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Marriage Invalidity – A Comparison of English and Hungarian Rules

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Abstract: Through a dogmatic comparative lens, the paper scrutinises the nuanced criteria for determining marriage invalidity through a comparative analysis of English and Hungarian legal frameworks. It explores the divergent historical trajectories and legal traditions that have shaped the conceptualisation of marriage in these two jurisdictions, noting the transition from ecclesiastical to secular regulation. It highlights the impact of recent legislative reforms, such as the ongoing revision of marriage law in England and Wales led by the Law Commission and the incorporation of family law into the Civil Code in Hungary. Furthermore, the analysis includes insights from the jurisprudence of the European Court of Human Rights, providing a common frame of reference for evaluating fundamental rights within both legal systems. By illuminating the complexities surrounding marriage invalidity, this study contributes to a deeper understanding of the intersection between legal tradition, social norms, and individual rights in the context of marital relationships.

1. Introduction

A line can be drawn between two traditions of understanding marriage in Western law: one views marriage as a contract, the other as a covenant. Consent is needed in both cases but a contract aims at an exchange of rights and duties while a covenant is a bond with more dimensions. Whether seen as a contract or a covenant, the existence and the validity of concluding

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the legal relationship has broad consequences that are both similar and dissimilar to those of contract law. The ancient Roman legal principle "Consensus non concubitus facit nuptias," while aiming at legal certainty, is not without its criticisms. This paper aspires to explore the complex issues of invalidity by analyzing English and Hungarian marriage law from a dogmatic comparative perspective and supplementing the substantive law with a glimpse at the fundamental rights viewpoint of ECtHR jurisprudence as a common frame of reference for both jurisdictions.

The reason for singling out these two legal systems is that both had a customary law tradition. Still, marriage had been regulated by canon or ecclesiastic law and then this area was secularized. This historical tradition is also the cause for the fragmentation of the law, however, the origins of this are different in the two jurisdictions and derive from the nature of common law in England and Wales. It has a distinct historical origin in Hungarian law that became part of the continental legal tradition but its development of marriage law is not characteristic of other continental legal traditions. In several other aspects, these two systems are not alike: In England and Wales, (some) religious marriages[1] are acknowledged besides civil ceremonies while in Hungary, civil-only marriages are recognized by the law. English legislation is contemplating a revision of its marriage law, through a project led by the Law Commission,[2] while Hungarian rules for marriage have relatively recently been revised when the recodification of the Civil Code allowed family law to return to the private law codex.

1.1. Point of Departure

In the UK – in England and Wales – the Law Commission started the project of revising rules for marriage in 2015. As these rules are very complex, marriage can be concluded in both a secular and a religious setting. The government gave the mandate to the Commission in 2018 and the project was

1 Which brings its own problems – see: Rebecca Probert, Rajnaara C. Akhtar, and Sharon Blake, *Belief in Marriage – The Evidence for Reforming Weddings Law* (Bristol: Bristol University Press, 2023), 2.

2 Law Commission reforming the Law: Weddings. Current project status: https://lawcom.gov.uk/project/weddings/; full report published by Law Commission for England and Wales, "Celebrating Marriage: A New Weddings Law, Report no. 408," 18 July 2022, London, accessed July 30, 2024, https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2022/07/A-new-weddings-law-LC-report.pdf.

launched in July 2019, but soon the global pandemic brought several additional questions to light.[3] The main subjects of the undertaking are legal preliminaries, types of weddings, venues of celebration, the wedding ceremony, and marriage validity.

In Hungary, most recently marriage was revised as part of family law in the grand project of the recodification of the Civil Code. The Civil Law Codification Committee was established in 1999 and the final law was passed in Parliament in 2013. Concerning marriage, the most important changes were the dogmatically defined difference between non-marriage and invalid marriage:[4] some minor failures of form, not attributable to the spouses, do not result in invalidity anymore, and minor changes in the marriage impediments were also implemented. However, the system of invalidity rules of the socialist era had not been revised, which is a missed opportunity for dogmatic excellence.

1.2. Genesis

The concept of nullity is one of the most common institutions that is applied through wide areas of private law that divest legal actions of their legal effects.[5] In ancient Roman law, there was no coherent dogmatically elaborated concept of nullity but some defects led to automatic nullity and others gave rise to an action in nullity. About rules of nullity concerning marriage, Modestinus notes, "It is always necessary to consider not just what is lawful but also what is decent."[6] The two types of nullity, void and voidable acts, therefore, might be understood as having two reasons for depriving of legal effects: void acts that are *ab initio* null are to safeguard public order while voidable acts are to protect the private interest of one of the parties.[7]

There is no denying that many features of marriage are contract-like, most prominently the act that creates marriage is the consent and

3 Nicholas Hopkins, Elizabeth Welch, and Sam Hussaini, "The Law Commission's Project on Weddings Law Reform," *Ecclesiastical Law Journal* 23, no. 3 (2021): 267–79, https://doi.org/10.1017/S0956618X21000351.

4 2013. évi V. törvény a Polgári Törvénykönyvről – 2013 Act V. Hungarian Civil Code (hereinafter: HCC) 4:5. § (1).

5 Ronald J. Scalise, Jr., "Rethinking the Doctrine of Nullity," *Louisiana Law Review* 74, no. 3 (2014): 664.

6 Digesta Iustiniani 23.2.42.

7 Scalise, "Rethinking the Doctrine of Nullity," 670.

the intention behind it. The problem with placing so much weight on intent is that marriage is "too intimate a matter to be left to the crudities of the law, yet it is also too public a matter to be left to the private convictions of the parties."[8] Therefore, civil law can only rely on the uttered form of the intent declaration of will, however, as will be shown below, sometimes hidden intent might cause invalidity in marriage. In canon law, this civil understanding that consensus in itself constitutes the marriage is not accepted, besides, this consent has to be proven by words rather than deduced from the actions of the parties. Subsequently, the exchange of words has to be followed by intercourse to create marriage. Now, this is important because the formalities that the law imposes on the conclusion of marriages reach back to this tradition of catholic canon law when clandestine marriages were to be ended by the Council of Trent in 1545–63. In England this happened later – in 1753, under the Marriage Act, common-law marriages came to an end.

Hungarian law has taken a different path, secular marriage appeared with the XXXI Act on Marriage Law of 1894. This act had several dogmatic questions settled much like English law with traces of canon law and contract law. This dogmatic excellence was left behind with the socialist law of the 1952 Act IV on Marriage, Family, and Guardianship and has not entirely been resurrected at the recodification of the Civil Code.

Free and full consent of the parties to marry is a fundamental prerequisite that appears in international human rights treaties as well. This consent cannot be conditional upon a time limit or otherwise in Hungarian law.

2. The Existence of Marriage

The concepts of valid, voidable, void, null, and non-existent marriage or non-marriage are rather confusing. This is even more evident in ECtHR jurisdiction since, while one marriage contracted outside *lex loci celebrationis* may still entail consequences, another similarly contracted regardless

[8] Christopher Brooke, *The Medieval Idea of Marriage* (Oxford, New York: Oxford University Press, 1989), 130.

of the civil law procedure is deemed non-existent and without any consequences.[9]

The question of non-marriage shall be addressed first, as dogmatically it is very peculiar. First of all, thinking about a legal act that does not exist is a fairly philosophical task, but legal abstraction besides practicality has been part of the duality of private law for centuries. Obviously, a marriage concluded on the stage by two actors playing Romeo and Juliet cannot be considered to be an existing marriage, which also applies to a similar situation at music festivals, or TV shows.[10]

However, when in a country where only marriage contracted in a civil registry office is acknowledged, a canonic marriage entered into by the parties who are eligible to marry one another, have no previous marriage, are not relatives to one another, etc. solemnized by a priest, creates a lawful marriage in canon law but is regarded a non-marriage in civil law, just like one on the stage.

> Marriages that do not meet the formality requirement should be void rather than deemed to be non-existent: failure to comply with the formalities should not be a more serious flaw in marriage than marriage below a certain age or within the prohibited degrees [of consanguinity or affinity][11]

which would be considered void marriages and therefore financial and other consequences may arise. Nonetheless, this is the case in Hungarian law, where the concept of non-existing marriage is defined by the Civil Code.[12]

The definition of non-marriage does not exist in statute law in England and Wales but has been a developing concept in jurisprudence.[13] So far,

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9 ECtHR Judgment of 8 December 2009, Case Muñoz Diaz v. Spain, application no. 49151/07 and ECtHR Judgment of 2 November 2010, Case Şerife Yiğit v. Turkey, application no. 3976/05.

10 Depending on the jurisdiction, even some destination weddings at exotic holiday resorts are non-existent because couples would need to give notice in person 28 to 30 days before the wedding and few holidays last that long.

11 Rebecca Probert, "When Are We Married? Void, Non-existent and Presumed Marriages," *Legal studies (Society of Legal Scholars)* 22, no. 3 (2002): 409, https://doi.org/10.1111/j.1748-121X.2002.tb00199.x.

