés rögös útjain. Adalékok a peren kívüli konfliktusfeloldás eljárásjogi szabályozásához, in Wopera Zs. and Asztalos Zs. (eds), *Egységesülő polgári eljárásjog Európában* (HVG-ORAC, Budapest, 2009, 36–57) 42–43.

made it possible to dissolve the marriage upon the fault of either party, today, no divorce upon fault now exists.

Under the aegis of the complete and irretrievable breakdown as the sole ground of divorce, two types of divorce, divorce upon mutual consent of the spouses and divorce without mutual consent, can be distinguished. The reason why the marriage has broken down has to be investigated in the divorce proceeding if the spouses are not divorcing by mutual consent. The complete and irretrievable breakdown of the marriage can be established in particular if the marital life between the spouses has ceased, and, considering the process leading up to the termination of the marital life and the duration of the separation, there is no prospect of restoring it. In the case of divorce by consent, there is no presumption of an irretrievable breakdown, but, provided that the spouses have agreed on the accessory issues, the court does not have to investigate the reasons giving rise to the divorce. In such a case, the spouses have to agree on divorce and all accessory issues, clarify that their request for divorce is not the result of undue influence, and declare it as their final decision. The spouses must present their agreement about the custody and maintenance of any child, the non-custodial parent's right of contact with their child, if the claimant so requests, spousal maintenance, and the right to use the matrimonial home after divorce.

Mediation was not covered in the Family Act, but has been built into the HCC. According to the HCC, spouses can use a mediation procedure to resolve their relationship and other disputed issues related to the divorce based on agreement, either by their own decision or at the initiative of the court before or during the divorce proceedings, while the agreement that is reached because of the mediation process can be included in a lawsuit settlement. This rule does not mean that the mediation process is a mandatory element of divorce proceedings.

III. Mediation in the Mediation Activities Act

Act LV of 2002 on mediation activities (Act on Mediation) is the first Hungarian act to regulate mediation generally. The purpose of this Act is to facilitate the settlement of civil and administrative disputes arising in connection with the personal and property rights of natural and other persons, in which the parties' right of disposal is not restricted by law. Some family law proceedings are excluded from the scope of the Act, and it states that in matrimonial proceedings, a judicial decision is necessary for the dissolution of marriage. Mediation is defined in the Act. According to the definition it is a special procedure conciliating, preventing litigation or facilitating the end of the judicial or administrative procedure, managing conflicts and resolving disputes which purpose is to facilitate the creation of a written agreement containing a solution to the dispute between the parties with the involvement of a third party (hereinafter referred

to as a mediator) who is a neutral person and based upon the affected parties' mutual consent. Originally, the relationship between judicial and administrative litigation focused on the prevention of litigation. Later, it was modified to comply with the then-adopted HCC.

IV. Mediation in the HCC and civil procedural law

During the recodification process of the HCC, which lasted between 1998 and 2012, mediation was emphasised in particular regarding family law proceedings. At the early stage of the HCC's recodification, the facilitating character of mediation was recognised, underlining that it might have a supporting function in divorce law and especially in settling accessory issues in the case of divorce upon mutual consent of the spouses.[7] At this time, mediation was denoted as the counterpart of the strict legal proceeding. More and different significance was attributed to it than pure litigation prevention and conflict management. Mediation was indicated as a tool based on the voluntary participation of the parties that may facilitate peaceful divorce and the settlement of the disputed issues by agreement.[8] Even if mediation was not heavily emphasised during the elaboration of drafts of the HCC, it is obvious that the drafter of the HCC saw a great future in it and made an effort to attach it to family law rules.

Mediation was planned to be attached to the Family Law Book of HCC in two fields, divorce and parental custody. Divorce mediation was seen to be able to resolve disputed ancillary issues, and future modifications were expected to be implemented in both substantive law and civil procedural law.[9] The codification was based upon Recommendation No. R (98) 1 of The Committee of Ministers to Member States on Family Mediation. Although this European document does not prescribe the reconciliation of divorcing spouses, the Hungarian codification held that mediation might be used with the aim of reconciliation or the arrangement of disputed issues emerging in connection with the dissolution of marriage. As states should facilitate the approval of mediated agreements by a judicial authority or other competent authority where parties request it and provide mechanisms for the enforcement of such approved agreements according to the recommendation, the draft of HCC included that the mediation agreement could be a basis for divorce upon mutual consent. It was foreseen that a mediation agreement could not be converted directly into a lawsuit settlement.

[7] Weiss E., A készülő Polgári Törvénykönyv családjogi könyvének a Kodifikációs Szerkesztőbizottság által elfogadott koncepciója, (2001) (4–5) *Polgári Jogi Kodifikáció,* (21–40) 24–25.

[8] Kőrös A. and Makai K., Harmadik Könyv. Családjog, in Vékás L. (ed.), *Szakértői javaslat az új Polgári Törvénykönyv tervezetéhez* (Complex, Budapest, 2008, 391–570) 417.

[9] Kőrös A., Makai K. and Szeibert O., Negyedik Könyv. Családjog, in Vékás L. and Gárdos P. (eds), *A Polgári Törvénykönyv magyarázatokkal* (Complex, Budapest, 2013, 237–360) 254–255.

The reason for this is that the content of a lawsuit settlement in a divorce procedure upon mutual consent is regulated accurately and in detail, and it must meet the requirements of enforceability.[10]

The elaboration of the rules of a special mediation procedure applicable in family law cases has been maintained as necessary, such as the modification of the civil procedural rules and the integration of child protection and child welfare mediation into family mediation. According to Act CXXX of 2016 on civil procedure, the court shall provide information on the possibility of using mediation, its method and benefits, the possibility of including any agreement in a court settlement, and the rules for suspension. This is in harmony with the procedural requirement for the judiciary that the court, if there is an opportunity of success, shall attempt to promote an agreement between the parties.

V. Divorce mediation

1. Difference between divorce and dissolution of marriage

The HCC and the legal rules together do not use the phrase 'divorce', which is 'válás' in Hungarian. Although people, including even lawyers (when simplifying the proceedings for the dissolution of marriage), use the word 'divorce' every day, it is considered common usage. The proper legal terminology is 'dissolution of marriage', which is 'házasság felbontása' in Hungarian, a phrase that is used in HCC and all legal regulations. Sometimes the word 'divorce' is used as the synonym of dissolution of marriage but in some cases 'divorce' covers the splitting up of partners, whether spouses or cohabitants, and in further cases the word 'divorce' is used to mean the whole legal and non-legal process of the breakdown of a partnership, including the legal dissolution of marriage. While 'dissolution of marriage' is always used for the legal issue itself, 'divorce' thus has several and multifaceted meanings. The analysis of the mediation-related literature allows us to draw the conclusion that divorce is primarily understood not as a legal proceeding but as a long process with many non-legal and legal elements.

2. Meaning of divorce mediation

Neither the Mediation Act nor the HCC defines 'divorce mediation'. Some definitions or attempts to define 'divorce mediation' may be found in the mediation-related literature. Although the literature refers to the significance of mediation in case of the dissolution of marriage and the fact that mediation may contribute to the arrangement

[10] Kőrös and Makai, Harmadik Könyv, 418.

of accessory issues, the legal counterpart of 'divorce mediation' emphasises mediation as a facility and not the fact that mediation is a tool for arranging the legal issues of 'divorce' directly. Sometimes, 'matrimonial mediation' and 'divorce mediation' seem to mean the same thing: mediation between spouses.[11] 'Divorce mediation' is denoted as an 'additional element' to the court procedure directing the dissolution of marriage, and the judge may use mediation techniques to help allay the parties' anxieties and fears and help them better understand the parties' underlying interests.[12]

The primarily psychological, even if mediation-related, literature endeavours to mention that 'divorce mediation' probably includes issues such as the placement of the child, the distribution of assets and the contact between the child and the separate living parent.[13] 'Divorce mediation' may be proposed to partners who clearly intend to dissolve their marriage, but cannot reach an agreement on the factors which 'impede divorce'.[14]

In the mediation approaches, it is usual to connect divorce mediation to family mediation and underline the autonomy of family members involved in mediation. Besides this traditional approach, there is another, child-focused approach to 'divorce mediation'. Mediators having expertise in child protection and child wellbeing emphasise the child-focused character of 'divorce-mediation'. This conviction or mediation trend has emerged from the Hungarian 'contact monitoring service', a special contact-focused form of mediation. According to this mediation approach, both the contact monitoring service and 'divorce mediation' come under the auspices of child protection services, with the consequence of helping to enforce children's rights. The consequence is that the mediator can only be a professional child protection mediator (psychologist, pedagogue, or social worker).[15] This approach has recently been echoed in papers dealing with 'divorce mediation' and the child's interests. 'Divorce mediation' works as an opportunity for the child to receive attention during the procedure, and their interests have to be given priority during the dispute resolution.[16] The same claim is accepted and repeated in a recent study.[17]

[11] Barcy M. and Szamos E., *"Mediare necesse est". A mediáció technikái és társadalmi alkalmazása* (Animula, Budapest, 2002) 62–63.
[12] Sáriné Simkó, *A mediáció,* 77.
[13] Kozékiné Hammer Z., A válás mediáció, avagy a párkapcsolat befejezését segítő humánus módszer bemutatása, (2014) (2) *Alkalmazott Pszichológia,* (79–101) 89.
[14] Kozékiné Hammer, A válás mediáció, avagy a párkapcsolat befejezését segítő humánus módszer bemutatása, 90.
[15] Kardos F. and Ábrahám Z., Különélő szülő kapcsolattartása gyermekével – mediáció a legkisebbek védelmében, in Eörsi M. and Ábrahám Z. (eds), *Pereskedni rossz! Mediáció: a szelíd konfliktuskezelés* (Minerva, Budapest, 2003, 131–149) 132.
[16] Kukity K., Juhász É. and Hunyadi K., A mediáció kérdése: a gyermek helye a válási mediációban, (2017) (1) *AKV Európai Szemle,* (98–105) 101.
[17] Pilinszki A. and Watfa Zs., A válás folyamata és a mediáció, (2022) (1) *Esély,* (56–73) 61.

3. The purpose of 'divorce mediation'

The goal of 'divorce mediation' seems to be as divergent as this kind of mediation's definition, such as it exists. Different purposes are articulated and emphasised in different papers and contributions on mediation, or at least different purposes are underlined.

The goal of 'divorce mediation', which coincides with the goal of 'family mediation', is threefold. Conflict management, which helps couples and families resolve problems in their relationships, assists with basic 'divorce-'related issues if divorce is unavoidable and supports in closing the past so those involved can get over any painful events as soon as possible after the divorce and focus their energies on shaping the future.[18]

Managing emotions and conflicts is a typical goal of 'divorce mediation', as are its educational benefits. Divorce mediation has an indirect goal, which is also an (indirect) goal of all kinds of mediation. The spouses accept that they are responsible for their own problems, as they know their own problems the best.[19] The goal is not to reconcile the spouses, but to reduce the anger that has built up during the conflict[20] and the emotional burden of the divorce on the spouses.[21] They need to become collaborative partners while still remaining connected, and instead of restoring the relationship, the focus is on deciding on the future relationship.[22] An aim of 'divorce mediation' is to support 'better communication tools, clearer boundaries [and] more secure parenting skills' for the parents.[23]

In some mediation-related literature, the focus is on the agreement. In some cases, only the aim of reaching an 'agreement' as quickly as possible is mentioned to help get over the painful events of the past as quickly as possible, and to focus energies on shaping their future.[24] Some literature connects mediation to divorce upon mutual consent, while others emphasise the connection to divorce without spouses' mutual consent. If the debate between the partners is about the dissolution of marriage itself (and not about the accessory issues), and if it turns out that there is an overt or hidden interest behind someone's opposition to divorce, mediation may have a raison d'être.[25]

[18] Feuer M. (ed.), *A családsegítés elmélete és gyakorlata* (Akadémiai, Budapest, 2008) https://mersz.hu/dokumentum/m633acseeg__175/#m633acseeg_173_p4 (2019, identical online version) (last accessed: 31.12.2024.).
[19] Sáriné Simkó, *A mediáció,* 79.
[20] Barcy and Szamos, *"Mediare necesse est",* 62.
[21] Sáriné Simkó, *A mediáció,* 78.
[22] Barcy and Szamos, *"Mediare necesse est",* 62.
[23] Kozékiné Hammer, A válás mediáció, avagy a párkapcsolat befejezését segítő humánus módszer bemutatása, 93.
[24] Feuer, *A családsegítés elmélete és gyakorlata;* Sáriné Simkó, *A mediáció,* 78.
[25] Barinkai Zs., A válás és gyermekelhelyezés jogi problémái a mediáció szemszögéből, in Eörsi M. and Ábrahám Z. (eds), *Pereskedni rossz! Mediáció: a szelíd konfliktuskezelés* (Minerva, Budapest, 2003, 118–130) 123.

Some mediators refer to the fact that, according to their experiences, the aim of 'family mediation' relates to the agreement about the 'placement of the child' and contact between the child and the separate living parent, such as the assignment of the residence of the child.[26] The issues discussed in mediation are determined by the partners, and some authors consider the accessory issues of a divorce, upon the mutual consent of the spouses, as obligatory topics about which the partners have to agree. These are necessary but not necessarily sufficient issues to address, as parents may prepare for their parenting role after divorce.[27]

Some further approaches connect 'divorce mediation' closely and directly to legal divorce, the dissolution of marriage. According to one approach, the goal of 'divorce mediation' is to create an agreement between the spouses with their active contribution at the end of the mediating process, which 'can be submitted to the court, making possible a simple and quick divorce proceeding'.[28] Even a psychological approach defines 'divorce mediation' as an idealistic method of arranging divorce instead of civil procedure if the spouses have articulated their wish to end their relationship and their aim is to end their relationship with a focus on the future and their future cooperation. This approach includes the agreement between the spouses that contains every item they accept jointly.[29]

A study analysing the narratives of mediation within the Hungarian legal literature underlines that the papers (published until cc. 2012) identified the goal of mediation as improving communication between participants, and teaching them cooperation methods (among others), but nominating the goal of mediation as a form of child protection was a new approach.[30]

4. Tasks of 'divorce mediation'

Opinions are diverging on the potential tasks of a mediator in 'divorce mediation'. Some literature focuses on emotional issues, while others focus on legal ones.

According to one author, divorce mediation addresses both legal and emotional issues in a complex manner.[31] The tasks of 'divorce mediation' are balancing the power differences between the parties, achieving economic independence, developing better

[26] Sáriné Simkó, *A mediáció,* 78.
[27] Pilinszki and Watfa, A válás folyamata és a mediáció, 61.
[28] Kozékiné Hammer, A válás mediáció, avagy a párkapcsolat befejezését segítő humánus módszer bemutatása, 90–91.
[29] Kozékiné Hammer, A válás mediáció, avagy a párkapcsolat befejezését segítő humánus módszer bemutatása, 81.
[30] Ferenczi A., A mediáció narratívái (2012) (7–8) *Új Pedagógiai Szemle,* (118–129) 127.
[31] Sáriné Simkó, *A mediáció,* 78.

conflict resolution skills for the future and enhancing the spouses' autonomy.[32] In addition to reducing the emotional burdens associated with divorce, the goal is to also address the financial and legal aspects of divorce.[33]

According to one mediator, the job of a 'divorce mediator' is 'to bury a relationship nicely'.[34] The task of the mediator is not to pacify the parties, as the mediator cannot have such a purpose. The mediator is a tool, and mediation is not therapy for couples.[35] However, in the classic 'mediation inside the family', a special situation is when the spouses divorce. Although the mediator should remain neutral and impartial in the sense that he or she should not take a position for or against any party, nor give advice to either party, they must strive to enable the weaker party to be on an equal footing and to prevent one party from exercising a dominant power over the other (which is typical in family mediations).[36]

In the case of mediating couples (spouses who have already separated or divorced), the task of the mediator is to represent the family members' interests, points of view and needs towards other family members, such as encouraging them to articulate their emotions connected to their interests and needs.[37] Family law mediation is identified as mediation between couples. It focuses attention on the responsibility and independence of couples affected by the breakdown of marriage and the breakdown of matrimonial life.[38] Besides this, the mediator's task is to assist the spouses to reach a settlement, which will be included in a legal deed.[39]

According to the 'permissive' approach, 'divorce mediation' is also available to partners whose relationship has deteriorated but may hope to remain together, and for those who have already decided on the dissolution of marriage but intend to solve it 'humanely and in a cultured way'.[40] Although some approaches distinguish between conciliation (pacification) and mediation, others summarise mediation as negotiation and conciliation.[41]

According to one approach to divorce mediation, such as child-monitoring service mediation, which is child-focused mediation with the aim of enforcing

[32] Barcy and Szamos, *"Mediare necesse est",* 63.
[33] Sáriné Simkó, *A mediáció,* 78.
[34] Kardos, *Gyermekközpontú közvetítés,* 82.
[35] Kardos, *Gyermekközpontú közvetítés,* 82.
[36] Kertész T., *Mediáció a gyakorlatban* (Bíbor – ME ÁJK, Miskolc, 2010) 239.
[37] Sebes A., A közvetítő szerepektől a mediációig, in Aczél Á. et al (eds), *A társas szociológus* (ELTE Eötvös Kiadó – ELTE TáTK, Budapest, 2011, 97–112) 105.
[38] Nagypál Sz., A családjogi közvetítés (mediáció) alapelvei és sajátosságai, (2011) (1) *Családi Jog,* (17–22) 20.
[39] Lovas Zs. and Herczog M., *A mediáció, avagy a fájdalommentes konfliktuskezelés* (Wolters Kluwer, Budapest, 2020) https://mersz.hu/dokumentum/m735YOV1798__5/#m735YOV1798_3_p13 (last accessed: 31.12.2024.).
[40] Sáriné Simkó, *A mediáció,* 79.
[41] Feuer, *A családsegítés elmélete és gyakorlata*.

children's rights, the task of the mediator is not to be neutral – she or he must be a non-neutral participant in the process. This kind of mediator should be openly pro-child in any conflict between the parents.[42] This approach strengthens the opinion of the parent who represents the child's interests better, at least in the opinion of the mediator. If the parents (partners) reach an agreement, the mediator should undersign it as he or she is responsible for ensuring that the agreement is in the child's interests.[43]

VI. 'Divorce mediation' as 'family mediation'

'Divorce mediation' is regularly discussed as part of 'family mediation'. Some authors identify 'family mediation' as 'divorce mediation' or at least explain that the typical form of 'family mediation' is 'divorce mediation' or mediation between spouses (or other partners) whose relationship has broken down.[44]

However, the approaches towards the meeting points between family – or family law – and mediation are diverging. It is typical in the legal literature that discusses mediation to deal with mediation connected to family – or family law or family issues – as a specific category of mediation.

One of the mediators uses the category of 'mediation inside the family'. In such cases, the typical topics are trust in each other, respect, appreciation, dignity, attention, reliability, communication, safety, family members' educational principles, predictability and understanding. The author emphasises the importance of emotions.[45] Another mediator differentiates between 'mediation inside the family' and 'family mediation' based on whether the mediator is a family member or a third party. The stability of a family is proven if the same family member does not always take on the role of the mediator, but several family members undertake this, or they take turns in this role.[46] Mediation dealing with conflicts between family members and couples specifies this kind of mediation as family law mediation.[47] The term family mediation combines the concept of family, which derives from the Latin familia, with mediation, reflecting the modern practice of resolving family disputes outside of court, with mediators belonging to the family. They are typically the wife and husband, and earlier spouses, usually with children.[48]

[42] Barinkai, A válás és gyermekelhelyezés jogi problémái a mediáció szemszögéből, 132.
[43] Barinkai, A válás és gyermekelhelyezés jogi problémái a mediáció szemszögéből, 132.
[44] Among others, Sáriné Simkó, *A mediáció,* 79.
[45] Kertész, *Mediáció a gyakorlatban,* 244.
[46] Sebes, A közvetítő szerepektől a mediációig, 108–109.
[47] Nagypál, A családjogi közvetítés (mediáció) alapelvei és sajátosságai, 21.
[48] Németh V., A mediáció jellemzői felhasználási területei szerint, (2018) (2) *Kultúra és Közösség,* (21–35) 21.

Family mediation is possible if the relationship among family members – typically spouses – has broken down or their conflicts need to be solved.[49]

Family mediation provides space for taking both emotional and legal approaches to family conflicts and divorces with the aim of arranging the legal consequences and handling emotional aspects, such as complacency, frustration, haste, thoughtlessness and vulnerability.[50]

According to one definition, 'family mediation' is a method for resolving practical conflicts that is based on a well-developed methodology that is constantly changing and draws on several theoretical sources, which are multifaceted and are based on psychotherapeutic methods, communication theories, and psychological and family therapy sources. In the family mediation approach, the family is perceived to form a system that affects all family members.[51] Some other authors expound that family mediation is about reaching an agreement on the 'placement of the child' and contact between the child and the separate living parent, such as the assignment of the residence of the child.[52]

A further approach is called 'family law mediation', which directly connects family-law-related issues – and particularly accessory issues in the case of divorce – upon the spouses' mutual consent. According to the categories of mediation being connected ('family life, family relations and partnerships'), the respective author distinguishes between divorce mediation, mediation in relation to the distribution of assets, the placement of children, access to children, contact, child maintenance, mediation related to educating children and mediation among non-close family members.[53] Mediation that deals with conflicts among family members and between couples suggests that this kind of mediation is a form of family law mediation.[54]

VII. Consequences

Even if 'divorce mediation' and 'family mediation' are special types of mediation, several authors are of the opinion that, as in the case of divorce, child custody, and family conflicts, judicial decisions do too little to resolve the disputes that arise between couples or other family members.[55]

[49] Sáriné Simkó, *A mediáció,* 79.
[50] Feuer, *A családsegítés elmélete és gyakorlata*.
[51] Sebes, A közvetítő szerepektől a mediációig, 100.
[52] Sáriné Simkó, *A mediáció,* 79.
[53] Kozékiné Hammer, A válás mediáció, avagy a párkapcsolat befejezését segítő humánus módszer bemutatása, 89.
[54] Nagypál, A családjogi közvetítés (mediáció) alapelvei és sajátosságai, 21.
[55] Lovas and Herczog, *A mediáció, avagy a fájdalommentes konfliktuskezelés.*

There is no unified definition of 'divorce mediation' in Hungary. Some authors of the analysed publications define 'divorce mediation', while some identify 'divorce mediation' *and* 'family mediation', and there is also an approach which puts the spouses' children at the centre of mediation while emphasising that this sort of mediation has to be clearly child-focused, with a non-neutral mediator. The difference is between the classic mediation that emerges from the self-determination of the parties and child welfare and child protection mediation, which aims at the protection of the child's interests. This is a consequence of the fact that mediation exists in several different fields. This issue leads to another one, which requires expertise in mediation.

Many publications that are analysed in this paper underscore the purpose of 'divorce mediation', and many clarify the authors' viewpoint, even if this is not defined. Conflict management is acknowledged as an essential goal of mediation, with the benefit of helping couples cope with difficulties regarding their parental roles on the basis of smooth communication as a result of the mediation. The emotional part of mediation is widely acknowledged, in harmony with the understanding that divorce involves several stages, and the legal component is only one of these. Although it is accepted by authors with different expertise that 'divorce' cannot be identified with the legal dissolution of marriage, some literature connects mediation directly to the dissolution of marriage, or rather to the accessory issues of divorce upon mutual consent.

The task of 'divorce mediation' is as divergent as the goals of this sort of mediation. Some authors underline the twofold character of this mediation, while others refer to the significance of the 'burying the relationship nicely'. Besides the psychological benefits of mediation, opinions – or at least, emphasis – differ concerning whether mediation means pacification and conciliation or only negotiation between partners. A further issue is the neutrality of the mediator regarding the child's interests.

The authors locate 'divorce mediation' within the wider category of 'family mediation'. Sometimes, 'family mediation' covers mediation concerning family issues such as the educational principles of parents, but in other cases, 'family mediation' means mediation related to legal issues, primarily the accessory issues of divorce upon the spouses' mutual consent. This leads to the recognition that, according to some authors, the legal issues comprise only part of the package that mediation refers to and covers.

Even earlier, when the Family Act was in force, the legal issues were not uncomplicated, but their complexity has since grown. Although matrimonial property issues are no longer included as accessory issues in the effective HCC, the significance of issues connected to the child has become much more relevant than earlier. It is not my aim here to overemphasise the significance of legal issues, but the mediation-related literature does not seem to attribute to the legal issues the importance they are awarded in judicial practice and people's real lives. So, one of the typical descriptions of

mediation as a procedure through which 'the husband and wife, after expressing and mutually accepting their intention to divorce, are able to discuss the issues involved in the divorce and reach a common agreement on child and property issues, then by mutual consent, with the jointly written agreement, the court will smoothly and quickly separate them',[56] does not function in reality. The discrepancy between the expertise and tasks of the mediator and the complexity of the legal issues may be resolved if the mediator 'transforms' the parties' words into their legal counterparts – or if the mediator is not a lawyer, then a lawyer transforms the parties' own words into a legal document.[57] This approach may be approved and has also been applied recently. While this method may guarantee that adequate agreements are reached, it is not in harmony with either the 'classic' and 'traditional' approach to mediation or the legally simplifying approach defined in the mediation-related literature in Hungary.

[56] Kozékiné Hammer, A válás mediáció, avagy a párkapcsolat befejezését segítő humánus módszer bemutatása, 90.
[57] Juhász É. A. and Rúzs Molnár K., *Bevezetés a mediációba* (Iurisperitus, Szeged, 2024) 98–99.

Szegedi, László*

Independence and transparency of EU expert bodies in the automobile sector – Ten years after Dieselgate, before the European e-car revolution, are emission measurements still hidden and unclear?**

Abstract

The Dieselgate scandal led to the reconsideration of the automobile industry's testing procedures and scientific decision-making competencies. The new testing procedures and the apparent move towards on-road testing led to more realistic measures; however, there is still room for improvement. An even more complicated system of diverse actors and capacities at European and national levels has been built up. Evaluating their independence profiles and transparency as part of the EU composite administration is pivotal to decreasing overreliance on car manufacturers' testing results and providing reliable data for car buyers, as clear concerns were identified during Dieselgate.

Some centralisation steps have been taken towards creating more EU-level expert bodies, yet with diverse mandates – laboratory capacities vs. mediators between national actors vs. information providers. Even a decade after Dieselgate, too many diverse actors have these competencies, with necessarily diverse independence and transparency profiles. The EU must address these concerns, especially in light of the move towards technically even more complicated new hybrid and fully electric car powertrain systems, while striving to keep some of its former dominance over the global car market.

Keywords: Dieselgate; expert bodies; independence; transparency; JRC; EU agencies; electric cars; Draghi Report

* Szegedi, László Associate Professor, Ludovika University of Public Service.

** This paper was supported by the Bolyai János Research Scholarship of the Hungarian Academy of Sciences.

DOI: 10.56749/annales.elteajk.2024.lxiii.9.153

I. Introduction

The Dieselgate scandal has brought to the forefront concerns about the independence decade. The 2015 Dieselgate, especially the relatively moderate post-scandal reforms, has been heavily criticised by stakeholders and NGOs in the transport and environmental sphere. These ongoing issues have underscored the clear need to strengthen the EU Single Market's (own) scientific capacity and expert bodies' policy choices so that they have strict and far-reaching implications. In the current era of constant economic, environmental, and societal challenges, the need for solid science is not just a necessity but a lifeline, not to mention the dilemma of the EU and its consumers concerning how to make grounded decisions at the end of the era of combustion engines, heading to the e-car revolution, which might lead to similar concerns.

This paper highlights the Single Market's current evolution, in which the independence and the transparency of the EU expert bodies are put under the limelight, yet often relying too much on Member States' *vis-á-vis* manufacturers' scientific capacity. Therefore, it addresses these market deficiencies by describing the independence- and transparency-related concerns of automobile industry-related expert bodies and scientific decision-making. Consequently, it starts with a brief history of Dieselgate, one of the most significant market failures of recent times, combined with a post-scandal examination of the EU institutional landscape that emphasises the role of the expert bodies. Considerations about the evolutionary and theoretical nature of these particular types of bodies will be followed by an examination of the patterns of independence of the reshaped or newly enacted expert bodies, focusing on their status and potential functioning in the post-Dieselgate era. The rest of this article addresses the transparency of such bodies with a view to supporting their accountability and increasing consumers' awareness. Finally, the paper evaluates the current tectonic changes in the automobile industry. Namely, there are clear challenges for the sector associated with entering the new era of hybrid cars, especially e-cars, which may have similar deficiencies in terms of the ability to identify the full spectrum of emissions.

In a broader sense, this paper analyses the EU's composite administration, in which diverse-level actors and experts must cooperate to provide a comprehensive picture of cars' emission performance. As a result, it also reflects the institutional landscape of the automobile sector, which has mainly remained Member-State-centred in its competencies alongside the nationally diverse capacities. As a result, the paper's approach combines an assessment of regulatory, institutional, organisational, and, to some extent, technical changes in the EU's crisis management-related evolution of the post-Dieselgate era. To explore these highly technical issues, the paper has applied desk research of related policy documents and scholarly secondary sources, combined with two interviews conducted with technical experts.

II. Dieselgate and the post-scandal landscape of the EU's expert bodies

1. A brief overview of Dieselgate

The starting point of the so-called 'Dieselgate' was the United States Environmental Protection Agency's (US EPA's) notice issued in September 2015 to the car manufacturer Volkswagen (VW) Group. Several Volkswagen and Audi models had been launched in the U.S. market with 'clean' diesel engines lacking further selective catalytic reduction equipment (such as an AdBlue tank) to reduce their NOx (nitrogen-oxide and nitrogen-dioxide) emissions and meet the U.S. requirements in this regard. However, a small group of graduate students from West Virginia University, supported by an NGO (the International Council for Clean Transportation – ICCT), began investigating the "clean diesel" introduced to the U.S. market by conducting real-world driving tests on various European car models. They revealed that the software of several diesel engine models could detect when the models were being tested under laboratory circumstances and accordingly adjust the cars' emissions to meet the minimum requirements ('defeat devices'). This was noticed by the U.S. EPA and the California Air Resources Board (CARB) for the European partners.[1] In the wake of the scandal, senior VW Group officials were forced to resign. The company faces fines that could reach billions of dollars and class action- and other lawsuits,[2] which have expanded to car suppliers like Bosch[3] as the developer of such devices initially meant to avoid stability control malfunctions under laboratory testing cycles.[4]

What made the scandal even more interesting was the non-detection of significant issues with the EU's car type approval and in-service conformity system years before the 2015 Dieselgate scandal. The harmonised framework for approving motor vehicles covers their common registration, sale, and entry into service on the EU level. As for the share of competencies, Directive 2007/46 laid down that the car manufacturer is primarily responsible for the (national) approval process at the national regulatory authority, including all aspects of the approval process and ensuring production conformity. Later, several further provisions were added to this directive,

[1] L. Bovens, The Ethics of Dieselgate, (2016) 40 (1) *Midwest Studies in Philosophy,* 262. DOI: https://doi.org/10.1111/misp.12060

[2] T. Gardner, P. Lienert and D. Morgan, After year of stonewalling, VW stunned US regulators with confession, *Reuters,* (24 September 2015), https://www.reuters.com/article/usa-volkswagen-deception/insight-after-year-of-stonewalling-vw-stunned-us-regulators-with-confession-idUSL1N11U1OB20150924 (last accessed: 31.12.2024.).

[3] Bosch pays 90-million-euro fine over diesel scandal, *DeutscheWelle,* (23 May 2019), https://www.dw.com/en/bosch-pays-90-million-euro-fine-over-diesel-scandal/a-48843405 (last accessed: 31.12.2024.).

[4] Interview with MM car development specialist (Teams online platform, 6 January 2025).

including technical details, such as the Commission's technical requirements and the so-called Euro emission norms.[5]

As a result of the Dieselgate scandal, the European Parliament established a special committee that issued a report based on its inquiry (EP Dieselgate Report) in 2017.[6] The primary deficiencies identified by the Dieselgate Report included failures in testing procedures and severe system-level concerns about the EU's type approval and in-service conformity provisions. This also refers to concerns about the independence of national expert bodies, the insufficient level of their own laboratory capacity, and the lack of EU-level actors in charge of car emissions. In practice, the Member States have relied heavily on tests performed in the car manufacturers' certified laboratories under the supervision of technical services. This has also included consultancy services that support car manufacturers to obtain type approvals – an apparent conflict of interest due to the additional financial link. At the same time, the national authorities were only responsible for validating the procedure.[7] Additionally, the Commission neither undertook any further technical or legal research or investigation on its own nor by mandating its scientific body (Joint Research Centre – JRC), nor requested any information or further action from the Member States.[8] Yet, some EU-level expert bodies had signalled the deficiencies associated with Dieselgate in due time, as the 2013 JRC report already mentioned the possible use of defeat devices, while JRC, the in-house expert body of the Commission, started its on-road testing cycles within its laboratories as early as 2007.[9]

2. The post-Dieselgate reforms of EU expert bodies and decision-making

The post-Dieselgate reforms remained relatively weak, especially concerning the identified fraudulent practices.[10] The most ambitious, yet also delayed, part of the reform concerning scientific decision-making and testing procedures was introducing

[5] M. Frigessi di Rattalma and G. Perotti, European Union Law, in M. Frigessi di Rattalma (ed.), *The Dieselgate. A Legal Perspective* (Springer, Cham, 2017) 179–217.; E. Mujkic and D. Klingner: "Dieselgate:" How Different Approaches to Decentralization, the Role of NGOs, Tort Law and the Regulatory Process Affected Comparative U.S. and European Union Outcomes in the Biggest Scandal in Automotive History, (2019) 43 (7) *International Journal of Public Administration,* 611–620. DOI: https://doi.org/10.1080/01900692.2019.1644521

[6] European Parliament – EP 'Report on the Inquiry into Emission Measurements in the Automotive Sector'. 2016/2215(INI). 2017.

[7] Ibid. 12.

[8] Ibid. 10.

[9] M. Weiss et al., *Analyzing On-Road Emissions of Light-Duty Vehicles with Portable Emission Measurement Systems* (JRC Scientific and Technical Reports, Publications Office of the European Union, Luxembourg, 2011) 31. DOI: https://doi.org/10.2788/23820

[10] T. Skupniewicz, The vehicle type approval framework regulation (2018/858): A post-Dieselgate paradigm shift for EU vehicle regulations or a missed opportunity?, (2020) 34 *Studenckie Prace*

new (more realistic) testing requirements. The obsolete NEDC testing cycle[11] was replaced by real driving emission rules (RDE) and the 'Worldwide Harmonised Light Vehicles Test Procedure' (WLTP), as only mandated as of 2017.[12] This new testing cycle and methodological shift have also led to the broader use of portable measurement devices – a significant step in moving 'outside laboratory premises' and making more realistic measurements.[13] Not to mention the more recent challenges of measuring the environmental footprints of products[14] or, more generally, market participants' sustainability performance.[15]

Further institutional reforms of emission measurement bodies remained mainly Member State-centred, in line with this policy area's original allocation of competencies. The institutional set-up of the Single Market, partly due to the ECJ case law[16] (Cassis case law), led to the increasing relevance of the first national entry point's authorities and the mutual recognition clause. The reforms only led to some EU-centralisation of emission measurements. This restructuring also put the diverse level actors' independence in the limelight, and not just on the applicant (manufacturer) side, which necessarily has interests in swift product authorisation, but also that of diverse Member States' more substantial expert and laboratory capacities in specific policy sectors.[17]

The EU-level capacity of scientific expertise was initially built within the realm of the Commission, which could guarantee the administrative support and background for the functioning of such bodies (in-house expert bodies). The most relevant one is the Joint Research Centre (JRC), which operates as a separate Directorate-General

Prawnicze, Administratywistyczne i Ekonomiczne, 51–61. DOI: https://doi.org/10.19195/1733-5779.34.4

[11] Regulation No 83 of the Economic Commission for Europe of the United Nations (UN/ECE) – Uniform provisions concerning the approval of vehicles with regard to the emission of pollutants according to engine fuel requirements (OJ L 375 27.12.2006).

[12] European Parliament 5.

[13] L. Szegedi, EU Expert Bodies in Light of the Glyphosate Saga and the Dieselgate Scandal – Cross-Sectoral Lessons to Be Learned in the Era of Emerging Risk Factors and Constant Crisis Management? (2022) 25 (3–4) *Európai Tükör,* 93–116. DOI: https://doi.org/10.32559/et.2022.3-4.5

[14] Environmental Footprint methods are mainly built upon established international standards such as ISO 14000/44.

[15] Sustainability performance indicators also vary across different disciplines and policy areas. Yet, the EU's post-COVID legislative steps provide more precise measurement guidance on the environmental, social, and governance (ESG) performance of market participants. R. G. Eccles, L-E. Lee and J. C. Stroehle, The Social Origins of ESG: An Analysis of Innovest and KLD, (2020) 33 (4) *Organization & Environment,* 575-596. DOI: https://doi.org/10.1177/1086026619888994

[16] Case C-120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein,* ECLI:EU:C:1979:42.

[17] Szegedi L., *Az európai közigazgatás fejlődése és szabályozása* (Dialóg Campus, Budapest, 2018) 42.

with priorities set by the Commission President while having its own resources and strategic work plan.[18]

In another step towards reform, market surveillance is now a shared responsibility, with national authorities conducting separate surveillance from type approval sources. The JRC VELA (Vehicle Emissions Laboratories), due to Dieselgate, expanded its laboratory capacity as the Commission's in-house expert body, and has been made specifically responsible for the new type (RDE and WLTP-based) vehicle testing.[19]

In a further reform of the EU expert bodies, the decentralised agencies' institutional weight became substantial compared to the 'in-house' expert body, publicly seen as an integral part of 'an overly bureaucratic and politicised Commission'. Additionally, the CJEU also concluded that any task conferred upon the Commission that cannot be carried out due to the lack of technical expertise could be left to EU agencies, stressing the agencies' primary role in functioning as bodies of technical expertise.[20] These agencies may often have a broader mandate than merely functioning as expert bodies, functioning as collective decision-making forums between national representatives and networking points for sectoral representatives, while having 'classic' administrative functions related to the Single Market. For their internal structure, the management boards of agencies primarily consist of the representatives of Member States, with further involvement of representatives of the Commission, the European Parliament, and stakeholders.[21] These agencies are non-Treaty bodies as they still lack the proper (sector-neutral) primary legal basis[22] for their creation and functioning.[23] Due to their 'non-Treaty' status, some common rules on their establishment and functioning in the form of the soft law Joint Statement and Common Approach of the

[18] D. Guéguen and V. Marissen, Science-Based and Evidence-Based Policy-Making in the European Union: Coexisting or Conflicting Concepts? (2022) (88) *Bruges Political Research Papers,* https://www.coleurope.eu/sites/default/files/research-paper/wp88%20Marisen_Guegen.pdf (last accessed: 31.12.2024.).

[19] F. Rodriguez and J. Dornoff, Beyond NoX Emissions of Unregulated Pollutants From a Modern Gasoline Car, (2019.05.08.) *White Paper,* https://www.researchgate.net/publication/332935022_Beyond_NOx_Emissions_of_unregulated_pollutants_from_a_modern_gasoline_car (last accessed: 31.12.2024.).

[20] M. Everson and E. Vos, EU Agencies and the Politicized Administration, in J. Pollak and P. Slominski (eds), *The Role of EU Agencies in the Eurozone and Migration Crisis* (Palgrave Macmillan, Cham,) 35. DOI: http://dx.doi.org/10.1007/978-3-030-51383-2_2

[21] Joint Statement and Common Approach of the European Parliament, the Council, and the European Commission on decentralised agencies (Common Approach) Point 10.

[22] EEA has a sector-specific primary legal basis in the form of Art. 192 TFEU (EC-Treaty Art. 175). Art. 100(2) TFEU [EC-Treaty Art. 80(2)] applies in the case of EMSA and of EASA, and Art. 91(1) TFEU in the case of EUAR.

[23] Article 263.1 of the Treaty on the Functioning of the European Union is almost the only reference to agencies that guarantees judicial review of their acts related to third parties before the Court of Justice of the European Union.

European Parliament, the Council, and the European Commission on decentralised agencies (Common Approach) were enacted in 2012.

NGOs[24] would have preferred emissions testing to be carried out by (more) independent environmental authorities, such as in the United States, where the U.S. EPA conducts market surveillance and enforcement activities at the federal level. Yet no new EU road transport agency has been created, even if the EP and other automotive industry representatives have proposed this.[25] Especially in the transport, railways, maritime, and air traffic areas, subsectors already had this kind of (more independent) agency, each having inspection powers over the national authorities.[26] The lessons of Dieslegate concerning high-level technical needs and diverse national practices would have instead required 'a single expert body for a Single Market', yet the outcome of the reform maintained the segmented form of expert bodies and capacities.

Yet, in a broader sense, the environmental sector does have a specific EU agency with a decades-long history. The European Environmental Agency's creation in 1994 was not necessarily a reaction to a transboundary crisis two decades before Dieselgate; however, it signalled the EU's commitment to taking care of the environment in light of the substantial amount of EU legislation issued in this area.[27] The EEA's main competencies clearly take the form of an information-agency focus on collecting, processing, and analysing data, providing information for further policy-making, and supporting and stimulating the exchange of information – yet it has not acquired inspection powers, even if these were proposed during its process of creation.[28] Sector-specifically, the EEA is responsible for data verifications, checks on new vehicle CO_2 emissions, and reporting missing values and inconsistencies.[29] As for its internal structure and scientific bodies, the EEA's Management Board rules align with its requirements, even if established long before the Common Approach. At the same

[24] Lehren aus dem Abgasskandal: Typzulassung von Pkw reformieren und reale Emissionen messen, *VCD,* (17 Dec 2015), https://www.vcd.org/service/presse/pressemitteilungen/lehren-aus-dem-abgasskandal-typzulassung-von-pkw-reformieren-und-reale-emissionen-messen (last accessed: 31.12.2024.).