12 HCC 4:5. § (1).

13 Rebecca Probert, "The Evolving Concept of Non-marriage," *Child and Family Law Quarterly* 25 (2013): 314–35.

intention has played a double role in determining the existence of marriage. On the one hand, intention is not enough to turn a non-marriage into a void marriage, much less into a valid one (El Gamal v. Maktoum, Dukali v. Lamrani). On the other hand, however, if the ceremony was consistent with the law, the lack of intention of the parties can transform it into a non-marriage (Galloway v. Goldstein).[14] In determining the existence of a marriage, the precedent Hudson v. Leigh states that four factors should be examined, namely whether the ceremony was aimed to be in accordance with the law; whether it had enough hallmarks of marriage; whether parties played a role, and most importantly the officiating official believed that the ceremony would create a lawful marriage; and whether others attending held the belief that it was a lawful marriage ceremony.[15] Now, some of the problems with this can be shown if one compares two cases: in Gereis v. Yagoub, even though the couple was advised to have a civil ceremony as well, their ordinary Christian marriage that was celebrated in an unlicensed Christian church was regarded void, whereas in A-M v. A-M, a similar Islamic ceremony led to a non-existent marriage.[16] In a later case, this has been rephrased as a non-qualifying marriage.[17]

In Hungary, marriage only exists between a man and a woman who are both present in person at the registrar's office and declare in person that they enter marriage with each other. This declaration may not be subject to conditions or a deadline.

Sham marriages are non-existent according to the Hungarian Civil Code as they are formed with an intent to circumvent the law, therefore under a condition. How can sham marriages be regarded the same as honestly intended canon marriages, especially if intent has such a pivotal role in the common understanding of what constitutes a marriage? On the other hand, there are no rules for forced marriages in Hungarian law. One might argue that these marriages are non-existent as well because they

14 Chris Bevan, "The Role of Intention in Non-Marriage Cases Post Hudson v. Leigh," *Child and Family Law Quarterly* 25 (2013): 90.

15 Idem., 81.

16 Ruth Gaffney-Rhys, "Hudson v Leigh-the Concept of Non-Marriage," *Child and Family Law Quarterly* 22 (2010): 357.

17 Rajnaara C. Akhtar, "From 'Non-marriage' to 'Non-qualifying Ceremony'," *Journal of Social Welfare and Family Law* 42, no. 3 (2020): 386, https://doi.org/10.1080/09649069.2020.1796375.

are contracted under the condition of coercion, however dogmatically this seems weak, and nor does jurisprudence seem to back this assumption.

In other jurisdictions, such as English law, forced marriages are invalid, due to the lack of capacity to consent. This again might be preferable as financial relief might be awarded to an ex-spouse of a null marriage. In this type of invalidity, marriage is not void *ab initio* but merely voidable by one of the parties to the marriage in a 3-year time period.[18] In contrast, in Hungarian private law, all void marriages are voidable, that is either the spouses or the public attorney or a third party with legal interest must bring the matter to court. The entitlement to petition for considering marriage to be void is in some cases restricted to one of the parties lacking the capacity due to age or mental capacity, but nothing is said about coercion as shall be demonstrated in detail soon.

3. The Status of Marriage from the Perspective of Fundamental Rights

Article 12 of the European Convention of Human Rights guarantees the right to marry and to found a family. The ECtHR has dealt with two cases where the existence and validity of the marriage were at stake. The first case came from Spain and the applicant was a widow who had lived with her presumed husband from 1971 after marrying him in a wedding solemnized according to Roma rites.[19] At the time, however, only canonical marriage was available, the law changed in 1978 and although the couple could have concluded a civil marriage then, they did not. The couple believed in good faith that their marriage was valid. The couple went on to have six children together and was awarded the large-family status by the state (for this the parents had to be spouses according to the court proceedings), the man also paid social security contributions supporting his wife and children. After his death, however, she was not awarded a survivor's pension as the couple had not been legally married under Spanish law. At the same time, in other circumstances, Spain has recognized entitlement to a survivor's pension when a couple could not be married according to canonical rites, or a canonical

18 Maebh Harding, "Marriage," in *Routledge Handbook of International Family Law*, ed. Barbara Stark and J. Heaton (Abingdon, Oxon, UK, New York, NY: Routledge, 2019), 19.

19 ECtHR Judgment of 8 December 2009, Case Muñoz Diaz v. Spain, application no. 49151/07, hudoc.int.

marriage was not registered in the Civil Register for reasons of conscience. The Court attached importance to the fact that domestic authorities did not call into question the good faith of the applicant about the status of their marriage, moreover, her conviction was reinforced by the official documents provided by the local authorities acknowledging her status as the wife of the late Mr Munoz-Díaz. Likewise, it was regarded crucial in the case that the applicant is a member of the Roma community, a minority with its customs and values that has been an integral part of Spanish society for centuries. Therefore, it was considered to be of special importance that, according to their customs, the applicant's marriage was never disputed and this fact and some aspects of this marriage were acknowledged by the Government and other authorities. Therefore, since these beliefs about the validity of the marriage were a collective assumption of the Roma community, the cultural significance of this cannot be disregarded.

Consequently, the Court concluded that it was wrongful of the Government to deny the applicant the survivor's pension, in which she was treated differently to similar cases that were effectively equal because, in those other situations, marriage was believed in good faith to exist. Therefore, despite the marriage being void, the widow was granted a survivor's pension. Now, this understanding of good faith might be criticised. "Ignorantia iuris non excusat" – lack of knowledge about the law's requirements for the validity of marriage does not exempt from the effects of the law. The decision refers to section 174 of the Spanish Social Security Act that stipulates that a survivor's pension be awarded when there was no legal marriage, still a null one has been contracted but was believed in good faith to be valid. However, these rules stand for cases of null marriage, but not of non-existent marriage, which are two different concepts,[20] as have been argued so far. Now, the above mentioned marriage was not performed before any authority, either civil or religious, which is why it can be argued that it did not exist in the eyes of the law.[21]

[20] Cristina Sánchez-Rodas Navarro, "Roma Marriage and the European Convention on Human Rights: European Court Judgment in the Muñoz Díaz v. Spain Case (8 December 2009)," *European Journal of Social Security* 12, no. 1 (2010): 82, https://doi.org/10.1177/138826271001200105.

[21] Ibid., 83.

However, in another case, Şerife Yiğit versus Turkey,[22] a similar situation resulted in a different judgment. Here the applicant was the partner of Ömer Koç (Ö.K.), a farmer whom she married in a religious ceremony in 1976 and with whom she also had six children. When Ö.K. died she was denied survivor's pension on account of them not being married in a civil ceremony. The applicant also acknowledged that before the time of the death of Ö.K., they had been making preparations for an official marriage ceremony, but Ö.K. had died following an illness.

The Court had to rule on whether the fact that their marriage was religious rather than civil would be a difference in treatment, unjustified like in the Muñoz-Díaz case. The Court made some observations. There had been a difference in treatment due to the mere fact that her marriage was religious and not civil. On the other hand, it was noted that she did not act in good faith when she was making preparations to legalize their marriage, because she knew she was not entitled to the benefits. Another important cultural difference was awarded significant weight, namely that secular-only marriage in Turkey was aimed at eliminating potentially disadvantageous treatment of women in Muslim marriages. Civil marriage was accessible all along, the procedure is easy and does not require excessive investment of financial resources or time.

Two conclusions can be drawn at this point from the presented cases. On the one hand, the intention and belief (in good faith) of the parties are crucial in determining the status of a marriage. On the other, it is unclear whether those marriages are void as the Court refers to them, while both of them would most probably be considered non-existent in Hungarian jurisdiction.

4. Invalidity

In Hungarian law, marriage invalidity rules are based on marriage impediments, in other jurisdictions, however, other reasons can cause marriage invalidity. Annulment, nullity, void, and voidable marriages are related terms but by no means are they synonymous, therefore nuances will be examined in what follows.

[22] ECtHR Judgment of 2 November 2010, Case Şerife Yiğit v. Turkey, application no. 3976/05, hudoc.int.

In English law, the difference between void and voidable marriages is that a void marriage is regarded by any court as null without the need for a decree of annulment, while in the case of a voidable marriage, this is the reverse: such a marriage is presumed to be valid as long as no decree of nullity has pronounced otherwise.[23] Dogmatically, the problem with the current Hungarian law is that it mixes the legal effects of the two: first, there is a need to petition for annulment, second, if this does not happen in the cases where there is a time limitation for petitioning, the marriage becomes valid retrospectively, therefore it is regarded null up until this point. This is ambiguous for several reasons, one is that it acts against legal certainty and interrupts the ordinary course of trade, so it is not followed in practice. Even if there is no differentiation between void and voidable marriages and Hungarian law considers only voidable marriages, this retroactively validating effect is problematic.[24] In practice, it means that when a nullity proceeding is concluded and nullity has been granted, this has an effect dating back to contracting the marriage, therefore the presumption of validity seems more logical.

However, most interestingly this has its roots in old Hungarian law and canon law. In canon law, if there is an impediment to a marriage, the impediment might be removed and the marriage made valid. This system of removing impediments is generally applied before the wedding occurs, but in some cases, it might happen after the wedding, for example by confirmation, or reaffirmation of the intent.

In English law,[25] the nullity of marriage can take two forms: void or voidable. In the first case, marriage has never been recognized as valid by the law and, at best, the couple is regarded as cohabitants. The grounds for a marriage to be declared void are threefold: the parties were either related

[23] Void and voidable marriages. P.M. Bromley, Gillian Douglas, and N.V. Lowe, *Bromley's Family Law*, 9th ed. (London: Butterworths, 1998), 78.

[24] T/57. számú törvényjavaslat indokolása - a házasságról, a családról és a gyámságról szóló 1952. évi IV. törvény. The original policy rational given by the ministry for the 1952 Act IV. on Marriage, Family and Guardianship said: The proposal does not differentiate cases of marriage invalidity – as opposed to the law in force (that was the 1894. XXXI. Act on Marriage Law) – as grounds for nullity and voidable, because the differentiation does not bring any practical meaning. The proposal solely knows of grounds for invalidity, nuances that may arise are settled at the specific grounds (15. §).

[25] Jonathan Law, *Oxford Dictionary of Law*, 9th ed. (Oxford: Oxford University Press, 2018).

in the prohibited degrees, or at least one of them was under the age of 16, or at least one of them was already married or in a civil partnership.[26] The parties will not be considered cohabitants if they are related, no matter if they live together.[27] *De facto* cohabitants might be acknowledged despite an ongoing marital relationship or civil partnership because numerous rights result from the fact of a community of life rather than the legal bond itself. In the case of underage marriage that is void and underage cohabitation, most countries do not have a set age for forming such a relationship, however, limitations on the capacity to act and child protection must play a role in deciding these cases. Nonetheless, these cases are problematic because no legal marriage was concluded that would protect the weaker party.

In the second case, the grounds for a marriage to be voidable are non-consummation, the respondent being pregnant by another man at the time of the celebration of marriage, one party suffering from a transmittable venereal disease, having undergone gender reassignment, or that one of the parties have not consented to the marriage.[28] Lack of consent might be caused by mental disorder, unsoundness of mind, duress, mistake, etc. An annulment is a decree granted by the court upon recognizing that the marriage was never valid in the eyes of the law. Such a procedure is only available within 3 years of celebrating the marriage (except for non-consummation). The petitioner also had to be ignorant of the facts that constitute grounds for nullity at the time of celebrating the marriage. There are some limitations on granting nullity in cases where the spouse knew about the "defect" but led the other spouse to believe they would not initiate nullity proceedings or it would be unjust to grant nullity.[29]

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26 Section 11 of the Matrimonial Causes Act of 1973.

27 This is not completely obvious under the ECtHR's jurisdiction as in the case of ECtHR Judgment of 13 April 2012, Case Stubing v. Germany, application No. 43547/08, hudoc.int., the court said that criminalising the relationship between half-siblings and therefore hindering the applicant's sexual relationship with the mother of his children may have interfered with his right to respect for family life, but surely has interfered with his right to private life. This ambiguity might cause confusion as to what relationships create a family.

28 Section 12 of the Matrimonial Causes Act of 1973.

29 Section 13(1) of the Matrimonial Causes Act of 1973.

In Hungarian law, on the other hand, the nullity of a marriage must be determined by a court,[30] and there are no two forms of invalidity.[31] Marriage impediments are not listed in the Civil Code, grounds for annulment are essentially what other systems would consider impediments: defect in the capacity to consent, parties being related in prohibited degrees,[32] and one of the parties still remaining in a previous marriage[33] or registered partnership.

Lack of capacity to act as grounds for invalidity is special in the sense that nullity proceedings are limited both in time and as to who is entitled to petition. The defect in the capacity to act might be due to age,[34] incapacitated adult under guardianship,[35] or marriage contracted when in a state of incapacity.[36] Age is an important limitation to marriage as it is aimed at preventing child marriages[37] since full capacity is needed to make a com-

30 HCC. 4:14. § (1).

31 Tímea Barzó, *A magyar család jogi rendje* (Budapest: Patrocinium Kiadó, 2017), 73.

32 The reasons behind prohibiting close relatives from marriage and sexual relationships are analysed in ECtHR Judgment of 13 April 2012, Case Stubing v. Germany, application no. 43547/08, hudoc.int.

33 But not a registered partnership. In HCC § 4:13., there is no mention of registered partnership as a marriage impediment. However according to 3. § (1) a) of the XXIX Registered Partnership Act of 2009, all effects of marriage shall be employed for registered partnerships. According to Tamás Lábady, the existence of a registered partnership is not the same marriage impediment as an existing previous marriage. In his opinion, the Civil Code does not refer to it as such. Moreover, the Civil Code does mention registered partnership along with marriage as an obstacle for a de facto cohabitation in HCC 6:514. § (1), but not for marriage. This would be a too broad interpretation. Tamás Lábady, "Családjog a Polgári Törvénykönyvben," 2014, 18, unpublished.

34 HCC. § 4:9.

35 HCC. § 4:10.

36 HCC. § 4:11.

37 Article 16(1) of the United Nations' Universal Declaration of Human Rights of 10 December 1948 requires full age to enter marriage. At the same time, Article 23(2) of the International Convention on Civil and Political Rights of 1966 requires marriageable age for a wedding to take place as does Article 12 of the European Convention on Human Rights of 1950. According to Article 2 of the United Nations Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 7 November 1962, for the purposes of stopping child marriages, the minimum age is to be set by States Parties to the Convention and exceptions have to be set for serious reasons and for the benefit of the intended spouses. Article 16(2) of the United Nations Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) of 1975 stipulates that child marriage has no legal effect. See more

mitment of marriage. If the grounds for invalidity is that one of the parties was a minor under 16 or a minor over 16 who lacked the authorization of the guardianship authority at the time of the wedding, proceedings for invalidity might only be brought within 6 months of them reaching majority and then only by this party. Similarly, if the capacity to act is lacking as the adult was under guardianship but this has ended only they can bring invalidity proceedings and only within 6 months from the termination of guardianship over the adult. A proceeding might be initiated by another legaly interested party before this deadline, but if the concerned party reaches majority or the guardianship has ended to their petition the suit has to be ended and the marriage becomes retroactively valid. Likewise, if the grounds for invalidity is a state of incapacity to act, proceedings can be brought within 6 months of regaining the capacity to act but in this case exclusively by this party.

As we have seen, the limitation on time to start annulment proceedings is not unique to Hungarian law, however, the Civil Code sets a dogmatically rather interesting solution. When the spouse who has the right to initiate annulment but lets the 6-month pass by, it yields in the marriage becoming retrospectively valid.[38] In other legal systems, the presumption is for the validity of marriage, but this rule seems to suggest that if there is an impediment, invalidity is the rule, and the validity is acknowledged by conduct, abstinence from initiating legal proceedings, retroactively validating the earlier lack of capacity. However, if Hungarian law could differentiate between void and voidable marriages, this would be less problematic dogmatically. In English law, these grounds for invalidity result in voidable marriages where, if the party wants to continue with the marriage, it means that they did not lack the capacity in the first place, so the marriage was never really null. By contrast, in Hungarian law, this is the reverse and marriage becomes retroactively valid if no invalidity proceeding has been initiated within the statutory timeframe. Therefore, in cases of voidable marriages, there is a subjective element of whether or not the wedding was

on child marriage in Hungary: Orsolya Szeibert, "Child Marriage in Hungary with Regard to the European Context and the Requirements of the CRC," *ELTE Law Journal* 1 (2019): 63–71.

38 HCC 4:9. § (4), 4:10. § (2), 4:11. § (2).

valid, and the fact that it is voidable flows from the presumption of validity that may be rebutted this way.

Grounds for invalidity might be grouped similarly to the contract-law dogmatic perspective: fault in form, fault in the capacity for rational decision-making, and fault in the aim of marriage.

4.1. Form

The requirements of form may serve different purposes in law, therefore their violation causes various degrees of sanctions in law. Formal requirements may be in place for cautionary or evidentiary reasons. Cautionary reasons mean that such a requirement calls attention to the binding legal act and the consequences, rights, and obligations that will flow from it. When such a formal requirement is additionally solemn, this is to further suggest the seriousness of the declaration and therefore give the parties the chance to acknowledge the magnitude of their action.[39] It is not surprising that marriage is one of the few legal acts that require a certain time for consideration, from acquiring the license, before actually contracting it and then performing it in a solemn form.