[25] MEPs Reject EU Road Agency in Vote for New Post-Dieselgate Car Approval Rules, *Euractiv,* (4 Apr 2017), https://www.euractiv.com/section/eet/news/meps-reject-eu-road-agency-in-vote-for-new-post-dieselgate-car-approval-rules/ (last accessed: 31.12.2024.); Frigessi di Rattalma and Perotti, European Union Law, 209.; Skupniewicz, The vehicle type approval framework regulation (2018/858), 55.

[26] L. Szegedi, The Crisis Management of the 'Dieselgate' – Transboundary (and) Crisis Driven Evolution of EU Executive Governance with or without Agencies, (2018) (1) *Európai Tükör,* 92–100.

[27] S. Chatzopoulou, The EU Agencies' Role in Policy Diffusion Beyond the EU: EEA, EMA and EFSA, (2018) (1) *TARN Working Papers,* DOI: https://doi.org/10.2139/ssrn.3105894

[28] M. Mertens, Voice or Loyalty? The Evolution of the European Environment Agency, (2010) 48 (4) *JCMS,* 8881–901. DOI: https://doi.org/10.1111/j.1468-5965.2010.02078.x

[29] European Court of Auditors, *Special report 01/2024: Reducing carbon dioxide emissions from passenger cars,* https://www.eca.europa.eu/ECAPublications/SR-2024-01/SR-2024-01_EN.pdf (last accessed: 31.12.2024.) 15.

time, the adaptation of the decisions typically requires a two-thirds majority. Draft versions of the multiannual and annual work programs will be consulted with the Commission and its scientific committee.[30] The committee is to be designated by the Management Board for four years, renewable once, to guarantee some independence.[31]

As a sign of automobile sectoral segmentation, a further body, the Implementation Forum, has been set up to address the diverse interpretation concerns associated with Dieselgate. This Forum, without a real mandate on technical expertise, has been created with representatives of national authorities and a wider circle of interested parties (economic operators, safety, and environmental stakeholders) to facilitate the uniform interpretation and implementation of the related Single Market rules. Within its advisory capacity, the Forum may issue (through consensus or simple majority as a second option) soft law opinions and recommendations.[32]

The Union legislator favoured maintaining the segmented form of EU-level expert bodies and capacities after Dieselgate, with expert testing laboratories (JRC VELA as the Commission's in-house body), common interpretation and mediator functions (the Implementation Forum), and reporting mandates (EEA) for different actors in the EU institutional landscape.

III. Independence of the EU's expert bodies associated with the automobile industry

1. Theoretical basis of EU expert bodies' Independence

Primary and secondary EU legislation refers to independence based on particular aspects, often making reference to this requirement.[33] The Treaties of the EU mention the independence of several EU institutions, such as the European Commission, the Court of Justice of the EU, and the European Central Bank.[34] The EU Charter of

[30] Regulation (EC) No 401/2009 of the European Parliament and of the Council of 23 April 2009 on the European Environment Agency and the European Environment Information and Observation Network (EEA Regulation) [2021] OJ L 243, art 8.

[31] EEA Regulation art 11.

[32] Regulation (EU) 2018/858 of the European Parliament and of the Council of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC, [2018] OJ L151, art 11.

[33] E. Vos, A. Volpato and G. Bellenghi, *Independence and Transparency Policies of the European Food Safety Authority (EFSA),* Study Requested by the European Parliament ENVI Committee (2023), 13, https://www.europarl.europa.eu/RegData/etudes/STUD/2023/740080/IPOL_STU(2023)740080_EN.pdf (last accessed: 31.12.2024.).

[34] Art. 17 TEU (Commission); Art. 252–254 TFEU (CJEU); Art. 130 and 282 TFEU (ECB).

Fundamental Rights also clearly refers to the right to good administration,[35] especially impartiality. Using the general terms of scholars, the independence of a public body 'can be defined as a status which ensures that a body concerned can act completely freely without taking any instructions or being put under pressure'.[36]

EU expert bodies are associated with two further reference categories based on their institutional (organisational, budgetary, staffing, and financial side) and functional (being shielded from external actors influencing the entity's activities in performing their tasks) independence.[37] Their independence may strongly depend on their status within the EU's institutional landscape, namely the in-house body status of the abovementioned actors and the 'inbetweener' status of EU agencies. Namely, the more independent agencies called 'inbetweeners' function inside a triangle consisting of EU institutions, national authorities, and market participants.[38] Functional independence and threats to it can also vary due to various influences.

The institutional independence of in-house expert bodies *vis-á-vis* EU agencies is different due to their direct relationship with the Commission, which has the primary executive authority within the EU. The Commission and single commissioners have a decisive role in the case of the in-house expert bodies, yet do not function as a centralised ministerial administration concerning agencies. The EU agencies refer to certain DGs as 'partners' in their reports.[39] Yet, the Commission can substantially impact the expert body's work (even that of more independent agencies) by influencing its staffing policy by initiating the related budget proposals.

A further dilemma arises regarding the EU expert bodies' internal structure and decision-making. The management of in-house bodies refers to the preferences of the Commission (JRC's direct appointment). As the main decision-making body, the independence of management boards of agencies differs within the abovementioned triangle, as is also reflected by the boards' composition, including various interested parties. Even if the national representatives must conform to various integrity-related requirements related to their tasks based on the Treaties, EU Staff Regulations, and the

[35] Art. 41 EU CFR refers to every person's right to have their affairs handled impartially, fairly, and within a reasonable time by the institutions, bodies, offices, and agencies of the Union.

[36] E. Vos, N. Athanassiadou and L. Dohmen, *EU Agencies and Conflicts of Interests,* Study Requested by the European Parliament Petitions Committee, (2020), 14, https://www.europarl.europa.eu/RegData/etudes/STUD/2020/621934/IPOL_STU(2020)621934_EN.pdf (last accessed: 31.12.2024.).

[37] Vos, Volpato and Bellenghi, *Independence and Transparency Policies of the European Food Safety Authority (EFSA),*14.; Vos, Athanassiadou and Dohmen, *EU Agencies and Conflicts of Interests,* 14.

[38] M. Everson, C. Monda and E. Vos, European Agencies in between Institutions and Member States, in M. Everson, C. Monda and E. Vos (eds), *European Agencies in between Institutions and Member States* (Wolters Kluwer International BV, 2014) 4.

[39] M. Egeberg, J. Trondal and N. M. Vestlund, The quest for order: unravelling the relationship between European Commission and European Union agencies, (2015) 22 (5) *Journal of European Public Policy,* 620. DOI: https://doi.org/10.1080/13501763.2014.976587

sector-specific laws that mandate prioritising EU interests, in practice, national interests might overrule those of the Union ('double hattedness'). As a result, the lowest common denominator solutions may be easier to agree upon, preventing the effective representation of EU interests in Union acts.[40]

As for the functional independence of in-house expert bodies *vis-á-vis* EU agencies, this involves even a broader range of requirements. In the case of the expert bodies, whether they theoretically act independently of external influences depends on their having appropriate resources and being impartial in their scientific decision-making. On the level of individual scientific personnel, these requirements are connected to the abovementioned double-hattedness concerns in a case- or product-specific way, focusing on the scientific personnel's impartiality and conflict of interest policies. This influence may also be relevant from a dual perspective, as EU personnel selection (especially in the case of highly qualified experts) relies on national candidates and, often, on former employees of manufacturers (revolving door practices).[41]

Referring specifically to agencies, some scholars already pointed out a decade ago that the independence and impartiality of the scientific internal bodies are core elements of agency independence, rather than concerns about national representatives' double-hattedness.[42] The functional side also involves policy-specific issues like the given actor's laboratory capacity, enabling in-house bodies and EU agencies to identify potential emission-related concerns regardless of the Member States or manufacturers' laboratory results.

2. Institutional independence – still within the realm of the Commission?

The post-crisis reforms have left the allocation of related competencies relatively Member States-centred, potentially contributing to the heterogeneity of independence on the national level and further independence-related issues on the EU level. As the European Court of Auditors noted after the crisis, only a few Member States (Spain, the Netherlands) have separated market surveillance and type approval authorities and functions, even if NGOs have demanded clear steps be taken towards having more independent national authorities.[43]

[40] E. Vos, European Agencies and the Composite EU Executive, in M. Everson, C. Monda and E. Vos (eds), *European Agencies in between Institutions and Member States* (Wolters Kluwer International BV, 2014) 26.

[41] A. Schout and F. Pereyra, The institutionalization of EU agencies: agencies as "mini commissions", (2011) 89 (2) *Public Administration,* 418–432. DOI: https://doi.org/10.1111/j.1467-9299.2010.01821.x

[42] Common Approach Point 20.

[43] European Court of Auditors, *The EU's Response to the "Dieselgate" Scandal. Briefing Paper 2019,* 30, https://www.eca.europa.eu/lists/ecadocuments/brp_vehicle_emissions/brp_vehicle_emissions_en.pdf (last accessed: 31.12.2024.).

The newly established EU-level bodies function mainly in 'the realm of the Commission'. JRC VELA, the Commission's in-house expert body with laboratory and testing capacities, is a cornerstone of the new institutional setup. Whether new laboratory testing measurements are considered in further policy-making may also be relevant. A recent report pointed out that JRC VELA's data has not been used to provide feedback on the correctness of cars' CO_2 emission values, which undermines the overall outcome of the reforms – regardless of the expert bodies' status regarding independence.[44]

The Implementation Forum also functions within the 'realm' of the Commission (competent DG), providing technical, secretarial support and infrastructure for its functioning. At the same time, its membership instead reflects the intergovernmental dynamics of decision-making of the representatives of each Member State, yet peer pressure may also be present.[45] The European Court of Auditors concluded that the Commission used the Forum as a substitute for networking with national counterparties instead of ensuring the uniform application of CO_2 framework rules and carrying out required assessments.[46]

The work of the two bodies and the new institutional set-up has created inter-reliance as the JRC's planning of testing cycles partly relies on the inputs of the Forum. Eighty per cent of the JRC's testing capacity applies to a proactive selection of vehicles (based on risk assessment gathered and shared in the new Forum). The remaining 20% has been based on a reactive (suspicious cars, vehicles with the latest technologies, etc.) approach.[47] Therefore, the Forum's rather intergovernmental-influenced decision-making might also impact JRC's testing activities.

Even if no new EU road transport agency was created after Dieselgate, the history of the EEA may be highly relevant regarding institutional independence. Martens has summarised the first decade of EEA's history (1994–2003) as the era of inter-institutional tensions due to the political vision of its first director, Mr. Jiménez-Beltrán. He emphasised that policy analyses should be produced by the EEA rather than merely gathering facts.[48] The EEA also analysed the institutional performance of DG Environment and national authorities, which led to the budget freeze proposals

[44] European Court of Auditors, *Special report 01/2024.* 20.
[45] Szegedi, The Crisis Management of the 'Dieselgate', 85–100.
[46] European Court of Auditors, *Special report 01/2024.* 19.
[47] P. Bonnel et al., *European Market Surveillance of Motor Vehicles,* (JRC Science for Policy Report, Publications Office of the European Union, 2022), 6. DOI: https://doi.org/10.2760/59856; C. Gruening et al., *European market surveillance of motor vehicles – Results of the 2022 European Commission vehicle emissions testing programme,* (Publications Office of the European Union, 2023) DOI: https://data.europa.eu/doi/10.2760/452119; V. Valverde Morales et al., *European market surveillance of pollutant emissions from internal combustion engine vehicles,* (Publications Office of the European Union, 2024) DOI: https://data.europa.eu/doi/10.2760/191638
[48] Mertens, Voice or Loyalty?, 888–889.

and staffing cuts on the side of the Commission. According to the Commission, the EEA should have focused on its core data-gathering tasks, while it also criticised the EEA for emphasising general analyses without providing complex data for further policy-making.[49] The later period of inter-institutional partnership (from 2004) led to the reprioritisation of DG Environment's preferences by the EEA, while the EP positioned itself as an ally of the EEA in the budget proposal process.[50] Additionally, it seems the EEA has tended to maintain its less confrontative attitude, as its 2016 report already revealed the shortcomings of diesel cars' defeat devices without using the term 'exploitation' and instead described the car manufacturers' behaviour as optimising testing procedures.[51]

3. Functional independence – split into pieces?

Regarding functional independence, a broader circle of potential influence could be considered, yet further emphasis should be given to the internal rules of impartiality and capacity deficiencies (potential outsourcing). Independence-related heterogeneity regarding the functional aspect of national authorities and expert bodies similarly applies due to their diverse status. Regarding capacity differences, the ECA's recent study revealed that national authorities make highly different numbers of data checks on manufacturers' CO_2 data and apply diverse policies with regard to testing and in-service conformity checks. In contrast, CO_2 testing obligations have often been outsourced by national authorities to private contractors due to a lack of capacity.[52]

The JRC VELA, a newly enacted actor, accepted its rules on 'Independence, Impartiality of Testing, and Inspection Activities'. Even if these internal rules are much less detailed than those of the agencies described below, they refer to their accreditation details, the JRC's (general) Integrated Management policy, and the 2015 Scientific Integrity Statement. Explicitly referring to the impartiality of the Inspection Body (JRC VELA), it is also stated that inspection services are only provided to European Commission Directorates. No private customers can ask JRC VELA for accredited inspections or tests.[53] In practice, this does not necessarily mean the

[49] Mertens, Voice or Loyalty?, 888.
[50] Mertens, Voice or Loyalty?, 890–892.
[51] J-P. Huteau Skeete, Examining the role of policy design and policy interaction in EU automotive emissions performance gaps, (2017) 104 *Energy Policy,* 373. DOI: https://doi.org/10.1016/j.enpol.2017.02.018
[52] European Court of Auditors, *Special report 01/2024.* 20–23.
[53] JRC VELA, *Independence and Impartiality of Testing and Inspection Activities,* (2024) https://joint-research-centre.ec.europa.eu/laboratories-z/vehicle-emissions-laboratories_en#statements-for-accreditation-and-independenceimpartiality-of-testing-and-inspection-activities (last accessed: 31.12.2024.).

exclusion of third parties. The JRC's 2020–21 in-service conformity testing also involved a consortium of private laboratories that performed the tests for neither the manufacturers nor the type-approval-granting authorities as a general requirement.[54] From a broader perspective of outsourcing partnerships, national authorities and EU bodies should also expand their IT and interoperability capacities, as on-board fuel consumption meters (OBFCM) and CO_2 reporting obligations will be enacted in the upcoming years.[55] The latest article on JRC's integrity framework also highlights some issues: leadership roles don't always prioritize scientific expertise, risking biased policy research, while clear communication to non-experts also remains a challenge.[56]

Although the new Implementation Forum for automobile policy cannot be labelled a 'true' expert body, functional independence might be highly relevant due to its networking point status, channelling diverse national and stakeholder interests. This has been proven in the broader context of automobile emissions by the pre-crisis period's commercial double-hattedness (see the RDE-LDV working group manufacturer-centred representation model) or the more recent revolving door issues[57] (see postponing stricter Euro7 emission rules). The Forum has its own rules of procedure detailing, to some extent, a publicly available conflict of interest (internal) policy. This refers to the Commission (competent DG) as the main actor and manager of the Forum's conflicts of interest decision-making (reporting and assessing conflicts; taking adequate measures).[58]

As a more decentralised agency, the EEA has the relatively most detailed conflict of interest policy covering EEA staff, following the EU Staff Regulations, the Common Approach's main rules.[59] Yet, the European Parliament refused to give a budgetary discharge to agencies like the EEA due to concerns about the independence of their experts and staff.[60] Therefore, the Common Approach has also been amended to include a broader circle of potentially influential personnel,[61] as 'the independence of

[54] Bonnel et al., *European Market Surveillance of Motor Vehicles,* 23.
[55] European Court of Auditors, *Special report 01/2024: Reducing carbon dioxide emissions from passenger cars*. 31–32.
[56] N.E.G. Loevestam, S. Bremer-Hoffmann, K. Jonkers and P. Van Nes, Fostering scientific integrity and research ethics in a science-for-policy research organisation, (2025) 21 (1) *Research Ethics,* 56–75. DOI: https://doi.org/10.1177/17470161241243001
[57] S. Wheaton, Politico Driving through the revolving door before emissions vote, *Politico,* (5 Oct 2023), https://www.politico.eu/newsletter/politico-eu-influence/driving-through-the-revolving-door-before-emissions-vote-2/ (last accessed: 31.12.2024.).
[58] Rules of Procedure of the Implementation Forum, Point 14.
[59] Staff regulations and Obligations of EEA Officials and other servants under the Staff Regulations and Conditions of Employment, articles 11a, 12b, 13 and 16.
[60] European Parliament, Committee on Budgetary ControlA7-0103/2012, 'Report on discharge in respect of the implementation of the budget of the European Union Agencies for the financial year 2010: performance, financial management and control of European Union Agencies' 2011/2232(DEC).
[61] Vos, European Agencies and the Composite EU Executive, 37.

the scientific experts should be fully ensured, inter alia by promoting the highest standards, setting sound selection criteria and promoting best practices'.[62] As EEA work shifts towards more reliance on IT-network tools in CO_2 reporting systems,[63] the dilemma arises whether and how this reliance should later be managed.

IV. Transparency of the EU's expert bodies related to the automobile industry

1. The EU's general regulatory framework on transparency

Transparency has become the cornerstone of the requirement envisaged by Lisbon's primary law, namely the TEU of open decision-making, which is due to be conducted as closely as possible to citizens. However, EU Regulation No 1049/2001-related (the primary legislative act in this area) long-awaited reform has been pending since 2008, shifting responsibility from the EU legislator to the CJEU and the European Ombudsman, leading to a patchwork-like mixture of diverse EU-level transparency rules.[64] COVID and other sector-specific turbulences have led to some changes in the EU agencies (new transparency rules for the European Food Safety Authority and European Medicines Agency),[65] having expert mandates related to the Single Market. Yet, the EU's transparency and openness have remained somewhat blurred sectorally, while digitalisation-related new EU legislation also poses a threat to prioritising explainability (mediated and potentially manipulated information narratives) over true transparency.[66]

2. Technical transparency but far from consumer-friendliness?

In light of the Dieselgate scandal, there has been a clear demand for enhanced accountability and transparency. Therefore, even expert bodies' procedural and methodological processes must be made publicly available and explainable.

[62] Common Approach, para 20.
[63] European Court of Auditors, *Special report 01/2024*. 31–32.
[64] D. Curtin and A. Rubio, *Regulation 1049/2001 on the right of access to documents, including the digital context,* (Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2024) 9.
[65] Regulation (EU) 2019/1381 of the European Parliament and of the Council of 20 June 2019 on the transparency and sustainability of the EU risk assessment in the food chain [2019] OJ L231/1.; D. Curtin, Opening Executive Technocratic Bubbles: Gusts of Transparency in a Turbulent Europe, in F. de Abreu Duarte and F. Palmiotto Ettorre (eds), *Sovereignty, Technology and Governance after COVID19: Legal Challenges in a Post-Pandemic Europe* (Hart Publishing, 2022), 7.
[66] Ibid. 5.

Furthermore, sector-specific and explainable transparency can influence car buyers' (even resellers') preferences by communicating accurate emission outputs and more comprehensive data on the sustainability performance of diverse automobiles and brands, the latter which has also been enacted as an obligation under the CO_2 Regulation (mainly addressed to the Commission, yet also referring to other actors as well).[67]

The JRC's (and the expanded VELA's) transparency framework is also influenced by its status as the Commission's in-house body, yet some steps have already been taken towards openness. As a result, it only makes available its exhaustive Policy on Integrity, Impartiality, and Independence to customers internal to the European Commission upon request. At the same time, accredited test and inspection results are to be communicated via the Official EU Electronic Platform, while further transparency rules are to be followed in conformity with the 2001 Transparency Regulation and upon individual request.[68]

As for defeat devices, the JRC's first post-Dieselgate 2020–21 in-service conformity testing report could be seen as, to some extent, representative of its transparency performance.

The report tends to reflect JRC's in-house status, as it has been mainly targeted towards the bodies involved in EU market surveillance while remaining rather technical, along with its formulations and three-part structure (requirements and methodologies, the test results, and an overview of the main findings), prioritising accuracy instead of consumer-friendliness.[69] Yet, an executive summary has softened this approach, increasing the report's potential to impact non-professional consumer preferences. The report clarified that non-compliance under the new emission rules (RDE and WLTP) could still be detected in less than 10% of tested models – interestingly, in gasoline engines that applied Auxiliary Emission Strategies (AES). Moreover, the JRC concluded that their environmental impact might still be significant; therefore, the manufacturers' justification for protecting these engines with fuel enrichment techniques must be approved with extreme care (even if the national approval authorities have approved these AES).[70] Transparency regarding the gasoline engine-related use of AES could also be necessary for consumers in a

[67] Commission Implementing Regulation (EU) 2021/392 of 4 March 2021 on the monitoring and reporting of data relating to CO_2 emissions from passenger cars and light commercial vehicles pursuant to Regulation (EU) 2019/631 of the European Parliament and of the Council and repealing Commission Implementing Regulations (EU) No 1014/2010, (EU) No 293/2012, (EU) 2017/1152 and (EU) 2017/1153 [2021] OJ L 77; European Court of Auditors, *Special report 01/2024.* 21.

[68] European Commission (JRC VELA), *Statements for Accreditation and Independence/Impartiality of Testing and Inspection Activities,* https://joint-research-centre.ec.europa.eu/laboratories-z/vehicle-emissions-laboratories_en (last accessed: 31.12.2024.).

[69] Bonnel et al., *European Market Surveillance of Motor Vehicles,* 23.

[70] Bonnel et al., *European Market Surveillance of Motor Vehicles,* 4.

market era that is leaning towards gas and hybrid cars instead of diesel models. Especially in light of recent reports explicitly highlighting the challenges posed by AESs used in petrol engines.[71]

The Implementation Forum is a body that mediates between the Member States, the Commission, the JRC, and other stakeholders. Therefore, its transparency profile falls under the horizontal[72] and sector-specific Commission expert group rules, which refer to general accountability rather than consumer-friendliness. Due to the abovementioned proactive selection protocol, this informal accountability might significantly impact other bodies, especially the JRC's work.

Taking the post-Dieselgate regulations and enforcement concerning defeat devices as an example, the Forum dealt with these devices and practices many times from the beginning of its establishment in March 2019. The reference point of the Forum's work was the CJEU's rulings on limiting manufacturers' right to apply such devices in thermal windows to protect car engines.[73] The Forum's post-CJEU ruling minutes demonstrated the patchwork of diverse national enforcement practices: identifying no serious risk (thermal windows) (by Germany), referring to still ongoing evaluations (by France and Romania), justifying thermal windows for safe operation (by Italy), and updating testing programs (by Sweden).[74] The obvious regulatory step from the Commission led to the development of an EU-level notice identifying these devices, which dedicated a specific part to anti-tempering protection and non-acceptable AES.[75] Recent minutes of the Forum also revealed suspicion of the devices, yet the still-ongoing status of the evaluation has not led to conclusive results.[76] These publicly available minutes of meetings were not meant to have substantial potential to influence consumer decisions. Yet, it has been revealed that defeat devices remain present, posing a market regulatory and enforcement deficiency almost a decade after Dieselgate.

---

[71] Gruening et al., *European market surveillance of motor vehicles – Results of the 2022 European Commission vehicle emissions testing programme;* Valverde Morales et al., *European market surveillance of pollutant emissions from internal combustion engine vehicles.*

[72] Commission, Decision of 30.5.2016 establishing horizontal rules on the creation and operation of Commission expert groups.

[73] C-128/20 *GSMB Invest,* ECLI:EU:C:2022:570; C-134/20 *Volkswagen,* ECLI:EU:C:2022:571; M-E. Arbour, The Volkswagen Scandal at the CJEU: Defeat Devices between the Conformity Guarantee and Environmental Law, (2022) 13 (4) *European Journal of Risk Regulation,* 670. DOI: https://doi.org/10.1017/err.2022.32

[74] Commission, Minutes on 14th meeting of the Forum for Exchange of Information and Enforcement.

[75] Commission, Notice Guidance on the identification of the presence of Defeat Devices with regards to emissions of light-duty vehicles approved with Real Driving Emissions (RDE), heavy-duty vehicles and on anti-tampering protection 2023/C 68/01.

[76] Commission, *Minutes on 18th meeting of the Forum for Exchange of Information and Enforcement,* https://ec.europa.eu/transparency/expert-groups-register/screen/meetings/consult?lang=en&meetingId=50770 (last accessed: 31.12.2024.).

The EEA's primary mandate is to disseminate information on environmental and sustainability issues. It regularly publishes reports, briefings, datasets, and analyses. In its 2016 report, the EEA revealed the shortcomings of diesel car defeat devices, describing manufacturers' behaviour as optimising testing procedures. Later, the EEA obtained a pivotal role in new vehicles' CO_2 emission reporting, as the agency has been responsible for carrying out semi-automatic data checks and communicating any potential inconsistencies or missing values to reporting countries. The EEA also publishes provisional data on new cars' CO_2 emissions by communicating with national authorities and manufacturers, creating the basis for specifying excessive emission premiums (to be paid by car manufacturers).[77] Similar to the Forum's information mediator mandate, this reporting system involved publicly available datasets, prioritising accuracy.[78] Yet, the EEA's latest publications referred to emission decrease trends in a relatively informative manner.[79] A recent study has identified clear concerns about the overly tight timeframe for the EEA to double-check errors with manufacturers in relation to the reporting system's functioning for 2020. Data optimisation led to a specific IT tool (Reportnet3) for automating the reporting of national authorities and manufacturers. The national authorities' practices might also differ in terms of whether they have formalised electronic type-approval certificates, which could contribute to further delays or swifter inputs in reporting cycles.[80]

The automobile sector's post-Dieselgate transparency landscape takes a step towards technical transparency, with the involvement of EU-level expert bodies and actors introducing more standardised reporting systems and mediatory functions. Yet, in light of the experience of the first decade, especially that of the first year, this constellation of many diverse actors has remained rather segmented and far from transparent in a consumer-friendly way.[81]

[77] European Court of Auditors, *Special report 01/2024.* 15.
[78] European Environmental Agency, *CO_2 emissions from new passenger cars,* https://tinyurl.com/3ar55zrf (last accessed: 31.12.2024.).
[79] European Environmental Agency, *CO_2 emissions from new cars and vans further decrease as electric vehicle sales grow in Europe,* (2024) https://www.eea.europa.eu/en/newsroom/news/new-data-co2-emissions-of-new-cars-and-vans (last accessed: 31.12.2024.).
[80] European Court of Auditors, *Special report 01/2024.* 23–27.
[81] European Court of Auditors, *Special report 01/2024.;* Commission reply to Special Report 2024/1 – Point III (b).

V. At the beginning of a new era?

1. The erosion of the EU's leadership of the car industry

As the 2024 Draghi Competitiveness Report outlines, the 2020s mark a new era for the European car industry, while the EU's traditional leadership in the automotive industry has been eroded.[82] A clear move towards green mobility characterises these profound changes, as the transport sector is among the most significant contributors to EU greenhouse gas emissions. Reducing transport emissions is vital to achieving the EU's 2050 climate neutrality objective.[83] Next to competitiveness and sustainability considerations, this new era has led to commercial policy turbulence in the global market. The EU applied tariffs on Chinese EVS using the newly enacted Foreign Subsidies Regulation[84] to protect the Single Market's manufacturers, a debated measure that polarises diverse Member States[85] based on their technological and commercial preferences. Hungary, celebrating the 20th anniversary of its EU accession and the Presidency of the Council of the EU in 2024, has positioned itself in favour of the EV revolution by inviting Chinese representatives of the EV industry (battery and car manufacturers) to its territory in recent years, while also opposing the introduced EU tariffs.[86]

Even the internal combustion engine (ICE) era led to challenges concerning compliance with technical requirements, including emission requirements. In those cycles, even relatively minor changes in technical recalibration required close cooperation between component developers, car manufacturers, and policymakers.[87] *One of the apparent challenges of the automobile industry entering this new era of EVs and software-based cars includes* similar deficiencies in identifying the full spectrum of emissions. Therefore, there is a clear dilemma for EU policy-makers and legislation: how to renew the testing cycles beyond the previous reform's new approach (applied in

[82] Commission, *The future of European competitiveness* (2024), (Draghi Report) 140, https://commission.europa.eu/topics/eu-competitiveness/draghi-report_en#paragraph_47059 (last accessed: 31.12.2024.).

[83] European Environmental Agency, *New registrations of electronic vehicles in Europe* (2024), https://www.eea.europa.eu/en/analysis/indicators/new-registrations-of-electric-vehicles (last accessed: 31.12.2024.).

[84] Commission, *Foreign Subsidies Regulation* (2023), https://competition-policy.ec.europa.eu/foreign-subsidies-regulation_en (last accessed: 31.12.2024.).

[85] European Council on Foreign Relations, *Divided we stand: The EU votes on Chinese electric vehicle tariffs* (2024), https://ecfr.eu/article/divided-we-stand-the-eu-votes-on-chinese-electric-vehicle-tariffs/ (last accessed: 31.12.2024.).

[86] International Institute for Strategic Studies, *The EU's approach to tariffs on Chinese electric vehicles* (2024), https://www.iiss.org/publications/strategic-comments/2024/10/the-eus-approach-to-tariffs-on-chinese-electric-vehicles/ (last accessed: 31.12.2024.).

[87] Interview with MM car development specialist (Teams online platform, 6 January 2025).

RDE/WLTP cycles), as the ambitious target of zero emissions by 2035 was mainly based on tailpipe measurements.

The International Energy Agency has concluded that the carbon footprint of EVs (emissions associated with the production of vehicles and their components) is generally higher than that of ICE vehicles at the production stage due to the energy intensity and carbon footprint associated with battery manufacturing using current technologies (including raw material mining and processing).[88] In contrast, Bloomberg has reported that EVs are associated with potentially lower lifecycle emissions than ICE cars, stressing the initial battery manufacturing period, later followed by a reduced footprint depending on the region-specific grid where EVs are charged.[89]

New methodologies and measurement cycles are required to consider a more comprehensive mix of different emissions (beyond decarbonisation limits) and an extended life-cycle approach (ultimately, not always justifying the cleaner status of EVs), as also concluded by the Draghi Report. Following these modification-related necessities, the Commission is already working on a methodology (to be completed by 2025) for those manufacturers who may want to report voluntarily data on CO_2 emissions throughout the complete life cycle of cars and vans sold in the EU market.[90] Our expert interview also referred to the highly complex nature of e-car emissions, comprising a wide range of outputs not necessarily related to the powertrains but also the comfort specifications applied in new car models. Moreover, these outputs also interfere with each other within a single model, causing various regulatory and technical challenges.[91]

There is an ongoing debate about the future of powertrain regulation, as the Commission seems to be deprioritising its green ambitions to foster the EU's competitiveness. Referring back to the influence of lobbyists, it appears that the automotive industry may successfully fight back against EU CO_2 penalties and even overturn the 2035 ban on combustion engines.[92]

[88] International Energy Agency, *Comparative life cycle greenhouse gas emissions of mid-size BEV and ICE vehicle* (2024), https://www.iea.org/data-and-statistics/charts/comparative-life-cycle-greenhouse-gas-emissions-of-a-mid-size-bev-and-ice-vehicle (last accessed: 31.12.2024.); Draghi Report, 147.

[89] No Doubt About It: EVs Really Are Cleaner than Gas Cars, *BloomberNEF,* (21 March 2024), https://tinyurl.com/48k7j2we (last accessed: 31.12.2024.).

[90] Draghi Report, 147.

[91] Interview with BGG car development specialist (Teams online platform, 2 April 2025).

[92] C. Randall, EU considers new plug-in hybrid regulation after 2035, *Electrive,* (5 Febr 2025), https://www.electrive.com/2025/02/05/eu-examines-new-plug-in-hybrid-registrations-after-2035/ (last accessed: 31.12.2024.).

2. New Powertrains, Same Measurement Problems?

As the automobile sector enters this new era, new challenges and needs for reform have emerged for the EU expert bodies.

The JRC VELA could acquire new testing facilities specified for electric and hybrid vehicles (VELA 8), electromagnetic testing (VELA 9), and smart grid interoperability. Furthermore, these new facilities will create a transatlantic bridge with JRC's partner facility at the U.S. Department of Energy's Argonne National Laboratory.[93] Similar to the case of the global-level WLTP, these collaborations could also contribute to the EU market's swifter integration into leading technological standardisation procedures. Moreover, this could also support JRC's and VELA's functional independence by involving transatlantic peers, ensuring the further harmonisation of testing procedures and technology validation, and facilitating e-mobility through interoperability.

The Implementation Forum's recent minutes demonstrate that further issues regarding EVs and ICEs' emission measurements and testing divergences have emerged. These also refer to Member State delays in submitting market surveillance verification reports to EU actors and the diverse national practices involved in making the national testing results publicly available.[94]

The EEA and Commission's preliminary analysis (along with other studies) of plug-in hybrids (PHEVs), which ought to play a leading role in the coming years, recently revealed a substantial gap (3.5 times higher CO_2 emissions) between their laboratory and real-world testing results.[95] PHEVs have theoretically been considered low-emission vehicles, assuming that they are driven more frequently electrically. Yet, much more frequent combustion engine use of PHEVs has been observed, especially in the case of company-owned PHEVs, since employers usually pay for fuel without providing further incentives for employees to recharge the PHEV batteries.[96] This dilemma also makes it obvious how many factors (including financial and consumer preferences) must be considered when analysing real-world emissions.

Interestingly, one actor has already taken steps towards whole life-cycle measurements – even if only at the pilot project stage. Green EuroNCAP is hosted and supported by the private consortium of the European New Car Assessment Programme. It has designed the new methodology adhering to the international consensus that the

[93] European Commission (JRC VELA), *EU Interoperability Centre for Electric Vehicles and Smart Grids,* https://joint-research-centre.ec.europa.eu/laboratories-z/eu-interoperability-centre-electric-vehicles-and-smart-grids_en (last accessed: 31.12.2024.).
[94] Commission, Minutes on 18th meeting of the Forum for Exchange of Information and Enforcement.
[95] European Court of Auditors, *Special report 01/2024.* 33.
[96] ICCT, *Real World Useage of PHEVs in Europe,* https://theicct.org/wp-content/uploads/2022/06/fs-real-world-phev-use-jun22.pdf (last accessed: 31.12.2024.).

environmental effects of transportation systems can only be genuinely analysed based on Life Cycle Assessment (LCA), including the various facilities' production, operation, and end-of-life treatment,[97] even if LCA data does not allow for the integration of greenhouse gases originating from vehicle production and recycling into the rating system because the values differ from case to case, and the information used for the analysis is on available a generic, statistical level, which does not allow for differentiation between the production emissions of different cars.[98] However, it might be advantageous to use more comprehensive LCA methodologies. Moreover, its current results and factsheet data, made publicly available on its webpage, tend to be the most consumer-friendly of all the other tools presented earlier.[99]

VI. Conclusions

Ten years after Dieselgate, before the European E-Car revolution, car emission measurements still need to be clearer. Yet, the post-Dieselgate era led to several positive changes in emission measurement.

RDE and WLTP have proven to be more realistic than the NEDC. However, the most recent analyses have demonstrated that precise emission measurement would also require the inclusion of several factors and diverse market and consumer/user scenarios. It was identified in 2016 that new WLTP rules inherently involve flexibilities that car manufacturers can exploit further.[100] Moreover, concerning the JRC VELA's electromobility-specific devices, the latest testing facilities have only started operating to monitor e-cars' broader (including electromagnetic) emissions spectra, requiring further adjustments for measuring this new type of emissions. On the regulatory and user scenario side, PHEV powertrains' mixed (and as described, to some extent distorted) electric vs ICE usage has also had to be addressed, which seemingly led to readjustments[101] by the Commission. Not to mention the demand for a shift towards a more sophisticated life-cycle approach, especially with new powertrain technologies.

Considering the future challenges of Union legislators, the EU must meet diverse expectations, including legal certainty for market participants as product developers (applicants), with well-detailed criteria to be fulfilled prior to their products entering the Single Market, while guaranteeing protection for Union citizens. Despite

[97] Win–win–win: Cleaner Cars through Better Environmental Impact Assessment, *EUObserver,* (14 Sep 2023) https://euobserver.com/stakeholders/157424 (last accessed: 31.12.2024.).
[98] Euro Green NCAP, *Scope,* https://www.greenncap.com/scope/ (last accessed: 31.12.2024.).
[99] Euro Green NCAP, *Life Cycle Assessment Results,* https://www.greenncap.com/european-lca-results/ (last accessed: 31.12.2024.).
[100] TNO, NEDC/WLTP comparative testing, https://publications.tno.nl/publication/34622355/ZCzWY2/TNO-2016-R11285.pdf (last accessed: 31.12.2024.).
[101] Revision of the Utility Factor calculation described in Annexe XIV of Regulation (EU) 2023/443.

this, the inevitable flexibilities of such a highly complex policy area of transportation have led to significant inconsistencies: during Dieselgate, market participants' exploitative activities undermined the abovementioned protective goals, resulting in only formal-level conformity. There is a clear need for a better simulation of consumers' circumstances within the EU's testing procedures. This justifies the broader involvement of the relevant data sources combined with the analysis of further user and market scenarios (including typical vs realistic usage). This supports the strengthening of disciplinary pluralism, which could be an integral part of this policy framework associated with potentially more comprehensive data sets and methodological plurality.

The attempts at institutional and organisational reform regarding the EU expert bodies and the allocation of competencies create a rather vague picture. As the automobile industry policy area has maintained its Member States-centred competencies, EU legislators have also taken steps towards better coordination between the Member States with the new Implementation Forum (yet without this being a true expert body) and strengthening EU-level laboratory capacities by creating the vehicle sector-specific JRC's VELA (yet without making a new Road Transport Agency). Regardless of the post-Dieselgate reforms, the role of the EEA has also been strengthened as a reporting body for CO_2 emissions recently. The independence profiles and mandates of these new or reformed actors have remained formally diverse and segmented in their functions, demonstrating the need for enhanced mediation and clear communication between them in search of precise emission data on the European car market. The openness of their functioning could be labelled rather technical due to their interrelated status and the segmented share of competencies of related type-approval and in-service conformity procedures. Yet, consumer-friendly transparency is to be promoted by the Commission, which can be demonstrated through the communication practice associated with the Euro GreenNCAP (even if formally independent from the EU composite administration). The increased use of IT tools could shed light on the intrabody communication between actors at different levels and with varying mandates, while this could also streamline the EU composite administration's functioning by introducing common procedures, even having a 'best practice effect' on national actors in their reporting cycles.

The EU agency cannot be labelled an 'always-true solution' as it is a more formally independent expert body. Yet, its institutional weight may be substantial compared to an 'in-house' expert body publicly seen as an integral part of 'an overly bureaucratic and politicised' Commission. The creation of (more) independent expert bodies, even such as a new EU road transport agency, has been proposed by the EP and other representatives of the automotive industry.[102] This could potentially have a more proactive attitude, with greater motivation to strengthen its self-profile and act as a

[102] Frigessi di Rattalma and Perotti, European Union Law, 209.

sector-specific counterbalance against global market players.[103] Considering the highly diverse U.S. administration, especially CARB's activity during Dieselgate, the potential for a sectorally more independent agency seems proven. This kind of independence, already evaluated from an institutional and functional perspective, could be substantial if it is associated with a more independent communication-related profile that could contribute to a sector-specific expert body's credibility. In recent years, the evolution of other EU agencies has also demonstrated that cross-sectoral learning might be of added value, especially in moving from fragmented to cross-sectoral transparency and openness.[104]

In an era of the contested credibility of sound scientific decision-making, the EU's credibility relies on the added value of EU-level experts (and expert bodies), the smooth operation of communication systems, and an openness to the broader European public. EU-level expert bodies, therefore, might have a pivotal role in ensuring further integration of the EU (Single Market) into global standardisation processes and the EU car industry regaining a competitive edge with their shift towards precise (realistic) emission measurement and more credible communication.

[103] Szegedi, The Crisis Management of the 'Dieselgate', 90–100.
[104] A. de Boer, M. Morvillo and S. Röttger-Wiertz, Fragmented Transparency: The Visibility of Agency Science in European Union Risk Regulation, (2023) 14 (2) *European Journal of Risk Regulation,* 1. DOI: https://doi.org/10.1017/err.2022.47

Villegas Ramirez, Paola Andrea*

An analysis of the 10 years of the FTA between the EU and Colombia, Peru, and Ecuador: opportunities and challenges

Abstract

This article examines the first decade of implementation of the Free Trade Agreement (FTA) between the European Union (EU) and Colombia, Peru, and Ecuador, focusing on trade relations, economic impacts, and legal developments. The analysis highlights both the opportunities and challenges that have emerged since the adoption of the FTA, emphasising tariff liberalisation, export growth, and improved market access for key sectors, particularly coffee and pharmaceuticals. Despite these benefits, the study identifies significant shortcomings in terms of sustainable development, particularly with regard to labour rights and environmental protection in Colombia. It concludes that while the FTA has promoted economic cooperation and regulatory harmonisation, the expected progress on sustainable development remains slow. Strengthened enforcement mechanisms and further regulatory adjustments are recommended to achieve the broader objectives of the agreement.

Keywords: EU-Colombia trade agreement; sustainable development; market Access; trade balance; legal harmonisation

I. Introduction

The European Union (hereinafter EU), as a member of the World Trade Organization (WTO), the world's largest economic bloc,[1] and whose economic policies significantly impact the world economy, always seeks to improve its global trade relations. In this

* Villegas Ramirez, Paola Andrea, lawyer; LL.B. (ICESI University, Cali, Colombia), LL.M. (ELTE, Budapest, Hungary).