According to English law, if certain formal requirements such as banns, place of celebration, marriage schedule, and official or registrar are not satisfied, this leads to invalidity.[40] In Hungarian law, non-compliance with form causes either non-existence or does not bring invalidity. If the wedding is not celebrated by the registrar in their official capacity, it does not lead to invalidity, exemption may be granted from celebrating the wedding at the registry office. Lack of signing the marriage schedule also results in an administrative error but not the invalidity of marriage. The requirement of two witnesses, if not fulfilled, does not cause the non-existence of the marriage but a formal error. From these, one can deduce that these requirements are not of cautionary function but their evidentiary nature is also not so severe that failure would lead to invalidity, much less non-existence. The requirement of the presence of the spouses concerns the existence of marriage, not its validity. However, if the marriage is not celebrated with the cooperation of the registrar, but in some other form, this

39 Scalise, "Rethinking the Doctrine of Nullity," 693.

40 Matrimonial Causes Act 1973 Section 11 (a) (iii).

causes non-existence rather than invalidity, as has been shown before. This question is seemingly more complicated in the English system, where some churches are granted the prerogative to solemnize marriages and those marriages have civil effect. These churches are the Church of England[41] or Church of Wales, which is understandable as this is the state religion, others are Jewish denominations and the Society of Friends (Quakers), while other denominations have to be registered places of worship for marriages.[42] This causes significant problems, especially with the growing number of immigrants of Muslim or Hindu backgrounds failing to register their places of worship as places for the celebration of marriage or very often celebrating marriage in a private home, therefore, those marriages do not exist in the eyes of the law.[43] No such restrictions are in place for the three privileged churches. In a culturally diverse society, singling out some religious marriages has the disadvantage for those who are unaware of their mistake and, in the event of separation or death of their partner, are surprised to discover that they were only cohabitants, which has very few financial consequences in England and Wales.[44]

4.2. Capacity

Lack of capacity is also different within the two legal frameworks. Notably, it is observed that the Hungarian legal system lacks provisions for annulment predicated on factors such as mistake, misrepresentation, or duress. An intriguing aspect pertains to the historical evolution of marital legislation in Hungary. The first law on marriage, Act XXXI of 1894 used to specify these grounds.[45] Furthermore, this law would also differentiate between void and voidable marriages.[46]

In English law, the absence of consent renders a marriage voidable, whereas the lack of capacity to marry renders a marriage void *ab initio*.

41 Marriage Act of 1949 Part II.

42 Marriage Act of 1949 Part III.

43 Gaffney-Rhys, "Hudson v Leigh-the Concept of Non-Marriage," 357–8.

44 Russell Sandberg, "Celebrating Marriage: A New Weddings Law," *International Journal of Law, Policy and the Family* 37, no. 1 (2023): 1, https://doi.org/10.1093/lawfam/ebad031.

45 1894. évi XXXI. törvénycikk a házassági jogról (Ht.) XXXI. of 1894. Act on Matrimonial Law (Hereinafter: MLA) 53–55. §§.

46 MLA. 41–50. §§ void (matrimonium nullum), voidable (matrimonium rescissibile) 51–62. §§.

Conversely, under Hungarian law, the latter circumstance leads to voidable marriages, while the former is not addressed within the legal framework. This regulatory distinction has persisted since the enactment of the 1952 Marriage, Family, and Guardianship Act but not in the earlier law. The rationale behind this discrepancy appears so perplexing that it is almost hard to believe. According to the original policy rationale articulated by the ministry:

> The proposal assumes that the different nature of marriage and family law issues in general must be the point of departure, and therefore, coercion, mistake, and deception cannot be considered as circumstances affecting the validity of a marriage. Forced marriage is unlikely to occur in our socialist society of free people, also the number of marriages contracted on grounds of mistake and deception is negligible. If, however, such marriages do occur and the party who lacked consent finds that the marriage contracted in this way is unbearable for them, they can file for divorce. Therefore, the proposal does not provide annulment on the grounds of coercion, mistake, or deception.[47]

This absurd wording reflects the era and prompts genuine bewilderment regarding its persistence as a legal principle, particularly in the context of extensive recodification efforts aimed at doctrinal refinement within the Civil Code. One can only wonder at the underlying rationale for retaining an anachronistic and arguably deficient legal provision. An explanation could be the entrenched nature of legal practice over the preceding six decades, which, while potentially influential, remains subject to scrutiny regarding its substantive justification. One might also argue that marriages contracted under coercion, mistake, and deception might be invalidated through the rules of error in the contractual intention mistake, misrepresentation, and duress.[48] This broad interpretation of the law has never been employed in the jurisdiction, no petition sought these grounds for nullity. Moreover, given that the Family Law Book of the Civil Code explicitly addresses concepts such as mistake, deception, and unlawful threats,

47 T/57. számú törvényjavaslat indokolása - a házasságról, a családról és a gyámságról szóló 1952. évi IV. törvény. The original policy rational given by the ministry for the 1952 Act IV. on Marriage, Family and Guardianship.

48 HCC 6:90. §-6:91. §.

particularly in provisions concerning paternity rules,[49] the absence of explicit mention of these factors within the context of marriage regulations suggests a deliberate omission. Consequently, it is improbable that courts would extend the broad interpretation of contractual invalidity principles to encompass challenges to the validity of marriages.

4.3. Aim

Depending on the age and the cultural context we live in, several situations might be considered to be against the aim of marriage. The existence of a previous marriage is against the public policy of monogamy, but this means outlawing parallel polygamy without outlawing consecutive polygamy in our society. If the previous marriage ends in divorce, a new marriage can be contracted. A close blood relationship between the spouses is undesirable for the benefit of the children who would be born of the marriage, but what the prohibited degrees of relationship are and how close a relationship is forbidden depends very much on the cultural context – direct descendants, siblings and descendants of siblings[50] are excluded. Marriage between an adoptive parent and child would also be contrary to the aim of marriage not for the health concerns but social concerns for the family and the aim of adoption. Some grounds in English and Welsh law – nonconsummation, the respondent being pregnant by another man at the time of the celebration of marriage, one party suffering from a transmittable venereal disease, and undergoing gender reassignment – would also be contrary to the aim of the marriage. In Hungarian law, no such grounds exist but the non-existence of marriage is attached to the same sex of the parties, sham marriage, and a condition or deadline for contracting the marriage, and these grounds could be considered to be against the aim of marriage in Hungarian law.

5. Faith as the Key to Validity – A Recurring Theme from a Different Angle

There is a special case for nullity of marriage in Hungarian law when the impediment would be an already existing marriage on the part of one of the parties to the "new" marriage. The reason why such a marriage, despite

[49] HCC 4:107. §, 4:109. §.

[50] HCC 4:12. § (2) involves an exemption from this if there is no risk for the descendants.

all rules, might be formed, is the fact that the parties do not know that the previous marriage still exists. This is because the "former" spouse is presumed to be dead and officially a decree of their death has been issued according to the relevant rules,[51] but in fact, they reappear after a while. This has happened in great numbers after wars, in Hungary most recently after World War II. In this case, the person presumed to be dead does not "die" by the effect of the declaration and so this presumption can be rebutted, but on the other hand, the presumed widow or widower has a just legal interest to continue their life and so might contract a new marriage in complete good faith that their previous marriage has ended due to the death of their spouse. In order not to abuse this option, the new spouse also has to be in good faith about the death of their bride's or groom's previous husband or wife. In the case of both of them acting in good faith, their newly contracted marriage is going to be valid even if the former spouse turns out not to have died.[52]

6. Concluding Thoughts

The three types of concepts that might result in a marriage having no or very limited consequences might be explained by the metaphor of Gaudemet saying that a void contract is like a non-viable organism that is missing an essential organ and is born dead, a voidable one is like a sick organism that will struggle to live if it is confirmed but might die due to annulment.[53] To take this picture a step further, a non-existent contract, or marriage, considered in this paper, is an organism that has not been conceived, there was some form of generative act and the signs of pregnancy were observed but it turned out to be a false pregnancy as no organism ever came into being.

51 HCC 2:5. §.

52 HCC 4:20. § (2).

53 Gaudemet Eugène, *Théorie Générale des Obligations Réimpression de l'édition de 1937* (Dalloz, 2004), 142; quoted in Scalise, "Rethinking the Doctrine of Nullity," 698.

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Letterbox Companies and the Corporate Mobility Regime in the EU after Directive 2019/2121

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Abstract: This paper analyses the solutions aimed at fighting letterbox companies introduced alongside certain enabling rules on cross-border corporate restructuring transactions, namely conversions, mergers and divisions, into the Company Law Directive (2017/1132). The new law introduces an anti-abuse clause, which is embedded into the certification procedure of each cross-border restructuring. The results of the analysis suggest that the new anti-abuse tool lacks an accurate indication of what type of practices it is supposed to curb. Additionally, the law allows public authorities to view letterbox companies as systemic threats to the values of the single market without providing compelling reasons for such an assessment.

1. Introduction

Over the past decade, scandals involving taxation and labour practices have ignited vigorous debates across Europe. They have brought to light the detrimental effects of letterbox companies (LBCs) on tax revenue and working conditions, notably in sectors such as transportation and construction. As a result, many critics argue that LBCs represent ineffective mechanisms for wealth accumulation.[1] This perception of LBCs as enablers of misconduct

[1] However, currently no data is available to identify potential or actual abuses. Instead, the criticism is based on anecdotal evidence and data from specific sectors, such as freight transport by road, e.g. reports for the European Commission: Ex-post evaluation of Regulation (EC)

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has led to comprehensive regulatory efforts in Europe. The latest updates include new rules about cross-border corporate reorganisations, such as conversions, mergers and divisions, in the Company Law Directive (hereinafter: "CLD")[2] as amended by Directive (EU) 2019/2121 (hereinafter: "amending Directive").[3] As Rapporteur Evelyn Regner stated during the debate preceding the vote on the amending Directive at the EU Parliament:

> Company law is systematically abused in order to utilise the most favourable legal system, mostly at the expense of employees and taxpayers. That is why I am particularly proud that a mandatory anti-abuse clause is now being introduced. […] No more abusive letterbox companies may result from enterprise mobility.[4]

It is evident that LBCs were a primary concern of the European authorities when the new provisions facilitating corporate mobility were considered in 2019. As stated, the anti-abuse clause should be the primary measure to combat LBCs in the course of cross-border conversions, mergers and divisions. That is to say, if the competent national authorities suspect that a cross-border transaction is undertaken for abusive or fraudulent purposes, they may deny a company the right to move to another jurisdiction. This measure, in the hands of the national authorities, is intended to curb cross-border reorganisations, particularly those involving abusive LBCs.

This paper aims to examine the effectiveness of the new regulations on cross-border corporate mobility in Europe in reducing the use of LBCs as a strategy for regulatory avoidance. It first examines the impact of LBCs on corporate markets. It then provides specific guidance on interpreting the anti-abuse clause introduced by the amending Directive. The paper concludes that although a clear distinction between abusive and legitimate cross-border activities is essential for effective supervision, the new provisions seem

No 1071/2009 and Regulation (EC) No 1072/2009, 2015, https://op.europa.eu/pl/publication-detail/-/publication/99881a2b-b2e4-11e6-9e3c-01aa75ed71a1#, accessed October 27, 2023.

2 Directive (EU) No 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (O.J.E.C. L169, 30 June 2017).

3 Directive (EU) No 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) No 2017/1132 as regards cross-border conversions, mergers and divisions (O.J.E.C. L321, 12 December 2019).

4 The author's own translation of the speech in German.

to create more confusion than they provide clear standards and criteria for national authorities. As a result, it is doubtful that the amending Directive will effectively deter regulatory evasion.

The structure of this paper is as follows. First, it outlines the main characteristics of LBCs in the broader context of regulatory arbitrage. Next, it provides a brief classification of how LBCs are used in practice. The following section analyses the anti-abuse clause incorporated into the amending Directive. This section also highlights the potential concerns that the clause may raise in the context of LBCs. The last section provides concluding remarks.

2. Letterbox Companies and Corporate Regulatory Arbitrage

2.1. General Remarks

The phenomenon of regulatory arbitrage can be observed in a number of contexts. Here, it refers to the actions undertaken to select the most favourable corporate law.[5] In essence, corporate regulation arbitrage occurs when corporate players are able to evade the constraints of a regulatory framework. This is achieved by selecting the relevant legislation at the time of company formation and simultaneously relocating its operation to another jurisdiction. An alternative approach is the ex-post "escape" strategy, which allows companies to alter the law governing their internal affairs after registration (redomestication) through the use of special legal mechanisms, including conversion, merger or division.

Determining whether a specific method of regulatory arbitrage is advantageous or detrimental hinges on the initial examination of whether a regulation enhances social welfare. Frequently, grappling with this fundamental question proves exceedingly challenging, if not unfeasible, due to various factors. In the realm of interstate dynamics, numerous variables come into play that can influence the effects of regulatory measures. In the context of corporate law, regulatory arbitrage can be beneficial if it provides more competitive and cost-efficient legal frameworks governing business operations. Conversely, such arbitrage can result in undesirable

[5] See: Magnus Willesson, "What Is and What Is Not Regulatory Arbitrage? A Review and Syntheses," in *Financial Markets, SME Financing and Emerging Economies*, eds. Giusy Chesini, Elisa Giaretta, and Andrea Paltrinieri (Cham: Palgrave Macmillan, 2017), 71.

redistributive consequences, particularly when stakeholders such as employees or creditors experience value redistribution benefitting other parties involved in corporate agreements. Furthermore, arbitrage tactics exacerbate agency costs by complicating relationships among corporate entities, thereby increasing the complexity of corporate structures. Consequently, this results in an increase in the costs of conducting business, which may, at times, outweigh the benefits derived from arbitrage.

The prevailing opinion perceives LBCs as a means of escaping legal constraints.[6] While instances may exist where such entities can be employed to implement manipulative strategies,[7] thereby reducing social welfare, this is not always the case. In legal systems where the established rules are suboptimal, non-compliance may benefit both business and society. The Centros case[8] provides a particularly illustrative example of such a situation. In this instance, Danish regulations on minimum capital were circumvented by establishing a company in the UK. The creation of companies such as Centros Ltd has significantly weakened the requirement for the payment of a minimum share capital upon the formation of a company. Consequently, it contributed to a change in the European legal landscape arguably resulting in benefits outweighing the associated decrease in creditor protection.[9] Nevertheless, it is essential to acknowledge that not all regulatory arbitrage techniques yield positive outcomes.[10] Therefore, it is vital to differentiate between effective and ineffective LBCs.

6 See: Karsten Engsig Sørensen, "The Fight Against Letterbox Companies in the Internal Market," *Common Market Law Review* 52, no. 1 (2015): 85.

7 See: Christine Oliver, "Strategic Responses to Institutional Processes," *The Academy of Management Review* 16, no. 1 (1991): 152.

8 CJEU Judgment of 9 March 1999, Centros Ltd v Erhvervs- og Selskabsstyrelsen, Case C-212/97, EU:C:1999:126, para. 24.

9 See: Ariel Mucha, "The Spectre of Letterbox Companies: An Empirical Analysis of the Bankruptcy Ratio of Private Limited Companies Operating in Germany in Years 2004–2017," *European Company Law* 16, no. 2 (2019): 58.

10 See: Annelise Riles, "Managing Regulatory Arbitrage: A Conflict of Laws Approach," *Cornell International Law Journal* 63, no. 1 (2014): 65; Elizabeth Pollman, "Tech, Regulatory Arbitrage, and Limits," *European Business Organization Law Review* 20, no. 3 (2019): 568.

2.2. Use and Abuse of LBCs

The primary challenge in detecting abusive LBCs arises from the recognition that their legitimate or illicit activities often hinge greatly on the intentions of their creators. This characteristic is a prevalent aspect across various manipulation tactics.[11] In terms of the purpose of establishing LBCs, there are two main categories to consider: asset division and identity or action concealment. These are the main and very wide-ranging objectives of setting up LBCs.

The separation of assets (and, consequently, the distribution of commercial risks) has always been at the heart of company formation.[12] It is evident that minimising personal liability (defensive asset partitioning) is crucial. However, what might be even more significant is enhancing transparency and lowering the costs for creditors to obtain information about those who owe them money (affirmative asset partitioning). In the current context, legal entities encompass a variety of assets, including traditional tangible ones, human resources, and intangible assets such as intellectual property rights and customer trust. Against this background, it is not uncommon for LBCs to control assets, including significant goods in terms of value, such as intellectual property rights. The primary role of LBCs is not to utilise assets for economic activities but rather to transfer profits and/or costs among various entities and consolidate them within corporate shells, thereby associating them with a specific jurisdiction. In particular, LBCs can function as special purpose vehicles (SPVs) involved in capital raising or forming joint ventures. SPVs are also beneficial for risk sharing, such as when launching a new business line within an already large and complex group of companies (holding companies). These vehicles are frequently employed in the securitisation of loans, mortgages, credit card debt, and other receivables. In such instances, entrepreneurs are able to implement their business strategies with greater efficacy. However, asset partitioning increases the risk of potential debtor opportunism. The unrestricted movement of assets between companies undermines the advantages of

11 For definitional problems for manipulation on capital markets, see: Daniel R. Fischel and David J. Ross, "Should the Law Prohibit Manipulation in Financial Markets?," *Harvard Law Review* 106, no. 2 (1991): 503.

12 See: Henry Hansmann and Reinier Kraakman, "The Essential Role of Organizational Law," *The Yale Law Journal* 110, no. 3 (2000): 393.

maintaining strict boundaries between corporate entities. In fact, asset separation allows companies to internalise profits while externalising business costs. This occurs because companies can move assets back and forth across different entities and conceal them behind the corporate veil, making asset tracing difficult. Although there are mechanisms to address this issue, such as capital maintenance rules, fraudulent conveyance laws, equitable subordination, and veil-piercing, they do not always provide effective protection. Therefore, it is helpful to differentiate asset partitioning from situations where a company merely serves as a medium for transferring assets, including human resources, leading to outcomes contrary to public policies. This occurs when LBCs assist in circumventing certain regulations, particularly those on illicit and abusive fiscal practices, avoidance of social contributions or wage payments.

A second major function of LBCs is to shield the identity of the actual beneficial owner(s) of a company. While perhaps more controversial than the division of assets, this may be a sound reason for the creation of LBCs. For example, concealing the identity of the true buyer may influence price negotiations, as revealing the identity may lead to a price increase. In addition, identity hiding contributes to the maintenance of effective competition by protecting trade and business secrets, for example in the development of or investment in new products or technologies. However, concealing the identity or activities of the beneficial owner often leads to illegal uses of LBCs, such as when a beneficial owner exerts indirect influence over the company's board of directors and engages in illegal or abusive practices. In addition, LBCs are used to evade contractual obligations, such as anti-competition clauses. Arguably the most egregious misuse of corporate structures involves hiding or laundering proceeds of crime, terrorist financing, corruption, organised VAT fraud or other criminal activity. In these cases, both the identity of the beneficiary and the nature of the illegal activity are concealed.