[1] The European Union as a "political and economic union" is an individual member of the WTO; however, the EU Member States are also individual members of the WTO in their own right. https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm (last accessed: 31.12.2024.).

DOI: 10.56749/annales.elteajk.2024.lxiii.10.177

regard, the European Commission, in its 2018 report on the implementation of Free Trade Agreements (FTAs),[2] states that the EU implements different types of Trade Agreements according to their content and goals, which can mainly be classified into four categories: The 'First generation of trade agreements' mostly focused on tariff liberalisation and concluded before 2006; 'Deep and Comprehensive Free Trade Areas' (DCFTAs) were usually adopted with EU neighbouring countries and focused on approaching the commercial legislation of the parties and supporting regional integration into the EU market. Moreover, there are *Economic Partnership Agreements* (EPAs) whereby the EU provides wider trade assistance to support its partners in implementing the agreement. Finally, there is the new generation of *Free Trade Agreement'* (FTAs) that, besides tariff liberalisation, also include obligations on services, investment, public procurement, regulatory issues, and particular provisions on trade and sustainable development (TSD).[3]

The EU and the Community of Latin American and Caribbean States (CELAC)[4] have been trading partners for many years, as most of them are also WTO members. Colombia is a member of CELAC, but at the South American level, it is also part of the Andean Community (CAN). Moreover, the EU is the largest investor in Latin America and the second most significant trade partner; thus, the EU has used different association mechanisms with Latin American nations, such as trade agreements, to achieve further regional integration.[5] In 2012, the EU signed two agreements with Latin American countries.[6] First, the Association Agreement between the EU and Central America, and later the multilateral *Free Trade Agreement between the European Union and Colombia, Peru, and Ecuador*[7] (hereinafter FTA), one of the known "New Generation" of FTAs of the EU. This FTA was signed on December 21,

[2] European Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation of the FTAs,* (2018), https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=celex%3A52019DC0455 (last accessed: 31.12.2024.).

[3] The classification of trade agreements made by the European Commission is based on the trade-based rules recognised by the WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap2_e.pdf (last accessed: 31.12.2024.).

[4] More information about the EU-CELAC relations can be found at https://www.eeas.europa.eu/node/13042_en (last accessed: 31.12.2024.).

[5] European Union External Action, EEAS. EU – Latin America & the Caribbean, https://www.eeas.europa.eu/eeas/eu-latin-america-caribbean_en#62678 (last accessed: 31.12.2024.).

[6] Information on the current status of EU trade agreements and negotiations can be found in https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en (last accessed: 31.12.2024.).

[7] Trade Agreement between the European Union and its Member States, of one part, and Colombia and Peru, of the other part. [2012] OJ L 354. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A22012A1221%2801%29 (last accessed: 31.12.2024.).

2012, by the EU, Colombia and Peru, and Ecuador has also been a member since 2016, and it entered into force on October 14, 2024.[8]

This document reviews the ten-year implementation of the FTA in the EU and Colombia, focusing on its economic impact and legal developments. It examines the associated trade relations, particularly imports and exports, and assesses the broader implementation of the agreement, including its TSD provisions. It also examines how, while the FTA has increased trade and opened markets, progress on environmental, peace and labour issues remains slow in less developed countries such as Colombia. The analysis covers the background of the EU-Colombia FTA, initial objectives, and evaluations for 2018[9] and 2022,[10] as well as reports from Colombian institutions and FTA subcommittees.

In addition, this document will show that some of the legal instruments created by both parties have been explicitly adopted in the context of the FTA. However, the EU has created most of the rules related to the topics covered by the agreement as a homogeneous legal framework applicable to those trade agreements to which the EU is a party. I chose coffee and pharmaceutical products as illustrations of the EU-Colombia trade relationship to analyse the legal conditions and progress exercised by the EU with regard to Colombian coffee imports, as well as the legal framework applicable to pharmaceutical products imported from the EU to Colombia.

Finally, this document concludes that although the trade agreement has had a positive economic impact, as it has helped to reduce tariffs and promote the expected opening of each other's markets, slow progress on sustainable development undermines its effectiveness and it will require a more significant effort by the parties if the envisioned objectives in this area are to be achieved along with general compliance with the FTA. It is also evident that the EU is the main driver of legal developments produced by the parties, being the dominant party to the agreement.

[8] Council of the European Union, Council Decision (EU)2024/2751 of 14 October 2024 on the conclusion of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L_202402751 (last accessed: 31.12.2024.).

[9] European Parliament, *Trade Agreement between the European Union and Colombia and Peru – European Implementation Assessment,* (2018), https://www.europarl.europa.eu/RegData/etudes/STUD/2018/621834/EPRS_STU(2018)621834_EN.pdf (last accessed: 31.12.2024.) *(Ex post evaluation 2018).*

[10] European Commission, Directorate-General for Trade, *Ex post evaluation of the implementation of the Trade Agreement between the EU and its Member States and Colombia, Peru and Ecuador: final report. Vol. I, Main report* (Publications Office of the European Union, 2022), https://data.europa.eu/doi/10.2781/9164 (last accessed: 31.12.2024.) *(Ex post evaluation 2022).*

II. Relationship between the EU and Colombia

The EU and Colombia have had a long-standing relationship based on economic cooperation and political dialogue for a long time, and significant efforts have been made in the last two decades to achieve peace and work to reach sustainable development.

The Andean Community (CAN) was founded with the signing of the Cartagena Agreement in 1969, but this Regional Trade Agreement only entered into force in 1988.[11] Currently, there are four member countries of this community: Colombia, Peru, Ecuador, and Bolivia (all are members of the WTO).

For its part, the European Union has been a member of the WTO since 1 January 1995[12] and has maintained economic integration relations with the Andean Community ever since. For several years, the Andean countries were beneficiaries of the preferential tariffs under the EU's General Scheme of Preferences (GSP) until the multilateral FTA concluded between the EU and Colombia, and Peru was signed on 26 June 2012, which covers further topics besides the customs and tariffs duties for its signatories.

This FTA has been provisionally applied in Colombia since 1 August 2013, in Peru since 1 March 2013, and Ecuador was added to the agreement in November 2016 and provisionally applied since 1 January 2017. From the EU's side, the FTA has been provisionally applied since 1 August 2013.[13]

Bolivia has the option to become a member of the FTA, based on Article 329 of the agreement, and currently gains benefits from the GSP+ in its trade relations with the EU. Moreover, Bolivia is the biggest Latin American beneficiary of bilateral EU development assistance.[14]

Since the adoption of the FTA, Colombia has become the EU's most important trading partner in the Andean Community and the fifth largest in Latin America, with a trade volume of EUR 8,305 million in 2020.[15] The EU is Colombia's third-

[11] Andean Community. Official website: https://www.comunidadandina.org/quienes-somos/cronologia/ (last accessed: 31.12.2024.).

[12] The EU Member States are also individual members of the WTO, https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm#:~:text=The%20European%20Union%20%28until%2030%20November%202009%20known,union%20with%20a%20single%20trade%20policy%20and%20tariff (last accessed: 31.12.2024.).

[13] European Commission, EU trade relationship by country/region, "Overview of ongoing bilateral and regional negotiations", https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en (last accessed: 31.12.2024.).

[14] *Ex post evaluation 2018, 9.*

[15] Delegation of the European Union to Colombia, *The European Union and Colombia, Bilateral, Regional and Multilateral relations between the EU and Colombia* (EEAS, 2021), https://www.eeas.europa.eu/colombia/european-union-and-colombia_en?s=160#9210 (last accessed: 31.12.2024.) *(EEAS 2021).*

largest trading partner and the main source of foreign direct investment.[16] Beyond trade, the FTA has strengthened cooperation in areas such as development and diplomacy. The EU played an important role in facilitating the 2016 peace agreement with the FARC (Revolutionary Armed Forces of Colombia) and continues to support its implementation through initiatives such as the €130 million European Peace Fund for post-conflict efforts.

III. FTA Content and current implementation at the economic level

1. FTA Content

The FTA document has 14 titles, 14 annexes, and one joint declaration. Among its elements are, Title I on initial provisions, Title II on the Trade Committee and its functions as a guarantor of the implementation of the FTA, Title III on trade in goods, Title IV on trade in services and electronic commerce, Title VII on intellectual property, Title IX on the TSD provisions, Title XII on dispute settlement, and Title XIII on technical assistance. In turn, the annexes are very precise on specific subjects such as tariff elimination schedules (Annexe I), agricultural safeguards measures (Annexe IV), sanitary and phytosanitary measures (Annexe VI), government procurement (Annexe XII), and the mediation mechanism for non-tariff measures (Annexe XIV).

The accession of Ecuador was concluded with a protocol signed for the EU, Colombia, Peru, and Ecuador, which includes the same Annexes (annexes XV–XX) already applicable for the EU, Colombia, and Peru.

The FTA, in its Title XIII on technical assistance and trade capacity building, requires the creation of a Trade Committee formed by delegating people from each State Party. This committee has the main responsibilities of supervision, evaluation of the FTA's application, operational facilitation to develop the agreement, and monitoring the work of all the specialised bodies (such as sub-committees). In addition, there are eight specialised sub-committees for eight different areas covered by the agreement, namely Agriculture; Customs, Market Access, Intellectual Property; Sanitary and Phytosanitary Measures; Trade Facilitation and Rules of Origin; Government Procurement; Technical Obstacles to Trade; and Trade and Sustainable Development.

[16] World Trade Organization, *Colombia and the WTO,* https://www.wto.org/english/thewto_e/countries_e/colombia_e.htm (last accessed: 31.12.2024.).

2. Current implementation

In 2012, the European Commission published the 'Assessment of the Economic Impact of the Trade Agreement between the EU and signatory countries of the Andean Community (Colombia and Peru)'[17] once the structure of the final trade agreement draft had been completed. This assessment established several economic objectives to be achieved, but overall, it forecasted a positive impact on the gross domestic product (GDP) of the parties. For Colombia, it predicted growth in its GDP by 0.4% (around 500 EUR million), and for the EU, 0.05% (2.3 EUR million).[18] Moreover, other matters were expected to improve market access, such as the opening of the government procurement and services market and eliminating tariffs, which could save around 500 EUR million/year on import duties. Regarding trade benefits by sectors, it is believed that the FTA would mainly benefit Colombia in four areas: agricultural and fishing products, services, industrial and raw materials, and investment.

The 2018 ex-post evaluation by the European Parliament Research Service assessed the impact of the EU-Colombia FTA from its provisional application in 2013 to 2017. Economically, Colombia's macroeconomic performance improved, with a cumulative GDP growth rate of 3.95% from 2005 to 2016. However, post-FTA, GDP growth slowed from 4.23% (2005–2013) to 1.66% (2014–2016). Similarly, GDP per capita growth declined after the implementation of the FTA, from 3.2% to 1.06%. While the FTA had a positive impact on Colombia's economy, these figures indicate slower growth after its implementation due to the stricter requirements of the TSD provisions and the more rigorous testing of food products from the EU side.[19]

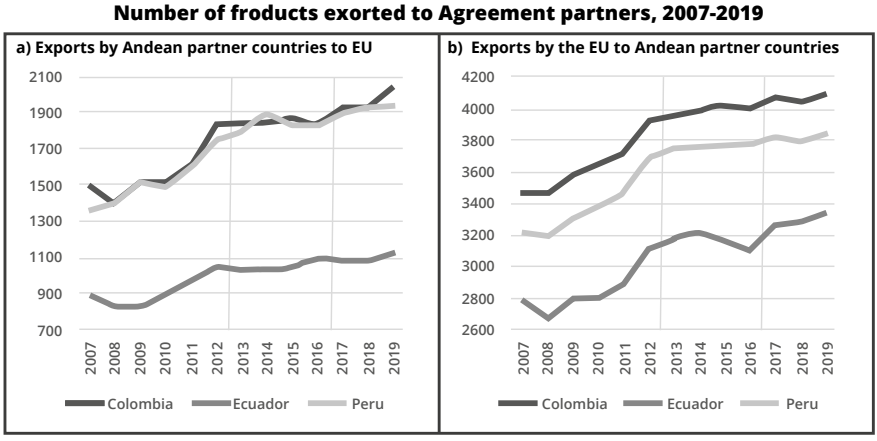
Bilateral trade has shown mixed results. The value of Colombian exports to the EU fell significantly, from €8,634 million in 2012 to €5,606 million in 2017, a decrease of 35%. Meanwhile, EU exports to Colombia increased by 8.6% from 2012 to 2017, reaching EUR 5,986 million, with growth of 10.5% compared to 2016.[20] Colombia's exports mainly consist of agricultural and mineral-energy products, which are affected by fluctuations in the price of coal, which is directly reflected in the statistics presented above. On the other hand, the EU's exports are goods of higher value, such as pharmaceuticals, vehicles, and machinery, whose value does not constantly fluctuate, thus contributing to a trade imbalance.

[17] European Commission DG Trade, *Assessing the Economic Impact of the Trade Agreement Between the European Union and Signatory Countries of the Andean Community (Colombia and Peru)* (2012), https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/dd23c915-e9a6-4aa6-a81c-a10561c966c8/details (last accessed: 31.12.2024.).
[18] These calculations were made with the application of computable general equilibrium (CGE) models.
[19] *Ex post evaluation 2018,* 35.
[20] Ibid.

Later, in 2022, the European Commission published the 'Ex post evaluation of the implementation of the Trade Agreement between the EU and its Member States and Colombia, Peru and Ecuador', covering the FTA implementation period of 2013–2019. It declares that

> "EU sectors benefitting most in the form of increased exports to Colombia are various types of manufactured products, such as vehicles (an increase of USD 974 million or 122% compared to no Agreement), machinery (USD 801 million/39%), electronics (USD 334 million/49%), and others. Garments, leather, and processed food (notably meat products and vegetable oils and fats) are also expected to have benefited substantially. Among Colombian sectors, the Agreement led to the highest increases in exports to the EU for fruit and vegetables (an increase of USD 64 million or 50% compared to the situation without the Agreement in place in 2020), other food products (USD 50 million/87%) and chemicals (USD 33 million/36%), as well as garments, and rubber and plastic products."[21]

Figure 1. The COVID-19 pandemic in 2020 disrupted global trade, including between the EU and Colombia[22]



No specific FTA reports were issued for this period, but Colombia's Ministry of Commerce, Industry and Tourism[23] noted a decrease in both exports and imports, which reduced the trade deficit. In 2020, Colombia's main exports to the EU were gold and coffee (19% each), with coal falling to third place (10%). In 2021, coal regained its

[21] *Ex post evaluation 2022,* 31.
[22] Source: EU Commission. Directorate-General for Trade. Ex post evaluation published in 2022.
[23] Ministry of Commerce, Industry and Tourism, *Report on the current trade agreements of Colombia 2022,* https://www.tlc.gov.co/temas-de-interes/informe-sobre-el-desarrollo-avance-y-consolidacion (last accessed: 31.12.2024.) *(Colombian FTAs report).*

top position (19%), while coffee remained in second place (18%). On the import side, pharmaceuticals, especially vaccines and COVID-19-related inputs, became the largest category (20% in 2020 and 17% in 2021), overtaking mechanical and electrical machinery. The pandemic affected trade by shifting demand towards essential goods such as pharmaceuticals and reducing trade in other sectors.

The Trade Committee and subcommittees overseeing the implementation of the FTA continued their work during the pandemic, mostly through online meetings since 2020. Reports of their discussions are available on the EU CIRCABC website and on the Colombian Ministry of Trade and Industry website.[24] The committee adopted its rules of procedure early on and applied them to the subcommittees. They also designated arbitrators, established a Code of Conduct and outlined procedures for dispute settlement, particularly under the Trade and Sustainable Development (TSD) provisions, thus ensuring a structured approach to managing compliance with the FTA.

From an economic point of view, the FTA implementation reports issued by the EU and Colombian institutions show progress in trade cooperation and tariff liberalisation as planned since the negotiation of the treaty. However, these reports also show that this FTA is one of the agreements in which the least developed party (in this case, Colombia) is the one mainly obliged to adapt to the commercial standards and legal guidelines created by the stronger party to the agreement; in other words, there is a kind of implicit harmonisation of commercial conduct and a legal framework created by the stronger party to the trade agreement.

Likewise, it should also be noted that although the official reports of the FTA are mainly positive in terms of its economic impact, other commercial actors in Colombia have publicised their discontent with the trade agreement because, since 2015, Colombia has had a deficit in its trade balance.[25] Although some products have penetrated the European market, agricultural producers (mainly farmers) feel that they need more partnerships, training, and safety guarantees (such as food safety standards, quality control and phytosanitary measures) to meet all the requirements stipulated by the EU, because, from their point of view, the FTA has affected the marketability of some products, such as milk and rice, produced in Colombia.[26]

[24] Ministry of Commerce, Industry and Tourism, *Agreements. European Union,* https://www.tlc.gov.co/acuerdos/vigente/union-europea (last accessed: 31.12.2024.).

[25] Mas+ Colombia, *FTA with the European Union: Colombia has exported less,* (22 August 2021), https://mascolombia.com/colombia-ha-exportado-menos-a-partir-del-tlc-con-ue/ (last accessed: 31.12.2024.).

[26] Colombia: the peasants who want to defeat "free trade", *BBC News,* (2 September 2013), https://www.bbc.com/mundo/noticias/2013/09/130902_colombia_paro_agrario_ (last accessed: 31.12.2024.).

IV. TSD provisions as a challenge to FTA's implementation

Sustainable development in the EU is based on three pillars: economic, environmental and social. The EU aligns its trade policy with these pillars to promote human rights, social justice and high environmental and labour standards. EU trade agreements, in particular the new generation of free trade agreements (FTAs), include trade and sustainable development (TSD) chapters to promote these goals. However, studies have shown weaknesses in the implementation of TSD provisions, mainly due to the lack of enforceable sanctions and unclear guidelines for dispute settlement. Despite these challenges, the EU continues to use trade agreements as a tool to promote sustainable development with its partners.[27]

In response, the EU Commission published the "15-Point Action Plan"[28] in 2018, aimed at improving the enforcement of TSD chapters. By 2021, the Commission had launched a review of the Action Plan and requested an independent study to further assess the effectiveness of TSD implementation in trade agreements. This plan aims to strengthen compliance with the EU's sustainability goals.

This study was conducted by the London School of Economics and Political Science – LSE Consulting, which extensively and critically reviewed different approaches to TSD chapters in eleven EU FTAs and made some comparisons with TSD provisions applied in US agreements. This study showed that the US uses TSD provisions before signing trade agreements as a requirement in negotiations and as an incentive to promote effective environmental reforms. In this sense, "the US sanction-based approach is more likely to have an impact ex-ante (before FTA ratification), while the EU's soft approach is said to yield greater results ex-post (after ratification)".[29]

In 2022, based on the information obtained in the requested LSE study, the open public consultation on the review of trade and sustainable development, and the reports issued by the TSD subcommittees of the various EU FTAs, the European Commission published its final review report on the 15-Point plan,

[27] European Commission, *Trade Development and Sustainability. Sustainable development,* https://policy.trade.ec.europa.eu/development-and-sustainability/sustainable-development_en (last accessed: 31.12.2024.).

[28] European Commission, Non-paper of the Commission services, *Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements,* https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf (last accessed: 31.12.2024.).

[29] Comparative Analysis of TSD Provisions for Identification of Best Practices to Support the TSD Review, *London School of Economics and Political Science,* (Feb 2022), https://www.lse.ac.uk/business/consulting/reports/comparative-analysis-of-tsd-provisions-for-identification-of-best-practices (last accessed: 31.12.2024.).

which sets out six key action points to enhance the effectiveness and enforcements of FTA TSD provisions.[30]

1. TSD chapter and its application in the EU- Colombia/Peru/Ecuador FTA

The EU-Colombia, Peru, and Ecuador FTA includes Trade and Sustainable Development (TSD) provisions in Title IX aimed at strengthening commitments to human, labour, and environmental rights. These provisions are consistent with International Labor Organization (ILO) standards and environmental agreements such as CITES and the Kyoto Protocol. The agreement addresses issues such as sustainable forest management, combating illegal fishing, cooperation on climate change, and ensuring equal working conditions. It also emphasises transparency through consultations with civil society.

However, implementing the provisions of the TSD in Latin American countries such as Colombia is challenging due to long-standing problems of corruption, economic instability, and violence. These factors make achieving sustainable development goals more difficult than in more developed countries such as EU Member States.

The 2018 assessment of the implementation of the FTA highlighted the important role of the EU in supporting Colombia's peace agreement with the FARC, contributing to its success through negotiation, implementation and monitoring. The creation of the EU Trust Fund for Colombia in 2016 and annual budgets for post-conflict programs further strengthened this cooperation. In addition, Colombia has passed legislation to facilitate international agreements such as the Paris Agreement and the Minamata Convention on Mercury. However, challenges remain in the area of the protection of human and labour rights, particularly in the mining and palm oil sectors, where Colombia has failed to ensure adequate consultation with indigenous and Afro-descendant communities, a legal requirement for land-impacting projects.[31]

The FTA evaluation published in 2022 proved that although the signing of the peace agreement between the Colombian government and FARC was an excellent achievement in terms of peace, statistics from later years showed that human rights violations persist in other areas, such as violence against trade union activists or civil society in general. The Commission also highlighted some problems that have been recurrent since the beginning of the implementation of the FTA, such as the lack of participation by civil society in the implementation of this agreement, the violation

[30] European Commission, *Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions,* COM(2022)409., https://circabc.europa.eu/ui/group/8a31feb6-d901-421f-a607-ebbdd7d59ca0/library/8c5821b3-2b18-43a1-b791-2df56b673900/details (last accessed: 31.12.2024.).

[31] *Ex post evaluation 2018, 67.*

of some vulnerable population groups' human and labour rights, such as those of farmers, indigenous communities, and people of African descent. Overall, although the FTA has produced a more open market, especially for agricultural goods, this increase in demand is not aligned with current labour conditions.

Furthermore, the latest available report (2021) of the Subcommittee on Trade and Sustainable Development[32] provides information on recent programs and initiatives by the parties on sustainable development, with a particular focus on the challenges generated by the COVID-19 pandemic. For example, the EU presented its progress through the Next Generation program implemented in February 2021. Colombia, for its part, explained the range of measures applied to mitigate the effects of the pandemic, such as the 'Formal Employment Support Program', and the relief program for workers whose contracts had been suspended since the start of the COVID-19 confinements. In addition, the EU acknowledged Colombia's efforts and welcomed the information thus presented but insisted that measures to protect social and union leaders must still be improved, and dialogue with civil society must be strengthened.

V. Legal development since the adoption of the FTA

Since the FTA began to apply between the parties, some specific rules have been issued for implementing this agreement. On 30 July 2013, the European Commission published Regulation (EU) 740/2013[33] on derogations from the rules of origin set out in Annexe II to the Trade Agreement, which determines the conditions for the application of these exceptions for imports from Colombia. Regulation (EU) 741/2013[34] on opening and providing for the administration of Union tariff quotas for agricultural products originating in Colombia was also issued on that date.

[32] Ministry of Commerce, Industry and Tourism, *Agreements. European Union. Subcommittee on TSD. Minute VIII.* (November 2021), https://www.tlc.gov.co/acuerdos/vigente/union-europea (last accessed: 31.12.2024.).

[33] European Commission, *Implementing Regulation (EU) 740/2013. On the derogations from the rules of origin laid down in Annex II to the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, that apply within quotas for certain products from Colombia,* [2013] OJ L 204., https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2013.204.01.0040.01.ENG&toc=OJ%3AL%3A2013%3A204%3ATOC (last accessed: 31.12.2024.).

[34] European Commission, *Implementing Regulation (EU) 741/2013. Opening and providing for the administration of Union tariff quotas for agricultural products originating in Colombia,* [2013] OJ L 204., https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2013.204.01.0043.01.ENG&toc=OJ%3AL%3A2013%3A204%3ATOC (last accessed: 31.12.2024.).

Moreover, Regulation (EU) 19/2013[35] states the rules for the stabilisation mechanism applicable to bananas exported from Colombia and Peru to the EU due to the enormous quantities imported. In 2017, this regulation was amended by Regulation (EU) 2017/540,[36] implementing the stabilisation mechanism for bananas exported from Ecuador. Other EU norms applicable to the subjects covered by the agreement have not been issued exclusively due to this trade agreement; in other words, they are, in general, legal measures that can be applied to similar EU agreements.

Colombia has implemented several regulations to improve the effectiveness of its trade agreement with the EU, influenced by the subcommittees that oversee the implementation of the FTA. Decree 1636 of 2013[37] established the conditions for the fulfilment of Colombia's market access commitments. Similarly, Law 1609 of 2013[38] outlined the government's responsibility to adjust tariffs and customs regulations to facilitate trade agreements. Based on this law, Decree 390 of 2016 introduced new customs regulations in line with international agreements, which were later replaced by Decree 1165 of 2019,[39] which governs Colombia's current customs regime. In 2021, Decree 360 of 2021[40] introduced a simplified procedure for customs users, which

[35] European Parliament and the Council, Regulation (EU) 19/2013, *Implementing the bilateral safeguard clause and the stabilization mechanism for bananas of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part,* [2013], https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0019 (last accessed: 31.12.2024.).

[36] European Parliament and the Council, Regulation (EU) 2017/540. amending Regulation (EU) No 19/2013 implementing the bilateral safeguard clause and the stabilisation mechanism for bananas of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, and amending Regulation (EU) No 20/2013 implementing the bilateral safeguard clause and the stabilisation mechanism for bananas of the Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, [2017], https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0540&qid=1579189798344&from=EN (last accessed: 31.12.2024.).

[37] Ministry of Industry and Trade, Decree 1636 of 2013, *By which market access commitments acquired by Colombia under the Trade Agreement between Colombia and Peru, of the one part, and the European Union and its Member States, of the other part, signed in the city of Brussels on June 26, 2012, are implemented* [2013], https://www.tlc.gov.co/TLC/media/media-TLC/Documentos/Decreto-1636-del-31-de-julio-de-2013.pdf (last accessed: 31.12.2024.).

[38] Congress of Colombia. Law 1609 of 2013, *By which general rules are dictated to which the Government must be subject to modify the tariffs, tariffs and other provisions concerning the Customs Regime,* 2013, http://secretariasenado.gov.co/senado/basedoc/ley_1609_2013.html (last accessed: 31.12.2024.).

[39] Ministry of Finance and Public Credit, Decree 1165 of 2019, *By which provisions are issued regarding the customs regime in development of Law 1609 of 2013,* (2 July 2019), https://www.mincit.gov.co/getattachment/minindustria/temas-de-interes/zonas-francas/normatividad/2019/decreto-1165-de-2019/decreto-1165-del-2-de-julio-de-2019-compressed-1-comprimido.pdf.aspx (last accessed: 31.12.2024.).

[40] Ministry of Finance and Public Credit, Decree 360 of 2021, *By which Decree 1165 of 2019 on the Customs Regime is modified and other provisions are issued,* (7 April 2019), https://dapre.presidencia.gov.co/normativa/normativa/DECRETO%20360%20DEL%207%20DE%20ABRIL%20DE%202021.pdf (last accessed: 31.12.2024.).

grants certain benefits once compliance with the requirements of the Colombian customs authority is achieved, streamlining international trade transactions for qualified users.

Nevertheless, as indicated at the beginning of this document, another issue of interest in the legal development since the FTA is the study of the legal framework applicable to imports and exports between the parties, in particular coffee and pharmaceutical products, as the key goods driving the EU-Colombia trade relationship.

The FTA includes (general and specific) provisions applicable to imports and exports between the parties; however, particular rules on trade in goods under Title III of the Agreement and Annexes IV and VI on agricultural safeguard measures and sanitary and phytosanitary standards are relevant to the export of coffee from Colombia to the EU, and the import of EU pharmaceuticals to Colombia.

1. Coffee exports from Colombia to the EU

Coffee is one of the world's most in-demand products, grown in more than 70 countries, with Latin America being the largest exporting region. The EU is the largest coffee market, consuming 44% of the world's coffee, with Germany, Italy and France accounting for 10% of global consumption.[41] Each EU citizen consumes an average of 4.67 kilos of coffee per year, leading the EU to import 46.2 million bags of green coffee, 0.7 million bags of roasted coffee and 2 million bags of soluble coffee per year.[42] Colombia is a major player in the coffee industry, with large exports to the EU, Japan and the U.S., supported by the Colombian Coffee Federation (FNC) and its internationally recognised "Café de Colombia" brand.[43]

Approximately 86% of Colombian coffee is exported as green coffee, and the remaining amount (nearly 60 kg bags or 120 thousand tons) is processed as instant or roasted coffee and is consumed locally. Colombia is also an important producer of certified coffee worldwide. This country has joined seven certification programs, among which Colombia is the largest producer of Fairtrade-certified coffee and the second-largest producer of Rainforest Alliance-certified coffee.[44]

[41] International Labour Organization, *Sustainable supply chains to build forward better. Coffee production in Colombia for the European Market*, (2020), https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/genericdocument/wcms_777245.pdf (last accessed: 31.12.2024.).

[42] Connect Americas, *Rules for exporting coffee to the European Union,* https://connectamericas.com/content/rules-exporting-coffee-european-union (last accessed: 31.12.2024.).

[43] World Intellectual Property Organization, Case Studies, *Making the Origin Count: The Colombian Experience,* https://www.wipo.int/ipadvantage/en/details.jsp?id=2617 (last accessed: 31.12.2024.).

[44] G. Ferro, *United Nations Conference on Trade and Development. National Workshop on Fostering Integration of the Ethiopian Roasted Coffee Value Chain into Regional Value Chains* (11 March 2021), https://unctad.org/system/files/information-document/THAN_ETH_Gustavo_Ferro_Colombia_110321.pdf (last accessed: 31.12.2024.).

In 2013, when the FTA started to be applied provisionally, imports of Colombian speciality coffee to the EU reached EUR 606.3 million, with the strongest demand from Switzerland and Germany, representing 31% and 18% (respectively) of total coffee imports during that year.[45] By 2022, Colombian coffee imports to the EU were valued at EUR 758 million.[46] These numbers may not represent a significant increase in the value of Colombian coffee imports after nine years of FTA implementation; however, a deep analysis of these amounts requires taking other external variables into account, such as changes in the price of the product or the particular circumstances of production each year in Colombia.

a) EU legal framework

The coffee industry at the EU level is covered by the EU food safety policy "Farm to fork food", which sets high standards for plant protection, animal health and welfare, and specifies the need for clear information on origin, among other biosecurity requirements, to ensure the quality of food products and the protection of human health in the EU.[47] To this end, the EU has established an extensive legal framework covering various aspects of food production, such as hygienic standards and monitoring residues, pesticides, and contaminants. These rules generally apply to all foodstuffs distributed in the territory of the Union; it means that they also apply to food products produced by third countries and imported into the EU.

For the export of coffee to the EU, it is possible to classify the legal requirements applicable to this product into four groups: food safety, food contaminants, general labelling – packaging requirements, and official controls and enforcement.

Food Safety

Regulation (EC) 178/2002, also known as the "General Food Law Regulation",[48] was adopted in 2002 and serves as the primary framework for food safety legislation in the EU. It outlines the principles and procedures for all stages of food and feed production and distribution. A key feature of this Regulation is the "Rapid Alert System for Food and Feed" (RASFF),[49] which allows for the rapid exchange of information between Member States in the event of food safety risks. The regulation also established the

[45] *Ex post evaluation 2018,* 40.
[46] *EEAS 2021.*
[47] European Commission, *Strategy and Policy. Food Safety,* https://commission.europa.eu/strategy-and-policy/food-safety_en (last accessed: 31.12.2024.).
[48] European Parliament and the Council of the European Union, *Regulation (EC) No 178/2002 of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety,* [2012] OJ L 31, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32002R0178 (last accessed: 31.12.2024.).
[49] European Commission, RASFF Window, https://webgate.ec.europa.eu/rasff-window/screen/search?event=SearchForm (last accessed: 31.12.2024.).

"European Food Safety Authority" (EFSA),[50] an independent agency that provides advice on risks associated with food production and distribution.

Regulation (EU) 2017/625[51] lays down general rules on the hygiene of foodstuffs during production, processing and distribution. It aims to protect consumer interests, ensure fair trade practices, and regulate the use of materials in contact with food. This Regulation also plays a crucial role in the enforcement of food safety rules, in particular through official controls. In addition, Regulation (EC) No 852/2004 on food hygiene applies to specific products such as coffee and ensures compliance with the Hazard Analysis and Critical Control Points (HACCP) principles throughout the food production chain. Together, these regulations ensure the safety and integrity of food within the EU.

The Commission's Health and Consumers Directorate General has also contributed in this area by publishing a guidance document, "Key questions related to import requirements and the new rules on food hygiene and official food controls",[52] addressed to the competent food authorities and commercial food operators from the EU Member States and third countries, in order to address some key questions regarding the implementation of food hygiene import requirements.

Food Contaminants

Food contamination is another critical issue in food security, as it can occur at different stages of food production under different circumstances. Coffee is obtained from a basically agricultural process; therefore, contamination control begins with the cultivation process, where the monitoring of pesticides used on coffee plants is relevant. Later, norms related to food contact materials in labelling are essential in the packaging and transport phases of the product.

[50] European Food Safety Authority, EFSA, https://www.efsa.europa.eu/en/about/about-efsa (last accessed: 31.12.2024.).

[51] European Parliament and the Council of the European Union, Regulation (EU) 2017/625. of 15 March 2017, *on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products, amending Regulations (EC) No 999/2001, (EC) No 396/2005, (EC) No 1069/2009, (EC) No 1107/2009, (EU) No 1151/2012, (EU) No 652/2014, (EU) 2016/429 and (EU) 2016/2031 of the European Parliament and of the Council, Council Regulations (EC) No 1/2005 and (EC) No 1099/2009 and Council Directives 98/58/EC, 1999/74/EC, 2007/43/EC, 2008/119/EC and 2008/120/EC, and repealing Regulations (EC) No 854/2004 and (EC) No 882/2004 of the European Parliament and of the Council, Council Directives 89/608/EEC, 89/662/EEC, 90/425/EEC, 91/496/EEC, 96/23/EC, 96/93/EC and 97/78/EC and Council Decision 92/438/EEC (Official Controls Regulation),* [2017] OJ L 095, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02017R0625-20220128 (last accessed: 31.12.2024.).

[52] European Commission, Health and Consumer Protection Directorate-General, Guidance Document, *Key questions related to import requirements and the new rules on food hygiene and official food controls,* 2014, https://food.ec.europa.eu/system/files/2016-10/biosafety_fh_legis_guidance_interpretation_imports.pdf (last accessed: 31.12.2024.).

Regulation (EC) 1881 of 2006[53] sets the maximum levels of contaminants allowed in food and divides them into nine groups listed in an Annexe. If a product exceeds these contaminant limits, it cannot be sold or distributed in the EU. Each EU Member State is responsible for testing food for contaminants and reporting the results to the EFSA. As a food product, coffee is subject to specific contaminant regulations, particularly for mycotoxins such as ochratoxin A, which can contaminate green coffee beans during production, post-harvest or transportation. Regulation (EU) 2022/1370[54] sets the maximum level of Ochratoxin A at 3% for roasted coffee and 5% for ground and instant coffee.

In addition to mycotoxins, coffee may be contaminated by hydrocarbons such as polycyclic aromatic hydrocarbons (PAHs) and mineral oil aromatic hydrocarbons (MOAHs) during the drying process. Although coffee is not specifically included in Regulation (EU) 835/2011, this regulation addresses PAHs in all foods. Some EU Member States, such as Germany, have issued guidelines about the potential risks of MOAH contamination in green coffee.[55] These hydrocarbons, particularly MOAHs, may be carcinogenic, although the EU has not set a specific maximum level for them.

Another potential contaminant in coffee is acrylamide, a carcinogenic substance formed during roasting at temperatures above 120 °C. Regulation (EU) 2017/2158 limits the amount of acrylamide in roasted coffee to a maximum of 400 µg/kg.[56] These regulations aim to protect consumer health by controlling the presence of harmful substances in coffee and other food products.

Pesticide control is a critical aspect of food safety, especially for plant protection products. Regulation (EC) 396/2005[57] sets the maximum residue levels (MRLs) of pesticides allowed in food of plant and animal origin. The European Commission's EU Pesticides Database allows users to search for MRLs, active substances and emergency authorisations for plant protection products in the Member States.[58] Regulation (EU)

[53] European Commission. Regulation (EC) 1881/2006 *setting maximum levels for certain contaminants in foodstuffs,* [2006] OJ L 364, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32006R1881 (last accessed: 31.12.2024.).

[54] European Commission, Regulation (EU) 2022/1370, *Amending Regulation (EC) No 1881/2006 as regards maximum levels of ochratoxin A in certain foodstuffs,* [2022] OJ L 206, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022R1370 (last accessed: 31.12.2024.).

[55] CBI Ministry of Foreign Affairs.

[56] Commission Regulation (EU) 2017/2158, *Establishing mitigation measures and benchmark levels for the reduction of the presence of acrylamide in food (Text with EEA relevance),* [2017], https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32017R2158 (last accessed: 31.12.2024.).

[57] European Parliament and the Council, Regulation (EC) 396/2005, *on maximum residue levels of pesticides in or on food and feed of plant and animal origin and amending Council Directive 91/414/EEC,* [2005], https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02005R0396-20220516 (last accessed: 31.12.2024.).

[58] European Commission, Food Safety, *EU Pesticides Database,* https://food.ec.europa.eu/plants/pesticides/eu-pesticides-database_en (last accessed: 31.12.2024.).

2023/334,[59] adopted in February 2023, amended Annexes II and V of Regulation (EC) 396/2005 to update the MRLs for clothianidin and thiamethoxam in coffee beans, setting the limit at 0.05 mg/kg. This will ensure that pesticide residues in food are kept at safe levels.

EU food safety legislation also covers food contact materials (FCMs) to prevent contaminants from migrating from packaging to food. These materials must comply with Regulation (EC) 1935/2004, as amended by Regulation (EU) 2019/1381, which requires that FCMs do not change the composition, smell or taste of food in an unacceptable way. The European Food Safety Authority (EFSA) oversees the risk assessments associated with the manufacture of FCMs. FCMs must also adhere to Good Manufacturing Practices (GMP) as outlined in Regulation (EC) 2023/2006.[60] These regulations ensure that materials such as plastics and ceramics used in food packaging are safe for consumers and comply with both EU and national legislation.

General labelling and packaging requirements

Food labelling is important for providing customers with essential information about products and allowing them to make informed choices about what to consume. In this area, the EU has some mandatory and general rules on food labelling that apply to any food or beverage distributed within EU territory.

The main legal source for food labelling in the EU is Regulation (EU) 1169/2011[61] on the provision of food information to consumers (FIC Regulation). This sets out the harmonised requirements for all food labelling information, such as the name of the food, ingredients list, allergen information, quantity of ingredients, date of marketing, expiry date, country of origin, quantity, storage conditions (if required), and the name and address of the food business operator or principal importer. Likewise, there are some specific rules for some food products. In the case of coffee, there are some specific labelling requirements, including the ICO's coffee identification

[59] Commission Regulation (EU) 2023/334, *Amending Annexes II and V to Regulation (EC) No 396/2005 of the European Parliament and of the Council as regards maximum residue levels for clothianidin and thiamethoxam in or on certain products*. [2023] OJ L 47, https://eur-lex.europa.eu/eli/reg/2023/334/oj (last accessed: 31.12.2024.).

[60] European Commission, Regulation (EC) 2023/2006, *On good manufacturing practice for materials and articles intended to come into contact with food*. [2006]. OJ L 384, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32006R2023 (last accessed: 31.12.2024.).

[61] European Parliament and the Council, Regulation (EU) 1169/2011, *On the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004*. [2011] OJ L 304, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32011R1169 (last accessed: 31.12.2024.).

code, the label in English for green coffee, the country of origin, grade, net weight in kilograms, the inspection body's name, and the certification number for certified coffee.[62]

Official controls and enforcement

Regulation (EU) 2017/625, also known as the Official Control Regulation (OCR), outlines the mandatory controls that food safety authorities in EU Member States must carry out. It covers official certificates, health approvals and approved establishments involved in food distribution to ensure compliance with food safety standards. Moreover, Regulation (EU) 2019/1793[63] imposes strict conditions on food products from countries that repeatedly fail to meet safety requirements and regularly updates the list of non-compliant products and countries.

The European Commission also provides tools to help companies understand specific requirements for food products. For example, the Access2Markets website's "My Trade Assistant Goods",[64] a tool that allows users to search for information based on a product's name or Harmonised System (HS) code, country of origin, and country of destination. The HS code for coffee is 0901. In addition, the RASFF, established by the General Food Law Regulation, acts as a database to monitor food safety, including cases when coffee is rejected or approved for distribution in the EU.

In summary, exporting food products (such as coffee) to the EU requires a prior assessment exercise by the food business operators to identify all the general EU requirements on food safety and the specific conditions relevant to each product. In the case of coffee, once coffee exporters are aware of the general food regulations, they need to demonstrate compliance with the HACCP principles, MRLs, the maximum permitted levels of contaminants, and packaging conditions for the different types of coffee.

2. Pharmaceutical goods exports from the EU to Colombia

Pharmaceutical goods are among the most important goods in the EU-Colombia economic relationship. Along with aircraft and automotive machinery, pharmaceuticals

[62] CBI Ministry of Foreign Affairs.

[63] European Commission, Implementing Regulation (EU) 2019/1793 of 22 October 2019 on the temporary increase of official controls and emergency measures governing the entry into the Union of certain goods from certain third countries implementing Regulations (EU) 2017/625 and (EC) No 178/2002 of the European Parliament and of the Council and repealing Commission Regulations (EC) No 669/2009, (EU) No 884/2014, (EU) 2015/175, (EU) 2017/186 and (EU) 2018/1660. [2019], https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02019R1793-20220703 (last accessed: 31.12.2024.).

[64] European Commission. DG Trade, Access2Markets, My Trade Assistant Goods + ROSA, https://trade.ec.europa.eu/access-to-markets/en/results?product=090121&origin=CO&destination=HU (last accessed: 31.12.2024.).

are the most valuable imported goods from the EU to Colombia. In 2022, Colombia's imports of pharmaceutical products from the EU amounted to EUR 1,128 million, representing 13.22% of total imports in that year.[65]

Annexe VI of the FTA covers sanitary and phytosanitary measures, and Appendix 3 provides general guidelines for the harmonisation of testing requirements and audits for animal and plant products that have an impact on health. These provisions ensure transparent cooperation and alignment of technical guidelines for high-quality pharmaceuticals and medical devices, thereby promoting international regulatory harmonisation.[66] Its Appendix I highlights the shared responsibilities of EU Member States and the European Commission for controlling production conditions, inspections and issuing health certificates. The European Commission coordinates inspections and implements legislation to ensure uniform application of standards across the EU and compliance with the requirements of importing parties.

In Colombia, the control and surveillance of imports, especially from the EU, are managed by the Colombian Agricultural Institute (ICA 'Instituto Colombiano Agropecuario') and the National Institute for Medicaments and Food Surveillance (INVIMA 'Instituto Nacional de Vigilancia de Medicamentos y Alimentos'). These institutions are responsible for verifying that imports meet Colombia's sanitary and phytosanitary standards, including inspections and certificates from EU Member States.[67] INVIMA specifically handles the authorisation and control of pharmaceutical product imports, ensuring compliance with health regulations.

INVIMA is a public institution under the Colombian Ministry of Health and Social Protection, which enforces health surveillance and quality control policies for medicines and biological products. It also engages in international cooperation, sharing best practices with regulatory authorities in Latin America and beyond. INVIMA maintains direct relations with health authorities in Spain, Denmark, and the Netherlands, fostering bilateral cooperation with the EU in areas related to public health and safety standards.[68]

a) Colombian legal framework

Colombia's main legal framework for import registration and licensing is outlined in Decree 925 of 2013, issued by the Ministry of Trade, Industry and Tourism. This decree updates previous licensing systems to streamline trade processes and align with Colombia's international trade commitments, such as the Free Trade Agreement

[65] *EEAS 2021.*
[66] FTA, 2188.
[67] FTA, 2188.
[68] Instituto Nacional de Vigilancia de Medicamentos y Alimentos – INVIMA. Cooperación Internacional. https://invima.gov.co/es/web/guest/cooperacion-internacional (last accessed: 31.12.2024.).

with the EU.[69] Article 12 of the Decree defines the import license as an administrative permit based on criteria established by the national government. Import registration is only mandatory for goods that require a permit, as specified in Article 24, with health checks or other compliance measures supervised by the competent authorities prior to authorisation (Article 25).[70]

The registration and sanitary approval of pharmaceuticals is primarily regulated by Law 9 of 1979, later amended by Decree 2106 of 2019. Article 88 of the Decree requires that all medicines, cosmetics and related products that affect public health, with the exception of those for agricultural use, must obtain a permit or sanitary notification from INVIMA.[71] In addition, Article 94 outlines the process for obtaining sanitary registrations for new medicines, which requires a comprehensive evaluation, including pharmacological, pharmaceutical and legal assessments, by INVIMA prior to the approval of applications for sanitary registrations. This framework ensures the safety and regulatory compliance of products entering the Colombian market.

Subsequently, Decree 1782 of 2014 outlines the procedures for the pharmacological and pharmaceutical evaluation of biological medicinal products during the health registration process in Colombia. Article 12 requires that laboratories producing biological medicinal products obtain Good Manufacturing Practices (GMP) certification, as defined by the Ministry of Health and based on the latest World Health Organization (WHO) reports.[72] The pharmacological evaluation is described as an assessment of the quality, safety and efficacy of a medicinal product, carried out by the Specialized Room of Medicines and Biological Products at INVIMA, Colombia's regulatory agency. The regulation was introduced in response to advances in GMP standards set by the WHO.

Then, Regulation 5402 of 2015 complements Decree 1782 of 2014 and provides a manual for verifying GMP compliance in the manufacture of biological medicines. The regulation is aligned with WHO guidelines and outlines procedures for the manufacture of biological medicinal products, taking into account the origin and production methods of these products. This GMP manual was notified to the World

[69] Ministry of Commerce, Industry and Tourism, Decree 925 of 2013. Official Journal No. 48.785 of May 9, 2013, https://www.cancilleria.gov.co/sites/default/files/Normograma/docs/decreto_0925_2013.htm#25 (last accessed: 31.12.2024.).

[70] Ibid.

[71] Administrative Department of the Civil Service. Decree 2106 of 2019, *by which rules are issued to simplify, suppress and reform unnecessary procedures, processes and procedures existing in the public administration*. Official Journal No. 51.145 of November 22, 2019. https://www.cancilleria.gov.co/sites/default/files/Normograma/docs/decreto_2106_2019.htm#87 (last accessed: 31.12.2024.).

[72] Administrative Department of the Civil Service. Decree 1782 of 2014, *which establishes the requirements and procedure for the Pharmacological and Pharmaceutical Evaluations of biological medicines in the process of sanitary registration*. September 18, 2014. https://tinyurl.com/5f5bpkt9 (last accessed: 31.12.2024.).

Trade Organization (WTO) in 2014 under code G/TBT/N/COL/202, and no objections were raised.[73] The purpose of these regulations is to ensure that biological medicinal products manufactured in or imported into Colombia meet strict safety and quality standards.

Moreover, Notice 18 of 2020, issued by the Foreign Trade Directorate of the Ministry of Commerce, addresses the permits and authorisations required prior to applying for registration and import licenses, particularly for pharmaceutical products handled by INVIMA. Article 1.4 stipulates that products such as drugs, vaccines and medical instruments must be approved by INVIMA when applying for tariff exemptions.[74] Article 2.5 defines pre-import control measures, including sanitary registrations, marketing authorisations and other necessary approvals for the import of finished products and raw materials used in pharmaceuticals and medical devices, all within the scope of INVIMA.[75]

In addition to existing regulations, Decree 481 of 2004 from the Ministry of Social Protection provides more flexible rules for the production, import, and commercialisation of 'vital medicines not available' in Colombia. These medicines are essential for saving lives or alleviating patient suffering, but are unavailable or insufficient due to their low commercial profitability. The Specialized Chamber of Medicines of INVIMA's Review Commission is responsible for determining which medicines fall into this category, ensuring access to essential treatments despite market limitations.

In 2020, as a response to the COVID-19 pandemic, the Colombian government issued Decree 1148 of 2020, which established sanitary requirements to facilitate the production and importation of essential products and services. This decree addressed the global shortage of medical supplies by classifying COVID-19 treatments, such as vaccines, as "vital not available", allowing for their expedited import and distribution under the supervision of INVIMA. It also temporarily relaxed labelling, packaging and Good Manufacturing Practices (GMP) regulations to meet the urgent demand for Covid-19-related products.[76]

[73] Ministry of Health and Social Protection, Regulation 5402 of 2015, *By which the manual and the instrument of verification of Good Manufacturing Practices of Biological Medicines is issued*. December 17, 2015. Preamble, https://studylib.es/doc/7707423/resoluci%C3%B3n-5402-de-2015---ministerio-de-salud-y-protecci%C3%B3... (last accessed: 31.12.2024.).

[74] Ministry of Commerce, Industry and Tourism - Directorate of Foreign Trade. Notice 18 of 2020. Official Journal 51,427 of 04 September 2020. Article 1.4, https://www.cancilleria.gov.co/sites/default/files/Normograma/docs/circular_mincomercioit_0018_2020.htm (last accessed: 31.12.2024.).

[75] Ibid. Article 2.5 numeral 1 and 2.

[76] Presidency of the Republic of Colombia, Decree 1148 of 2020, *which establishes the sanitary requirements that facilitate the manufacture and import of products and services to address the COVID 19 pandemic and dictates other provisions*. August 18, 2020, https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=138950 (last accessed: 31.12.2024.).

To further combat the pandemic, Decree 1787 of 2020 established the sanitary conditions for granting Emergency Use Sanitary Authorization (EUSA) for chemical synthesis and biological medicines used in the diagnosis, prevention, and treatment of COVID-19. This decree emphasised the need for rigorous regulatory processes to ensure the quality, safety, and efficacy of these highly specific medicines prior to their commercialisation.[77] Based on international standards, such as those set by the European Medicines Agency (EMA) and the U.S. Food and Drug Administration (FDA), Colombia adopted similar temporary authorisations to streamline the approval of COVID-19 treatments and ensure the rapid availability of crucial medical products during the pandemic.[78]

By mid-2022, although the COVID-19 situation had improved globally, in Colombia, the WHO had not yet declared the pandemic over. In response, the Colombian Ministry of Health and Social Protection issued Decree 1651 of 2022 on August 6, 2022, which approved the Emergency Technical Regulation for the Emergency Use Sanitary Authorization (EUSA) of chemical and biological medicines. This regulation, which is based on Decree 1787 of 2020, outlines the procedures for granting EUSA for new medicines or those with an existing sanitary registration seeking additional uses. The authorisation is valid for one year and renewable up to three times, with restrictions on medical or gift samples.[79]

In summary, all pharmacological products, whether manufactured in or imported into Colombia, require an authorisation from INVIMA for use or commercialisation, as well as sanitary registration. The specific procedures vary depending on the type and intended use of the drug. Colombia has been actively updating its regulatory framework to comply with international standards set by organisations such as the WHO, the WTO and the European Union's EMA. This ensures that Colombia's pharmaceutical regulations remain in line with global best practices.

[77] Presidency of the Republic of Colombia, Decree 1787 de 2020, *which establishes the sanitary conditions for the processing and granting of the Emergency Use Sanitary Authorization – EUSA for chemical synthesis and biological medicines for the diagnosis, prevention and treatment of Covid-19*. December 29, 2020. Preamble, https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=154146 (last accessed: 31.12.2024.).

[78] Ibid.

[79] Ministry of Health and Social Protection, Decree 1651 of 2022, *By which the emergency technical regulation is issued for the processing of Sanitary Authorization of Emergency Use – ASUE of chemical and biological synthesis drugs and other provisions are issued*. August 6, 2022, https://www.cerlatam.com/normatividad/minsalud-decreto-1651-de-2022/ (last accessed: 31.12.2024.).

VI. Conclusions

This document shows that the revision of the FTA has strengthened the economic relationship between the EU and Colombia. As one of the EU's New Generation FTAs, this agreement goes beyond traditional trade agreements by addressing tariff liberalisation, services, public procurement, and sustainable development. The EU's role as Colombia's third-largest trading partner and main source of foreign direct investment underscores the economic interdependence between the two regions. In addition to improving market access, the FTA has facilitated cooperation in areas such as development, diplomacy, and Colombia's post-conflict peace process. For example, the EU played a key role in Colombia's peace agreement with the FARC, supporting both the negotiation and implementation phases, including the creation of the European Peace Fund. This cooperation underscores the broad scope of the EU-Colombia relationship, combining economic growth with peacebuilding and sustainable development initiatives. Despite these positive aspects, Colombia has faced challenges in maintaining a consistent trade balance, reflecting the uneven benefits of the agreement across sectors.

Economically, the FTA has had mixed results. While it has contributed to Colombia's macroeconomic growth and opened markets, it has also exposed the country to fluctuations in global commodity prices, particularly in sectors such as coal, coffee and agricultural products. The EU's exports to Colombia have largely consisted of high-value goods such as pharmaceuticals, vehicles and machinery, contributing to a trade imbalance. In contrast, Colombia's exports, mostly agricultural and mineral products, are subject to global price volatility, which has affected their market performance. Between 2012 and 2017, the value of Colombia's exports to the EU decreased by 35%, while EU exports to Colombia increased by 8.6%, exacerbating the trade deficit. This imbalance highlights the structural economic challenges Colombia faces when competing with a more developed economic bloc such as the EU. Furthermore, while the FTA aimed to boost Colombia's GDP growth, the post-FTA period saw a slowdown in growth rates. This suggests that while the FTA has facilitated trade, the expected economic benefits have been uneven, especially when compared to the gains experienced by the EU.

Another distinctive feature of the EU-Colombia FTA is the inclusion of TSD provisions aimed at promoting human, labour and environmental rights. These provisions underscore the EU's commitment to integrating sustainable development into its trade policy, ensuring that economic growth does not come at the expense of social justice or environmental protection. However, the implementation of these TSD provisions has faced significant challenges in Colombia, largely due to the country's internal problems, including corruption, economic instability, and violence. While the FTA has supported the peace process and Colombia's alignment with international environmental

agreements, it has been less successful in improving labour rights, particularly in sectors such as mining and palm oil production. Reports of ongoing human rights violations, including violence against trade unionists and the failure to adequately consult with indigenous and Afro-descendant communities on land-use projects, point to the limitations of the FTA's provisions. Without enforceable sanctions or clear dispute resolution mechanisms, TSD chapters risk becoming symbolic rather than effective.

The text also shows that since the implementation of the FTA, both Colombia and the EU have adopted legal instruments, such as Colombia's Decree 1636 of 2013 and Law 1609 of 2013, to regulate trade and align policies with international commitments. These frameworks streamline trade processes, benefiting key sectors such as coffee and pharmaceuticals. Colombian coffee exports to the EU are thriving due to the FTA and Colombia's global position, while strict EU regulations ensure product quality. Similarly, pharmaceutical imports from the EU are governed by robust legal standards. However, ongoing regulatory adjustments are needed to realise the full potential of the FTA and maintain efficient trade.

Overall, the FTA has had a positive economic impact on the EU and Colombia, but its full benefits are limited by trade imbalances, slow progress on sustainable development, and the need for ongoing legal and regulatory updates. The agreement has facilitated market access and cooperation, but achieving its broader objectives, particularly in the areas of labour rights and environmental protection, will require sustained efforts and stronger enforcement mechanisms. As the FTA continues to evolve, it will be crucial for both parties to address these challenges to ensure that trade serves as a tool for inclusive and sustainable growth.

HABILITATIO

Antal, Attila*

Governance by extraordinary measures and the age of crises**

This is a summary of my habilitation lecture given on 29 November 2023. The research on which the lecture is based was conducted within the framework of the MTA Bolyai Scholarship, and during the same period I also conducted postdoctoral research within the framework of the National Research, Development and Innovation Office Postdoctoral Excellence Program, entitled The State of Emergency in the Era of Global Ecological and Pandemic Crisis.[1]

I. Introduction

We have entered an era of overlapping crises (polycrisis). The authoritarian populist right-wing has rapidly reemerged in the field of authoritarian state and emergency governance. Moreover, the COVID-19 crisis has given new impetus to this phenomenon. The failures of liberal democracy, which can be called "neo-Weimarisation", have opened the way to authoritarian right-wing populism. The rise of authoritarian populism and extraordinary measures of governance have fundamentally changed the relationship between law and politics. I will examine the impact of extraordinary governance measures (EGM) on democracy and the structure of law. Overlapping states of exception lead to several dilemmas, as governing by extraordinary measures is not inherently undemocratic. However, if the executive power primarily performs its tasks in an extraordinary manner, this has very serious social and political consequences, and it also leaves its mark on democracy. At the same time, governments have shifted strongly towards a kind of crisis management direction, which provides incredible opportunities to govern by EGMs, but also takes us incredibly far away from any kind of political or social normality. In examining the practice of exceptional governance in autocracies, one of the most important issues is the impact of political governance on constitutionalism,

* Antal, Attila, Dr. habil., Associate Professor, Eötvös Loránd University, Faculty of Law Institute of Political Science, antal.attila@ajk.elte.hu

** This paper was written within the framework of the Hungarian Academy of Sciences' call for proposals for the support of researchers raising children and is an expanded and revised version of the author's earlier Hungarian-language paper.

[1] The research website can be found here: https://www.stateofemergency.hu/ (last accessed: 31.12.2024.).

DOI: 10.56749/annales.elteajk.2024.lxiii.11.203

the legal system, and the law itself. Under a state of exception, the law becomes an instrument of political voluntarism and loses its autonomy.

II. The Impact of Exceptional Measures on Normality[2]

Michael Hardt and Antonio Negri argue that the separation of war from politics was a fundamental goal of modern political thought and practice among both liberal and non-liberal political theorists.[3] This consensus has collapsed, and authoritarian populist regimes are introducing the kinds of permanent states of exception elaborated by Giorgio Agamben.[4] As Michael Head states: "The early years of the twenty-first century have seen increasing resort to emergency-type powers or claims of supra-legal executive authority, including by the Western countries regarded as the world's leading democracies."[5] Due to the COVID-19 pandemic and global social crises, the rise of emergency powers defines our time more than ever. The solid contours of war have disappeared. Moreover, war and peace are mixed up, and the emerging states of exception indicate these tendencies remarkably well. Authoritarian populist regimes sense these trends and prefer to use emergency measures of government. These systems are using the power of the police/penal state to create political enemies and annihilate them as modern forms of homo sacer.[6] The state of exception and modern forms of deprived social groups, understood as contemporary homo sacer, have become the main accompanying components of the authoritarian populist regimes of our time.

Authoritarian populism is about the use of exceptional measures to maintain political power, and the COVID-19 crisis has given new impetus to this phenomenon. According to Agamben,[7] there has been a seminal transformation in conjunction with the idea of government, "which overturns the traditional hierarchical relation between causes and effects. Since governing the causes is difficult and expensive, it is

[2] This section is based on a paper I am currently publishing, in which I explain the points made here in more detail: A. Antal, The Impact of the Exceptional Governance Measures on Democracy and Legal Systems, *ELTE Law Journal* (forthcoming).

[3] M. Hardt and A. Negri, *Multitude. War and Democracy in the Age of Empire* (Penguin Publishing Group, New York, 2004) 6.

[4] G. Agamben, *Homo Sacer: Sovereign Power and Bare Life,* Transl.: D. Heller-Roazen (Stanford University Press, California, 1998); G. Agamben, *State of Exception* (The University of Chicago Press, Chicago, 2005) DOI: https://doi.org/10.2307/j.ctv1134d6w.16

[5] M. Head, *Emergency Powers in Theory and Practice. The Long Shadow of Carl Schmitt* (Routledge, Surrey, 2016) 1. DOI: https://doi.org/10.4324/9781315563282

[6] Agamben, *Homo Sacer: Sovereign Power and Bare Life*.

[7] G. Agamben, From the State of Control to a Praxis of Destituent Power, (2014) *ROAR Magazine,* https://roarmag.org/essays/agamben-destituent-power-democracy/ (last accessed: 31.12.2024.).

safer and more useful to try to govern the effects".[8] Authoritarian populist regimes have started to manage the effects of the crisis they have created, and this is a considerable change. Agamben described this situation in the following way: "The ancient regime aimed to rule the causes; modernity pretends to control the effects. And this axiom applies to every domain, from the economy to ecology, from foreign and military politics to the internal measures of police. We must realize that European governments today have given up any attempt to rule the causes, they only want to govern the effects."[9] Exceptional or putative exceptional situations offer authoritarian populist regimes a convenient opportunity to criminalise political groups and claim that these groups are enemies and that the regime is protecting people from these enemies they have created. This is a situation where the normal processes of governing are replaced by police forces, and the normal situation becomes exceptional, during which anything is conceivable.[10]

The major challenge of exceptional measures is thus how to preserve the status quo (i.e. the existing 'normality', the democracy to be defended), which is to be protected by exceptional means, while at the same time granting the executive extraordinary powers.[11] This is further complicated by the fact that there may be exceptional situations (e.g., natural or industrial disasters, war, or epidemics) that require rapid and effective mechanisms to address and when there simply is not enough time to operate the normal democratic process of constitutional decision-making. It is to resolve this dilemma that the rules of liberal constitutionalism have been developed – to ensure the rule of law and the system of checks and balances that also apply even in times of emergency, the basic idea being that the executive, when brought into a situation, cannot make any definitive constitutional changes during the emergency, the main aim being to manage the dangerous situation and "rescue" normality.[12]

The constitutional system of the exercise of exceptional power has been significantly influenced by the Roman legal tradition through republican political thought, as the elaborate Roman legal system incorporated a number of fundamental limits and checks and balances on the executive. On the one hand, this ensured the rights to which Roman citizens were accustomed, but on the other hand, it resulted in a rather cumbersome system of responding to various crises, whereby in the event of an emergency the Roman Senate could order the consuls to appoint a dictator for a period

[8] See also: Agamben, From the State of Control to a Praxis of Destituent Power.
[9] See also: Agamben, From the State of Control to a Praxis of Destituent Power.
[10] A. Antal, *The Rise of Hungarian Populism. State Autocracy and the Orbán Regime* (Emerald Publishing, Bingley, 2019) 29–30. DOI: https://doi.org/10.1108/9781838677510
[11] J. Ferejohn and P. Pasquino, The law of the exception: A typology of emergency powers, (2004) 2 (2) *International Journal of Constitutional Law,* (210–239) 210. DOI: https://doi.org/10.1093/icon/2.2.210
[12] See also: Ferejohn and Pasquino, The law of the exception... 211.

of six months.[13] The Roman legal system was rather conservative, since a dictator was entitled to suspend rights and various legal procedures, and to deploy military and other forces to avert threats to the republic, but when he had finished this work he had to resign, and his decrees and their legal effects were terminated, i.e. the original 'normal' state had to be restored. Exceptional legal measures in modern constitutional democracies follow a similar conservative approach: that is, emergency powers are intended to deal with temporary situations and to create a situation in which a normal constitutional system of rights and procedures can be restored.[14] As Ferejohn and Pasquino have argued, Niccolo Machiavelli, James Harrington and Jean-Jacques Rousseau constitute the theoretical mediators through which the institution of the Roman dictator has grounded debates in modern constitutional and political history about the exceptional exercise of power.[15] Carl Schmitt plays a key role in this debate, which has resurfaced in the context of the crises of our time, following the period between the two world wars. The German constitutional lawyer examined the question of exceptional governance within the framework of sovereignty[16] and linked it to the unlimited power of the executive.[17] For this reason, it is crucial to outline the historical circumstances in which the contingency models introduced in the context of COVID-19 are to be assessed: in the second section of this paper, it is argued that both in the inter-war period and during contemporary governance regimes, the practice of governing by extraordinary measures (with its many dangers) has come to the fore, thus, while the onset of the pandemic posed an unexpected challenge to nation-state governments, the extraordinary practices that have been adopted in many places are far from without historical antecedent.

III. The Impact of the Pandemic[18]

V-Dem research (from before the COVID-19 pandemic) showed that there is a positive correlation between an undemocratic (authoritarian) turn and governance by extraordinary measures: countries affected by emergency measures are 59% more likely

[13] See also: Ferejohn and Pasquino, The law of the exception... 211–212.
[14] See also: Ferejohn and Pasquino, The law of the exception... 212.
[15] See also: Ferejohn and Pasquino, The law of the exception... 212.
[16] C. Schmitt, *Dictatorship. From the origin of the modern concept of sovereignty to proletarian class struggle* (Polity Press, Cambridge, 2014).
[17] T. Ginsburg and M. Versteeg, The Bound Executive: Emergency Powers During the Pandemic, (2020) (52) *Virginia Public Law and Legal Theory Research Paper,* 1503. DOI: https://dx.doi.org/10.2139/ssrn.3608974
[18] This section is based on my forthcoming paper: Antal, The Impact of the Exceptional Governance Measures on Democracy and Legal Systems.

to experience a downturn than those without.[19] The authors therefore proposed viewing the state of emergency "as a potential symptom and accelerator of autocratization processes. Like a fever, they are a strong warning sign that something maybe wrong with the state of democracy and that autocratization might be under the way."[20] In other words, exceptional governance measures and special legal orders can be both a cause and a consequence of democratic decline.[21] This makes it important to examine the intentions of the leader of the executive when judging the use of exceptional measures of governance and for the public to monitor them continuously, so that the former does not exceed their mandate in terms of either substance or timing, and uses exceptional means genuinely to defend the democratic order (to restore it) and not to authoritatively reinforce their own position.

One of the most comprehensive such studies was conducted by Ginsburg and Versteeg, who compiled a substantial database and collected information on the pandemic response in some 106 countries until mid-July 2020.[22] The authors examined the emergency governance in the context of the pandemic, basically in line with the framework of the emergency models presented above, with one of the main aspects being the state of legislatures and courts during the pandemic. The authors found that the most common response to a pandemic was to resort to an element of the legislative model, with 52% of the countries they studied relying on legislation in their response. The latter include, among others, large democracies such as Germany, France, the Netherlands, Switzerland, Austria, the United States, Australia, Belgium, Taiwan, South Korea, South Africa and Japan.[23] The vast majority of countries surveyed by Ginsburg and Versteeg, 89%, have detailed constitutional emergency legislation, while only 43% have declared such a constitutionally based emergency (compared to 40% of the total sample), including Spain, Hungary, the Czech Republic, Armenia, Sierra Leone and Senegal.[24] Ginsburg and Versteeg's data collection also highlights another interesting aspect: the activation of emergency provisions in constitutions is not primarily dependent on whether the regime is authoritarian, as 42% of democratic regimes and 33% of authoritarian regimes have made use of this option.[25] However, there have also been cases (China, Cuba, Cameroon, Belarus, Saudi Arabia, Sudan, Cambodia, Rwanda, Laos and Tanzania) when emergency

[19] A. Lührmann and B. Rooney, When Democracy Has a Fever: States of Emergency as a Symptom and Accelerator of Autocratization, (2019) (85) *V-DEM Working Paper Series,* 16. DOI: https://doi.org/10.2139/ssrn.3345155
[20] See also: Lührmann and B. Rooney, When Democracy Has a Fever... 18.
[21] See also: Lührmann and B. Rooney, When Democracy Has a Fever... 19.
[22] See also: Ginsburg and Versteeg, The Bound Executive... 1513.
[23] See also: Ginsburg and Versteeg, The Bound Executive... 1516.
[24] See also: Ginsburg and Versteeg, The Bound Executive... 1516.
[25] See also: Ginsburg and Versteeg, The Bound Executive... 1516.

governance was based solely on executive measures and the legal basis for the measures taken was not clarified.[26]

The investigation also provided an opportunity to assess the checks and balances on the executive during the emergency period, namely the legislatures, the courts and sub-national (e.g. local officials, municipalities, member states of federal states) checks and balances. In 64% of the countries studied by Ginsburg and Versteeg, the legislature was directly involved in the management of the pandemic (a state of emergency was declared or extended, or new legislation was adopted). In 75% of the countries responding under the constitutional model, the legislature had to declare or extend a state of emergency, while in 45% of the countries responding under the legislative model, the legislature passed new laws to deal with the pandemic, but in 72% of these countries the laws were temporary and only applied to the COVID-19 pandemic.[27] The strength of democratic controls and institutional resilience is demonstrated by the fact that in 52% of the countries studied, legislatures were continuously involved in the fight against the pandemic (68% in democratic countries, but even 30% in authoritarian regimes) and thus in counteracting the executive.[28] In 41% of the countries studied by Ginsburg and Versteeg, the judiciary was directly involved in the response to the pandemic. The courts were involved in 55% of democracies and 27% of authoritarian regimes:[29] such control included ensuring compliance with procedural requirements; in the case of disproportionate and unnecessary violations of fundamental rights, the courts could take the initiative to prevent or lift a blockade; further, the courts could call for concrete action by the executive to fulfil its constitutional obligation.[30] In 34% of the countries surveyed, countervailing forces against extraordinary measures emerged at the sub-national level, and in 82% of the countries, one or more of these countervailing factors were present at all three levels (legislative, judicial, and sub-national).[31]

[26] See also: Ginsburg and Versteeg, The Bound Executive... 1516.
[27] See also: Ginsburg and Versteeg, The Bound Executive... 1516.
[28] See also: Ginsburg and Versteeg, The Bound Executive... 1517.
[29] See also: Ginsburg and Versteeg, The Bound Executive... 1517.
[30] See also: Ginsburg and Versteeg, The Bound Executive... 1518–1526.
[31] See also: Ginsburg and Versteeg, The Bound Executive... 1517.

IV. The Dangers of Exceptional Measures: Weaponized Law, Law Without Morals and a Crisis of Normativity

a) Law without morals and the "weaponization of law"

With the crisis of liberal democracy and the legal and political reactions to exceptional circumstances, the constitutional and political reinterpretation of constitutional democracies by authoritarian regimes has begun. The essence of this is to redefine the political sovereignty inherent in the executive and elevate it to a hegemonic position. This requires ignoring the basic assumptions of the previous constitutionalism that prevented the concentration of power and subordinating law as an instrument to politics. As the Weimarisation tendencies of the inter-war period showed, the excessive and persistent hegemony of politics can very easily turn into the totalisation of politics, since a politics freed from its legal and (related and consequent) moral constraints can essentially keep the political community in a state of permanent exception. In other words, even in a changed environment, in an era of objective crises and suspended normality – an inescapable reality in the wake of the global ecological and climate crisis – it will be necessary to maintain the fundamental moral constraints of constitutionalism. The permanent state of exception applied by governments essentially damages the democratic immune system of society and individuals and nips in the bud any mechanisms of social self-defence, and governments exploit this to the full: as we have seen in the analyses of the COVID-19 pandemic, the promise of security has become a political watchword under which mechanisms intended to restrict freedom can be introduced, not for the security of society, but for the political security of government. In the context of 20th-century and contemporary parallels, I have indicated that in many ways there is much to learn from where and how totalitarian politics emerged in the 20th century, but there is also much to learn from the responses.

It is therefore worth recalling here the consequences of the constitutional and legal abuses of National Socialism, as described earlier, which followed the Second World War. I refer to Gustav Radbruch's formula, which he formulated in his work from 1946, *Statutory Lawlessness and Supra-Statutory Law*.[32] According to Radbruch, unjust law must be regarded as "flawed law" when the conflict between law and justice becomes intolerable.[33] Radbruch starts from a critique of German legal positivism: "Positivism, with its principle that 'a law is a law', has in fact rendered the German legal

[32] G. Radbruch, Statutory Lawlessness and Supra-Statutory, (2006) 26 (1) *Law Oxford Journal of Legal Studies,* 1–11. DOI: https://doi.org/10.1093/ojls/gqi041

[33] B. Bix, Radbruch's Formula and Conceptual Analysis, (2011) 56 (1) *American Journal of Jurisprudence,* 45–57. DOI: https://doi.org/10.1093/ajj/56.1.45

profession defenceless against statutes that are arbitrary and criminal".[34] Radbruch takes the conflict between justice and legal certainty as his starting point, and nor does he formulate his famous formula to resolve it: "The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice."[35]

Radbruch also refers to a qualified case in his formulation, for in his view, when there is not even an attempt to enforce the truth in the creation of a particular law (that is, when, in his view, equality is deliberately betrayed by the enactment of the act), it is not only flawed, but lacks legal quality.[36] Radbruch puts it this way: "It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'flawed law', it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice."[37]

In my view, in the case of law constituted in a state of exception and constituted by the executive as a tool aimed at the concentration of power, we see a shift from "defective law" in the Radbruchian sense to law that is increasingly morally and professionally questionable. I believe that in the 21st century, what we consider to be law needs to be thoroughly revised, since politics is increasingly producing (exceptional) situations in which political norms are given legal normativity uncritically, without controversy, and without social and professional debate. This seriously damages the quality of legislation and, according to the Radbruch formula, its very existence. However, this is not only dangerous for the law, but also for politics, since a policy imposed by legal means loses its deliberative, negotiated character: in other words, its political quality. For all these reasons, Radbruch shows that the apparent national socialist legal order that emerged as a result of the dual state was far from being a national socialist legal order: "Measured by this yardstick, the coherent parts of national socialist law never acquired the dignity of valid law."[38]

Exceptional legal orders and extraordinary measures of governance, rather than defending the normality of the legal and political system (for which they were historically established), have very often become a means of dismantling normality,

[34] Radbruch, Statutory Lawlessness and Supra-Statutory, 6.
[35] See also: Radbruch, Statutory Lawlessness and Supra-Statutory, 7.
[36] See also: Bix, Radbruch's Formula and Conceptual Analysis, 46.
[37] See also: Radbruch, Statutory Lawlessness and Supra-Statutory, 7.
[38] See also: Radbruch, Statutory Lawlessness and Supra-Statutory, 7.

and the use of law as a "weapon" is a key trend in this. In this context, it is worth quoting Kennedy, whose term "lawfare" refers to "law as a weapon, law as a tactical ally, law as a strategic asset, an instrument of war. They observe that law can often accomplish what might once have been done with bombs and missiles: seize and secure territory, send messages about resolve and political seriousness, even break the will of a political opponent."[39] Such a fusion of warfare and law has a very dramatic effect. Moreover, normality and exceptionalism, war and peace, have now become mixed. Kennedy also refers to the observation made in relation to the US military that law can very often be a more effective instrument of war than actual combat (I will give a number of examples in this research, from economic exceptionalism to Guantanamo, of the intertwining of the legal structure of government by extraordinary means in the history of American ideas and politics). Kennedy says: "When the military buys up commercial satellite capacity to deny it to an adversary – contract is their weapon. They could presumably have denied their adversary access to those pictures in many ways. When the United States uses the Security Council to certify lists of terrorists and force seizure of their assets abroad, they have weaponized the law. Those assets might also have been immobilized in other ways. It is not only the use of force that can do these things. Threats can sometimes work. And law often marks the line between what counts as the routine exercise of one's prerogative and a threat to cross that line and exact a penalty."[40]

All this shows that the weaponisation of law is very much connected with the disappearance of the moral content of law (as criticised by Radbruch), and the practically institutionalised form of this is the dual state or autocratic legalism. In other words, the political management of a state of exception, of a state of emergency (historical and modern examples of which we have seen in this volume) that is constantly maintained, necessarily damages law, because as a political instrument it upends the moral and normative content of law, and as we have seen, law without normative embeddedness can only be considered law in a formal sense, not in a substantive sense.

b) Normativity and Normalcy

The research aims to provide a comprehensive picture of the impacts and challenges facing the system of law and democracy in the first decades of the 21st century. Three clusters of challenges to liberal democracy and the legal system can be identified: (1) on the one hand, the acute crises of liberal democracy that have been dragging on for decades, in particular the rise of authoritarian populism; (2) on the other hand, with the era of crises comes the era of governance by extraordinary means; here, the emphasis

[39] D. Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press, 2016) 258. DOI: https://doi.org/10.2307/j.ctt1wf4cz3
[40] See also: Kennedy, *A World of Struggle*... 258.

is on authoritarian tendencies of extraordinary governance; and, (3) finally, due to the authoritarian tendencies, the nature of legal normativity itself has begun to change. All these phenomena point to the disintegration of the normativity that we have hitherto associated with law and democracy in the historical-geographical system of liberal democracies. The problem for research is therefore whether there may be a return to normality, or more precisely, whether law can henceforth be a guarantee of normality, or whether, in an era of polycrisis, we must accept the primacy of politics and the fact that it (re)constructs normality itself on a daily basis.

The question of normality and the role of law in it is increasingly at the centre of social science research. A very interesting aspect of the dilemma noted here is highlighted by Mark Neocleous, who argues that normality and emergency are not really separable, as if they were two sides of the same coin.[41] He argues that "In separating 'normal' from 'emergency', with the latter deemed 'exceptional', this approach parrots the conventional wisdom that posits normalcy and emergency as two discrete and separable phenomena. This essentially liberal paradigm assumes that there is such a thing as 'normal' order governed by rules, and that the emergency constitutes an 'exception' to this normality. 'Normal' here equates with the separation of powers, entrenched civil liberties, an ongoing debate about public policy and law, and the rule of law, while 'emergencies' are thought to require strong executive rule, little time for discussion, and are premised on the supposedly necessary suspension of the law and thus the discretion to suspend key liberties and rights. But this rests on two deeply ideological assumptions: first, the assumption that emergency rule is aberrational; and, second, an equation of the emergency/nonemergency dichotomy with a distinction between constitutional and nonconstitutional action. Thus liberalism seeks to separate emergency rule from the normal constitutional order, thereby preserving the Constitution in its pristine form while providing the executive with the power to act in an emergency."[42]

Petr Agha examines the question of the state of norms in the context of the EU's economic policy and legal paradigms in the context of the integration of Central and Eastern European states.[43] He argues in terms of the rule of law (RoL) that "One primary manifestation of the pursuit of normalcy is the emphasis on the RoL as a foundational EU principle. The discourse on the RoL often revolves around 'good governance' and 'democratic values,' essential components of normalcy. This pursuit aims to restore stability in the face of disruptions, shifting towards legal constitutionalism post-1989. This transition led to counter-majoritarian institutions, juridification across

[41] M. Neocleous, The Problem with Normality: Taking Exception to "Permanent Emergency", (2006) 31 (2) *Alternatives,* 191–213. DOI: https://doi.org/10.1177/030437540603100204
[42] Neocleous, The Problem with Normality... 207.
[43] P. Agha, Reinforcing Institutional Power: The Discourse of Normalcy in European Union Governance, (2024) 16 *Hague Journal on the Rule of Law,* DOI: https://doi.org/10.1007/s40803-024-00232-5

policymaking, and the rise of 'legal constitutionalization'. Legal constitutionalism post-1989 recalibrated political dynamics, establishing a network of legal institutions known as the 'juristocracy'. This system emphasizes normalization through harmonized laws across member states for consistency. The link between post-1989 politics and normalization is intricately woven into 'legal constitutionalization', altering governance dynamics and elevating the role of legal norms in shaping the political landscape."[44] All of this, Agha argues, leads to an overlooking of the structural factors that sustain social inequalities, to technocracy, and to an overemphasis on institutional aspects in crises, as well as an underemphasis on social factors.[45] Agha also notes in relation to exceptional situations that "[t]he normalization narrative frames emergencies as abnormalities, reinforcing established institutions' authority and perpetuating the sense of inevitability surrounding existing power dynamics".[46]

Whichever approach one adopts, there is no doubt that the three sets of nodal challenges to liberal democracy and the legal system examined in this volume have made it doubtful that legal normativity can continue to be a guarantee of normality under the system provided by liberal democracy. One can reflect on how liberal democracy (even at the EU level) can be radically transformed; one can argue for the integration of exceptionalism into normality and for treating the two as a unity. However, one thing we cannot do, in my view, is give up the fundamental guarantee of legal normativity, because however we conceive of the relationship between exceptionalism and normality, a legal system that is autonomous and thus constrains politics must have a corollary role in both.

[44] See also: Agha, Reinforcing Institutional Power...
[45] See also: Agha, Reinforcing Institutional Power...
[46] See also: Agha, Reinforcing Institutional Power...

Gellérné Lukács, Éva*

Health insurance-related rules of EU law and their implementation into Hungarian national law

I. Challenges arising from the current state of EU law

At the EU level, patient mobility refers to situations in which patients receive healthcare in a Member State other than the one in which they are affiliated (insured) based on residence or gainful activity.

The classical form of patient mobility occurs when a patient voluntarily chooses a healthcare provider in another Member State and personally covers the costs. In this case, the patient purchases healthcare services and acts as a service recipient in the host Member State.[1] As with any other economic service, the patient is entitled to equal treatment in the host country under the Treaty on the Functioning of the European Union (TFEU).[2] The healthcare provider is obligated to grant access to treatment under the same professional and personal conditions and at the same prices as those applicable to the host Member State's own citizens. The patient pays for the service, receives an invoice, and then returns to their home country – essentially mirroring the consumption of any other service. This form of mobility does not involve the movement of healthcare professionals[3] or healthcare services. However, its scope remains limited, as not all individuals are sufficiently informed or in a financial and personal position (e.g., due to language barriers) to take advantage of this option.[4]

* Gellérné Lukács, Éva, Dr. habil., ELTE University, Faculty of Law, gellernelukacs.eva@ajk.elte.hu

1 Joined cases 286/82 and 26/83, *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro,* [ECLI:EU:C:1984:35].

2 W. Palm and I. A. Glinos, Enabling patient mobility in the EU: between free movement and coordination, in E. Mossialos, G. Permanand, R. Baeten and T. K. Hervey (eds), *Health Systems Governance in Europe – The Role of European Union Law and Policy* (Cambridge University Press, Cambridge, 2010) 509–560.

3 Kovács R., Az Európai Szakmai Kártya bevezetésének első hazai tapasztalatai (Initial Domestic Experiences with the Introduction of the European Professional Card), (2020) (2) *Munkajog,* 20–27.; R. Kovács, Health professionals on the move: analysing Brexit's influence on diploma recognition and the employment of health care workers, (2023) 62 (1) *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae. Sectio Iuridica,* 163–188.

4 A. De Ruijter, *EU Health Law & Policy. The Expansion of EU Power in Public Health and Health Care* (Oxford University Press, Oxford, 2019).

DOI: 10.56749/annales.elteajk.2024.lxiii.12.215

Another form of patient mobility occurs when a patient receives healthcare services in another Member State and obtains reimbursement from their own insurer. These cases are governed by the EU social security coordination regulations [Regulations (EC) No 883/2004 and No 987/2009] and Directive 2011/24/EU.[5]

The main rule under the EU social security coordination regulations is that an EU citizen and their family members may receive health insurance services from a publicly funded provider in another EEA Member State – whether as medically necessary care or as pre-authorised treatment that is also covered under their own insurance package – and the competent institution of the Member State of affiliation reimburses the full cost to the institution of the Member State providing the treatment. According to these regulations, prior authorisation is required for all planned treatments. Third-country nationals are also covered by these regulations if their situation involves more than one Member State and they have residency in an EEA country.[6] Though the scope of this provision remains contested, particularly in light of the *Balandin* case.[7]

Since 2013, following the transposition deadline of Directive 2011/24/EU, Member States must recognise the right of their insured individuals to access healthcare services in another EU Member State based on the Directive.[8] Under the Directive, reimbursement is not full but is limited to the internal tariff.[9] The term "internal tariff" refers to the amount that the treatment would have cost in the individual's home Member State, with the reimbursement not exceeding the actual cost of the treatment.[10] Under the directive, healthcare services may be obtained from any provider, including private healthcare providers.