In short, the essence of abusive LBCs is to engage in economically unjustifiable activities and objectives. The establishment of a company, along with the separation of its assets, should be aimed at spreading the risks associated with commercial activities. If this objective is not achieved, there is a good reason to suspect abuse. It is therefore essential to thoroughly review the reasons for and consequences of establishing each LBC. Legitimate

LBCs can be distinguished from abusive LBCs by taking into account certain relevant factors that outline the limits of the objectives that LBCs can pursue and the interests (other than those of their beneficial owners) that they must take into account in their decision-making. This approach seeks to ensure that LBCs do not pursue objectives that entail social costs and are not sustainable within the framework of political consensus.

2.3. Response to Abusive Regulatory Arbitrage

There are numerous legal strategies designed to counteract arbitrary transactions, with varying legislative approaches across different jurisdictions. Some legal systems implement anti-abuse rules to motivate or compel individuals to adhere to policy objectives. These rules can range from outright prohibitions on certain behaviours to more sophisticated measures that rely on case-by-case assessments by authorities based on a general public policy indicator. Their effectiveness varies. The first group tends to be either too broad or too narrow in achieving their objectives. The second group, which includes anti-abuse rules, provides greater flexibility for unexpected situations but reduces predictability and requires time for authorities to develop clear interpretations in the field. In the context of tax law, V. Fleischer identified three methods of using anti-abuse rules to limit legal arbitrage.[13] He opens his taxonomy with the "rifleshot" anti-avoidance rules, moves on to the "shotgun" anti-abuse rules, and closes with the general anti-abuse rules (GAAR).[14] This categorises rules according to their scope, from narrow to broad. Narrow anti-avoidance rules are used when legislators identify a specific avoidance strategy and create precise rules to thwart it, without using general terms such as "abuse" or "fraud". This approach focuses on targeted legislative action but may encourage alternative avoidance strategies by market participants. In response, legislators keep changing the rules, leading to a constant game of cat and mouse in which public reaction is often delayed. As a result, the social costs of abusive strategies are only marginally reduced. This limitation makes "shotgun" anti-abuse rules more attractive.

13 See: Viktor Fleischer, "Regulatory Arbitrage," *Texas Law Review* 89, no. 1 (2010): 252.

14 This taxonomy is not perfect and shows some shortcomings, such as unclear dividing lines. Nevertheless, it provides a flexible and analytical framework for a better understanding of legal arbitrage.

These rules do not target a specific transaction, but a broader category of transactions, in particular, those with a specific economic purpose or legislative objective. A shotgun rule is triggered when objective factors indicate that the abuser's motives significantly undermine regulatory objectives. Where no specific transaction or strategy is identified, legislators may use a general anti-abuse rule (GAAR) to prevent abuse more broadly. Because it is overly inclusive[15] and lack clear conceptual boundaries,[16] the last mechanism is deficient. Besides, a general anti-avoidance rule can have a chilling effect on the legitimate exercise of rights owing to the fear of legal sanctions, even if applied cautiously by the competent authorities.

From an institutional standpoint, the extent to which decision-making power is transferred from the legislator to the judiciary creates the difference between the rifleshot approach and the GAAR. This transfer is intended to allow the application of general rules to specific real-life situations that cannot be effectively addressed through the legislative process alone.

3. New Regime for Cross-Border Corporate Restructurings

3.1. The Amending Directive in General

In response to the European Commission's proposal of 25 April 2018 ("Proposal"),[17] the amending Directive was swiftly passed on 27 November 2019. Before the amending Directive, stakeholder protection relied heavily on targeted ("rifleshot") mechanisms, addressing specific risks at various stages of cross-border restructurings. The objective of these mechanisms was to inclusively address stakeholder concerns within the context of the reorganisation process, rather than blocking the transactions. Most of these

15 See: Isaac Ehrlich and Richard A. Posner, "An Economic Analysis of Legal Rulemaking," *Journal of Legal Studies* 3, no. 1 (1974): 268, who underlines that overinclusiveness imposes a social cost by prohibiting efficient conduct.

16 E.g., the requirement to carry out a liquidation procedure in the case of corporate cross-border conversions; it eliminates a company's possibility to reincorporate abroad (in the fastest and easiest manner), even when the interests of creditors, minority shareholders and employees are not threatened. The requirement was described by A.G. Kokott as "almost counterproductive". See: A.G. Kokott's opinion delivered on 4 May 2017 in *Polbud*, C-106/16, ECLI:EU:C:2017:351, para. 57.

17 See: European Commission, "Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions," COM(2018) 241 final.

mechanisms, with some enhancements, remain in the CLD. Furthermore, during the discussions on the Proposal, the Commission noted that the expansion of LBCs contributes to the growth of abuses such as the circumvention of labour standards, social security payments and aggressive tax planning.[18] E. Regner, the rapporteur for the amending Directive, confirmed this shortly before the vote in the EU Parliament on 17 April 2019, stating:

> […] the Court jurisprudence became independent over the decades – always in the absence of rules – which confirmed the [the right to the] crossing of the national border and enabled the emergence of letterbox companies. […] The main demands of the European Parliament are reflected in the new text of the Directive: better protection of employees when companies move to another Member State is guaranteed as well as a mandatory anti-abuse clause to avoid circumvention, such as the emergence of letterbox companies.[19]

Against this background, the concept of "abuse of law" is not entirely new in EU company law, although the Court has not always applied it consistently. It has already been presented in *Centros*[20], *Inspire Art*[21] and confirmed in the *Polbud* decision.[22] In each case, the European Court of Justice has recognised the need to prevent companies from abusing the rights granted by the Treaties. However, this approach was not codified in EU company law until the adoption of the amending Directive.

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18 The Proposal, at 20.

19 In German: "Deshalb geschah über Jahrzehnte die Verselbständigung der EuGH-Rechtsprechung – immer in Abwesenheit von Regeln –, die den Gang über die nationale Grenze bestätigte und die Entstehung von Briefkastenfirmen ermöglichte. […] Die wesentlichen Forderungen des Europäischen Parlaments spiegeln sich im neuen Richtlinientext wider: besserer Schutz der Beschäftigten, der Arbeitnehmer und Arbeitnehmerinnen, wenn Unternehmer in einen anderen Mitgliedstaat ziehen, wird gewährleistet und eine verpflichtende Antimissbrauchsklausel, um Umgehungstatbestände zu vermeiden, wie etwa die Entstehung von Briefkastenfirmen."

20 See: CJEU Judgment of 9 March 1999, Centros Ltd v Erhvervs- og Selskabsstyrelsen, Case C-212/97, para. 25.

21 See: CJEU Judgment of 30 September 2003, Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd, Case C-167/01, para. 120.

22 CJEU Judgment of 25 October 2017, Polbud - Wykonawstwo sp. z o.o., Case C-106/16, EU:C:2017:804, para. 39. See: Ariel Mucha and Krzysztof Oplustil, "Redefining the Freedom of Establishment under EU Law as the Freedom to Choose the Applicable Company Law," *European Company and Financial Law Review* 15, no. 2 (2018): 297.

3.2. Anti-abuse Clause

3.2.1. General Presentation

Under the amending Directive, the anti-abuse clause has been incorporated into the certification sub-procedure[23] for each cross-border restructuring. By and large, the anti-abuse clause represents a mechanism for national authorities to achieve effective and consistent protection of stakeholders. This far-reaching clause not only empowers the competent authority but also puts it under an obligation to prevent companies from carrying out cross-border operations that could lead to adverse outcomes. As a consequence, the national authority must first of all verify that a company "complies with all relevant conditions and that all necessary procedures and formalities have been completed".[24] If not, there is no need to invoke the abuse clause. The anti-abuse clause is therefore a measure of last resort, to be used only when shortcomings in stakeholder protection pose a serious threat to shared interests and values under EU law.

In fact, the anti-abuse clause is a list of non-defined terms with little further clarification. This vague definition reflects the ambiguity and inconsistency often found in European Court of Justice rulings.[25] The exact sense of these terms in real cases is left to national authorities and the EU judiciary. This suggests that the translation of the abuse doctrine into legislative measures is still evolving and lacks sufficient precision. This approach contrasts sharply with methods that provide examples of frequent abuses, such as those set out in Article 12 of the Market Abuse Regulation.[26]

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23 The certification process comprises two stages. In the initial stage, the competent authority or authorities assess whether the migrating companies have fulfilled the formalities outlined in the legislation applicable to each company. This includes requirements concerning the protection of minority shareholders, creditors, and employees. A positive evaluation at this stage results in issuing a pre-conversion, pre-merger, or pre-division certificate. The second stage of the procedure takes place in the destination Member State, where the requirements of that State are taken into account. There is no further evaluation of the conformity with the requirements already verified by the issued certificate.

24 See: Articles 86m(7), 127(7) and 160m(7) of the CLD.

25 See: Stefan Vogenauer, "The Prohibition of Abuse of Law: An Emerging General Principle of EU Law" in *Prohibition of Abuse of Law: A New General Principle of EU Law?*, eds. Rita de la Feria and Stefan Vogenauer (Oxford: Hart Publishing, 2011), 524.