Both the EU social security coordination regulations and the Directive have been interpreted in hundreds of CJEU cases. Additionally, as a form of soft law, Member States apply the decisions of the Administrative Commission for the Coordination of Social Security Systems.[11]

---

[5] Király M. (szerk.), *Az Európai Unió gazdasági joga I. (Commercial Law in the EU I.)* (ELTE Eötvös Kiadó, Budapest, 2021) 145–150.

[6] Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality, OJ L 344, 29.12.2010, p. 1–3.

[7] Case C-477/17. *Balandin* [ECLI:EU:C:2019:60]. Amendments to the regulations have been under discussion since 2016, but their adoption has been delayed.

[8] G. Berki, *Free Movement of Patients in the EU* (Intersentia, Belgium, 2018).

[9] Gellérné Lukács É. and Gyeney L., Élesedő kontúrok – gyakorlati kihívások a határon átnyúló egészségügyi ellátás területén (Sharpening Contours – Practical Challenges in the Field of Cross-Border Healthcare), (2014) (15) *Pázmány Law Working Papers,* 1–3.

[10] Article 7(4): The costs of cross-border healthcare shall be reimbursed or paid directly by the Member State of affiliation up to the level of costs that would have been assumed by the Member State of affiliation, had this healthcare been provided in its territory without exceeding the actual costs of healthcare received.

[11] The complete list can be downloaded from here: https://ec.europa.eu/social/main.jsp?catId=868&langId=en (last accessed: 31.12.2024.).

EU law cannot function without national implementation and enforcement. This principle is reinforced by Article 35 of the Charter of Fundamental Rights, which, in the field of healthcare, refers exclusively to national laws without mentioning EU law: "Everyone has the right of access to preventive healthcare and the right to benefit from medical treatment under the conditions established by national laws and practices."

The social security sector is therefore unique in that, despite extensive EU legal instruments, numerous national competences remain.[12] The design and operation of social security systems fall under the exclusive competence of Member States,[13] and even the European Union, despite its broad legal powers, lacks competence in these matters. EU law does, however, establish certain rules,[14] such as those governing the European Health Insurance Card (EHIC),[15] while Member States also seek to provide social protection to their citizens beyond their borders through bilateral agreements.[16] EU law and international agreements take precedence over national law. This means that the applicable rules of either EU law or bilateral agreements determine which state's national regulations must be applied. When a specific Member State's law becomes applicable, it must be applied in its entirety, covering both insured status and entitlement to benefits in accordance with the designated national legal framework.

The challenges of EU law are twofold. First, it is difficult to pinpoint the exact content of EU law due to the complexity of secondary legislation, CJEU case law, Administrative Commission decisions, and interpretative documents. Second, once

[12] Hungler S., Gellérné Lukács É., Petrovics Z. and Dudás K., *Az Európai Unió szociális és munkajoga (Social and Labour Law of the European Union)* (ELTE Eötvös Kiadó, Budapest, 2020).

[13] Berke Gy., Kajtár E. and Bankó Z., *Bevezetés a társadalombiztosítási jogba (Introduction to Social Insurance Law),* (JPTE Állam- és Jogtudományi Kar, Pécs, 2018); Hajdú J. and Homicskó Á. O. (eds), *Bevezetés a társadalombiztosítási jogba (Introduction to Social Insurance Law),* (Patrocinium, Budapest, 2012).

[14] Hoffman I., Az Európai Unió jogának és politikáinak hatása a szociális személyes szolgáltatásokra (The Impact of European Union Law and Policies on Social Personal Services), (2019) (3) *Munkajog,* 46–50.; Fazekas M., Szociális kérdések az Európai Unióban (Social Issues in the EU), in Forgács I. (szerk.), *Gazdasági szektorok és jogharmonizáció (Economic Sectors and Legal Harmonisation),* (Osiris, Budapest, 2000) 473–539.; É. Gellérné Lukács, Benefit-related interpretation issues in social security coordination, in J. Bergham and P. Schoukens (eds), *The social security of moving researchers,* (Acco, Den Haag, 2011) 59–74.

[15] S1. Határozat (2009. június 12.) az európai egészségbiztosítási kártyáról (2010/C 106/08). Kristó K. and Borbás Sz., Külföldi egészségügyi ellátások az európai uniós és a magyar szabályok tükrében (Healthcare Services Abroad in Light of European Union and Hungarian Regulations), (2021) (3) *Acta Humana,* 141–154. DOI: https://doi.org/10.32566/ah.2021.3.6 (last accessed: 31.12.2024.); Kristó K. and Malustyik B., A tervezett külföldi gyógykezelés engedélyezése Magyarországon: Az elektronikus ügyintézés egy lehetséges útja (Approval of Planned Foreign Medical Treatment in Hungary: A Possible Path Through Electronic Administration), (2021) (2) *Új Magyar Közigazgatás,* 15–25.

[16] Mészáros Á., Magyarország szociális biztonsági egyezményei, és az azokban alkalmazott főbb szabályozási elvek (Hungary's Social Security Agreements and the Main Regulatory Principles Applied in Them), (2019) (4) *Munkajog,* 30–39.

this content has been identified, the next challenge is the interpretation and application of the designated national law to the specific legal situation (e.g. who is qualified as insured or employed under the national legal framework[17]). This requires familiarity with the principles and fundamental concepts of the national legal system, the substantive and procedural rules of EU health insurance law, and the ability to integrate national and EU law effectively.

The following discussion first addresses fundamental concepts, then examines specific issues related to EU social security regulations and the Directive, and concludes with *de lege ferenda* proposals.

II. Hungarian health insurance principles in the light of EU principles

In my habilitation thesis, I analysed the fundamental principles of Hungarian social security and health insurance within the framework of EU principles, identifying the implications that arise from the intersection of Hungarian and EU law.

One fundamental reference point is the 2006 Council Conclusions, which state that "The health systems of the European Union are a central part of Europe's high levels of social protection, and contribute to social cohesion and social justice as well as to sustainable development".[18] However, the same document emphasises that "All health systems in the EU aim to make provision, which is patient-centred and responsive to individual need. However, different Member States have different approaches to making a practical reality of these values." It further asserts that "Whilst it is not appropriate to try to standardise health systems at an EU level, there is immense value in work at a European level on health care." These statements indicate that while existing European principles are acknowledged by the Member States and remain the subject of continuous discourse, their core aim is to ensure healthcare systems respond to individual needs.

A second key point is that although Member States recognise these fundamental principles, they retain full autonomy over their practical implementation. The exclusive competence of Member States in shaping and operating their health policies and health insurance systems extends to determining the fundamental principles governing these systems.

[17] I would refer here to my recent article, which relates to this issue, namely the effect of national definitions of 'social insured' under EU law, see É. Gellérné Lukács and T. Gyulavári, Social rights of EU mobile workers: limitations through the concepts of 'worker' and 'insured person', (2025) *Transfer: European Review of Labour and Research,* DOI: https://doi.org/10.1177/10242589251315852

[18] Council Conclusions on Common values and principles in European Union Health Systems (HL C 146., 2006.6.22., 1. o.). Common values and principles.

Given this autonomy, the question arises as to the extent to which EU principles – such as universality, solidarity, equal treatment, access to high-quality care, and patient participation – should be applied to Hungarian social security and health insurance principles. In my view, as an EU Member State, Hungary must take into account the explicit or implicit expectations derived from the European value system, even when these expectations do not carry binding legal force, as they ultimately aim to improve citizens' lives. There must be European benchmarks, even if they are not mandatory, as they serve to guide participating states within the Union. Accordingly, periodic assessments of the extent to which these principles are being upheld are necessary. This is not about creating an idealised, infinitely funded, publicly financed healthcare system, but rather about determining the principles the state conveys to its citizens in shaping social consciousness. It concerns the direction of policy efforts and how available human, financial, and other resources are utilised to achieve specific objectives.

In Hungary, for several decades, the dominant narrative has centred on the distinction between the 'public' and 'private' healthcare systems. Before the COVID-19 pandemic (2017–2019), it appeared that the state was gradually withdrawing from financing the publicly funded healthcare system in favour of a private insurance-based model reliant on private healthcare providers, which would reduce public expenditure on healthcare services.[19] This shift suggested that the population had the financial capacity to bear these costs – after all, if the state withdrew, healthcare financing would have to be assumed by either private insurers or patients themselves. During this period, no new pharmaceutical substances were added to public health insurance coverage for four consecutive years, waiting lists grew, capacity limits were reduced, hospitals and healthcare centres were closed, and private healthcare providers proliferated.

However, a shift has been noticeable since the post-COVID period, peaking in 2023. It appears that policymakers have, at least temporarily, abandoned plans for a fundamental transformation of the publicly funded healthcare system. The primary reason for this is that the vast majority of the population is neither able nor likely to be able to afford private healthcare services or private insurance policies that provide comprehensive coverage, which are increasing in cost each year. Even major private healthcare providers primarily rely on contracts with companies that offer limited outpatient care packages for their employees, as individual patients alone do not represent a sufficient market, especially in rural areas. Additionally, continuous inpatient care in the private sector is practically non-existent at present, with most private facilities closing on weekends and discharging patients. A relevant example is Slovakia's 2013 decision to renationalise two private health insurers through

[19] L. Cs. Dózsa, Restoring the Appeal of the Publicly Funded Healthcare System, (2021–2022) (1) *Medicina Yearbook,* 22–24; Cs. Dózsa, Regulation of Public and Private Services, (2020) *Medicina Yearbook. Hungarian Healthcare in Numbers: Provision, Economy, Innovation,* 116–117.

expropriation, as private insurers ultimately failed to provide adequate healthcare services under the financial constraints imposed on them.[20]

The Hungarian state appears to have resigned itself to the notion that no fundamental conceptual changes can be implemented; instead, the existing system must be adapted to the available financial resources. Consequently, continuous reforms are being introduced.[21] While this inevitably entails certain sacrifices, it is my view that the present system should be maintained, as it serves the majority of society, making consideration of entirely new structures unnecessary. Signs of this commitment to continuity are evident in recent policy decisions, such as the centralisation of emergency services,[22] regulations on in-vitro procedures, and the precise definition of conditions for the use of high-value diagnostic equipment.[23]

A key objective of the current healthcare policy is also to ensure that public healthcare does not serve as a safety net for correcting professional errors in the private healthcare sector.[24] Instead, the goal is to optimise the utilisation of the substantial financial resources that are available. In this regard, governmental efforts should be supported. This does not imply the marginalisation of the private sector, as private providers have been incorporated into service provision (e.g., in laboratory diagnostics). However, it is essential for the state to prioritise private healthcare services that maintain exceptional quality and demonstrate a professional standard at least equivalent to public healthcare. As Zsombor Kovácsy aptly stated, "Neither total state control nor the extreme free market approach is the optimal solution in healthcare".[25]

Following this introductory discussion, it is my contention that the Hungarian healthcare system, in both its foundational principles and the detailed measures

[20] D. Futej and D. Grigel, *Expropriation of health insurance companies in Slovakia,* (20 February 2013), https://www.iflr.com/article/2a63733ixysbvcl0rovfv/expropriation-of-health-insurance-companies-in-slovakia (last accessed: 31.12.2024.).

[21] Barzó T., Reformlépések az egészségügyben: Hálapénz tilalom, kirendelés és összeférhetetlenség kontra illetményemelés (Reform Steps in Healthcare: Ban on Gratuities, Assignments and Conflicts of Interest vs. Salary Increase), (2022) 17 (2) *Miskolci Jogi Szemle,* 53–66.

[22] In accordance with Section 6/A of Act CXXIII of 2015, as amended by Act LXXIII of 2022, the gradual introduction of the new, unified on-call system began in Hungary after January 2, 2023.

[23] The provisions amending the Health Insurance Act (Ebtv.) in Act LIII of 2023, which underpin Hungary's 2024 national budget (Sections 30–37), forecast cardinal changes in the field of outpatient specialist care. Section 30(1b) of the Ebtv. stipulates that diagnostic imaging procedures, including computer tomography (CT) and magnetic resonance imaging (MRI), must be carried out within the framework of health insurance under a financing agreement with a state, church, or municipal institution, and financing agreements with privately owned healthcare providers can only be made for supplementary state services. The new subsections (21)–(27) of Section 82 and Section 82/X of the Ebtv. contain the regulations ensuring the implementation of these provisions.

[24] Danó A., *Kulcsszerepet kap a műhibák "beárazásában" az Egészségügyi Tudományos Tanács (The Health Science Council plays a key role in the "pricing" of medical errors.),* (20 February 2024), https://nepszava.hu/3225961_egeszsegugy-neak-muhiba-maganegeszsegugy (last accessed: 31.12.2024.).

[25] Kovácsy Z., *Elfekvő – Gyógyítható az egészségügy? (Dormant – Can Healthcare Be Healed?),* (Noran Libro Kiadó, Budapest, 2020) 10.

implementing those principles, remains committed to European values. Furthermore, I would argue that the current system even exceeds the expectations set forth in EU soft law guidance. The health insurance framework is needs-based, ensuring extensive coverage that encompasses almost the entire population under various legal entitlements. No distinction is made between individuals with different eligibility statuses regarding access to healthcare services, meaning that all patients receive care based on their medical condition rather than their legal classification. Moreover, this care is not only comprehensive but is also provided free of charge to those entitled. The principle of responsiveness to individual needs is upheld, as patients receive diagnostic and therapeutic interventions tailored to their specific medical conditions until they can be declared recovered.

These principles ensure that a financially disadvantaged or socially vulnerable citizen has the same opportunity for recovery as an individual in more favourable circumstances who could afford to pay for care out of pocket. Given that health is both a value and an investment, this also signifies that the Hungarian state has, for decades, been investing in the health of nearly all its citizens. In this regard, Hungary surpasses, for example, the United States. Despite President Obama's efforts, only a minimal universal healthcare package was successfully enacted in the American legislature, covering only a small fraction of the population,[26] an implicit indication that the U.S. government only partially assumes responsibility for safeguarding the health of disadvantaged social groups. The contrast between these two approaches is clear.

This fundamental message is what is truly at stake when discussing healthcare principles. In this context, it can be argued that the Hungarian system exceeds expectations by incorporating almost the entire population into the mandatory risk-sharing framework, ensuring that everyone has a chance at recovery. Naturally, a pivotal role is played by healthcare professionals, who constitute the backbone of the system. Although my habilitation thesis does not address their situation – due to both thematic and scope limitations – the employment conditions of the latter have been significantly influenced by numerous legal changes in recent years.[27]

During my lectures, students frequently raise the question of why, in Hungary, the cost of healthcare for „others" is primarily borne by those who pay contributions (those engaged in gainful employment or self-employed). They argue that a system in which those who contribute more receive better access and greater benefits would be preferable. In other words, they question why Hungary adheres to a needs-based and

[26] T. Luhby, *Here's why it would be even harder now to kill Obamacare,* (7 December 2023), https://edition.cnn.com/2023/12/07/politics/obamacare-affordable-care-act-repeal/index.html (last accessed: 31.12.2024.).

[27] See Horváth I. and Kártyás G., Látlelet: Az egészségügyi szolgálati jogviszonyról és a szabályozás kérdőjeleiről (A Report: On the Healthcare Service Relationship and the Questions of Regulation), (2021) (1) *Munkajog,* 1–17.

comprehensive healthcare model rather than shifting toward a contribution-based approach. In response, it is worth reconsidering the significance of the broader societal message embedded in the current system, as previously discussed. Additionally, it is crucial to recognise that healthcare is not a static snapshot reflecting an individual's health status or financial ability at a given moment. Rather, the healthcare system functions as an ongoing narrative – akin to a continuously running film – where the central question is whether a person can be assured that they will always be able to afford necessary medical care throughout their lifetime. No one can predict whether they will eventually find themselves in a position where they cannot pay for care at the „end of the film".

Moreover, as implied by the expectation of high-quality healthcare services, maintaining a comprehensive health insurance system is an inherently costly endeavour. The system operates under continuous pressure to integrate new technologies, medical devices, and pharmaceuticals into publicly funded care. Certain treatments can cost millions of forints, and while a small number of individuals may indeed be able to cover any medical expense for themselves and their families, such individuals are in the minority.

Many place great faith in the omnipotence of private healthcare providers. However, certain highly specialised medical fields – such as traumatology, cardiology, and oncology – continue to fall outside the scope of private healthcare in Hungary. This is partly because such procedures are not cost-effective for private providers and partly because the volume of surgeries required to maintain a high standard of expertise is not feasible in private institutions. Complex procedures, such as open-heart surgery or organ transplantation, require the infrastructure, technical capacity, and professional expertise that only major public hospitals (university clinics) possess and will likely continue to possess.

As a result, it is in the interest of both the economically disadvantaged majority and the wealthier elite to preserve a strong publicly funded healthcare system. The former relies on this because they cannot afford private care, while the latter may require it when specialised treatments are unavailable in the private sector due to cost considerations. A fundamental issue arises if the publicly funded system deteriorates to the point where even private providers cannot offer the necessary treatments, as no service will exist to purchase, regardless of financial means.

Another argument frequently raised is that comprehensive coverage and equal treatment „soften" individuals, and that there should be sanctions for those who do not lead a healthy lifestyle. Actually, such a mechanism already exists in the system and is enshrined in Constitutional Court Decision 3132/2013. (VII. 2.) AB,[28] commonly

[28] Constitutional Court of Hungary, Decision 3132/2013. (VII. 2.) AB on the rejection of the petition seeking the establishment of the unconstitutionality and annulment of certain provisions of Decree

known as the „patient compliance rule." This principle allows the restriction of healthcare subsidies if a patient's non-compliance is deemed inadequate, even when the request for financial support would otherwise be justified by their medical condition. The Constitutional Court ruled that it is not unconstitutional for authorities to condition the full reimbursement of analog insulin treatment on the patient maintaining appropriate metabolic control, as measured by their HbA1c levels. In other words, adherence to prescribed dietary guidelines can determine the extent of state-funded treatment for diabetes patients.

It is likely no coincidence that this is the only sanction embedded in the system. First, it is worth considering the logical options available for evaluating patients. If access to publicly funded healthcare services were made contingent upon adherence to a healthy lifestyle, someone would need to monitor whether each patient meets the relevant health criteria. In a (perhaps not-so-distant) future dominated by artificial intelligence, such oversight might become easily feasible. However, under current administrative conditions, such a system is not practically implementable. At present, the millions of doctor-patient encounters that take place cannot begin with physicians reviewing data on patients' eating habits, exercise routines, sleep patterns, and overall lifestyle choices before determining whether they qualify for treatment.

A second approach could involve restricting the examination of healthy lifestyle habits to specific treatments. However, this raises the question of who would conduct these evaluations, what criteria would be assessed, and at what point in the treatment process such assessments would occur. This approach also lacks a solid foundation. Consider, for instance, a hypothetical policy where smokers are denied treatment for lung cancer, or excessive alcohol consumers are refused care for laryngeal cancer. In response, smokers and alcohol consumers might question why smoking or drinking should be treated more harshly than excessive eating, which can lead to obesity-related cardiovascular diseases. Such distinctions are difficult to justify.

A third option would be to shift from punitive measures to incentives, rewarding individuals who maintain a healthy lifestyle. This could take the form of preferential treatment, such as moving up on waiting lists for medical services. However, even in this scenario, challenges arise regarding how to verify and track patients' adherence to a healthy lifestyle. If artificial intelligence could be leveraged in this area, it could provide societal benefits, though it would also entail significant risks.

Additionally, in the Hungarian system, the implementation of the needs-based and comprehensive healthcare model is supported by several complementary legal mechanisms. These include the right to freely choose a physician, the right to seek a second medical opinion, and the option to receive treatment at a provider other than

32/2004 (IV. 26.) of the Minister of Health, Social and Family Affairs. Available at: https://njt.hu/jogszabaly/2013-3132-30-75 (last accessed: 31.12.2024.).

the one designated by territorial service obligations, including the possibility of receiving medical care abroad with financial support from Hungarian social security. Additionally, treatment protocols are standardised through professional guidelines to ensure equal treatment for all patients. The system also incorporates built-in equity measures that provide temporary assistance in special cases.

In conclusion, based on the above considerations, it can be stated that the fundamental principles of Hungarian health insurance align with key EU requirements, including universality, solidarity, equal access to healthcare, and quality treatment (the latter understood strictly from a legal perspective, as an in-depth quality analysis falls beyond the scope of the habilitation and the author's expertise). Indeed, ensuring nearly universal access to healthcare based on equal treatment is a socially valuable proposition that conveys an important positive message. The adequacy of the principles does not inherently mean that they are implemented at an outstanding level in practice in Hungary. In fact, implementation faces considerable criticism, including issues such as regional disparities in access, long waiting lists, and shortages of professionals and nurses. However, it is important to emphasise that the existence of these problems does not warrant a response that seeks a solution in the dismantling of the fundamental principles. From this perspective, the continuous reforms and modifications of the system are necessary adjustments, and it is to be hoped that the structural foundations of this system will not only be preserved but also strengthened in the future

III. The personal scope of the social security coordination regulation and Hungarian law

As discussed earlier, EU law establishes numerous mandatory rules, and states also seek to provide extraterritorial protection to their citizens through bilateral agreements. The binding international obligations primarily rest on two pillars: EU law and the system of treaties composed of bilateral agreements. These international obligations take precedence over the application of Hungarian law. According to the rules of the Tbj. (Social Security Act) and the Ebtv. (Mandatory Health Insurance Act),[29] they enjoy primacy over Hungarian legal provisions. This means that EU law or the provisions of a bilateral agreement determine whether Hungarian rules should be applied at all or whether the laws of another state are applicable.

If Hungarian law is applicable, it must be applied in its entirety, meaning that all Hungarian provisions related to insured status, benefits, or their financing become mandatory. Hungarian law, in a sovereign manner, determines who qualifies as eligible,

[29] Section 3. of Act CXXII of 2010 on Social Security and Section 8/A. of Act LXXXIII of 1997 on Mandatory Health Insurance.

meaning who is insured and entitled to healthcare services. However, the relevant provisions of EU law must also be applied in this context. This requirement is explicitly stated in Section 6(3) of the Tbj., which provides that: „An insured person is also a natural person who performs work outside the territory of Hungary for a foreign employer and falls under the scope of this Act based on the Community regulation on the coordination of social security systems or a bilateral social security agreement concluded by Hungary". Consequently, EU law mandates the application of Hungarian law (the Hungarian Tbj.) even in cases where an employee works outside Hungary for a foreign employer and has no other connection to Hungary besides their residence.

A Hungarian residence is required for this provision to apply. In such instances, EU law bases the insurance relationship on the place of residence of the economically active insured person, which would not otherwise occur under the Hungarian Tbj., because if economic activity is present, the place of activity shall determine the applicable law, not residence.

Regarding the challenges arising from the implementation of the regulation, it is also necessary to examine the situation of third-country nationals. Regulation 1231/2010/EU states that "Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 shall apply to nationals of third countries who are not already covered by those Regulations solely on the ground of their nationality, as well as to members of their families and to their survivors, provided that they are legally resident in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State".[30]

This article was the subject of the Balandin case and its subsequent Hungarian counterpart, the *Koppány 2007 Kft.* case.[31] A common feature of both cases is that the third-country national workers involved had undeniably travelled to multiple locations and worked in different Member States. Thus, they met the requirement of involvement in more than one Member State, with only the issue of lawful residence remaining as a condition to be fulfilled.

In the Koppány 2007 Kft. case, based on Balandin, the CJEU established that it was undisputed that truck drivers working in the international freight transport sector were in a situation involving multiple Member States. The Court further ruled that, despite not having a registered address in Hungary, they were lawfully resident in Hungary due to their employment, making them eligible for an A1 certificate for posted workers. The A1 certificate confirms that workers are subject to Hungarian social security rules, meaning they contribute to and are entitled to benefits under Hungarian regulations.[32]

[30] Article 1 of Regulation (EU) No 1231/2010.
[31] Case C-477/17. *Balandin* [ECLI:EU:C:2019:60] and Case C-523/20. *Koppány 2007 Kft. and Vas Megyei Kormányhivatal* [ECLI:EU:C:2021:160].
[32] Case C-523/20. *Koppány 2007 Kft.,* para 29.

It is noteworthy that in the Balandin case, the Advocate General opined that Ukrainian and Russian figure skaters did not meet the requirement of lawful residence and were therefore not covered by the Regulations.[33]

For Hungarian legal practice, the issuance of an A1 certificate should not be in question, as it must be granted following the *Koppány 2007 Kft.* case. However, there may be some discretion regarding the issuance of the EHIC to third-country nationals, since the requirement of multiple Member State involvement may not be met by a third-country national who resides and works exclusively in Hungary. This calls for caution in extending the eligibility for the EHIC to third-country nationals who are only temporarily residing in Hungary. Such an extension could put case officers in a difficult position when assessing applications, as it would be challenging to determine which third-country nationals have connections to multiple Member States and which do not. Without the criterion of lawful residence as a decisive factor, this would become the key question in deciding whether an individual falls within the scope of the Regulation.

IV. Prior authorisation under the EU Patient Rights Directive

According to the Directive, authorisation cannot be refused if the requested treatment is included among the benefits provided for under the legislation of the Member State where the insured person resides and if, considering the patient's current health condition and the probable course of the illness, the treatment cannot be provided within a medically justifiable timeframe in the Member State of residence.[34]

Before the adoption of the Directive, in the *Elchinov* case,[35] the CJEU addressed the issue of whether a Member State could be obliged to reimburse treatment costs in cases where prior authorisation had been requested but not granted at the time of treatment. It ruled that a national rule that systematically excludes reimbursement for hospital care received without prior authorisation deprives insured persons who were prevented from applying for such authorisation due to their health condition or the urgency of the required hospital treatment – or who could not wait for the competent institution's decision on their request – from obtaining reimbursement, even if the conditions for reimbursement were otherwise met.[36] Since the Bulgarian system categorically excluded the possibility of reimbursement in such cases, the CJEU considered this an unjustified restriction on the freedom to provide services.[37]

[33] Opinion of the Advocate General in Case C-523/20. *Koppány 2007 Kft.* [ECLI:EU:C:2019:60] para 45.
[34] Article 8 of Directive 2011/24/EU.
[35] Case C-173/09. *Elchinov* [ECLI:EU:C:2010:581].
[36] Case C-173/09. *Elchinov,* para 45.
[37] Case C-173/09. *Elchinov,* paras 45–47., 51., 75.

The ruling established that reimbursement cannot be denied if the insured person was prevented from submitting a request due to their health condition or the urgent need for hospital treatment, or if they could not wait for the competent institution's decision, provided that the EU legal conditions for authorisation were otherwise fulfilled. Notably, the concept of obstruction ('akadályoztatás') was introduced in the ruling, even though the *Elchinov* case did not actually involve such a situation, as Elchinov had submitted a request. Nevertheless, the introduction of obstruction as a valid justification became part of the ruling and significantly narrowed the grounds for refusing prior authorisation in subsequent cases.

However, this principle was not incorporated into the Directive.

The first case in which the CJEU had to rule on authorisation in light of the Directive was the *WO and Vas County Government Office* case, which had a Hungarian connection.[38] In this case, no request for authorisation was submitted before the treatment was carried out. Upon returning home, the patient submitted a reimbursement claim, citing obstruction. However, the authority did not examine the claim on its merits but rejected it on formal grounds, arguing that the absence of prior authorisation per se excluded the possibility of reimbursement.

In its ruling, the CJEU held that a national regulation that categorically excludes reimbursement for planned medical treatment obtained in another Member State due to a lack of prior authorisation – despite all other legal conditions being met – cannot be justified by overriding reasons of public interest, fails to meet the requirement of proportionality, and constitutes an unjustified restriction on the freedom to provide services.

Accordingly, the insured person (patient) is entitled to directly claim reimbursement from the competent institution for an amount equivalent to what would have been covered if prior authorisation had been obtained. In paragraph 83 of the ruling, the CJEU stated that if a patient is unable to wait for a decision or is obstructed from obtaining authorisation, then requiring prior authorisation for ophthalmic surgery cannot be justified on planning grounds or for maintaining the financial balance of the social security system.

The CJEU unequivocally established that reimbursement cannot be automatically refused solely on the formal ground that the patient did not request prior authorisation. Instead, every reimbursement request must be examined on its merits. The core principle is clear: an inquiry must be conducted to determine whether the

[38] É. Gellérné Lukács, Prior and Subsequent Authorization of Cross-Border Healthcare under Directive 2011/24/EU, The Significance of the WO Case for EU Law and for Hungarian Law, (2023) 11 (1) *Hungarian Yearbook of International Law and European Law,* 50–73. DOI: https://doi.org/10.5553/HYIEL/266627012023011001005

patient was obstructed from obtaining prior authorisation and whether the medical conditions for granting authorisation and covering the costs were otherwise met.[39]

The key difference between *Elchinov* and *WO and Vas County Government Office* lies in the extent of the CJEU's ruling. In *Elchinov,* the CJEU effectively decided the case, declaring that authorisation should not have been refused, as the refusal violated EU law, and therefore reimbursement was due. However, in *WO and Vas County Government Office,* while applying the same legal principles, the CJEU did not rule on the substantive merits of the case but left it to the national court to assess whether the conditions for reimbursement under Article 8(1) of the Directive were met.

Horizontally, the Directive, building upon the *Elchinov* case, took a stance on the topic of the solidarity-individualistic approach, reinforcing the latter. The CJEU further emphasised the individualistic direction and, in the case of *WO and Vas County Government Office,* went as far as weakening the prior authorisation requirement. When the CJEU ruled that the Hungarian regulation was incompatible with EU law because it did not provide a possibility for reimbursement in the absence of a prior application, stating that the patient was obstructed or could not have awaited the authorisation, it essentially moved beyond the formal requirement of prior authorisation. The concept of obstruction, as used by the CJEU, was not aligned with the approach under Hungarian national law but rather an EU interpretation, which seems to have a relatively broad scope, particularly in the *WO and Vas County Government Office* case.

Tacconi[40] criticised the CJEU in the *Watts* case[41] for glossing over the factual elements, and this occurred again in the present case. It cannot be definitively stated that the patient was indeed obstructed from requesting prior authorisation, since *(i)* when traveling for the treatment, they likely knew the surgery would take place the following day, and *(ii)* upon returning home, they did not request authorisation or provide supporting documents but rather submitted a reimbursement claim.

The CJEU clearly based its ruling on the freedom to seek services, seeking to make a statement beyond the specific individual case about the condition of prior authorisation for reimbursement. With a permissive spirit, driven by supporting the rights of individual patients, the CJEU effectively rendered the prior authorisation requirement outdated and left its scope broader (since more individuals might now consider themselves 'obstructed' from submitting an application). The CJEU

[39] The CJEU has left considerable leeway for national courts to decide whether a patient is entitled to reimbursement under the scope of Regulation 883/2004/EC, which is clearly more advantageous for the patient, as full reimbursement is the general rule in this context.

[40] F. Tacconi, Freedom of Health and Medical Care Services within the European Union – Recent Jurisprudence of the European Court of Justice, with Particular Reference to Case C-372/04 Yvonne Watts, (2008) 68 (1) *ZaöRV,* 195–207. https://www.zaoerv.de/68_2008/68_2008_1_b_195_208.pdf (last accessed: 31.12.2024.).

[41] Case C-372/04. *Watts* [ECLI:EU:C:2006:325].

horizontally weakened the gatekeeper function of national authorities. Without a prior request, the national authority – the responsible body for the insured individual, which is in charge of reimbursement – would not even be aware that expenses are likely to arise. This could negatively impact the planning objectives previously accepted by the CJEU. Previously, the CJEU had affirmed that for both hospital and non-hospital treatments, the need for prior authorisation is justified by planning reasons: The aim of planning is, on one hand, to ensure adequate and constant access to quality and balanced hospital care within the Member State. On the other hand, planning contributes to ensuring cost-efficiency and preventing the waste of financial, technical, and human resources.[42]

In the *WO and Vas County Government Office* case, the national authority cited planning needs as a justification for requiring prior application, arguing that post-treatment authorisation would undermine the system both financially and in terms of human resources. The CJEU, using the concept of obstruction, overruled the argument based on planning needs, which might be grounded in the fact that obstruction is considered more of an individual case issue.

There exists an approach that views patients asserting their cross-border rights in national courts as explorers in the context of the national health insurance system.[43] As a result of the case law they induce, the situation of those who would not have been able to travel abroad for treatment could improve, thereby contributing to solidarity within the healthcare system of the Member State in which the insurance is based. The *WO and Vas County Government Office* case marks another step in this direction, further expanding the rights of cross-border healthcare seekers. An open question for the future remains whether this will strengthen solidarity within the national system or whether more resourceful patients will gain better positions in cross-border healthcare contexts.

V. Financial and data protection aspects of EU law implementation in Hungary

1. Financial Aspects

The habilitation thesis also addresses the costs arising from EU legal obligations. The main rule in EU social security coordination regulations is reimbursement between Member State institutions. According to Article 35 of Regulation 883/2004/EC, health insurance services provided in another Member State are reimbursed at full

[42] Case C-372/04. *Watts,* paras 109–110.

[43] B. Van Leeuwen, The Patient in Free Movement Law: Medical History, Diagnosis, and Prognosis, (2019) 21 *Cambridge Yearbook of European Legal Studies,* (162–186) 164., "Through the exercise of their free movement rights, moving patients acted as explorers for their national healthcare systems."

cost. The accounting is based on actual costs, meaning that Member States invoice each other for the actual services rendered. The EU Patient Rights Directive contains several provisions allowing patients to seek healthcare in another EU Member State without prior authorisation, provided certain administrative formalities are met, with costs covered by the Member State of the patient's insurance. However, the Directive does not contain rules for inter-State accounting, as such rules are absent; the patient settles accounts directly with the service provider and later with their insurer. In this case, the Member State of insurance reimburses a portion of the cost to the patient, without any inter-State accounting. The reimbursement is generally based on internal tariffs, meaning the patient's insurer reimburses an amount equivalent to the cost of the treatment in the Member State of insurance (or the actual cost if it is lower than the domestic cost).[44] According to the Directive, prior authorisation is required for reimbursement in certain cases, such as costly or hospital treatments that require overnight stays.[45] However, even with prior authorisation, reimbursement cannot exceed the domestic cost.

Due to the binding nature of EU law, Hungary must bear the costs associated with its obligations. The decision on how to bear and cover these costs is within the competence of each Member State, including Hungary. Cost planning is included in the annual Budget Act under the chapter of the National Health Insurance Fund ("E-Alap"). Healthcare financing in Hungary follows a mixed funding model, where contributions are made through payroll taxes by employers and insured individuals, while the state assumes financial responsibility through budgetary allocations. The financial coverage of healthcare services primarily relies on three pillars: the contribution obligations of the insured individuals and employers, the employer's solidarity tax obligation (social contribution tax), and the state's liability from the central budget when expenditures exceed revenues.

No separate financing or coverage is allocated for international obligations; costs are paid from the National Health Insurance Fund. It could be said, somewhat exaggeratedly, that every insured person paying contributions participates in the financing of their fellow insured citizens' foreign healthcare, whether planned or unplanned (but legally entitled). This aspect is partly criticised in the literature, described as a kind of solidarity deficit,[46] although in reality, it represents an advanced extraterritorial legal protection for the insured. Financial data analysis indicates that the use of the EU Directive by Hungarian insured individuals is rather limited to medication reimbursements, and beyond that, Hungarian insured individuals do not

[44] Article 7 of Directive 2011/24.
[45] Article 8 of Directive 2011/24.
[46] See N. N. Shuibhne, *The Coherence of EU Free Movement Law. Constitutional Responsibility and the Court of Justice,* (Oxford University Press, 2013), "incompleteness of reasoning and the selective citation of existing authority", 66.

make use of the opportunities provided by the Directive.[47] The Hungarian Medical Chamber regularly monitors statistical data, and it seems that their 2018 conclusion, stating that „with the entry into force of the EU Directive, the number of planned foreign treatments has not increased significantly",[48] still holds true today.

In conclusion, based on the above, it can be established that an increasing number of Hungarian insured individuals are benefiting from the advantages offered by EU law, with more people using the EHIC or the card-replacement form, i.e., participating in EU patient mobility. Three clarifications must be made: firstly, the increase only relates to those extraterritorial protection situations where insured individuals do not need to pay upfront, as the full cost is covered by the Hungarian health insurer based on the financial rules of the EU regulations. Secondly, the use of the EHIC is still considered very low compared to the EU average. Thirdly, the process exhibits regional and local network characteristics, as both Austria and Germany are among the top three partners, with Slovakia appearing as the third most significant partner for expenditures and Romania as the third most significant for revenue.

2. European Health Data Space

The proposed regulation on the European Health Data Space (EHDS)[49] aims for revolutionary changes: experts in the field have long agreed that „the regulation and standardization proposed by the EHDS are necessary steps towards a harmonized, forward-looking, data-driven research-supported digital health space".[50] However, it is crucial how this is implemented, as it will be necessary to gain the trust of EU citizens for the project to succeed. A comparison of the original version of the regulation with the Council mandate shows that the Council has significantly improved the draft by retaining the original objectives while adding stronger data protection guarantees and better access conditions.

It is important to note that the regulation does not mandate Member States to introduce electronic systems, as the EU does not have the competence to do so. It only

[47] Gellérné Lukács É. and Paragh B., A magyar biztosítottak részvétele az európai uniós szintű betegmozgásokban – tervezett egészségügyi szolgáltatások igénybevétele (The Participation of Hungarian Insured Persons in European Union-Level Patient Mobility – Utilization of Planned Healthcare Services.), (2020) (4) *Munkajog,* 27–36.

[48] https://mok.hu/hirek/lapszemle/nem-akarunk-kulfoldon-gyogyulni (last accessed: 31.12.2024.).

[49] Commission welcomes political agreement on European Health Data Space https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1346 (last accessed: 31.12.2024.), https://www.consilium.europa.eu/en/meetings/mpo/2024/3/coreper-1-permanent-representatives-committee-(342717)/ (last accessed: 31.12.2024.).

[50] R. Raab et al., Federated electronic health records for the European Health Data Space, (2023) (5) *Lancet Digit Health,* (840–847) 846., https://www.thelancet.com/action/showPdf?pii=S2589-7500%2823%2900156-5 (last accessed: 31.12.2024.).

stipulates that if a Member State has or creates such a system, it must function with the appropriate exchange formats. For example, Bulgaria currently has no electronic system, but if it were to establish one, it would need to comply with this regulation. This is indicated in Article 5(1) of the Council mandate, stating that „if the data is exchanged electronically…",[51] and only under this condition (i.e., if the Member State continues to use paper-based systems, the regulation does not apply).

Another noteworthy aspect is that, in addition to regulating the cross-border data exchange format, there are provisions in the regulation that influence national internal regulatory frameworks. Thus, there is an indirect harmonisation trend, which was ultimately accepted by the Member States in the Council. For example, the regulation specifies the contents of patient files registered at the national level. The original Article 3 was restructured by the Council and placed after Article 8, but its main elements remain unchanged.[52] It stipulates, for instance, that by the end of the transitional period, medical imaging results (not just medical opinions about them) must be uploaded into the accessible patient file. This will significantly increase storage capacity requirements, but substantially improve the availability of diagnostic tools. For example, an MRI viewed by a doctor conveys more information than simply reading a colleague's medical opinion on an MRI result they have not seen themselves.

VI. De lege ferenda proposals

The analysis of EU law and Hungarian law in the field of health insurance necessarily leads to improvement proposals that may be worthy of consideration. At the end of the habilitation thesis, three specific proposals are presented, two of which concern Hungarian law, and one EU law.

1. Rethinking the appeals structure of the Health Insurance Act

Sections 77–78 of Act LXXXIII of 1997 on Mandatory Health Insurance (Ebtv.) regulate appeals. The current text was established by Section 32 of Act CX of 2019, which amended several laws in order to simplify the functioning of capital and county government offices, effective January 1, 2020. According to the justification of Section 32, „Due to the general exclusion of appeals in the case of government office and district office matters, it is necessary to repeal the provisions concerning appeals". In Hungary, the primary remedy is an administrative lawsuit, which, as a general rule,

[51] Council Mandate, Article 5(1): "For the purposes of this Chapter, where data is processed in electronic format, the priority categories shall be…".
[52] Council Mandate Article 8/A.

results from a one-step administrative procedure. In the case of health insurance benefits, the court with jurisdiction is the one located within the area of the plaintiff's domestic residence or, in the absence of such, the location of the employer's headquarters and the relevant health insurance authority.[53]

The rules applicable to such cases are contained in Act I of 2017 on Administrative Procedure. According to this, a court can alter an administrative action if it occurred within a multi-level administrative procedure, or if it was part of a single-level procedure, only if another law specifically permits it and (as a cumulative condition) if the nature of the case allows, the facts are sufficiently clarified, and the available data enable a final decision on the legal dispute.[54] The Ebtv. does not expressly authorise alteration, thus, such changes are only possible in multi-level or repeated procedures.[55] However, by generally excluding appeals, the majority of cases are one-step procedures, meaning judicial alteration is not possible.