26 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of

In short, the nature of the anti-abuse clause is that any cross-border transaction that is intended to abuse law or to engage in criminal activities will not be approved by the relevant authority[27] through a pre-conversion/pre-merger/pre-division certificate.[28] The EU legislator adds that where there are serious doubts as to the true nature of the transaction, the competent authority "shall take into consideration relevant facts and circumstances, such as, where relevant and not considered in isolation, indicative factors of which the competent authority has become aware…".[29] As regards the concept of "indicative factors", it is only in the preamble of the amending Directive that it is specified. In particular, recital 36 seeks to clarify the meaning of this ambiguous term by listing a number of elements that illustrate these indicative factors, such as:

> the characteristics of the establishment in the Member State in which the company or companies are to be registered after the cross-border operation, including the intention of the operation, the sector, the investment, the net turnover and profit or loss, the number of employees, the composition of the balance sheet, the tax residence, the assets and their location, the equipment, the beneficial owners of the company, the habitual places of work of the employees and of specific groups of employees, the place where social contributions are due, the number of employees posted in the year prior to the cross-border operation […], the number of employees working simultaneously in more than

the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (O.J.E.C. L173, 16 April 2014).

27 For cross-border conversions, mergers and divisions, see: Articles 86m(8), 127(8) and 160m(8) of the CLD, respectively.

28 The certification process comprises two stages. In the initial stage, the competent authority or authorities assess whether the migrating companies have fulfilled the formalities outlined in the legislation applicable to each company. This includes requirements concerning the protection of minority shareholders, creditors, and employees. A positive evaluation at this stage results in issuing a pre-conversion, pre-merger or pre-division certificate. The second stage of the procedure takes place in the destination Member State, where the requirements of that State are taken into account. There is no further evaluation of the conformity with the requirements already verified by the issued certificate.

29 For cross-border conversions, mergers and divisions, see: Articles 86m(9), 127(9) and 160m(9) of the CLD, respectively.

> one Member State […], and the commercial risks assumed by the company or companies before and after the cross-border operation.[30]

3.2.2. Premises of the Anti-abuse Clause

Addressing the complexities of the anti-abuse clause requires a heuristic approach. This suggests that it includes a number of interrelated conditions that should be considered together because they are complementary. Consequently, the forthcoming analysis proposes a two-step method for determining whether a transaction under review is abusive or fraudulent. This method involves confirming whether (1) the cross-border conversion is carried out for abusive or fraudulent purposes (subjective component) and whether (2) it results or is intended to result in the evasion or circumvention of Union or national rules (objective component). Moreover, a cross-border procedure established on criminal grounds is inherently abusive and poses a direct challenge to the coherence of national or EU legal structures. In principle, the anti-abuse provision requires deliberate wrongdoing (such as abuse, fraud or criminal activity) and the resulting harm (evasion or circumvention of the law). The wrongdoing has an "abusive or fraudulent purpose", even if a cross-border transaction formally complies with the letter (but not the spirit) of the law. These concepts are not developed further in the Directive. For this reason, and due to the autonomous nature of legal concepts in EU law,[31] the identification of "abusive or fraudulent purpose" must be based on the common understanding within the EU and the objectives of the amending Directive.

2.2.3. Abuse

Two key aspects are relevant in determining whether a transaction is considered to be conducted for abusive purposes. Abuse occurs in situations where (1) formal rules are complied with, but (2) the results are contrary to the intent or spirit of the law. The first element is very much in tune with the new provisions of the amending Directive. As mentioned above, the competent authority must first assess whether the national procedural requirements have been complied with. If the answer to this question is in the affirmative,

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30 Cf. Article 86n(1) of the Proposal, which strongly resembles the cited Rec. 36 of the amending Directive.

31 See, for instance, CJEU Judgment of 14 October 1976, LTU v Eurocontrol, Case 29/76, ECR 1541, para. 3.

attention then shifts to assessing the purpose behind the cross-border transaction or its results, as required by the relevant legislation. In this respect, the goals of the amending Directive can be derived from the preamble. According to Rec. 4, the Directive's objectives should be interpreted in a broad context, taking into account the need to reconcile economic values ("the objective of an internal market without internal borders for companies") with other "objectives of European integration, such as social protection as set out in Article 3 of the Treaty on European Union (TEU) and Article 9 of the TFEU, as well as the promotion of social dialogue as set out in Articles 151 and 152 of the TFEU". This part of the preamble can be read as implying that the assessment of the cross-border transaction should not be based solely on business effectiveness, but should also account for various considerations and the interests of other individuals who may be affected by the transaction. There is no reference in the amending Directive suggesting that the objective of any restructuring process is to establish a genuine presence in the host Member State. The introduction of such a requirement would introduce an additional criterion for the enjoyment of the freedom of establishment, which is not provided for in the Treaties. Consequently, letterbox companies are not per se considered to be abusive corporate vehicles.

3.2.4. Fraud

It appears that fraud involves the misrepresentation of material facts, opinions or intentions in order to induce others to take or refrain from taking certain actions, resulting in loss to the victim.[32] The amending Directive does not specify the target of the fraud. Consequently, a person could deceive the competent authority in order to obtain a cross-border certificate or persuade others that the cross-border operation is being carried out in good faith or in the common interest. In this context, cross-border operations involving LBCs can be a convenient way to conceal identities or actions and to impede public or private control. They can therefore be a tool for committing fraud.

[32] See: Ruth Sefton-Green, "General Introduction," in *Mistake, Fraud and Duties to Inform in European Contract Law*, ed. Ruth Sefton-Green (Cambridge: Cambridge University Press, 2005), 24.

3.2.5. Abusive and Fraudulent Purpose

With regard to the purpose of abusive or fraudulent conduct, the amending Directive adds only marginal guidance. Notably, it is ambiguous if a transaction must be conducted "solely for the purpose of enjoying"[33] the benefits of the cross-border reorganisation in order to be deemed abusive, or if it is enough that the primary, but not the only, purpose was to secure an unfair advantage. The Court's position on this issue continues to be unsettled. Tax case law indicates that if "the economic activity carried out may have some explanation other than the mere attainment of tax advantages", then any allegation of abusive purpose lacks merit.[34] In practice, it would be fairly sufficient to arrange transactions in such a way as to show at least a minimal economic basis, which would provide a sound protection against the claim that the transactions were carried out for an abusive purpose. Likewise, in free movement of workers disputes, schemes that merely give the impression of genuine economic activity ("purely marginal and ancillary" employment) will not defeat claims of artificiality.[35] Accordingly, any scheme deliberately designed to mislead as to its economic purpose should be rejected. This scrutiny will primarily apply to letterbox companies with minimal business involvement.

Albeit not explicitly stated in the clauses, the key element that often separates a legitimate transaction from a sham one is the intention of the parties to cause harm by engaging in the transaction. Even so, this intention is emphasised by phrases such as "set up for" and "leads to or is aimed at". Interestingly, this illicit intent is also relevant to fraudulent acts. This means that unintentional errors about the facts would not constitute fraud under the provision discussed.

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33 Cf. CJEU Judgment of 21 June 1988, Sylvie Lair v Universität Hannover, Case 39/86, E.C.R. I-03161, para. 43: "where it may be established based on objective evidence that a worker has entered a Member State for the sole purpose of enjoying, after a very short period of occupational activity, the benefit of the student assistance system in that State."

34 Cf. CJEU Judgment of 21 February 2006, Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, C-255/02, ECLI:EU:C:2006:121, para. 75: "the essential aim of the transaction concerned is to obtain a tax advantage."

35 CJEU Judgment of 6 November 2003, Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst, C-413/01, ECLI:EU:C:2003:600, paras 25–6.

3.2.6. Indicative Factors

Another concern, closely related to the identification of the underlying purpose of the transaction, is its inherent subjectivity. In addition to clear evidence such as statements[36] by the parties involved or recordings of telephone or e-mail conversations, it is essential to refer to the external circumstances that the alleged abuser has externalised in order to identify the abusive practice. In this respect, the anti-abuse clause is enriched by non-exhaustive indicators listed in the preamble of the amending Directive, as mentioned above. These indicators facilitate the handling of complex cross-border transactions by highlighting the characteristics of behaviour generally indicative of an abusive purpose.

In the context of the amending Directive, the core aspect of the indicative factors is the artificial nature of the behaviour, characterised by establishing the company or companies in the Member State in which they are to be registered after the cross-border transaction. Examining the components of "establishing" as outlined in the preamble implies a broad review of various aspects of economic activity. Establishing covers not only production factors such as assets, equipment and employees, but also economic outcomes such as profits and losses. These indicators are likely to reflect concerns about potential abuses regarding:

- public obligations such as taxation or social security contributions,
- employee rights,
- interests of business partners and clients.