I propose an amendment to Section 77 of the Ebtv. to allow judicial alteration of decisions made in international matters under Sections 26(3) and (6) of the Ebtv., based on three main reasons:

a) Standardizing different national approaches

A one-step procedure is applied in reimbursement cases, but a multi-level procedure applies to cases concerning authorisation, where, based on Government Decree 340/2013 (IX. 25.), the National Hospital Directorate-General is the second-instance authority. Therefore, the appeal system for reimbursement cases related to the 2011/24/EU Directive differs for cases with or without authorisation requirements. In the first case, judicial alteration is not possible, while in the second case, it is. Neither the volume nor the nature of the cases justifies this distinction.

[53] Section 84(2) of the Social Security Act – In the case of a decision made during an inspection regarding the subsequent determination or cancellation of entitlement to insurance or healthcare services, the provisions of the Health Insurance Act (Ebtv.) and the Administrative Procedure Act (Art.) must also be applied accordingly for legal remedies.

[54] Case C-556/17. *Alekszij Torubarov és a Bevándorlási és Menekültügyi Hivatal* ügy [ECLI:EU:C:2019:626] resulted in the amendment of Act I of 2017. In the *Torubarov* case, the CJEU stated that if the Hungarian court, due to the lack of the power to amend, does not have the right under Hungarian law to grant refugee status to an asylum seeker, and if the authority fails to do so despite the court's guidance, then, in order to ensure effective legal remedy, the court is authorized to grant refugee status with a 'sanctioning' character, even if it would otherwise not have the power to amend. [Explanation of Section 90 of the Administrative Procedure Code.]

[55] Barabás G., F. Rozsnyai K. and Kovács A. Gy. (szerk.), *Kommentár a közigazgatási perrendtartáshoz – Kommentár a közigazgatási perrendtartásról szóló 2017. évi I. törvényhez. Magyarázat a Kp. 90. §-ához (Commentary on the Administrative Procedure Code – Commentary on Act I of 2017 on the Administrative Procedure Code. Explanation of Section 90 of the Administrative Procedure Code),* (Wolters Kluwer Hungary Kft., Budapest, 2018).

b) Reducing the financial and administrative burden on the parties involved

As seen in the WO case, the theoretical exclusion of judicial alteration in the field of health insurance can lead to prolonged litigation and significant burdens for both the plaintiff and the health insurer. The plaintiff may have to submit the statement of claim twice, and the insurer faces an administrative burden that could be avoided. Therefore, it would be beneficial for all parties involved if the court were not barred from altering the administrative decision, leading to quicker resolution of the case. Naturally, this would only occur if the nature of the case permits it, the facts are sufficiently clarified, and the available data allows a final determination of the legal dispute.

c) Introducing judicial alteration would not be an unprecedented solution

The possibility of judicial alteration would not be an unusual innovation, as this rule is also present in Act III of 1993 on Social Administration and Social Benefits.[56] The aim of judicial intervention is to provide quick assistance to a deserving applicant if the court finds it appropriate. Naturally, one might argue whether the court is in a position to make appropriate decisions in administrative matters, which often involve technical details or calculations requiring specialised expertise.

An example of anticipating judicial alteration can also be found in Act CXCI of 2011 on the Benefits for Persons with Reduced Working Capacity and Amendments to Certain Laws, which is based on the provisions of Act CL of 2016 on the General Rules of Administrative Procedure (Ákr.), albeit without special provisions. However, there is a reference to judicial alteration. According to Section 19(2) of the law: „If during the review, the rehabilitation authority determines that the qualification category under Section 3(2) differs from the qualification category established before the review (change in condition), the benefits for persons with reduced working capacity shall be determined with regard to the new qualification category – unless the court's decision in a repeated procedure states otherwise – from the day following the decision". This provision assumes that in a repeated procedure, there may be a judgment that differs, but not in the original procedure.

I believe that granting the possibility of judicial alteration does not imply that judges will necessarily exercise it when they do not have the necessary information. However, when they do have such information, the time spent on the process could seem like unnecessary delay: it starts with the annulment of the decision and issuing

[56] According to Section 11. (1) In an administrative lawsuit aimed at challenging the decision of the authority exercising social jurisdiction, the court, upon the request of a party, may order interim measures, particularly regarding:
a) the payment of normative monetary social benefits;
b) the provision of social services in kind;
c) the referral to a social institution providing personal care.

instructions to the administrative authority, and if the authority does not comply with the instructions, the process continues with an administrative decision made contrary to the instructions in the repeated procedure, which is concluded with the judicial decision altering the original decision. This situation could result in the applicant being in an uncertain position for years, simply because the legislator believes that the court should not be trusted to resolve the dispute in the original procedure.

2. Amendment of Government Decree 340/2013 (IX. 25.)

As previously discussed, although the CJEU unequivocally allowed for retroactive claims for reimbursement even in the absence of a prior authorisation request and approval, Hungarian law has not yet incorporated this legal conclusion. I have also pointed out that, while CJEU rulings are binding on Member States *erga omnes,* the conclusions of these cases are typically formalised in secondary legislation (regulations, directives) to actually produce an *erga omnes* effect. This has not been the case following the Elchinov and WO rulings.

It is important to clarify that the CJEU does not obligate Member States to provide reimbursement in every case if the request for authorisation and reimbursement is delayed. The obligation relates to examining the conditions following the treatment abroad and making decisions in light of this examination. A decision can be made in favour of the patient, but it could also involve the rejection of authorisation and reimbursement. What is crucial is the existence of a retroactive mechanism and the establishment of a procedure that effectively addresses the subsequent evaluation of medical criteria. Currently, the medical decision regarding prior authorisation is under the jurisdiction of the Health Science Council (ETT).[57] Professionally, the ETT or a similar independent evaluating body could be competent to act in the case of retroactive authorisation.

It might be worthwhile to consider developing a standard within domestic law, as the principle established in the Elchinov and WO cases is final: all requests for reimbursement concerning cross-border healthcare, citing obstruction, must be addressed by the authorities. These cannot be automatically rejected simply due to the absence of prior authorisation. Therefore, both medical and formal conditions must be examined, and a procedure must be devised by the authorities to handle this challenge. Naturally, any decision will be subject to the usual legal procedures, including appeals and judicial review if contested.

[57] Section 14/A of Government Decree 340/2013. (IX. 25.) on Detailed Rules of Medical Treatments Abroad.

3. Amendment of the EU Patient Rights Directive regarding retroactive authorisation

In connection with the above point, I believe that the implementation of the conclusions from the Elchinov and WO cases is necessary within Directive 2011/24/EU. The legal concepts of urgency and obstruction established in Elchinov and WO, could serve as a solid basis for amending the existing legal framework, particularly Article 8 of the Directive, to further narrow (or slightly relax) the legal scope of prior authorisation for cross-border healthcare. Aligning the legal provisions in this area could help prevent unforeseen legal uncertainties and unjust outcomes for patients lawfully seeking medical treatment abroad.

Without this, it is unlikely that Member States will consistently apply the rules regarding retroactive authorisation. The amendment of the Directive should address the preambles, as they all refer to prior authorisation, as well as Article 8, which currently deals with prior authorisation for healthcare services. I recommend including the conclusion of the *Elchinov* case in the preamble.

The current title of Article 8 is "Health care subject to prior authorization", which should be amended to "Health care subject to authorization", removing the word "prior". It is suggested that the word „prior" be deleted from the entire article. Furthermore, I propose adding a new paragraph (8) to Article 8 regarding the possibility of requesting retroactive authorisation, in line with the Elchinov case. Its content should correspond to the conclusion of the case, which stated: "the reimbursement of hospital care received without prior authorisation should not be excluded by national regulations if the insured person was unable to submit the request for authorisation due to health reasons or, as in the case of Elchinov, could not wait for the response of the competent institution".[58] Additionally, no Member State's regulations can exclude the reimbursement of hospital care received without prior authorisation in another Member State.[59]

The CJEU has clearly stated that such reimbursements would not jeopardise the objectives of hospital planning, would not severely affect the financial balance of the social security system, and would not impact the provision of balanced and universally accessible hospital care, capacity, or medical competence. With this, the CJEU has essentially excluded the possibility of Member States lawfully invoking any exceptions in these cases, making the retroactive reimbursement examination mandatory.

[58] Case C-173/09. *Elchinov,* para 45.
[59] Case C-173/09. *Elchinov,* para 49.

Simon, István*

Constitutional foundations of Hungarian tax law

I. The taxation clause

The Fundamental Law of Hungary and the decisions of the Constitutional Court which has limited fiscal powers under the law in force,[1] create the basic rules of taxation. The thesis examines the constitutional basis of taxation, which includes at least two conditions. The first is the definition of the taxing power, i.e. who has the right to decide on the imposition of a tax or, more widely, fiscal revenues; this implies the definition of the level of the source of tax law. The second is the definition of taxation as an obligation and its conditions, the most basic of which is the principle of ability to pay. These conditions create the content and limits of the power to tax.

The starting point is the tax-related provisions of the Fundamental Law. The Fundamental Law grants the power to legislate on taxation to the *Országgyűlés,* as the unicameral National Assembly is named.[2] According to Article I(3) of the Fundamental Law, "The rules for fundamental rights and obligations shall be laid down in an Act."

Taxation is defined as a fundamental obligation in Article XXX, quoted below. Consequently, tax legislation in Hungary is one-tiered, being made possible by Act, except for the limited taxing rights of local governments,[3] and the setting of fees.[4] Article XXX of the Fundamental Law defines taxation as a fundamental obligation and defines the purpose and limits of taxation:

> "(1) Everyone shall contribute to covering common needs according to his or her capabilities and to his or her participation in the economy. (2) For persons raising children, the extent of their contribution to covering common needs must be determined while taking the costs of raising children into consideration."

* Simon, István PhD, Associate Professor, Head of Department, Department of Fiscal and Financial Law, Eötvös Loránd University, Budapest, simoni@ajk.elte.hu

1 Art. 36(4) of Fundamental Law of Hungary (Fundamental Law).

2 Art. I(3) and XXX of Fundamental Law of Hungary.

3 Art. 32(1)*h)* of Fundamental Law of Hungary.

4 29. § of Act CXCIV of 2011 on the Economic Stability of Hungary (Stability Act).

DOI: 10.56749/annales.elteajk.2024.lxiii.13.237

I have examined the conceptual elements of the definition of tax liability in my habilitation thesis separately and in their entirety and determined the meaning I attribute to the above provision of the Fundamental Law on the basis of its text, the explanatory memorandum, the decisions of the Constitutional Court, the literature and the necessary historical and comparative legal analysis.

This article is divided into three main structural units. Chapter II addresses the question of who decides on tax law, i.e. who may make the rules governing taxation. Chapter III clarifies the meaning of the ability-to-pay principle. In Chapter IV, the so-called unorthodox tax reform is addressed.

II. The power to tax

Competence as a legal concept refers to the organ of the state that has the power to decide on a matter under the jurisdiction of that state. Legal scholars argue that the precondition of the legitimacy of tax rules is the prior consent of taxpayers, as a main rule via their representatives in Parliament; this is called input legitimacy. To support this claim, they cite historical situations in which the lack of consensus or, even more so, the obligation to pay imposed on taxpayers led to social movements, uprisings, revolutions, and wars of independence. A typical reference point is the claim made during the North American War of Independence – or, more precisely, earlier in the Enlightenment intellectual movement[5] – 'no taxation without representation'.[6] In this section, I review how the participation of taxpayers in the decision-making process has evolved throughout Hungarian history until the present day in an EU and global context, occasionally referring to other jurisdictions if the context requires. The historical overview also sheds light on the forms of subordination that have emerged in history and the forms of distribution of economic resources they have generated.

1. Historical models of the power balance in Hungary

a) Considering the European scene after the collapse of the Roman Empire, the observer may conclude that the collapse of the Roman state, based on a strict fiscal system and an extensive bureaucracy, led to the disappearance of the all-encompassing (abstract) state and its replacement by a patrimonial system organised on a tribal basis,

[5] E.g. G. Hamza, Characteristic Features of the Constitution of the United States of America, (2024) 72 (8) *Belügyi Szemle,* (1495–1512) 1498–1499.

[6] E.g. P. Essers (ed.), *History and Taxation* (IBFD, Amsterdam, 2022) (EATLP International Tax Series vol 20); Y. Edrey, Constitutional Review and Tax Law: An Analytical Framework, (2007) 56 (5) *American University Law Review,* (1187–1228) 1192–1193; W. Schön, Taxation and Democracy, (2019) 72 (2) *Tax Law Review,* 235–304.

in which private property and public property were not separated.[7] The Hungarian state, founded (AD 1000) after the conquest (895), was integrated into medieval Europe, built on the ruins of the Roman Empire.

b) Different patterns of development have occurred in Europe. That is why the following question about the historical regions of Europe is important: "Where do the internal borders of Europe run?"[8] Hungary, as a country of the semi-periphery, differed from the western part of Europe in economic terms as well as in the way society was organised.[9] For instance, feudalism, as Ganshof defines it, was limited in location (west of the Rhine area) and duration (i.e. from the tenth to the thirteenth centuries), and its central institution was vassalage.[10] Feudalism in this sense was never present in Hungary;[11] therefore, I will apply a more flexible interpretation of feudalism that covers Hungary in this context that spans the period from the establishment of the state (AD 1000) until 1848 (civil revolution and War of Independence). *In terms of taxation, this means that the feudal system of taxation prevailed until the middle of the 19th century.* The essence of Hungarian historical development may be summarised as that of a peripheral nation. The reasons for becoming a peripheral nation are the arrival of the Hungarians in the region five hundred years later than those of Western nations, the inorganic social development, rapid pattern adoption – following Western models instead of our 'own' way – determined primarily by foreign policy (the 'squeeze' of the German-Roman Empire and Byzantium) and the lack of historical antecedents. The above-mentioned reasons determined the characteristics of the Hungarians as members of a peripheral nation. The characteristics here mentioned are the imperative of convergence and integration, a forced position in terms of the division of labour – a country of agricultural products and mineral resources –, a conservative, feudal-type society that has persisted over time, an underdeveloped bourgeoisie, blind alleys of centralisation, failures in Western pattern following, and modernisation efforts sometimes imbued with a messianic sense of mission.[12] There is one aspect to highlight, which has determined both the historical development of the country and its tax system. This is the lost Battle of Mohács in 1526, which is a cornerstone of Hungarian

[7] R. C. Van Caenagem, *An Historical Introduction to Western Constitutional Law* (Cambridge, 1985) 34–36.

[8] J. Szűcs, The Three Historical Regions of Europe: An outline, (1983) 29 (2–4) *Acta Historica Academiae Scientiarum Hungaricae,* 131–184.

[9] E.g., A. Gerschenkron, *Economic backwardness in historical perspective* (Harvard University Press, 1962); I. Wallerstein, *The Modern World-System I: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century* (Academic Press, 1974).

[10] F. L. Ganshof, *Feudalism* (University of Toronto Press – MAA, 1996) XV–XVII, 65–67 and 70.

[11] Mezey B., Előszó, in Mezey B. (szerk.), *Magyar jogtörténet* (Osiris, Budapest, 2007) 10.

[12] Mezey B., A magyarság törzsi szerveződése és a nomád államodell, in Mezey B. (szerk.), *Magyar alkotmánytörténet* (Osiris, Budapest, 2003) 17–22., 41–47.

history, the results of which were the division of the country into three parts for 150 years (until 1699, until the displacement of the Turks) and a period of extremely limited sovereignty, lasting 400 years under Habsburg rule. *Four centuries – including the civil revolution and the War of Independence in 1848/49 and the prosperous period of the Austro-Hungarian Monarchy (1867–1918), involving a real union – were about independence; independence from the Turks and the transnational Habsburg dynasty, which the country did not achieve until 1918*. However, independence came about under extraordinary, post-World War I circumstances that were almost unmanageable. The country found itself on a forced path that led to its participation in World War II, which was followed by the Soviet occupation. *Therefore, a valid interpretation of Hungarian history is one that recognises that one of the fundamental features is the continuous struggle for independence since 1526. This may help explain the Hungarian attitude to the attempts at federalism associated with the EU.*

c) After outlining the context, the historical roots of the decision-making models on taxation are next summarised. The state emerged from the *community of blood kinship* through conquest, as a power construction. *The key element of the transformation of the development of the constitution in the Middle Ages was the liberation, or if one prefers, wrenching away, of the individual from the ties of the extended family, the bloodline, which made possible the development of new forms of subordination to the rising powers, and ultimately to the ruler.* This new form of subordination in Western Europe was typically a contractual relationship, based on vassalage. *The restructuring of property relations was important both for the establishment of a patrimonial monarchy based on the dominion and for the creation of a property basis for the Church.*[13] Land ownership was not merely the economic basis of power, but a precondition of power. In Hungary, the king had full sovereignty, and administration was patriarchal.[14] Law-making was the right of the king.[15]

The revenue system of the patrimonial state was based on the revenues collected by the king as a landowner, such as crops handed over, taxes and the obligatory labour service ('robot'). The public law-based regales were insignificant, playing almost no role.[16] The notion of public-law-based tax was unknown in the period of patrimonial kingship.[17]

[13] Bónis Gy., *Hűbériség és rendiség a középkori magyar jogban* (Osiris, Budapest, 2003) (Millenniumi magyar történelem – Historikusok) 24–26.

[14] Mezey, A magyarság törzsi szerveződése és a nomád állammodell, 17–22., 48; Bónis, *Hűbériség és rendiség a középkori magyar jogban,* 80.

[15] Bónis, *Hűbériség és rendiség a középkori magyar jogban,* 80.; Ferdinandy G., *A magyar alkotmány történelmi fejlődése* (Franklin Társulat, Budapest, 1906) 23.

[16] Hóman B., I. A magyar királyság háztartása és pénzügyigazgatása 1000–1322-ig, in Hóman B., *A magyar királyság pénzügyei és gazdaságpolitikája Károly Róbert korában* (Budavári Tudományos Társaság, Budapest, 1921).

[17] Bónis, *Hűbériség és rendiség a középkori magyar jogban,* 82.

d) The system of patrimonial kingship was undermined by the donation of lands to the nobility; royal land ownership declined significantly. *It was in the 13th century that the transformation of the patrimonial state into a state based on the power balance between the king and the estates began, reaching its full development by the 15th century.*[18] Seeking new resources, the ruler, as a novice financial power, at first approached taxation in a random and inventive way, which led to conflicts.[19] As concerns the relationship of the king and the estates, the whole feudal period was about the defence of the constitution and the primal rights of the nobility, among them their tax-exempt status until 1848. In 1222, the rights of the nobility were confirmed in the Golden Bull, a document like the English Magna Carta of 1215 or the Constitution of Leon of 1188. Several such confirmations have been concluded over time. In the power struggles with the monarch in the period of the Estates, the most powerful weapon of the Estates was the *Országgyűlés,* primarily because of the right to raise taxes,[20] although the public law position and authority of the Act was incidental in that period; its importance increased in the 19th century.[21]

The Habsburg dynasty – a strong multinational power beside the "temporary" Turk occupation – brought a new quality to the political system of Hungary after 1526. The iconic events during their rule involved the defence of the own public law structure of the country.[22] There were three significant dates (1547, 1687, 1723) when the king confirmed the Constitution of Hungary, which included a tax exemption for the nobility in exchange for the recognition of the kingship, and at last in 1723, of the female line of descent. In this way, the monarchy was transformed from an elective monarchy to a hereditary monarchy in exchange for the recognition and confirmation of the primordial rights of the nobility, including to tax exemption.[23] This compromise was the basis of the tax-free status of the nobility until the civil revolution in 1848.

Bálint Hóman divides the *revenue system of medieval public finances* into three parts: revenues based on ownership (dominion), revenues collected by sovereign right (regale), and revenues voluntarily offered (tax). As he writes, *income collected under landlord or royal sovereignty was not considered tax(es) in the medieval view, because the*

[18] Mezey B., *Öszve-szövetkeztetett Szövetségünknek kötele – A jogalkotás alkotmányos keretei a Rákóczi-szabadságharcban* (Gondolat, Budapest, 2009) 94.

[19] Hegedűs L., A magyar egyenes adózás kifejlődése (Az Árpádok és az Anjouk), (1900) 24 *Közgazdasági Szemle,* 190–208., 202; Baráth T., A magyar állam adóügye 1605–1648. (Első közlemény), (1929) (4–6) *Századok,* 607–655., 609.

[20] Ember Gy., Magyarország közigazgatása 1711–1865, (1983) (1–2) *Levéltári Közlemények,* 3.

[21] Mezey, *Öszve-szövetkeztetett Szövetségünknek kötele,* 92–93.; Varga Cs., *A kodifikáció mint társadalmi-történelmi jelenség* (Akadémiai Kiadó, Budapest, 1979).

[22] E.g. Mezey B., Feudális állammodellek Magyarországon, in Mezey B. (szerk.), *Magyar alkotmánytörténet* (Osiris, Budapest, 2003) 65.

[23] Concha Gy., *A kilenczvenes évek reformeszméi és előzményeik* (Franklin Társulat, Budapest, 1885) 5–6; Acts I-II of 1723.

income treated as tax was based on voluntary contribution. Accordingly, he divided revenues into ordinary and extraordinary revenues, the latter being taxes.[24] This division is also used by authors who analyse later periods, such as the 16th and 18th centuries.[25] *In the 17th century, ordinary revenues accounted for about 70 percent of state revenues.*[26] *This is a significant shift from the proportions that existed in the patrimonial monarchy.*

e) The next moment to be referred to here is the post-revolution *bourgeois state,* created mostly in the nineteenth century, although earlier variants – such as those in England – existed. The parliaments – and therefore the whole political system – of new bourgeois nation states were rather oligarchic since voting rights were allocated to a small fraction of society.[27] The Third Estate took over the power positions of the absolutistic state, and its political purposes can be described in two key words: *constitutionalism and parliamentarianism*. The first excluded arbitrariness and, in substance, created the rule of law, while the second created a regime where power is derived from and accountable to the electorate.[28]

In Hungary, the bourgeois revolution erupted in 1848, which turned into a fight for the country's independence; the Habsburg dynasty was dethroned in 1849. The War of Independence was defeated with Russian assistance. From 1849 until 1867, Hungary was an occupied country, and its former statehood was abolished. This situation was ended by the Compromise of 1867, which resulted in the creation of the Austro-Hungarian Monarchy as a real union, which ceased to exist in the autumn of 1918 when a revolution broke out and the People's Republic was proclaimed. In 1920, the name of the state was changed back to the Kingdom of Hungary, which existed as a kingdom without a king until 1945. Although the country was independent in public law terms, it was occupied by the German army on 19 March 1944, and from 1945 it was effectively under Soviet occupation until the elections in 1990.

f) Looking for an answer to our question – i.e. *who decided on tax law* during the century and a half between 1848 and 1990 outlined above – there are *three essential questions to be answered*. The first is what source of law is necessary for taxation. The second is the extent to which Hungarian statehood was sovereign, i.e. to what degree external factors influenced decisions. The third is what proportion of citizens in the given political community were entitled to vote.

[24] Hóman B., *A magyar királyság pénzügyei és gazdaságpolitikája Károly Róbert korában* (Budavári Tudományos Társaság, Budapest, 1921).
[25] Baráth, A magyar állam adóügye 1605–1648, 607–609; Nagy I., A Magyar Kamara adóigazgatási tevékenysége a XVI–XVII. században, (1995) 66 (1–2) *Levéltári Közlemények,* 29–51.
[26] Baráth, A magyar állam adóügye 1605–1648, 607–608.
[27] Caenegem, *An Historical Introduction to Western Constitutional Law,* 194–195.; Concha Gy., *Újkori alkotmányok,* I. kötet, (Eggenberger, Budapest, 1884).
[28] Caenegem, *An Historical Introduction to Western Constitutional Law,* 194.

The first two questions are discussed together, as the Hungarian public perception of the Habsburgs' rule was that it was an occupation, a rule by a foreign power. The legislative power was shared between the *Országgyűlés* and the crown, meaning that the validity of an act required the consent of both parties as last provided for in Act XII of 1790–91.[29] The last feudal *Országgyűlés* in 1848 adopted thirty-one resolutions that laid the foundations for the bourgeois transformation, which became acts by royal assent on 11 April 1848. The necessary level of legal source of the budget and the creation of the public debt were clearly defined in the laws.[30] Although the grounds for universal, equal and proportionate taxation were also laid down, the legal source of taxation was not clearly defined. After the dethronement, the *Országgyűlés* passed an act – alone – on the new, modern tax system in 1949, but this did not come into force due to the defeat in the War of Independence.[31]

Following the defeat in the War of Independence, legislative powers were redefined under the system of absolutism from 1849 to 1867, and Hungary lost its fiscal sovereignty. The modern Austrian tax system of the time was introduced in 1850 and 1851 by imperial decrees or orders issued with imperial approval. 1867 was the year of the Compromise, the establishment of the Austro-Hungarian monarchy. Under the 1867 Compromise, foreign affairs, military affairs and their finances became common affairs. Each year, a committee appointed by the two parliaments decided jointly on the proportion of the costs to be borne, and in the absence of agreement, the two parliaments, and ultimately the monarch himself, decided.[32] The Act of Compromise identified customs revenue as a direct source of financing for common affairs.[33] Domestic finances belonged to the competence of the Hungarian *Országgyűlés*. According to Article 17 of the Act of Compromise, taxes should be decided by the *Országgyűlés;* the form of the decision was not an act, but a resolution. Contrary to this wording, the reality was different; tax statutes were decided in the form of an act. The reason was that a secret agreement was reached between the monarch and the Hungarian leaders to maintain the King's right of assent, which was included in a

[29] Beér J. and Csizmadia A., Az 1848/49. évi népképviseleti országgyűlés – Bevezetés, in Beér J. (szerk.), *Az 1848/49. évi népképviseleti országgyűlés* (Akadémiai Kiadó, Budapest, 1954) (3–113) 92. and 446.; Récsi E., *Magyarország közjoga, amint 1848. előtt és 1848-ban fennállott* (Pfeifer Ferdinánd, Buda-Pest, 1861) 439–442; Moór Gy., A különböző jogforrások, azok egyensúlya és rendfokozata a magyar jogrendszerben, (1932) 13 (5) *Magyar Jogi Szemle,* (145–154) 149; Gratz G., *A dualizmus kora. Magyarország története, 1867–1918. I* (Magyar Szemle Társaság, Budapest, 1934) 11–12.

[30] 37. § Act III of 1848; Magyary Z., *A magyar állam költségvetési joga* (Stúdium, Budapest, 1923) (OGYH reprint, Budapest, 2010) 30.

[31] Act VII. of 1949; Beér and Csizmadia, Az 1848/49. évi népképviseleti országgyűlés – Bevezetés, 3–113., 92. and 446.

[32] 18–22. § of Act XII of 1867 on the relations of common interest between the countries of the Hungarian Crown and the other countries under the reign of His Majesty, and the manner of their settlement (Act on Compromise).

[33] 64. § Act of Compromise.

secret resolution of the Council of Ministers.[34] The monarch did not abandon his right to assent, but Hungarian politicians could not publicly acknowledge this. For the rest of the capitalist era, the legal sources for taxation were acts. However, the terms of the League of Nations loan for post-World War I stabilisation included significant budget and taxation constraints.[35] Therefore, the room for consideration of tax policy and legislation of the *Országgyűlés* of the formally sovereign state of the Hungarian Kingdom was narrow.

Regarding *voting rights as the third essential criterion for tax legislation,* the Hungarian domestic political community widened after the Civil Revolution. Act V of 1848 regulated the right to vote in accordance with the new social model based on equal rights, although political rights were far from equal. The Act linked the right to vote to the age of 20 but did not grant it to women. It contained further restrictions, such as a wealth and income census and limitations on the propertyless and those under a kind of 'paternal power'. In 1874, there was a reform of electoral law[36] which served as the basis for elections for more than thirty years. Under the new system, 6.5 percent of the population had the right to vote.[37] According to the Act, people with tax debts were not allowed to exercise their voting rights.[38] After the country regained state sovereignty, the electoral system was regulated by decree in 1919,[39] under which 40% of citizens were entitled to vote in 1920.[40] The next electoral law was passed in 1922 in the form of a ministerial decree which resulted in a decrease in the proportion of citizens entitled to vote to 29.8%. In 1925, the rules of the last decree were republished in the form of an act[41] that further decreased the proportion of entitled citizens to 26.8%. In 1935, 33.7% of citizens were entitled to vote. The proportion was similar at the last interwar election in 1939.[42]

As these are parts of Hungarian history, one must remember that in dictatorial circumstances, the consent of the people is not a precondition for taking personal assets. On 19 March 1944, the German armed forces occupied the country. According

[34] M.E. resolution 64 of 1867; Sarlós B., *Közigazgatás és hatalompolitika a dualizmus rendszerében* (Akadémiai Kiadó, Budapest, 1976) 33–34; Wiener I., A többségi elv és a bizalmi kérdés a dualizmus kormányzati rendszerében, (2007) (3) *Jogtörténeti Szemle,* (68–88) 68; Kárbin Á., Szuverén volt-e az Osztrák–Magyar Monarchia Magyarországa bizonyos nemzetközi gazdasági szerződések és a királyi vétó tekintetében? (2019) (3–4) *Jogtörténeti Szemle,* 64–66.

[35] Act IV of 1924 on the Rebalancing of Public Finances.

[36] Act XXXIII of 1874 on the modification and supplementation of Act V of 1848 and Act II of Transylvania (az 1848:V. törvénycikk és az erdélyi II. törvénycikk módositásáról és kiegészitéséről).

[37] Gratz, *A dualizmus kora,* 138.

[38] 12. § 5. of Act XXXIII of 1874.

[39] Prime Ministerial decree no 5985 of 1919 (1919. évi 5985. M.E. sz. rendelet).

[40] Dezső M., A választási rendszer, in Kukorelli I. (szerk.), *Alkotmánytan. I. Alapfogalmak, alkotmányos intézmények* (Osiris, Budapest, 2007) 217.

[41] Act XXVI. of 1925.

[42] The data of the elections available: Hubai L., *Magyarország XX. századi választási atlasza 1920–2000, I. kötet. A választások története és politikai geográfiája* (Napvilág Kiadó, Budapest, 2001) 43., 57., 65.

to the minutes of the 19 March 1944 government (Crown Council) meeting, headed by the head of state, Miklós Horthy, Adolf Hitler told the latter during their meeting in Germany on 18 March 1944, that German troops would march into Hungary since German leaders had lost their confidence in Hungary and wanted to keep the hinterland safe. To avoid social upheaval, Hitler insisted on Miklós Horthy keeping his position as head of state; otherwise, in the case of civil commotion, Romanian, Croatian and Slovakian armies would also invade Hungary besides the German troops. Miklós Horthy kept his position, the government resigned, and a new government led by Döme Sztójay took over the leadership.[43] On 29 March, the new government, in its first meeting, passed a decree on the confiscation of the property of Jewish people living in Hungary.[44] The confiscated assets were taken out of the country by the German army in the so-called 'golden train', composed of 77 wagons. On 11 May 1945, the train was seized by the American army.[45] World War II ended in Hungary on 4 April 1945, and the first democratic elections in Hungarian history were held in November of that year, the last until 1990; the country was occupied in the years in between. Private property was nationalised. The market economy, and with it, tax as a means of financing the state, essentially disappeared. Tax served an administrative purpose, as part of a pre-planned set of rules for regulating the economy and distributing income.

2. The constitutional framework of present days

a) The political system was transformed in 1990 with the first democratic elections. The first written constitution, reflecting the power structure of the time, was adopted in Hungary in 1949[46] at the beginning of the communist regime. As a result of the 1989 constitutional reform, only the title of this constitution remained unchanged.[47] In 1989, the text of the Constitution was amended to include Paragraph 70/I, which defined the tax liability, and also the provision on the level of the source of law – that is, cardinal law – for the regulation of fundamental rights and obligations.

The tax liability was defined as follows: "Article 70/I. All citizens of the Republic of Hungary have the obligation to contribute to public revenues in proportion [to] their income and wealth."

[43] Magyar Nemzeti Levéltár (1000–2100) (Hungarian National Archives), *Minutes of the Government meetings 1867–1944,* available at: https://www.eleveltar.hu/digitalis-tartalom?source=preservica&ref=5d1002a3-a71a-40e5-9bbc-5c3d2552fd9e (last accessed: 31.12.2024.).

[44] 1944. évi 1.600. M. E. rendelet (Government decree on report and freezing of Jewish property).

[45] Tarján, T. M., 1945. május 11.: Az amerikai hadsereg birtokába kerül a magyar Aranyvonat, *Rubicon,* 11 May 1945, http://www.rubicon.hu/magyar/oldalak/1945_majus_11_az_amerikai_hadsereg_birtokaba_kerul_a_magyar_aranyvonat (last accessed: 31.12.2024.).

[46] Act XX of 1949 on the Constitution of the Hungarian People's Republic.

[47] Act XXI of 1989 on the Modification of the Constitution.

The level of the necessary source of the law was defined in Article 8: "8§ (2) Regulations pertaining to fundamental rights and obligation[s] are determined exclusively by cardinal law."

The enactment of a cardinal law required a two-thirds majority. The reason for setting the level of the legal source was a lack of trust between the different political forces involved in the legislative work at the end of the socialist regime. It soon became clear that this requirement would paralyse the country,[48] therefore, a compromise was reached in the House.[49] A simple majority in the Legislature has been required to pass tax laws since 25 June 1990.

b) The current constitution is the Fundamental Law of Hungary, which, like the Constitution, gives the *Országgyűlés* the power to legislate on taxation as outlined in Chapter I, above. Among the constitutional rules on competence, mention needs to be made of Article 32, in which the *Országgyűlés* grants local governments the right to tax within the framework of an Act, that is, the Act on Local Taxes.[50]

In conclusion, the Hungarian electoral rules ensure the preconditions for democratic decision-making and the *Országgyűlés* functions in accordance with democratic, rule-of-law norms. The rules of the Fundamental Law guarantee that fiscal revenues have a legal basis.

c) In agreement with one of the positions expressed in the literature, I consider the *decisions of the Constitutional Court* a – negative – source of law, since they constitute an annulment of the normative decisions of the legislative bodies.[51]

There have been two fundamental decisions that defined the limits of its jurisprudence on the area of fiscal revenues. The first was the refusal of *ex ante* norm control of tax bills, thereby avoiding direct involvement in the formulation of tax policy.[52] In the other decision, in which the solution thus adopted became a regular formula in tax decisions, the Constitutional Court, like many other constitutional courts, ruled that the legislature may exercise a wide margin of appreciation in the enactment of tax legislation.[53] The application of the wide margin formula means that the Court put freedom before equality and formal equality before material equality.[54]

[48] Act XLIX 1989; Constitutional Court Decision 5/1990. (IV. 9.).
[49] 1. § (3) of Act XL of 1990.
[50] Act C of 1990 on Local Taxes.
[51] Jakab A., *A magyar jogrendszer szerkezete* (Dialóg Campus, Budapest and Pécs, 2007) 133.
[52] Constitutional Court decision 31/1990. (XII. 18.); Balogh Zs., Alkotmánybíráskodás egykor és ma, (2011) (1) *Alkotmánybírósági Szemle,* (72–82) 73.
[53] Constitutional Court decision 1558/B/1991.
[54] Pokol B., *Jogelmélet* (Századvég, Budapest, 2005) 87–90.

Since 2010, the power of the Constitutional Court has been restricted in the area of fiscal legislation;[55] the essential purpose of these rules is to delimit the potential intervention of the Court in budget framing and public debt reduction. While public ('general government') debt exceeds 50% of the GDP, the Constitutional Court has powers to review laws on the central budget, the implementation of the central budget, central taxes and other fiscal levies, and on the legislation of conditions for local taxes for conformity with the Fundamental Law solely as pertaining to fundamental rights defined in the Fundamental Law or infringing the procedural rules of legislation laid down by the Fundamental Law.[56]

3. Tax competences in the European Union

Neil Walker clearly articulated the historic importance of European cooperation when he wrote that European integration had provided Europe with important public goods after World War II: peace and prosperity.[57] The European Union is a special legal construct in which sovereignty problems have been solved by legalisation. This means that legislative powers have been shared between the Union and the Member States, and the Court of Justice of the European Union has been given special powers.[58] Article E(2) of the Fundamental Law provides for Hungary's relationship with the European Union as follows:

> "(2) With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure."

The EU treaties divide legislative power between the Member States and the EU institutions.[59] In the area of fiscal legislation, customs law is an exclusive competence of the Union. Taxes are a shared competence, with control being in the hands of the

[55] 1. § of Act CXIX of 2010 on the Modification of the Constitution modified the 32/A. § of the Constitution with the effect of 17 November 2010.
[56] Art. 37(4) of the Fundamental Law.
[57] N. Walker, The Place of European Law, in G. de Búrca and J. H. H. Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press, Cambridge, 2011) 57–105.
[58] R. W. Stone, *Controlling Institutions* (Cambridge, 2011) 104.
[59] Article 5(2) TEU, Art. 2-6 TFEU.

Member States under the special legislative procedure rules, since unanimity in the Council is required to adopt tax legislation.[60]

The law-making role of the European Court of Justice's rulings is beyond dispute. As has been argued in the tax law literature, the Court of Justice's rulings have clearly defined themselves as the depositories of the strengthening of integration; the Court sees the ultimate aim and spirit of European law as the achievement of ever closer integration.[61] The judgments of the European Court of Justice have contributed to the incorporation of provisions in the tax laws of individual Member States that contain similar solutions in specific areas. This is why the Court's activities are seen as an indirect catalyst for tax harmonisation, a kind of negative harmonisation – or in other words, back-door harmonisation.[62] By interpreting the Treaties, the Court of Justice has created a new constitutional legal order enforceable against the Member States.[63] As has already been mentioned in relation to the Hungarian Constitutional Court, the judicial forum with the competence of a constitutional court plays a decisive role in the political system by annulling the normative decisions of the supreme legislative forum and making interpretative decisions. According to a marked opinion in the literature, it takes supremacy over the democratically established political institutional system resulting from elections. In essence, political decisions are made in a legal language, not by a majority of the electorate, but by a majority within a given judicial forum.[64] Over the past decades, there have been several conflicts between national constitutional courts and the European Court of Justice, which have essentially been jurisdictional disputes over the boundaries between national law and EU law. Neil MacCormick, in a study published after the Maastricht decision of the German Constitutional Court, proposes a pluralistic approach to resolving disputes over the hierarchy of sources and powers. In essence, he argues that it is inappropriate to interpret the problem in the Kelsen model and to argue about whether national or European law is at the top of the hierarchy of sources of law, because this is not the way to solve the problem within the conceptual framework of law. It is more appropriate to understand them as interconnected, communicating legal systems, the scope of which is defined by the Treaties. However,

[60] Art. 113, 114(2), 115, 289(2) TFEU.
[61] E.g. M. G. H. Schaper, Chapter 2: Introduction to Part II, in *The Structure and Organization of EU Law in the Field of Direct Taxes* (IBFD, 2013) (Online Books IBFD) 2.3.1.3; A. S. Sweet, The European Court of Justice and the Judicialization of EU Governance, (2010) 5 (2) *Living Reviews in European Governance,* DOI: https://dx.doi.org/10.2139/ssrn.1583345
[62] M. Helminen, *EU Tax Law – Direct Taxation* (IBFD, Amsterdam, 2011) 10.
[63] J. Gillingham, *European Integration 1950–2003 – Superstate or New Market Economy?* (Cambridge University Press, Cambridge, 2003) 74.
[64] Pokol B., *Európai jurisztokrácia – az Európai Unió jurisztokratikus szerkezetének kérdései* (Dialóg Campus, Budapest, 2019).

it must also be seen, he writes, that not all disputes can be decided at the legal level, and there are some issues that require a political decision.[65]

4. Global decisions on tax issues – soft law

The traditional order of international tax law has been changing over the past two decades. The BEPS project under the OECD, followed by BEPS 2.0 and the new, expanded regime for information exchange – including FATCA agreements – has been emerging as a new element of tax regulation, meaning that global soft law has become hard law in the EU legal system and in the legal systems of nation states. The Inclusive Framework aims to broaden the scope of BEPS cooperation; not only can OECD member states participate, but any state can join. Today, the Inclusive Framework has more than 140 member countries. Whereas previously, starting with the report prepared by the four experts in the framework of the League of Nations, through the first OECD Model Convention adopted and published in 1977, to the subsequent amendments, the basic concept was a kind of harmonisation of the conceptual set and the structure of bilateral conventions, the BEPS project is different. The Multilateral Instrument contains globally agreed normative texts that states make part of their bilateral treaties, subject to mutual agreement. This solution not only restricts the room for manoeuvre for the conclusion of treaties, especially for smaller, so-called follower states, but also poses a constitutional problem since a solution for the ratification of treaties has to be found. Hungary has chosen to enact the MLI itself. It promulgated the text of the MLI as an annex to the act and set out the reservations to each of the points of the MLI. The reservations already adopted by the time of the adoption of the act, which concern bilateral treaties, have been specified in the act itself for certain articles of the MLI.[66] However, it should be noted that, as the Act in question also shows, the actual substantive impact of the MLI is limited due to the different interests of each country.[67]

[65] N. MacCormick, The Maastricht-Urteil: Sovereignty Now, (1995) (3) *European Law Journal,* 259–266.
[66] Act III of 2021 on the Proclamation of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ('MLI Act').
[67] R. S. Avi-Yonah and E. Lempert, The Historical Origins and Current Prospects of the Multilateral Tax Convention, (2023) 15 (3) *World Tax Journal,* 379–411.

III. The constitutional principles of sharing the fiscal burden

1. The issue

A fundamental problem for any society is how to share the benefits and burdens of community life with the scarce resources that are available. Taxation is at the centre of this issue. We must be clear that the conceptual set of our tax principles is rooted in the philosophical foundations of the bourgeois societies that followed feudalism. At their heart is individual freedom, which has previously been marginalised. If one reflects on how our predecessors (and ourselves today) thought (think) about the justification for taxation, and later on the sharing of the tax burden,[68] this always involves the relationship between the individual and the community. The main issue of burden sharing during the emergence of capitalist systems was the universality and equality of taxation, which essentially meant that the tax exemption of the nobility was abolished, and taxes were paid by all. The invention was sharing the burden in a proportional way, which meant that the proportions of primary income distribution via the market were not modified. This way, inequalities in the material positions of taxpayers were formulated into equality in taxation. The next watershed occurred around the turn of the 19th and 20th centuries, when the theoretical basis and the justification for personal income taxation were worked out during the so-called progressive era; the ability-to-pay principle gained momentum at that time.

2. The basic question and the short conclusion of the study

A specific feature of the Hungarian Fundamental Law is that it contains in the above-quoted clause the principles of tax burden sharing, with the ability-to-pay principle at its centre. The ability-to-pay principle is extended with the constitutional right of the child-rearing parents to tax benefits. The third principle is participation in the economy. This latter is an invention of the constituent *Országgyűlés,* the purpose of which has been to involve new criteria for taxation that have no direct connection to the ability to pay of the taxpayer; green taxes serve as an example.

The *central question* of the habilitation theses is what the ability-to-pay principle defined in the Fundamental Law means. It is important to note here that the cardinal

[68] E.g. Földes G., *Adójog* (Osiris, Budapest, 2004) 22–27; G. Bizioli and E. Reimer, Equality, ability to pay, and neutrality, in C. H. J. I. Panayi, W. Hansleaner and E. Traversa (eds), *Research Handbook on European Taxation Law* (Edward Elgar, Cheltenham, 2020) (51–74) 63–64; K. Vogel, The Justification for Taxation: A Forgotten Question, (1988) 33 (1) *American Journal of Jurisprudence,* (19–59) 22–25.

Stability Act contains four rules that partly give meaning to the principle and at the same time limit the decision-making power of the *Országgyűlés,* which decides by simple majority. As regards labour income, these rules are the mandatory flat tax, the 50% cap on the tax wedge and the family allowance rule. The latter states that an increasing amount per child has to be provided, depending on the number of children. As regards the taxation of business income, the Stability Act contains a flat tax rule.[69]

The short preliminary response to the central question above and the *conclusion* is that the overall tax burden borne by each taxpayer, whether as a taxpayer or as a non-taxpayer (e.g. a consumer in the VAT system), must comply with the ability-to-pay principle, which is a special tax principle of equality – meaning that the same taxpayer must be handled in the same way, and different taxpayers must be handled in a different way.

To make this short conclusion and the argumentation in this study clear, it is necessary to clarify some basic elements of the terminology as they are understood in this study. First, the principles of ability-to-pay, faculty, and capability are synonyms.[70] Second, the ability-to-pay principle applies to both natural persons and legal entities.[71] Third, the ability-to-pay principle is a yardstick for direct and indirect taxes. Therefore, fourth, the ability-to-pay principle is the benchmark for the sum of all taxes paid by natural persons and legal entities as tax subjects or simply as the bearers of the tax burden. In other words, the ability-to-pay principle is a yardstick for the complete income and wealth of natural and legal persons. The terminology is not merely based on the normative ideas of the author, but on the explanatory memoranda of two Constitutions referred to below and the decisions of the Constitutional Court.

At this point, we arrive at difficult terrain because differentiation is inevitable. This concerns whether – as examples of differentiation – the family policy preferences which occupy a prominent place in Hungarian tax policy, and the contested sectoral taxes on banking, retail trade, energy and other sectors are compatible with the principle of ability to pay as thus conceptualised.

3. Ability to pay as a condition of social justice in the constitutional texts

The purpose of the ability-to-pay principle under Hungarian law is to ensure burden sharing according to the principle of social justice, as can be read in the legislative explanatory memorandum of the Fundamental Law. The previous Constitution, as

[69] 36–38. § of Stability Act.
[70] E.g. R. Musgrave, *The Theory of Public Finance: A Study in Public Economy* (McGraw-Hill, New York, 1959) 94; S. G. Utz, Ability to pay, (2002) 23 (4) *Whittier Law Review,* (867–950) 867–869; E. Seligman, *The Income Tax* (MacMillan, New York, 1914) 3–22.
[71] Constitutional Court decision 8/2007. (II. 28.), C-75/18. *Vodafone Hungary v NAV.*

amended in 1989, created the constitutional basis for taxation similarly on the basis of the principle of ability to pay ('according to income and wealth'), and its explanatory memoranda also defined the legislative purpose of the ability-to-pay principle, as equity in taxation. That means that taxation under the Hungarian constitutional system will meet the condition of the ability-to-pay principle if it meets the condition of social justice or equity in the previous wording. Therefore, one must first clarify *the concept of (social) justice* as far as the context requires it.

4. Aristotle's concept of justice

The literature on distributive justice frequently commences the discussion of this topic by referring to Aristotle. He says that *justice seems somehow to be equality*.[72] Aristotle's interest in justice and equality came from his presupposition that harm to this rule is one of the causative factors of social upheavals, revolutions and changes in the form of government.[73] He distinguished between arithmetic and geometric equality. The first is based on equality in numbers, the latter on value, and therefore, proportionality is required as the means of expressing equality and, at the same time, difference.[74] For Aristotle, inequality means injustice. He made a distinction between universal and partial justice (equality), and within the latter, he also defined two categories, namely commutative and distributive justice. The concept of distributive justice for Aristotle applies to the justification of the distribution of advantages, such as offices or newly acquired land, among the members of the political community. Aristotle analysed 158 constitutions[75] and derived the conclusion that the criterion of distribution in different states was merit. However, depending on the form of government, different meanings of merit were utilised in the constitutions. In a democracy, the status of a free citizen qualified as merit; in an oligarchic state, noble status or wealth; while in an aristocratic political system, virtue was the decisive form of merit.[76] *One can derive the conclusion that the actual political balance of power created the basis of qualification (merit) and, in this way, the basis of distributive justice.* Aristotle offers a solution to the problem of citizens' equality, or rather inequality;

[72] Arisztotelész, *Eudémoszi etika,* VII. book 9, 1, https://mek.oszk.hu/05700/05709/05709.htm#5 (last accessed: 31.12.2024.).
[73] Takács P., Az ókori politikai bölcselet vázlata, in Egresi K. et al., *Államelmélet* (Széchenyi Egyetem, Győr, 2016) 12., 17.
[74] Aristoteles, *Politika,* V. book, 1, https://mek.oszk.hu/04900/04966/04966.htm (last accessed: 31.12.2024.).
[75] Sarkady J., Bevezetés, in Aristotelés, *Az Athéni állam – Pseudo-Xenophón: Az athéni állam* (Akadémia, Budapest, 1954) 7–17.
[76] Aristotle, *The Nicomachean Ethics,* (5th ed., Kegan Paul, Trench, Trubner & Co., London, 1893) 145–146.

however, the criterion (i.e., merit) for qualification is abstract and flexible and depends on the form of dominance (form of government) and the value judgements and interests it is imbued with; ultimately, it is power that decides.

5. The evolution of the concept of fair taxation

With respect to taxation, a usual starting point in the discussion of fair taxation is Adam Smith's maxim of proportionality.[77] Having presented this principle, based on geometric equality, Smith devised an answer to the question of how inequalities – such as those in the post-feudal context – could be handled to ensure equality in taxation. According to his concept, market-based income structure need not be modified. There are two ways of understanding his maxim; one of them is the so-called benefit approach, and the other is the ability-to-pay approach. They do not correspond directly to the individualistic and communitarian theories in terms of redistribution.[78] They differ from each other on the basis of the relationship between the individual and the state and in the relationship between tax payment on the one hand and services provided by the state on the other, or, more plainly, the two sides of the budget.[79] Some authors – e.g. De Viti de Marco – have argued in favour of a progressive tax rate on the basis of the benefit principle.[80]

John Stuart Mill solved the issue of excluding the exchange concept included in contractarian benefit theories by applying a concept of state in which the functions of the state, the existence of the state itself, create the justification for taxation. He also offered an answer to the equality-inequality question via his equal sacrifice theory, which creates the basis for linear taxation that does not modify primary income distribution.[81] This equal sacrifice model was transformed into the equal marginal

[77] A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations,* Book V, Chapter II, Part II, https://www.econlib.org/library/Smith/smWN.html?chapter_num=36#book-reader (last accessed: 31.12.2024.).

[78] R. Nozick, *Anarchy, State and Utopia* (Blackwell, Oxford, 1999, reprinted); A. Wagner, Three Extracts on Public Finance, in R. A. Musgrave and A. T. Peacock (eds), *Classics in the Theory of Public Finance* (Palgrave Macmillan, New York, 1967, 1896) 1–15; J. Rawls, *The Theory of Justice* (Harvard University Press, Boston, 1971); M. J. Sandel, *Justice: What's the Right Thing to Do?* (Straus and Giroux, Farrar, 2009); A. Macintyre, *Az erény nyomában – Erkölcselméleti tanulmány,* (Osiris, Budapest, 1999) 327–341.

[79] Musgrave, *The Theory of Public Finance: A Study in Public Economy,* 62.

[80] Musgrave, *The Theory of Public Finance: A Study in Public Economy,* 72–73; A. Petretto, The Modern Theory of Regulation as an Inheritance of De Viti de Marco's Cooperative State, (2014) 9 (21) *Working Papers – Economics (Universitá degli Studi di Firenze),* 1–23.

[81] Musgrave, *The Theory of Public Finance: A Study in Public Economy,* 90; R. Musgrave, A Brief History of Fiscal Doctrine, in A. J. Auerbach and M. Feldstein (eds), *Handbook of Public Economics* (North-Holland, 1985) Vol. 1, 18.

sacrifice version, which emerged as the 'correct' solution, as it has an immediate fairness appeal, according to Musgrave.[82]

Richard Musgrave formulated the ability-to-pay principle by applying its two components, horizontal and vertical equity.[83] It is important to note that he applied the terms 'equality' and 'equity' as synonyms, which sometimes causes confusion.[84] Musgrave's formula embraces the solution to the question of how equality as horizontal equity and inequality as vertical equity can be considered. The concept was born in the Second World War era when the welfare state was invented. To summarise the burden-sharing principles, the authors intended to develop the defining principle of equal and therefore fair taxation – in the modern era – within a framework of equality of rights and inequality of income and wealth. The basic question in defining the principle is whether the primary – market – distribution of income should be modified.

It is important to emphasise in this context that income is a relevant but not the sole index of ability to pay, and income tax is a strongly relevant element of the tax system, but not the sole tax type and is not the only tax burden borne by taxpayers.

6. Contemporary concepts involving the ability-to-pay principle

Reading the contemporary Hungarian and foreign literature, it can be recognised that different authors attribute different meanings to this principle. Some examples are worth mentioning to illustrate the problems of concept formulation.

In the Hungarian literature, Gábor Földes's view is that the ability-to-pay principle is a conceptual element of proportionality and implies a progressive tax rate. However, the principle applies only to the tax system as a whole, not to each individual tax.[85] Dániel Deák distinguishes between the concepts of proportionality and ability to pay, and the latter implies the application of a progressive tax rate. However, this is only applicable to natural persons.[86]

As for the foreign literature, Ekkehart Reimer and Gianluigi Bizioli write that the principle of equality applies to the field of taxation – treating the same as the same, treating different as different – employing the concepts of horizontal and vertical equity. However, the principle of equality is described as merely providing a structural – relative – guarantee, whereas the principle of ability to pay does more than that. It limits the

[82] R. Musgrave, Horizontal Equity, Once More, (1990) 43 (2) *National Tax Journal,* (113–122) 115–116.
[83] Musgrave, *The Theory of Public Finance: A Study in Public Economy,* 160.
[84] Musgrave, A Brief History of Fiscal Doctrine, 16; Musgrave, Horizontal Equity, Once More, 114–115.
[85] Földes, *Adójog,* 107.
[86] Deák D., A közteherviselés alkotmányos tartalmának változásai Magyarországon, (2015) 19 (1) *Fundamentum,* (37–54) 45.

taxing power in its choice of possible tax objects and contains an absolute ceiling and exemptions concerning the minimum subsistence level.[87] Joachim English and Hanno Kube explain the concept of the ability to pay, which was worked out by the German Constitutional Court. Traditionally, the Court judged the constitutionality of income taxes based on the principle of ability to pay but recently extended the application of the principle to other direct taxes, in particular inheritance and gift taxes. If the constitutionality of a tax is to be judged based on the ability-to-pay principle, it must comply with the two standards of justice, horizontal and vertical equality.[88] According to Joachim Lang, the ability-to-pay principle justifies only a linear burden. To justify a progressive tax rate, it is necessary to apply the welfare state principle in addition to the ability-to-pay principle, because the ability-to-pay principle does not serve social policy purposes. He considers that this principle only applies to personal income tax.[89] The problem with the ability-to-pay principle, says Wolfgang Gassner, is that everyone understands exactly what it means, but no one can explain it. In his view, the principle of ability to pay does not exist as a universal principle of law but can only be interpreted in a particular legal system. He says that German and Austrian law have many common features, thanks to their historical roots, but the ability-to-pay principle must be interpreted in both countries within their own constitutional frameworks, which are different.[90] Peter Essers and Arie Rijkers have reason to doubt that there will ever be an interpretation of the principle that is universal.[91]

Continuing the above line of thought, the ability-to-pay principle is a historically evolved legal principle, which has developed under different conditions in different countries.

[87] Bizioli and Reimer, Equality, ability to pay, and neutrality, 63–64.

[88] J. Englisch and H. Kube, Constitutional Requirements for Substantive Tax Law in the Federal Republic of Germany, (2023) 2 (3) *Review of International and European Economic Law (RIEEL),* (123–141) 128–129.

[89] J. Lang, The Influence of Tax Principles on the Taxation of Income from Capital, in P. Essers and A. Rijkers (eds), *The Notion of Income from Capital,* (IBFD, Amsterdam, 2005) (EATLP International Tax Series vol 1.) 3–31.

[90] W. Gassner, The Influence of Tax Principles on the Notion of Income, in P. Essers and A. Rijkers (eds), *The Notion of Income from Capital,* (IBFD, Amsterdam, 2005) (EATLP International Tax Series vol 1.) (33–52) 42., 44.

[91] P. Essers and A. Rijkers, General Report, in P. Essers and A. Rijkers (eds), *The Notion of Income from Capital,* (IBFD, Amsterdam, 2005) (EATLP International Tax Series vol 1.) (281–337) 291.

7. The ability-to-pay principle as developed by the Constitutional Court[92]

Given that the Constitutional Court's fiscal jurisdiction has been limited over the past decade and a half, the analysis is based on the decisions of the old Constitution, given that the tax clauses of the two constitutions are essentially identical. When discussing the concept of the ability-to-pay principle, one cannot avoid pointing out that the concept of tax in Hungarian law – according to the legislative practice and the jurisprudence of the Constitutional Court[93] – embraces all the three goals of taxation:[94] financing the state, redistribution, and regulation.

Although the ability-to-pay principle was included in the text of the Constitution in 1989, the Constitutional Court discovered it relatively late, in 2009, and it applied this principle to a negligible extent not only before but also after 2009; its decisions were based on the general equality principle. This was presumably because the conceptual framework of the constitutional law dogmatics developed by the Constitutional Court was largely influenced by the practice of foreign constitutional courts, especially the German one. The German Basic Law does not contain the principle of ability to pay; it was derived from the general principle of equality by the German Constitutional Court.

The Constitutional Court first ruled in 2009 that the principle of ability to pay is a special equality principle governing taxation.[95] It based its decisions on this constitutional principle in cases where the disproportionality of a tax type was explicitly at issue.[96] In other cases, where issues of horizontal[97] and vertical[98] equity arose, petitions and the decisions were based on the non-discrimination clause contained in 70/A §.

The Constitutional Court has ruled on the two extremes of the ability-to-pay principle, that is, the exemption of the minimum subsistence level and the prohibition of confiscation. The Court rejected the petition concerning the exemption from taxation of the minimum subsistence level.[99] The Constitutional Court also ruled on excessively disproportionate and confiscatory taxes.[100]

---

[92] See: I. Simon, Restricting the Legislative Power to Tax – National Report: Hungary. In Restricting the Legislative Power to Tax, IACL 17th Congress (General reporter: Henry Ordower), (2007) 15 (2) *Michigan State Journal of International Law,* 341–369.

[93] For example, Constitutional Court decisions: 31/1998. (VI. 25.) V.; 440/D//2001. (V. 12.) III.1.; 657/B/2005. III. 2.1.

[94] R. S. Avi-Yonah, The Three Goals of Taxation, (2006) 60 (1) *Tax L. Rev.,* 1–28.

[95] Constitutional Court decision 127/2009. (XII. 17.) IV. 2.

[96] E.g.: Constitutional Court decision 1531/B/1991.

[97] E.g.: Constitutional Court decisions 54/1993. (X. 13.), 34/1997. (VI. 11.) V.2., 137/B/1991., 191/B/1992., 12/1994. (III. 2.), 3/1995. (II. 17.), 1872/B/1991.

[98] E.g.: Constitutional Court decisions1558/B/1991.; 140/B/1995., 61/1992. (XI. 20.).

[99] Constitutional Court decision 85/B/1996., 1253/B/1996.

[100] Constitutional Court decisions 1531/B/1991., 184/2010. (X. 28.), 37/2011. (V. 10.), 37/2011. (V. 10.), 6/2014. (II. 26.); Chronowski N., Az Alkotmánybíróság második határozata a 98 százalékos

8. The issue of the overall tax burden in the context of the ability-to-pay principle and a potential solution for resolving the issue

In its decision, the Constitutional Court stated that the tax system as a whole must comply with Article 70/I/I of the Constitution, which is in line with the principle of ability to pay.[101] Despite the fact that the Constitutional Court has ruled on this, the result of its decisions shows that another picture has emerged. As a former justice of the Court explained in a study, the Constitutional Court does not observe the tax system as a whole on the basis of the ability to pay since it has no mandate for that. The Court has the mandate to observe the constitutionality of single tax statutes in the form of abstract and concrete norm control only, and not the overall tax burden-bearing capacity that must be observed in the context of the ability to pay.[102] *The problem with this concept is that if each tax meets the condition, it does not mean that the tax system as a whole does. This is the key problem of the Hungarian tax system, analysing it from a constitutional perspective.*

Measuring the total tax burden on taxpayers using economic statistics methodology and information technology is likely to be almost as accurate as measuring inflation. As changes in the consumer price index do not reflect either the personal inflation of people or the inflation relevant to individual business organisations, the overall tax burden can only be determined for statistically identifiable groups in each tax system, taking into consideration the effects of each tax type. Then the tax burden can be considered and limited. Obviously, the first objective is to equalise the burden via eliminating the regressive effect of indirect taxes on individuals. With the current state of information technology, the system can be refined to apply qualitative parameters in addition to quantitative indicators.

IV. The interpretation of the post-2010 tax reform

1. The merit of the issue: some data on households' ability to pay

a) An example of middle-class incomes: in 2009, the net income of a four-member family with two kids was HUF 240,000, provided the parents, in their early forties, were secondary school teachers. This was equivalent to 114% of the subsistence minimum (HUF 208,000) for a household of four with two active members and two children, according to the figures of the Central Statistical Office.

különadó ügyében, (2012) 3 (3) *Jogesetek Magyarázata,* 3–11; Kecső G., A pénzügyi tárgyú törvények alkotmányossági felülvizsgálatának korlátai, (2020) (10) *Jogtudományi Közlöny,* 471–479.

[101] Constitutional Court decision 127/2009. (XII. 17.) V. 2.

[102] Tertyánszkiné Vasadi É., A magyar Alkotmánybíróság pénzügyi tárgyú döntései, in Hajas B. and Schanda B. (szerk.), *Formatori iuris publici* (Szent István Társulat, Budapest, 2006) 483.

b) Hungarian real wages did not increase between 1990 and 2009.[103] The socialist system was – conceptually – based on redistribution, thus all welfare (e.g. healthcare, schooling) services were provided by the state free of charge. Now, only a fragment of those services is covered by public finances.

c) Although the proportion of those individuals who would not be able to cover an unexpected bill for cc 200 euros because of their lack of savings decreased from 75% to 35% between 2013 and 2019,[104] the economic effects of the pandemic and the war in Ukraine increased this figure again.

d) A closer look at the wage structure at the national level may also add important information. The national average net wage (5th decile in the gross wage statistics) was one and a half times more than the subsistence minima (HUF 75,024 in 2009 and 78,736 in 2010) in 2010; this figure was two and a half times more in the seventh decile, in the eighth decile the net wage was three times more than the subsistence level and in the ninth decile four times more. There was a very narrow scope for the progressive taxation of labour income, and this is true of the present situation as well, in spite of the fact that the last couple of years have brought an increase in wage levels.[105] In 2010, the highest (10th) level decile was composed of cc 46,000 taxpayers whose monthly gross income was 1.5 million Hungarian forints, or 780 thousand net, after (progressive) tax and social security contributions.

e) The effective personal income tax rate was 16.34% on the global tax base (basically wages) in 2010.[106]

f) According to estimates, 20-33% of the tax base remained untaxed between 1990 and 2009.[107]

[103] Kovács I., A jövedelemeloszlás és jövedelemegyenlőtlenség a személyi jövedelemadó-bevallási adatok tükrében, (2011) 89 (3) *Statisztikai Szemle,* (294–312) 306–307.

[104] Central Statistical Office, *Standard of Living of Households 2020,* https://www.ksh.hu/docs/hun/xftp/idoszaki/hazteletszinv/2020/index.html (last accessed: 31.12.2024.).

[105] STATADAT: 2.1.35. *Az alkalmazásban állók havi bruttó átlagkeresete a nemzetgazdaságban (Employees' monthly gross wage) (2000–),* http://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_qli012b.html (last accessed: 31.12.2024.).

[106] National Tax and Customs Authority, *Personal income tax statistics 2004–2010,* https://nav.gov.hu/nav/archiv/szolgaltatasok/adostatisztikak (last accessed: 31.12.2024.).

[107] E.g.: Krekó J. and P. Kiss G., *Adóelkerülés és a magyar adórendszer,* (MNB, Budapest, 2007) (MNB Műhelytanulmányok 65) 4., 31.

g) 90% of members of the Hungarian population live in their own residential property.[108] This is the only reported saving for 80-90% of households.[109]

2. The dual structure of the Hungarian economy

Andreas Nölke and Aljan Vliegenhart proposed to name the economic systems of East-Central European countries, among them Hungary, dependent market economies. These economies differ from the two traditional models, i.e. the liberal model represented by the US and the coordinative model represented by Germany.[110] The main feature of dependent market economies is the dominant role of foreign ownership. Taking the example of Hungary, foreign-owned companies accounted for 50% of both the gross income and gross added value of GDP between 2010 and 2015. In the energy industry, their gross income proportion was 71.3% in 2010 and 55% in 2015. As employers, these companies employed 25% of the labour force in Hungary.[111]

Hungary was in a deep crisis before 2010.[112] After the election, Hungary chose a process of crisis management that was different from the then widely applied orthodox method; therefore, it was named 'unorthodox'. The root of the conflict between Hungary and certain power centres in the Western world – including the IMF, the EU, and some of its Member States – was fiscal, which was a consequence of the tax reform.

3. The unorthodox tax reform

The key concept of the tax reform was to decrease fiscal levies on labour and on business – as it was thought that this would increase the level of employment and support economic growth – and to maintain the high level of consumption taxes. Also, the linear income tax rate and family tax allowance were significantly increased to support wage-earning middle-class families with children.

The loss of revenue from personal income tax was covered by the state through special taxes introduced on certain sectors of the economy. These special taxes,

[108] EUROSTAT: *Owning or renting? What is the EU's housing situation?* December 2021, https://ec.europa.eu/eurostat/de/web/products-eurostat-news/-/wdn-20211230-1 (last accessed: 31.12.2024.).

[109] Erdős T., Az adózás, a hatékonyság és a gazdasági növekedés kapcsolatának néhány elméleti problémája, (2014) 61 (különszám) *Közgazdasági Szemle,* (1–76) 34.

[110] A. Nölke and A. Vliegenthart, Enlarging the Varieties of Capitalism – The Emergence of Dependent Market Economies in East Central Europe, (2009) 61 (4) *World Politics,* 670–702.

[111] Central Statistical Office of Hungary, http://www.ksh.hu/docs/hun/xftp/idoszaki/pdf/kulfleany15.pdf (last accessed: 31.12.2024.).

[112] Kolosi T. and Tóth I. Gy. (szerk.), *Társadalmi riport 2010 (Social Report 2010),* (TÁRKI, Budapest, 2010).

temporarily (2010–2012), reallocated the tax burden from labour to certain industries (retail trade, banking, telecommunication, energy). Some tax types remained in the tax system, and some of them were reintroduced to finance the Ukrainian-Russian wartime budget.

4. The constitutionality of the tax reform

The Constitutional Court's competence in fiscal matters was already limited at the time of the tax reform. The question is how to assess the constitutionality of the tax reform in light of its previous practice. In the scope of horizontal equity, the Court decided upon differentiation by tax type (e.g., different business tax regimes for sole entrepreneurs and companies)[113] and within tax types (e.g., differentiation between employees' income and sole entrepreneurs' income on the basis of risk-taking).[114] In a landmark decision, the Court decided that "it is the scope of authority of the legislator to decide to create different rules for different groups of entrepreneurs and their taxable activities. This power is limited by the Constitution to ensure that *the regulation shall not result in discrimination within the same selected group of entrepreneurs, within the same scope of activity.*"[115] The interpretation of the 'same scope of activity' in this case was a very narrow standard, and the decision made a distinction between providing a loan and its functional equivalent, leasing. As a consequence of the concept of this judgment, sectoral taxes and extraordinary sectoral taxes are in accordance with the Fundamental Law.

The question that arises, regardless of the decisions of the Constitutional Court, is whether it is economically reasonable and morally fair to differentiate between businesses based on the line of business they operate in. Considering the above data, the burden on individual taxpayers did not comply with the principle of ability to pay as it is defined in the Constitution. My view is that the temporary reallocation of burdens to certain business sectors was justified and necessary. Unlike manufacturing companies, which provide local jobs and, to some extent, technology transfer and sell their products globally, the revenue of the industries burdened by additional taxes arises from domestic consumption, and the 'extra profit' realised in the previous decade stemmed more from location-specific than firm-specific rents.

[113] Constitutional Court decision 54/1993. (X. 13.).
[114] Constitutional Court decision 191/B/1992; Constitutional Court decision 12/2023. (VII. 13.).
[115] Constitutional Court decisions 57/1995 (IX. 15.); 66/2006. (XI. 29.) III. 2. Emphasis added.

V. Conclusions

1. Two conclusions can be drawn from Chapter II of this study, which are still worth considering today. The first is that throughout history, different balances of power – closely linked to economic strength, military power and technological development – have determined the modes of subordination (the social hierarchy) and the composition of the political actors that decide on taxes. Add to this the fact that those burdened by material services, including taxation, have in quite exceptional circumstances been involved in the decisions. A study of Hungarian history does not lead to the conclusion that there is no taxation without representation. Furthermore, when there is representation, it is mostly formal in terms of tax burden sharing. The other lesson is that although Hungary – apart from during a few short periods – has retained its constitutional autonomy and sovereignty for more than a thousand years, this sovereignty was limited after 1526 due to Turkish, Habsburg, German and Soviet occupation. This meant that Hungary was part of an internal European colonisation process that affected the distribution and use of economic resources and internal capital accumulation. Several attempts to break out were made but were mostly unsuccessful. As mentioned above, Hungary is currently involved in conflicts whose root is substantially fiscal. The most recent notable example is the termination of the bilateral tax treaty by the US because Hungary blocked the adoption of the Global Minimum Tax Directive in the European Council.

As for the most important finding on the distribution of the tax burden, my view is that although the ability-to-pay principle has been enshrined in the Hungarian constitutions since the political transformation in 1989–90, it has limited impact on the actual distribution of the tax burden. The Hungarian tax system is regressive, mainly due to the high weight of indirect taxes and the low income level, which fact may also be realised in comparison with the data of other European countries. In view of the income levels mentioned above, the partial reallocation of the tax burden – the introduction of the flat rate income tax and the sectoral taxes – was necessary. It has reduced the disproportionality of the tax system for the salaried middle class, especially for those with children, thus bringing the tax system closer to the ability to pay principle. Even though the Constitutional Court's powers are now limited, it did not apply the ability-to-pay principle in a meaningful way in the period before 2010, as it was described above. Its decisions are mostly based on the general principle of equality. It must be added that the Constitutional Court did not have the means to apply the ability-to-pay principle to the overall tax burden in a satisfactory manner. As has been mentioned, nowadays, information technology and economic statistics methodologies would allow the principle to be used in the form of a real measurement tool in tax legislation to ensure fair taxation. An especially important lesson to be learned about the concept of the ability-to-pay principle is that it has different concepts in different

legal systems. Reading the definitions in the literature and the constitutional court case law that is cited shows that the concept of the ability-to-pay principle evolved historically and differs from country to country.

A phenomenon worth considering in terms of historical development is that indirect taxes were traditionally a less important part of political debates in Hungary because they were regalia based on the sovereign right of the ruler, and later, some of them turned into state monopolies. Given that similar developments can be observed in some other countries, this may provide an indication as to why the principle is applied only to income tax, in particular personal income tax, in some constitutional systems today.

2. Last among the conclusions is the question of what lessons can be drawn from the investigations into the right to decide on taxation and the ability-to-pay principle from the perspective of Hungary as an EU Member State in the age of the global economy and information technology. If we take seriously the fact that the state has functions to implement that are not being taken over by anyone, then the only reasonable policy is to reinforce the conditions that facilitate the performance of state functions. Thinking in financial terms, maintaining and, as far as possible, widening fiscal and monetary room for manoeuvre and decision-making is a reasonable objective.

The European Union is a soft version of globalisation at a regional level, where the single internal market is accompanied by a common decision-making system and a mechanism to reduce disparities between Member States. However, these equalisation systems are far from sufficient to effectively redress North-South and East-West imbalances. The political and sometimes legal conflicts that have arisen between the EU institutions – and sometimes other Member States – and Hungary have their roots in this system of regional inequality in the European sphere and have been fiscal in their manifestation since 2010, when the recently ruling Hungarian political forces won the elections. The aim of the Hungarian government of the time can be interpreted as an attempt to break out of a serious economic, social and political crisis in the short run and to reduce economic backwardness in the long run. One of the key points of that policy was tax reform, as discussed above.

If Europe is large enough to be analysed from a geographical perspective in a globalized and digitalized world, one may conclude – on the basis of historical experiences – that a country in the landlocked East-Central European area with the size and properties (e.g., demography, natural resources, capital accumulation) of Hungary lacks alternatives in which it has longstanding experience to decrease its economic backwardness. It seems that those areas where the country has competence in an EU context – e.g., tax policy, monetary policy – create the possibility for workable solutions for economic development, although they are associated with difficulties. From a Hungarian perspective, strengthening federative EU structures and modifying competences seem problematic, as I see it.

Sulyok, Katalin*

Do we have a right to live unsustainably? Judicial strategies to protect the rights and needs of future generations in environmental and climate litigation

I. Introduction

The traditional legal maxim that "everything which is not forbidden is allowed" has provided individuals and States with broad freedom to act as they please as long as they do not infringe upon the sphere of protected rights of other contemporaneous rights holders. This framework has therefore allowed unsustainable consumption patterns and resource exploitation to proceed unchallenged, since future generations were not considered as rights-holders, and have had no legal standing, physical existence, or voting rights to protect their interests in current decision-making processes. In the same vein, under conventional interpretation, States retain nearly unfettered discretion in managing their natural resources under their sovereignty and setting environmental protection standards, with only soft law provisions concerning future generations' interests. Judicial review, both on domestic and international levels, tends to be deferential to States' regulatory authority, especially regarding science-based policy matters, with courts showing substantial restraint in scrutinizing state decisions affecting long-term environmental interests.

However, this myopic approach that is dismissive, or even bling, to State conduct generating intergenerational risks or harm has become increasingly untenable as humanity has entered the Anthropocene era – a new geological epoch where human activity acts as an Earth-shaping forth that is capable of fundamentally altering the Earth's systems.[1] Scientific research unequivocally shows we face an unprecedented ecological and climate crisis, having already transgressed six of nine planetary boundaries that define humanity's safe operating space.[2] The time window for

* Sulyok, Katalin Habil. Associate Professor, ELTE University, Faculty of Law, sulyok.katalin@ajk.elte.hu

1 P. Crutzen, Geology of Mankind, (2002) (415) *Nature,* 23.

2 K. Richardson et al., Earth beyond six of nine planetary boundaries, (2023) (9) *Science Advances,* 37. DOI: https://doi.org/10.1126/sciadv.adh2458

DOI: 10.56749/annales.elteajk.2024.lxiii.14.263

systemic intervention is rapidly closing,[3] therefore, the failure to transform our economic-legal systems will fundamentally undermine future generations' living conditions and life prospects.

The relationship between present and future generations has become a zero-sum game, where current growth comes at the direct expense of future wellbeing. Yet binding legal frameworks have been slow to adapt to this paradigm shift. The Paris Agreement wasn't adopted until 2015 and faces significant implementation challenges, while no comprehensive treaty exists to address the broader ecological crisis. National legislators have also largely remained passive in the face of these intergenerational challenges. Democratic systems exhibit an inherent bias toward short-term interests,[4] systematically disadvantaging future generations who lack voting rights or representation in current decision-making processes. Consequently, long-term concerns are routinely subordinated to immediate economic interests, as evidenced in many environmental regulations.

Future generations, thus, remain fundamentally dependent on the goodwill of present decision-makers. In the absence of binding national and international rules to manage the fundamental conflict between present and future interests, the principle of intergenerational equity offers a crucial normative foundation. This principle recognizes that short-term maximizing policies drastically reduce future generations' options by depleting current resources and attempts to counterbalance the power asymmetry and decision-making bias favoring the present and short-term economic gains.

This article presents a summary of the main findings of my habilitation research that was published as a book in Hungarian,[5] which examines the doctrinal avenues of protecting future generations before domestic, and some international, courts. This research has been dedicated to drawing and appraising the changing normative contours of inter-generational equity as arise from the recent wave of environmental and climate litigation cases. Although the principle of intergenerational equity currently lacks binding and justiciable character in international law and has mostly appeared in preambular or declarative provisions rather than enforceable obligations, this study suggests that it may nonetheless serve as an essential building block for finding a legal path forward from the Anthropocene crisis.

The central question explored here is whether present generations have a legally protected right to utilize natural resources excessively and to create environmental

[3] Intergovernmental Panel on Climate Change (IPCC), Summary for Policymakers, in IPCC, *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the 6th Assessment Report* (IPCC, 2023), 20-1. para. B.6.1., https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf (last accessed: 31.12.2024.).

[4] P. Lawrence, Justifying Institutions for Future Generations Based on the Mitigation of Bias and Intergenerational Justice, in *Giving Future Generations a Voice – Normative Frameworks, Institutions and Practice* (Edward Elgar Publishing, 2021) 23.

[5] Sulyok K., *Van-e jogunk a fenntarthatatlansághoz?* (Orac, Budapest, 2025).

harms in ways that compromise the ability of future generations to meet their needs and enjoy their fundamental rights. This seemingly philosophical inquiry has profound legal implications, as courts around the world increasingly face claims based on the principle of intergenerational equity, which are filed by various actors in the name of future generations, or with express reference to their interests. What is more, an increasing number of judicial fora are stepping in to provide a judicially enforceable protection to the long-term environmental interests of posterity. Future generations appear in a growing number of legal systems and courts in various jurisdictions increasingly operationalize this concept to enforce protection against environmental and climate risks and harms.[6]

My book examines how the concept of intergenerational equity has evolved from a mere moral obligation or "soft law" principle to an increasingly justiciable norm that courts are willing to enforce through mandating binding constraints for present-day actors. The book analyzes how various legal doctrines under domestic and international law are reinterpreted to protect the interests of future generations who cannot represent themselves in policy-making and legislative processes. Through a comparative analysis of emerging case law across jurisdictions, the book identifies common legal strategies that have proven successful in protecting the long-term environmental interests of posterity before courts.

This article will briefly set out the main findings of the book's chapters and, therefore, addresses in Section 2 what will be called as the dual nature of intergenerational equity. This section will show how the principle of inter-generational equity has had two modes of operation, one being a standalone yet soft law principle that is not enforceable before the courts, and the other being an idea that is colouring the interpretation of well-established and justiciable norms and standards. Section 3 conducts a cross-jurisdictional overview of domestic climate and environmental litigation case-law and argues that the core normative protection that domestic as well as certain international courts afford to future generations lies in prohibiting the arbitrary treatment of future generations. Section 4 zeroes in on EU law and maps the building blocks of the protection of future generations in EU law that are already present in primary EU legislation such as the Treaties, the Charter of Fundamental Rights, and some of the general principles of EU law. Section 5 investigates the protection of future generations in the European Convention on Human Rights system, by unpacking the normative meaning of the 'inter-generational burden-sharing' principle as announced by the ECtHR in *KlimaSeniorinnen* case. Section 6

[6] For an overview of how future generations appear in the domestic legal systems of several European States and how domestic courts rely on this concept in their reasoning, see: K. Sulyok, *Annual Report of the 2024 EU Forum of Judges for the Environment (EUFJE) Conference: Human rights-based tools to protect the environment and future generations,* https://www.eufje.org/images/docConf/bud2024/Report_EUFJE2024_FINAL.pdf (last accessed: 31.12.2024.).

explores constitutional protection for future generations in Hungary, where the constitution contains a specific public trust provision, which has been enforced by the Constitutional Court on many occasions in order to safeguard the environmental interests of future generations. Section 7 draws conclusions by identifying some cross-jurisdictional solutions of courts for mediating between the competing interests of present and future generations. This section also comments on the potentially transformative character of intergenerational equity for the future of environmental and climate adjudication and law-making.

II. The dual nature of intergenerational equity: From a soft law principle to an enforceable obligation

Intergenerational equity – also referred to as intergenerational solidarity or justice – prescribes certain obligations for the current generation regarding the long-term interests, needs, or rights of future generations. For much of its history, this concept served merely as a soft law principle, appearing in non-binding documents and the preambles of international treaties. However, in recent years, an increasing number of judgments have emerged where national courts and, more recently, international judicial or quasi-judicial forums have endowed this principle with binding force, deriving judicially enforceable obligations for states.

The principle of intergenerational equity has deep moral roots in ethical literature, religious traditions, and ancient civilizations. Various indigenous communities, for instance, based decisions on ecosystem stewardship principles that considered the interests of past, present, and future generations. The Iroquois, for example, relied on the "seventh generation principle", which required leaders to consider the impact of their decisions on the next seven generations.[7]

The temporal scope of intergenerational equity varies. It may apply to all unborn generations, a handful of future generations, or be limited to the near future, such as 10-25 years as in the case of the Welsh Commissioner for Future Generations mandate.[8] The Maastricht Principles define future generations as "those generations that do not yet exist but will exist and who inherit the Earth",[9] a position adopted by

[7] See the seventh-generation principle adopted by the Confederation of the Six Nations of the Iroquois cited by Intergenerational solidarity and the needs of future generations: Report of the Secretary-General A/68/322. para 12.

[8] See the practice of the Welsh Commissioner for Future Generations in A. Netherwood and A. Flynn, A shift in public policy for future generations in Wales? Future generations and well-being planning, in J. Linehan and P. Lawrence (eds), *Giving Future Generations a Voice* (Edward Elgar Publishing, 2021) (149–168) 152.

[9] Maastricht Principles on the Human Rights of Future Generations, Section I.1).

several states in the advisory opinion proceedings before the International Court of Justice on states' climate change obligations.[10]

Legal scholars have identified three main obligations that current generations owe to future generations: the conservation of options, conservation of quality, and conservation of access.[11] Conservation of options requires present generations to preserve the diversity of natural and cultural resources so that future generations' options for solving their problems are not unduly restricted. Conservation of quality demands that the quality of Earth's systems be maintained so present generations do not pass on a degraded natural heritage. Conservation of access allows current generations free access to available natural resources as long as they respect future generations' equitable access rights.

While intergenerational equity has been incorporated into numerous international treaty preambles and occasionally in substantive provisions. For instance, Article 3 of the UN Framework Convention on Climate Change explicitly recognizes that "parties should protect the climate system for the benefit of present and future generations". Yet, there is currently no binding international treaty that explicitly obligates States to protect the long-term interests of future generations. The principle's meaning also remains somewhat fluid, with no established "catalogue"[12] of its elements, and varying definitions in non-binding legal instruments.

In the international human rights context, the principle of intergenerational equity is closely connected though distinct from the human rights framework. Human rights guarantees typically address intragenerational equity issues and apply among contemporaries, while intergenerational rights formulate obligations we owe to our descendants. Nevertheless, human rights norms are increasingly interpreted to allow for the judicial blocking of harmful policies that affect the interests of both present and future generations. This future-oriented dimension is particularly pronounced in relation to the right to life, environmental human rights, and the rights to food and water.

The Maastricht Principles on the Human Rights of Future Generations advocate for a new reading of international human rights law, pointing out that major human rights conventions do not limit their temporal scope,[13] suggesting that human rights guarantees should be equally guaranteed to future individuals as to present rights-holders. This approach has gained traction in climate litigation, where courts increasingly protect the human rights of present rights-holders against

[10] Olbigations of States with respect to climate Change, pending Advisory Opinion proceedings of the International Court of Justice.

[11] E. Brown Weiss, *In fairness to future generations: internatioanl law, common patrimony, and intergenerational equity* (The United Nations University, 1989).

[12] C. Redgwell, Principles and Emerging Norms in International Law Intra- and Intergenerational Equity, in C. Carlarne, K. Gray and R. Tarasofsky (eds), *The Oxford Handbook on International Climate Change Law* (Oxford University Press, 2016) 195.

[13] See Preamble Section II.

future harms and/or the rights of future individuals in the context of the climate and ecological crisis.

While initially viewed as merely symbolic, intergenerational equity has increasingly influenced judicial reasoning, with courts now more willing to incorporate future-oriented interpretations of existing legal obligations. This trend began in national legal systems and has started to permeate international adjudication, particularly in human rights contexts. By informing the interpretation of existing legal norms, intergenerational equity has become indirectly enforceable, even if it has not achieved status as an independently recognized binding principle. As Éloise Scotford noted, principles of international environmental law often serve as "normative stimuli" for courts to "develop law around these principles".[14] Intergenerational equity appears to fulfill a similar catalyzing function, providing theoretical grounds for judicial reasoning that infuses state obligations with an intergenerational dimension. This represents a significant evolution from its origins as a purely aspirational concept to its current role in shaping the normative content of binding and justiciable legal obligations.

III. Binding state obligations with intergenerational dimensions: The prohibition of arbitrary treatment of future generations

Referencing the interests of future generations appears to be an increasingly common litigation strategy in the legal systems of several jurisdictions. Despite the procedural and substantive legal differences between these cases, they share a common thread: the doctrines invoked by plaintiffs all ultimately seek to impose limits on the discretion of States to unilaterally undermine the long-term interests of future generations – in other words, to treat them in an arbitrary way. The prohibition of arbitrary exercise of governmental power constitutes the core of the "rule of law",[15] which also suggests that future generations litigation ultimately challenges the traditional contours of rule of law guarantees, seeking to expand them to the future as well.

This emerging trend in future generations litigation is examined in the book through the rule of law framework as defined by the Venice Commission of the Council of Europe, and organ that is tasked with advancing democracy and the rule

[14] E. Scotford, *Environmental Principles and the Evolution of Environmental Law* (Hart Publishing, 2017) 84.

[15] Venice Commission of the Council of Europe: Rule of Law Checklist, 2016. CDL-AD(2016)007-e, Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e (last accessed: 31.12.2024.).

of law on the international level. This framework[16] identifies five major pillars for the rule of law, namely:

(i) Respect for human rights;
(ii) Quality requirements for legal regulations;
(iii) Guarantees against the arbitrary exercise of power;
(iv) Non-discrimination;
(v) Access to justice.

This research argues that in climate litigation cases referencing the interests of future generations, courts are increasingly extending the temporal scope of the above rule of law guarantees to the future, effectively prohibiting states from arbitrarily disregarding the interests and needs of future generations in pursuit of immediate economic advantages. This also means that climate litigation spurs a 'revolution',[17] or at least a 'transformation'[18] of the traditional scope and normative meaning of the rule of law in the age of the Anthropocene.

These pillars featured at the core demands of the plaintiffs in these cases, even though a wide variety of substantive legal bases are invoked in climate litigation in various types of proceeding and before different types of judicial fora. This research argues that the idea of intergenerational obligations act as a linchpin among all the different legal proceedings and that the intergenerationally conscious reinterpretation of traditional rule of law guarantees emerge as the shared legal architecture of climate litigation proceedings.

The first pillar, namely, respect for human rights, has seen courts extend the temporal scope of various human rights standards to the future, requiring protective measures again future risk or harm. Initially, courts derived obligations toward future generations from constitutional rights to a balanced and healthy ecology, as in the landmark *Minors Oposa* case in the Philippines.[19] Similar approaches have been

[16] European Commission for Democracy through Law (Venice Commission), Rule of Law Checklist, CDL-AD(2016)007, adopted 11–12 March 2016.
[17] K. Sulyok, A rule of law revolution in future generations' litigation – intergenerational equity and the rule of law in the Anthropocene, (2023) (14) *re:constitution working paper,* DOI: https://doi.org/10.25360/01-2023-00005
[18] K. Sulyok, Transforming the Rule of Law in Environmental and Climate Litigation: Prohibiting the Arbitrary Treatment of Future Generations, (2024) (13) *Transnational Environmental Law,* 475.
[19] Supreme Court of the Philippines, *Minors Oposa v. Factoran* (Secretary of the Department of Environment and Natural Resources), G.R. No. 101083 July 30, 1993.

adopted in South Korea,[20] Hungary,[21] Brazil,[22] Hawaii,[23] and the State of Montana.[24] Other courts have focused on more general human rights guarantees that future living rights-holders would likely claim against dramatic climate impacts, such as the right to life and the right to private life under the European Convention on Human Rights.[25] Courts in Colombia[26] and Pakistan[27] have even explicitly recognized the environmental rights of "unborn generations", while Germany's Federal Constitutional Court held that inadequate climate protection measures in the federal climate protection law were unlawful because they shifted the burden of emissions reduction disproportionately to future generations. The Constitutional Court emphasized that such policies would lead to a future where "practically every form of freedom" would be endangered.[28]

Under the second pillar, courts have enforced quality requirements for climate legislation. Germany's Federal Constitutional Court found the federal climate law unconstitutional primarily because it did not specify long-term reduction targets, thereby unilaterally shifting the burden of emission reductions to future generations. Similar reasoning was adopted by South Korean Constitutional Court, referenced above, the Irish Supreme Court,[29] and the UK Supreme Court,[30] all demanding that climate policies be sufficiently detailed, concrete, and realistic.

The third rule of law pillar – prohibiting arbitrary exercise of governmental power – has manifested in various legal doctrines limiting sovereign decision-making that jeopardizes the long-term viability of natural values. Courts have consistently applied a "duty of care" standard requiring states to take all "reasonable and necessary" measures to prevent rights violations, including by third parties. The European Court of Human Rights recognized this duty in its first climate cases, while national courts applying the ECHR have concluded that governments exceeded their margin of

[20] Constitutional Court of Korea: Case on the National Greenhouse Gas Reduction Targets Addressing the Climate Crisis, Constitutional Court of Korea, Judgment, 29 August 2024.
[21] Constitutional Court of Hungary, Decision No. 14/2020 (VII.6.) AB (Forest decision).
[22] Supreme Court of Brasil: *PSB et al. v. Brazil* (on Climate Fund) (2022), paras. 6, 8, 15, 16.
[23] In re Hawai'i Electric Light Co., SCOT-22-0000418, 13 March 2023.
[24] *Rikki Held v. State of Montana,* Cause No. CDV-2020-307, Findings of Fact, Conclusions of Law, and Order (14 August 2023). Section VI.A. 40. *(Held v. Montana).*
[25] E.g. *VZW Klimaatzaak v. Kingdom of Belgium & Others,* French-speaking Court of First Instance of Brussels, Civil Section, JUG-JGC No. 167, judgment (17 June 2021) case.
[26] Supreme Court of Colombia: *Demanda Generaciones Futuras v. Minambiente,* Number 11001-22-03-000-2018-00319-01, 4 April 2018, para. 5.2.
[27] Supreme Court of Pakistan: *D. G. Khan Cement Company Ltd. V Government of Punjab,* C.P.1290-L/2019, para 19.
[28] German Federal Constitutional Court: *Neubauer et al.,* the Order of the First Senate of 24 March 2021, 1 BvR 2656/18, para. 117.
[29] Supreme Court of Ireland, *Friends of the Irish Environment,* Judgment of 31 July 2020 para.6.21, 6.36.
[30] *R (oao Friends of the Earth) v. Secretary of State for Business Energy and Industrial Strategy,* [2022] EWHC 1841 (Admin), para. 248.

appreciation under Articles 2 and 8 by failing to demonstrate the necessary care in designing greenhouse gas emission reduction pathways.

Other legal approaches include the public trust doctrine, which holds that states cannot dispose of natural resources without limitation but must act as sovereign trustees, preserving trust assets for beneficiaries, including present and future generations. This doctrine has been successfully applied worldwide in environmental litigation[31] to invalidate political decisions that arbitrarily harm future generations' needs and rights, and is increasingly used in climate litigation.[32]

The fourth rule of law guarantee addresses non-discrimination against minors and future generations based on age. Scientific evidence shows that children born today will experience far more dangerous climate conditions than previous generations – a 2020 study indicates that a person born in 2020 will live in a world on average 2 °C warmer and suffer six times more heatwaves than a person born in 1960.[33] Such unequal climate conditions resulting from present policies can be framed as discriminatory treatment, either as indirect discrimination against children based on age or as discrimination based on birth cohort.

Finally, the fifth pillar concerns access to justice in future generations cases, addressing whether environmentally and climatically charged policy decisions can be adjudicated by courts and whether plaintiffs have standing to protect future generations' interests. While the Venice Commission has noted that "the judicial branch appears to be best placed to protect the future generations against the decisions of present-day politicians",[34] the political question doctrine and separation of powers concerns still block climate litigation in some countries, particularly the United States and Canada.

[31] J. Orangias, Towards Global Public Trust Doctrines: An Analysis of the Transnationalisation of State Stewardship Duties, (2021) 12 (4) *Transnational Legal Theory,* 550–586; K. Sulyok, The Public Trust Doctrine, the Non-Derogation Principle and the Protection of Future Generations: The Hungarian Constitutional Court's Review of the Forest Act, (2021) (9) *Hungarian Yearbook of International Law and European Law,* 359.

[32] M. C. Blumm and M. Ch. Wood, "No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine, (2017) 67 *American University Law Review,* 70–82, also see the lawsuits and campaigns launched by Our Children's Trust at https://www.ourchildrenstrust.org/ (last accessed: 31.12.2024.).

[33] W. Thiery, S. Lange and J. Rogelj, Intergenerational Inequities in Exposure to Climate Extremes, (2021) (374) *Science,* 158.

[34] European Commission for Democracy through Law (Venice Commission), Opinion No. 997/2020, 9 October 2020, CDL-AD(2020)020-e.

IV. Future generations in EU law: Building blocks of a legal obligation for EU institutions to protect Long-term interests

Despite the absence of explicit provisions obligating EU institutions to protect future generations in the founding Treaties, various legal hooks in EU primary legislation could be reinterpreted to justify stronger protection of long-term interests across all EU policies.[35] Several normative foundations in existing EU law, such as existing and emerging general principles of EU law, and international legal developments, under customary international law and some international treaties to which the EU is a party to, collectively provide a framework for future-proofing EU law.

The Treaty on European Union (TEU) contains key concepts that could support intergenerational protection. "Solidarity between generations" in Article 3(3) TEU could be interpreted as requiring EU institutions to balance short and long-term interests. Solidarity as a fundamental value under Article 2 TEU has been confirmed by the CJEU as "one of the fundamental principles of EU law" and could apply to intergenerational challenges. The EU's commitment to non-discrimination [Article 3(3) TEU] and sustainable development [Article 3(3) TEU] further supports this approach, as does the protection of human rights, including children's rights.

The EU Charter of Fundamental Rights offers the most direct reference to future generations in the primary legislation of EU law, stating in its Preamble that Charter rights "entail responsibilities and duties with regard to other persons, to the human community and to future generations" Article 37 on sustainable development provides an interpretative tool that could adjust the balancing of EU institutions between competing short and long-term interests.

General principles of EU law, particularly the precautionary principle and prohibition of age-based discrimination, provide additional support for the future-oriented duties of EU institutions. The precautionary principle, recognized as an autonomous general principle,[36] allows taking action to prevent future risks and is inherently future-oriented. The prohibition of age-based discrimination could also address the disparate impacts future generations will face due to climate change.

Two emerging general principles could potentially strengthen the framework by creating additional obligations for EU institutions to actively care for the future: intergenerational equity and the right to a healthy environment. Over 50% of EU

[35] For more details see: K. Sulyok, Future proofing EU law – does the European Union have a legal obligation to protect future generations? (forthcoming in RECIEL).

[36] T-13/99, *Pfizer Animal Health SA v Council,* ECLI:EU:T:2002:209, para 114; Joined Cases T-74, 76, 83–85, 132, 137 and 141/00, *Artegodan GmbH v Commission,* ECLI:EU:T:2002:283; see also: P. Craig and G. de Búrca, *EU Law* (4th ed., Cambridge University Press, 2020) 608.

Member States mention future generations in their constitutions,[37] and most recognize environmental rights, potentially justifying the CJEU's recognition of these as general principles of EU law.

International treaties to which the EU is party, including the UN Framework Convention on Climate Change, the Paris Agreement, the Convention on Biological Diversity, and the Aarhus Convention, all reference protection of future generations and form an integral part of EU law. Additionally, as a subject of international law, the EU must also respect customary international law with the scope of climate-related obligations currently being debated before the International Court of Justice in its pending climate advisory opinion.

Several legal avenues exist for mobilizing these normative foundations. EU legislators could adopt regulations based on a future-conscious reading of the Union's fundamental aims, potentially using the flexibility clause (Article 352 TFEU) to create legislation protecting future generations. The Commission could use its mandate to propose legislation that considers long-term impacts. Most transformatively, the CJEU could develop positive obligations under the Charter and declare new general principles of EU law based on emerging constitutional traditions in Member States. Without amending the founding treaties, these existing legal hooks could justify and potentially compel more ambitious protection of long-term interests by EU institutions, aligning with the fundamental purpose of the European project to ensure lasting peace and prosperity.

V. Protecting future generations by the European Court of Human Rights in climate cases

The European Court of Human Rights (ECtHR) made a groundbreaking shift toward protecting future generations in its landmark ruling in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*.[38] This decision represents a paradigm shift in how international courts approach intergenerational equity in climate litigation. The Court crafts another variation of the principle, namely, "intergenerational burden-sharing",[39] which becomes as a cornerstone principle in its reasoning, making it the first foundational consideration upon which the judgment was built. This principle became more than mere rhetoric, as the ECtHR derived specific legal obligations from it,

[37] R. Araújo and L. Koessler, The rise of the constitutional protection of future generations, (2021) (7) *LPP Working Paper,* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3933683 (last accessed: 31.12.2024.) which counts 81 such constitutions around the world.

[38] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland,* App. No. 53600/20, Grand Chamber judgment (April 9, 2024). For more details see K. Sulyok, Verein Klimaseniorinnen Schweiz and Others v. Switz. (Eur. Ct. H.R.), (2025) 64 (1) *International Legal Materials,* 1–186. DOI: https://doi.org/10.1017/ilm.2024.45

[39] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland,* paras. 410, 420.

namely, that of taking "immediate action" and the duty to set "adequate intermediate reduction goals… for the period leading to net neutrality".[40]

The judgment articulated specific positive obligations for State parties to the European Convention on Human Rights under Article 8, recognizing that the right to private life encompasses "the right of the individuals to effective protection by State authorities against the harmful effects of climate change".[41] The Court established an unprecedented list of technical requirements as part of States' positive obligations for adopting national climate measures, including *(i)* the obligation of setting time-bound carbon neutrality goals with quantifiable carbon budgets in a binding regulatory framework, which ensures reaching net neutrality within, in principle, three decades; *(ii)* the need to establish appropriate interim GHG reduction targets by sector, leading up to net neutrality; *(iii)* the duty of demonstrating compliance with these targets; *(iv)* that of updating targets based on the best available evidence and due diligence; *(v)* implementing relevant legislation in a timely, appropriate and consistent manner; and *(vi)* ensuring certain procedural safeguards, such as access to the underlying studies and information for affected citizens.[42]

Significantly, the Court rejected arguments that climate action should be left solely to the political branches, stating that climate change "is no longer merely a political matter but also a legal one".[43] It affirmed that courts have a duty to protect future generations from present-day political decisions, citing the Venice Commission's view that "the judiciary appears to be best placed to protect future generations against decisions by present politicians".[44]

The Court also explicitly rejected the "drop in the ocean" defense, emphasizing that all States must reduce emissions significantly to achieve climate neutrality within the next three decades, regardless of their relative contribution to global emissions.[45] This establishes a universal obligation that cannot be avoided by reference to one's globally marginal emissions or other States' inaction in taking adequate mitigation steps.

While the judgment does not explicitly mandate targeting the 1.5 °C temperature goal of the Paris Agreement, it does acknowledge that climate impacts will be significantly less severe if warming is limited to this level.[46] It is argued therefore that if read together with the requirement to prevent higher levels of warming that could cause "serious adverse effects",[47] the judgment does create, albeit indirectly, a duty of States toward aiming for 1,5 °C in their efforts.

[40] Ibid. para. 549.
[41] Ibid. para. 519.
[42] See Ibid. paras. 549–554.
[43] Ibid. para. 450.
[44] Ibid. para. 199.
[45] Ibid. para. 444.
[46] Ibid. para. 436.
[47] Ibid, para. 546.

At the same time, the judgment is silent on some important issues, such as the precautionary principle, negative emissions technologies, and climate justice considerations regarding historical emissions. It nonetheless establishes a robust foundation for future climate litigation cases where intergenerational equity serves as a key interpretive lens for State parties' human rights obligations. The judgment demonstrates how the concept of future generations can be effectively deployed in judicial reasoning to strengthen states' preventive obligations by extending the temporal horizon of their duties. This approach may influence other international courts, including the International Court of Justice in its pending advisory proceedings on climate change obligations.

VI. Protecting future generations by Hungarian courts: A constitutional public trust doctrine in action

The public trust doctrine represents one of the oldest legal principles governing natural resource management, with roots dating back to Roman law. This doctrine establishes that certain natural resources are held by the State in trust for public use and benefit, both for present and future generations. As trustee, the state's authority to manage these resources is constrained by fiduciary obligations to preserve them for the public and future beneficiaries.

In contemporary jurisprudence, the doctrine has evolved significantly across different jurisdictions. In the United States, where it has a rich jurisprudential history, courts have expanded the doctrine from traditional applications to navigable waters and shorelines to encompass wildlife protection, groundwater resources, and even atmospheric protection in climate litigation. The landmark *Mono Lake* case in California (1983) established that the public trust doctrine could limit previously granted water rights when necessary to protect ecological systems. In India, the Supreme Court has applied the doctrine broadly to protect forests, rivers, and other resources, explicitly stating in *M.C. Mehta v. Kamal Nath* (1997) that the doctrine extends beyond present needs to safeguard resources for future generations. The Philippine Supreme Court similarly ordered the rehabilitation of Manila Bay based on the public trust doctrine in 2008, while the Pennsylvania Supreme Court invoked the doctrine to invalidate legislation permitting hydraulic fracturing.

Hungary's constitutional framework offers a robust protection for future generations through Article P of the Fundamental Law, which establishes the concept of the "common heritage of the nation". This provision, unique among European constitutions, requires the State and all citizens to protect, maintain, and preserve natural resources, biodiversity, and cultural heritage for future generations.

The Hungarian Constitutional Court has consistently treated Article P as a source of substantive legal obligation rather than a mere declaratory statement. Through a series of landmark decisions since 2015, the Court has both annulled legislation that would have diminished environmental protections and established affirmative duties for the state as a fiduciary for future generations.

In its 14/2020 decision concerning the constitutionality of the amendment of the Forest Act, the Court explicitly recognized Article P as enshrining the public trust doctrine in Hungarian constitutional law.[48] Under this interpretation, the state functions as a trustee managing natural resources on behalf of future generations as beneficiaries. This fiduciary relationship limits the State's unfettered discretion to exploit natural resources and requires decision-making that balances present needs with future interests.

The Court has articulated several specific obligations flowing from Article P. First and foremost, the non-retrogression principle, according to which the legislature cannot step back from the stringency of statutory protection already provided in the law in force relating to the environment. This principle forbids the state from regulatory rollbacks or amendments lowering the level of protection without proper justification meeting strict constitutional requirements of proportionality and necessity in light of a narrowly defined list of legitimate aims.[49]

The intergenerational equity principle also forms part of Article P in the Court's interpretation. This principle, as proposed in the seminal book of Edith Brown Weiss,[50] is defined as imposing three main duties on the present generation, that of preserving options for future generations, maintaining environmental quality, and ensuring equitable access to resources.[51]

Moreover, the Constitutional Court found on the basis of Article P that the legislature has a duty to plan for the long-term, meaning that it must engage in multi-generational planning that transcends electoral cycles when making decisions affecting natural resources.[52] This is coupled with the duty of prudent resource management, as the State must conserve both the quantity and quality of water resources, and incentivize private citizens to use natural resources sustainably.[53]

Furthermore, the Court also deems the precautionary principle to be inherent in the protection of the interests of future generations. It stressed that in cases of scientific uncertainty about environmental risks, the burden falls on the State to prove

[48] 14/2020 (VII. 6.) AB decision.
[49] See decision Nos. 28/2017 (X. 25.) AB; 17/2018 (X. 10.) AB; 3104/2017 (V. 8.) AB finding violations of the non-retrogression principle.
[50] Brown Weiss, *In fairness to future generations...*
[51] Decision No. 28/2017 (X. 25.) AB.
[52] Decision No. 28/2017 (X. 25.) AB.
[53] Decision No. 13/2018 (IX. 4.) AB.

that regulatory changes will not cause irreversible harm to the environment.[54] The prevention principle is also associated with Article P) and with the right to a healthy environment, according to which the State must prioritize preventing environmental harm rather than merely sanctioning it after damage occurs.[55] The Constitutional Court even declared that the legislature cannot replace preventive regulatory tools with legal methods that address environmentally harmful activities *ex post facto,* as doing so constitutes an unconstitutional regression from the stringency of regulatory protection.

The above principles that were developed in environmental cases, are now gaining relevance before the Court in Hungary's first climate litigation case, which is pending before the Constitutional Court, challenging Hungary's Climate Protection Act of 2020.[56] Petitioners allege the inadequacy of Hungary's interim 2030 emissions reduction target of 40% below 1990 levels – a target the government acknowledged in 2024 has already been achieved. They argue this over-lenient target violates the right to a healthy environment and the public trust doctrine embodied in Article P) by putting future generations on a harmful path depency and unduly shifting the burden of decarbonization to posterity, particularly, since its ambition level makes in highly unlikely to effectively lead to net zero by 2050 and it falls far short of what IPCC science indicates is necessary to limit warming to 1.5 °C.

The petitioners' case has gained additional legal support with the *KlimaSeniorinnen* decision, which established concrete obligations for States to adopt effective climate measures, including appropriate interim reduction targets. Petitioners submitted an additional brief showing why and how the Climate Act fails to meet the positive obligations mandated by the ECtHR. The Court's ultimate decision may have profound implications for atmospheric public trust claims around the world, potentially establishing Article P's public trust doctrine as a powerful constitutional basis for challenging insufficient climate action on behalf of future generations.

VII. Conclusion: mediating between the competing interests of present and future generations

The legal protection of future generations requires courts to strike a legitimate and objective balance between competing interests of the present and the future. The underlying book has identified three principal methods that courts employ across domestic and international jurisdictions when adjudicating cases involving intergenerational conflicts.

[54] Decision Nos. 28/2017 (X. 25.) AB; 17/2018 (X. 10.) AB.
[55] Decision No. 13/2018 (IX. 4.) AB.
[56] Case No II/3536/2021.

1. Using scientific evidence to balance competing interests between generations

Courts frequently rely on scientific consensus about future risks to legitimate their intervention in policy decisions. In climate litigation, the European Court of Human Rights referenced IPCC reports when establishing states' obligation to adopt emission reduction targets based on best available science.[57] Similarly, the German Federal Constitutional Court emphasized that legislators must consider reliable data indicating potential exceeding of constitutionally relevant temperature targets.[58]

National courts also use scientific evidence as a reference point in defining what lies in the interests of future generations.[59] The Dutch Supreme Court directly adopted IPCC's global emission reduction projections when ordering the government to meet specific climate targets under ECHR Articles 2 and 8. National scientific advisory bodies' recommendations likewise play crucial roles, as seen in Belgium's *Klimaatzaak* case, where the court cited the Federal Council for Sustainable Development when finding a breach of the government's duty of care under civil law.[60]

2. Using soft law commitments as reference points

Courts frequently utilize non-binding political commitments and soft law instruments as benchmarks to determine whether a State conduct (or its absence) arbitrarily violates future generations' interests. The Hungarian Constitutional Court exemplified this approach in its Forest Act decision, where it used the Parliament's non-binding National Forestry Strategy to review mandatory rules in the Forest Act, finding that legislative changes permitting increased commercial logging while reducing nature conservation authorities' powers contradicted the sustainability principles in the strategy.[61]

The District Court of The Hague also employed similar reasoning in *Milieudefensie v. Royal Dutch Shell,* ordering the oil company to adopt stricter greenhouse gas reduction obligations based on the non-binding UN Guiding Principles on Business and Human Rights.[62] These examples demonstrate how courts transform soft law norms into judicially enforceable reference points, drawing authority from

[57] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland,* paras. 64–68.
[58] *Neubauer et al.,* the Order of the First Senate of 24 March 2021, 1 BvR 2656/18, para. 214.
[59] For an overview of how domestic courts utilize scientific evidence see: Sulyok, *Annual Report of the 2024 EU Forum of Judges for the Environment (EUFJE) Conference...*
[60] *Klimaatzaak,* page 76.
[61] Decision No. 14/2020 (VII. 6.) AB.
[62] Hague District Court, *Milieudefensie v Royal Dutch Shel PLC,* Commerce Team, C/09/571932 / HA ZA 19-379, Judgment (26 May 2021) para 4.4.13.

their adoption independent of litigation and their reflection of policy consensus about long-term values.

3. Rule of law guarantees as judicial balancing mechanisms

Finally, as shown in Section 3, rule of law guarantees provides courts with established legal principles to define the contours of obligations States owe to future generations. While acknowledging sovereign discretion in balancing competing interests, courts increasingly examine state decisions through rule of law requirements, effectively demanding a "reasonable balance" between present interests and longer-term concerns.

This approach for mediating the needs and rights of present and future people offers several advantages. First, rule of law guarantees are primarily procedural in nature, making it easier for courts to apply in concretizing intergenerational equity requirements. Second, grounding reasoning in fundamental legal norms that both judges and litigants recognize as well-established and justiciable ensures that jurisprudential development, while innovative, represents an incremental rather than a radical change. The rule of law, being the backbone of almost every major legal systems, ensures that any legal development tied to its guarantees will be anchored to legitimate and shared legal concepts. Empirical research into legal innovations suggests that revolutions in law do not work.[63] Hence in order to ensure lasting change, the execution of innovative legal ideas – such as the judicial operationalization of future generations – should remain incremental.

4. Systemic effects of enforcing intergenerational rights and obligations on environmental and climate law

The triple planetary crisis demands transformative, systemic change in legal systems. The legal construction of future generations represents a promising innovation that extends obligations' temporal scope, providing a meaningful response to the Anthropocene. This research suggests that operationalizing the concept of future generations in a normative way could be an essential legal avenue of charting humanity's way out of the Anthropocene through mending the short-term bias of traditional environmental and climate law and governance. We need novel tools to counter the planetary crisis,[64] and incremental change will likely be insufficient.

[63] N. Craik and S. L. Seck, The Value of an Innovation Framework for International Law, in N. Craik et al. (eds), *Global Environmental Change and Innovation in International Law* (Cambridge University Press, 2018) (317–328) 319.

[64] See the speech of UN SG Antonio Guterres deliveed on 22 April 2024 acknowledging that "we cannot solve 21st century problems with 20th century tools", https://news.un.org/en/

This research argues that judicially enforcing inter-generational rights and obligations appears to drive a transformation in three main directions. Attaching normative force to the idea of future generations acts as decentralizing, diversifying and expansive force with respect to the system of environmental and climate laws.

Firstly, regarding its decentralizing effect, lawsuits concerning future generations give rise to new voices and legal narratives from non-state entities, including cities,[65] federal states, and indigenous communities. Although the concept of inter-generational equity is a common theme underlying all these lawsuits, the legal recognition of future generations occurs within a decentralized framework. This manifests in the fact that the legal protection of future generations has varied legal bases and normative content across the jurisdictions, which is intricately linked to the doctrines and cultural aspects of national laws. Moreover, the normative concept of future generations is not a homogenous global entity, but possesses an essentially local character, inasmuch as domestic courts often refuse to grant standing to extraterritorial plaintiffs in climate litigation[66] and they bundle interests of present and future generations only on a local or national scale.[67] Future generational litigation therefore appears to enforce legal protection for a posterity that is closely tied to local imaginaries, in spite of the fact that inter-generational tensions manifest themselves on a planetary scale.

Secondly, litigation concerning future generations have a broadening influence by establishing new rights-holders, such as future generations or children,[68] in specific legal systems. From a procedural standpoint, this is evident in legal frameworks that permit a variety of participants, including young plaintiffs, civil society groups, and ombudspersons, to gain standing as representatives of long-term interests. Additionally, the narrative surrounding future generations paves the way for innovative legal strategies, fostering a more "imaginative"[69] reasoning and a richer discourse that amplifies the perspectives of diverse actors and legal traditions.

story/2024/04/1148806 (last accessed: 31.12.2024.).

[65] Conseil D'État: *Commune de Grande-Synthe v. France,* N° 427301.

[66] For lack of standing see *Milieudefensie v Shell,* judgment, para. 4.2.5. where the Hague District Court did not allow ActionAid's claim to proceed for not representing Dutch citizens (Hague District Court, *Milieudefensie v Royal Dutch Shell PLC,* Commerce Team, C/09/571932 / HA ZA 19-379, Judgment (26 May 2021); for a judicial finding where standing was granted to extraterritorial plaintiffs though was found that substantive olbigations were only breached *vis-á-vis* territorial plaintiffs see: Neubauer case (German Federal Constitutional Court: *Neubauer et al.,* the Order of the First Senate of 24 March 2021, 1 BvR 2656/18, paras. 101 and 173–181).

[67] For a class action lawsuit where interests were bundled on a local scale see: *Milieudefensie v Shell,* para. 4.2.4.

[68] For more details see A. Nolan, Children and Future Generations Rights before the Courts: The Vexed Question of Definitions, (2024) 13 (3) *Transnational Environmental Law*, 522–546. DOI: https://doi.org/10.1017/S2047102524000165

[69] M. Wewerinke-Singh, A. Garg and S. Agarwalla, In Defence of Future Generations: A Reply to Stephen Humphreys, (2023) (34) *European Journal of International Law,* 651.

Thirdly, the normative concept of future generations acts as a broadening force, blurring the lines between soft law and hard law and expanding the scope of judicially enforceable obligations. In several cases, courts are employing non-binding standards as a reference point to determine the interests of future generations that States are obligated to protect. This indicates that aspirations of soft law are increasingly being transformed into binding legal standards in case-law related to future generations. Additionally, inter-generational equity often broadens the temporal scope of well-established legal obligations as shown above.

Lastly, the narrative surrounding future generations challenges the conventional understanding of sovereign rights under international law, thereby expanding the scope of obligations that States must consider for the future. In summary, litigation for future generations limits the extent of States' unrestricted discretionary choices, as allowed under both domestic and international law, by establishing inter-temporal obligations in their place.

This research does make any predictions as to the future development or outcome of climate litigation cases on the domestic or international levels. Nevertheless, it argues that if courts continue to read intergenerational equity into binding obligations, the legal concept of future generations would likely push environmental and climate law further into these directions, transforming the legal and governance landscape. The current decade will undoubtedly determine the legal reach and future of 'future generations' as a normative idea, which was among the foundational principles of international environmental law at its inception in 1972 at the Stockholm Conference.

BOOK REVIEW

Kollonay, Csilla*

Review of Sára Hungler's "Social Justice, Welfare and EU Law: Integration in the Visegrád Countries"**

The main goal of the book is to examine the state of the welfare systems and social justice in (a part of) Europe and to analyse the functioning and results of European social protection and integration, including its failures and achievements. The growing inequalities in Europe and the visible deficiencies of European welfare models were the main sources of motivation underlying the author's engagement with these issues, coupled with the aim of identifying answers and ways of coping with the challenges to social justice and advancing it in the course of European integration.

To discover the reasons for the weaknesses and the potential means of improvement, the author has created an original, highly specific, and complex methodological framework.

After a general introduction to EU social laws and policies, she narrows down the focus of the book to the comparative study of four countries and two vulnerable groups and compares them in three dimensions. The compared countries are the members of the Visegrád Group, Poland, Slovakia, Hungary and the Czech Republic, chosen for their similarities that derive from their common historical backgrounds, the cooperative partnership aimed at their EU integration, and cultural and religious traditions coupled with the current differences in their socioeconomic development and orientation. The combined analysis of the four countries leads to relevant conclusions for the whole EU.

The two social groups selected for comparison are mothers of small children and the unemployed. The common feature of their high level of vulnerability is coupled with the sharp difference in their legal protection in EU and national law, deriving from their position at two opposite poles of EU regulatory competence. Mothers of small children, covered by mandatory EU norms, can be seen as a regulatory "success story", while adequate protection for the unemployed is still a mere "aspirational goal". The analysis of the social treatment of the two groups confirms the starting premise of the author: EU regulatory competence in social matters – manifested in voting rights – is a decisive element of social integration.

* Lehoczky Kollonay, Csilla, professor emerita, Central European University, kollonay@ceu.edu

** Sara Hungler, *Social Justice, Welfare and EU Law: Integration in the Visegrad Countries,* (Elgar, 2024, Cheltenham) 272 p.

DOI: 10.56749/annales.elteajk.2024.lxiii.15.285

Last but not least, the comparison is carried out in three dimensions: redistribution, recognition and representation – the core dimensions of social integration – drawing on Nancy Fraser's[1] theory of social justice, a cornerstone of the research and the book. The focus is on the impact of recognition on redistribution and representation – or, more specifically, the negative impact of a lower level of recognition on the other two dimensions and their regulation.

In this complex analysis, the influence of the three Fraserian dimensions on national legal and policy solutions that impact the situation of the compared groups are considered separately as well as in correlation. For the multi-factor comparison, the author uses the fuzzy-set qualitative comparative analysis (fsQCA) method associated with sociological and political research, combining qualitative (case analysis) and quantitative data. (In the Annexe, the author provides a detailed explanation of this method.) Primarily, the effectiveness of social transfers and employment policies in poverty reduction is assessed. The method results in revealing correlations that support the initial assumptions of the author: without mandatory minimum criteria for labour and social policies, including income transfers defined in enforceable norms, social justice for the unemployed cannot be achieved, and such transfers to working mothers are also fundamental for avoiding child poverty and social exclusion.

The analysis confirms the starting hypothesis that while the negative impact of the weaker recognition of a given group on the distributional and representational dimensions may reduce welfare state measures at the national level, the presence of EU hard law can counterbalance this. This is the case for working mothers: enforceable provisions on gender equality and social protection prevent national regulation from 'going below' the mandatory level of rights and benefits. In contrast, in the case of unemployed persons, the recognition dimension of social justice is predominantly dependent on the "deservingness" criteria and impacts the benefits provided to these people, who may be stigmatised as lazy or incompetent for losing their jobs and seen by many policymakers as potential abusers. The book underlines that if redistribution is subject to national discretion, besides insufficient replacement rates, eligibility criteria might "squeeze out" members of this vulnerable group from social benefits – or direct them through a (not very efficient) "active labour market policy" (ALMP) to re-enter the labour market without delay. However, the urge to find employment may prevent them from finding a job that is suitable in the long term.

For both groups, the fsQCA analysis across countries reveals that current trends are leading to a greater emphasis on labour market integration and employability, while the income-replacement function of such schemes is receiving decreasing attention.

[1] Nancy Fraser is a prominent exponent of Critical Legal Theory and feminist known worldwide for her philosophical works on, among other issues, the concept of truth and social justice.

The findings reveal similar important challenges in the representation dimension as well. The lack of EU competence to legislate in areas related to the right to association and collective bargaining leaves regulation relating to matters of social dialogue in the national domain.

As a result of the research, the author comes to the conclusion that the main reason behind the insufficient progress with social integration is the still dominant role of market integration in the EU that enjoys constitutional protection, while the social dimension of integration is not given similar status (including in how the jurisprudence of the CJEU gives preference to economic freedoms over social rights). The author mentions with criticism this "constitutional asymmetry" that dates back to the historic origins of the EU and still preserves the unequal distribution of competences. While defined as "shared competences" in the TFEU, the social dimension is primarily left to national competences.

The final conclusion of the book – based on the results of the analysis – is that social integration in the European Union is associated with considerable difficulty, which raises doubts about the achievable level of integration. If the EU intends to have a significant impact on social integration, especially via its implementation through binding legal regulations, substantial reforms of the EU are needed, including to the current voting system. Referring to the Single European Act, which brought about transformative changes through the revolutionary extension of qualified majority voting, the author concludes that a similar approach that leads to a shift from unanimity to qualified majority voting in the social area is needed to promote substantial reforms that foster social justice and progress in social integration.

Somody, Bernadette*

Review of István Hoffman's "The Recent Past and Present of Local Self-Government Through the Lens of Human Public Services"

István Hoffman's monograph, *Human Public Services and Local Self-Government – Transforming Responsibilities in a Rapidly Changing System (Humán közszolgáltatások és önkormányzatiság – átalakuló feladatok egy rohamosan változó rendszerben),* was published in 2023 as part of the Scientific Series by the Faculty of Law of Eötvös Loránd University and ORAC Publishing House. The book's detailed subtitle provides a clear indication of what readers can expect. The author primarily addresses welfare, educational, and cultural public services, focusing on their evolution in the Member States of the European Union and other welfare states from the last third of the 20th century to the present. Naturally, all the sectors that are examined share the feature that other state organs and private institutions, alongside local governments, also participate in the provision of these services. The study, however, focuses on the role of local governments.

The first part of the work summarises the methodological and conceptual foundations. Although this section constitutes almost one-third of the book, its length is not unwarranted. The presentation of the methodological framework, which extends far beyond laying the groundwork for the subsequent analysis, serves as a valuable reference for future studies. The introduction to comparative administrative science and the methods for the comparative examination of local governance serve as a robust starting point for future analyses. In this regard, the book also sets a course for such studies with its multidisciplinary administrative science approach, employing methods from law, political science, sociology, and economics. According to the author, this complex perspective is indispensable as "many characteristics of local government functions and operations cannot be uncovered using legal methods alone".

Recent developments have reinforced for researchers in the field of administrative law that understanding political, economic, and social contexts is essential for accurately evaluating whether certain legal institutions fulfil their intended functions. In comparative studies, it is particularly important to avoid misleading conclusions drawn from examining legal institutions in isolation from their broader legal and

* Somody, Bernadette Habil. Associate Professor, ELTE University, Faculty of Law, somodyb@ajk.elte.hu

DOI: 10.56749/annales.elteajk.2024.lxiii.16.289

socio-political contexts. The author highlights numerous relevant factors beyond administrative law concerning the role of local governments in providing human public services. These include the constitutional status of local governments, traditional frameworks of local government regulation, sectoral policy approaches, local-territorial spatial structures, and systems for organising public services.

In addition to methodology, the book's first part discusses the concept and scope of human public services. Hoffman adopts a narrower interpretation of public services, excluding the public authority activities of the state. However, he applies a broader interpretation of human public services, encompassing healthcare services, social welfare, educational services, research organisation and support, and cultural public services. This section also includes the interpretation and classification of local government responsibilities, outlining the conceptual framework for distinguishing between local government responsibilities and tasks performed by local governments, as well as defining the essence of local government.

The second part of the book examines the responsibilities of local governments related to welfare public services, while the third part addresses their role in cultural public services in the broad sense. Across four chapters, the author methodically guides readers through a comprehensive analysis of local-territorial government responsibilities concerning social, health, educational, and cultural services. Each chapter discusses the effects of European Union law and policies, which are limited due to the primacy of national competences. The dissertation delves into the sectoral subtopics with remarkable meticulousness, presenting a wealth of data and information supported by an extensive body of literature, yet ultimately, it still reveals the 'big picture': the starting point in every case is the service delivery models, and the outcome of the study is a comprehensive model formulation.

In the fourth part, Hoffman summarises his findings, concluding that over the past two decades – driven by the 2008/2009 economic crisis, the COVID-19 pandemic, globalisation, and the rise of populist movements and hybrid regimes from 2010 onward – centralisation trends have emerged worldwide. These factors, especially crises, have led to the centralisation and standardisation of public services globally, resulting in what Hoffman describes as the "thinning" of local self-government in human public service systems. These centralisation tendencies manifest differently across countries. In Western and Northern Europe, top-down reforms have primarily aimed at modernisation, restructuring municipal scales, and creating larger service units within the framework of local government. These regions experienced a form of creeping centralisation through regulatory or soft-law service standards. Similarly, the centralised organisation of data systems has led to latent centralisation, as digital solutions for public service management often require centralised infrastructure. By contrast, Southern and East-Central European countries are characterised by direct

centralisation, with the partial 'nationalisation' of previously municipal public services – that is, their organisation under direct state administration.

Beyond organisational perspectives, the author analyses welfare disparities, positing that the gap in public service quality has widened between core and semi-peripheral countries. This division aligns with the duality identified in centralisation trends.

The question arises whether it is possible to identify enduring models in Europe, which is marked by diverse local government organisational structures and public service policy approaches. In addition to this fragmentation, as highlighted in the subtitle, we are in an era of rapid changes, as demonstrated by the COVID-19 pandemic and subsequent crises. Regarding local governments' human public service responsibilities, Hoffman ultimately distinguishes two main European models while allowing for further subgroupings. The northern model, characteristic of Northern, Western, and some Central European countries, has featured relatively broad local government responsibilities and softer centralisation trends in recent decades. In contrast, the southern model, typical of Southern, East-Central, and Southeast European countries, has entailed a narrower conception of local governance and pronounced centralisation alongside reduced public service expenditure.

The natural target audience of István Hoffman's dissertation includes those engaged in human public services, whether as administrative lawyers or as representatives of other academic disciplines. Each chapter organises and analyses a significant volume of information and knowledge concerning the four sectors under examination – social, healthcare, educational, and cultural services – on an individual basis. Moreover, through the lens of human public services, the book provides valuable insights into the evolution of local self-governance over the past five decades and its current characteristics, including the weight and role of local governments in Europe and in our narrower region.

Printed by: Multiszolg Ltd