While the aforesaid factors provide insight into potential areas of abuse, they do not provide guidance as to what constitutes abuse when the indicative factors are found in States other than the host Member State. Thus, the core question of the abuse test remains outstanding. Moreover, the indicative factors appear to be tailored to target letterbox companies, although they are not explicitly named. It is arguable that by including the concept of establishment in the amending Directive, the European regulator is seeking to incorporate the crux of the real seat doctrine into EU

[36] In Centros, for example, the Danish couple did not deny that they had acted "for the purpose of avoiding Danish legislation requiring that a minimum amount of share capital be paid."

secondary legislation.[37] The second sentence of Recital 36 of the amending Directive states that

> [t]he competent authority may consider that if the cross-border operation were to result in the company having its place of effective management or place of economic activity in the Member State in which the company or companies are to be registered after the cross-border operation, that would be an indication of an absence of circumstances leading to abuse or fraud.

The underlying goal seems to be to encourage the creation of companies and provide them with the necessary tools for real business activity. However, doubts may arise about this policy. First, setting up the administrative and management headquarters in any Member State while pursuing abusive objectives is relatively simple. Further, the certification procedure is carried out before a company moves abroad, making it difficult for national authorities to thoroughly verify the actual location of the real head office ex ante. Often, the only available evidence is a statement by the board of directors of the migrating company, which renders the location of the real seat an imperfect indicator of abusive practices. Secondly, a reading of the recital in question a contrario implies that the mere location of the registered office in the host Member State could be an indication of potential abusive practices. However, such a wide-reaching interpretation of any company that wishes to separate its registered office from its place of business raises concerns, particularly in the context of the freedom of establishment. This is because some business activities with an international reach may be subject to discriminatory treatment compared to domestic ones to which such standards do not tend to apply.[38]

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37 The conflict of rules doctrine according to which the applicable law is determined by the national law of the State where a company has its administrative (real) seat (headquarters) or its principal place of business (its principal enterprise).

38 Only in some sectors, a requirement to locate businesses and register offices makes more sense because it aims at reducing the systemic risk inherent in a given sector. Cf. rules for financial institutions foreseen in Article 5(4) of the Markets in Financial Instruments Directive II containing an "in-built" defence against regulatory arbitrage; see: Pierre Schammo, "Comments on Abuse of Rights in EU Law," in *Prohibition of Abuse of Law: A New General Principle of EU Law?*, eds. Rita de la Feria and Stefan Vogenauer (Oxford: Hart Publishing, 2011), 159.

Further doubts may arise over the ability of various national authorities to effectively review business activities in such a complex manner, especially without the necessary expertise. The mechanism for controlling such operations is institutionally based on public or quasi-public authorities (such as notaries) whose powers are rather limited to analysing the documents submitted by the company. There is therefore little room for in-depth scrutiny to safeguard the interests of all parties potentially affected by the cross-border operation. The amending Directive addresses this issue by facilitating consultation between different national authorities and, where appropriate, the use of an independent expert's services.[39]

3.2.7. Evasion or Circumvention Situations

The normative definition of abuse requires that it results in, or is intended to, evade or circumvent EU or national law. It emerges that abuse or fraud in this context does not cover situations where a person exercises their rights improperly (referred to as *Rechtsmissbrauch* in German or *nadużycie prawa* in Polish), but rather seeks to escape the implications of a piece of legislation that would otherwise be triggered (known as *fraude à la loi*).[40] Yet, this qualification raises a couple of questions. Firstly, the distinction between abuse of law and abuse of rights is not clearly defined in EU law.[41] There is no plausible explanation for its inclusion in the amending Directive. Secondly, it remains unclear whether the term "Union or national law" covers only mandatory legal provisions or extends to other sources of rights and obligations, such as contractual rights. It could be argued that the new provision derives its meaning from tax law, which makes it more suitable for obligations resulting from public rather than private law rules. However, the indicative factors mentioned in the Directive pertain directly to the relationship between companies and employees. Moreover, one of the main objectives of the amending Directive was to improve the protection of minorities and creditors. Therefore, the argument that abuse includes a wide range of rights seems more coherent, as it adds to other mechanisms embedded in the amending Directive. Thirdly, the anti-abuse clause only allows for

39 For cross-border conversions, mergers and divisions, see: Article 86m(12), Article 127(12) and 160m(12) of the CLD, respectively.

40 See: Vogenauer, "The Prohibition of Abuse of Law," 554–8.

41 Ibid., 556.

a claim of abuse if a cross-border operation is aimed at avoiding the application of a law that would adversely affect the migrating company. However, there are cases where operations are undertaken for the sole purpose of activating rules that offer certain benefits (so-called "rule-seeking"). In such instances, no legal rules are avoided or circumvented. Consequently, certain strategies involving LBCs would not be covered by the anti-abuse clause.

4. Conclusions

The amending Directive creates the perception that letterbox companies are the source of abuse in the EU. This view is unfounded and fails to recognise the role of LBCs in enriching the diverse business regulatory landscapes across Europe. By switching between legal regimes easily, LBCs create competitive pressure on Member States. At the same time, it should be noted that legal arbitrage is not only caused by LBCs but also by a lack of regulatory harmonisation and/or ineffective national legal frameworks.

The analysis carried out in this study indicates that the new anti-abuse clause will not change this in the EU Single Market. The main reason is that in most cases abuse and fraud occur after a cross-border operation has been completed. The amending Directive does not provide competent authorities with a crystal ball that would allow them to effectively identify the real purpose of the corporate actors involved in a cross-border transaction. No clear guidance is offered on how to understand or define abuse or fraud, other than indicative factors based on the concept of establishment in the country where the effects of the corporate reorganisation will ultimately emerge. In such a scenario, the certification procedure may become chaotic and in some situations the refusal of certification will be based on biased attitudes towards some corporate vehicles, such as letterbox companies.

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A Comparative Analysis of Data Protection in E-commerce B2C Contracts in Georgia and the European Union

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Abstract: Development of technologies is a great human achievement. Online portals, mobile applications and digital platforms allow citizens to receive servicies remotely, which, on the one hand, reduces necessity of on-site visits and bureauctratic procedures, however, on the other hand, increases the risk of personal data disclosure processed in such manner. Digital tools play significant role in the process of E-commerce, especially in improving efficiency and accessibility of communication between the consumer and the trader. A lot of people communicate with the extensive use of the internet and technologies, including e-procurement, which, in these relationships require the correct processing of personal data, whereas improper protection of great deal of information increases risks of using data for criminal purposes and threatens personal privacy of consumers. Hence, it is important that organizations providing the internet

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services, especially those involved in e-commerce business, be well aware of obligations they are imposed by law. It is worth noting, that Law of Georgia "On Personal Data Protection" was adopted by Georgia in 2011, and its renewed version is quite similar to General Data Protection Regulation of Europe (DGPR) – which was adopted on June 14, 2023 and will enter into force on March 1, 2024. Within changes, the existed standard for personal data processing/protection will be substantially improved. As for protecting personal data processed on the basis of the B2C contracts concluded in the process of E-commerce, the interest regarding these topics increased after spread of coronavirus (Covid-19), when country faced new challenges. This issue is relevant even in the present time, since staying current with technological and legal development, renewed legal regulation and Association Agreement between the European Union and Georgia, imposes additional obligations on the country in the process of perfecting the mentioned field. Accordingly, this article will discuss compliance of regulatory framework of processing/protection of Georgian consumers' personal data in the online contracts with international standards and existing challenges, to assume obligations of the country under the Association Agreement between Georgia and the European Union to implement E-commerce in practice, best practices of European countries in this regard and the perspective, which Georgia should implement in E-commerce process, in order to insure effective protection of consumers' data security.

1. Introduction

The world is facing radical changes due to the fast development of internet technologies. Online retailing and the use of the services of companies or Internet platforms that provide those services have become very popular due to the accelerated pace of life. On the one hand, in the field of e-commerce, the number of electronically signed sale or service contracts and their specific importance in the development in this regard is increasing day by day.[1] The usage of technology and electronic systems has indeed improved

[1] See: Lloyd J.F. Southern, "The Attraction and Expansion of E-commerce During Recent Economic Downturn," *Problems and Perspectives in Management* 10, no. 3 (2012): 107–9,

the possibility of data recording/processing and simplified the service process in time, however, at the same time, it has increased the risks of unauthorised access to data. Therefore, some threats have arisen from traders, who collected and stored confidential information and used as means of manipulation of the consumer without the consumer's consent.[2] This has given rise to the need to bring established practices and national legislative approaches in line with international standards in order to protect consumers' personal data when concluding online contracts.

It is noteworthy that the "Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part," was signed on June 27, 2014, which was ratified by the Parliament of Georgia on July 18, 2014.[3] This relationship document is based on the partnership of the parties, their needs and opportunities for mutual assistance. Association Agreement describes details of the common plan for national development within European standards, after the implementation of which Georgia will become a country compatible with EU standards. Under Article 14 of said document, the parties agree to cooperate to ensure a high level of personal data protection in accordance with the European Union, Council of Europe and international legal documents and standards.The document refers to the mandatory reforms that bring peace and stability to the country (human rights, the rule of law, the fight against corruption and transnational organized crime, etc.) and one of the most important points of the agreement – Deep and Comprehensive Free Trade Area (DCFTA) with the European Union, which resulted in the opening of the European market for the sector of products produced and services offered in Georgia. Chapter 6 of Title IV, which is related to Establishment, Trade in services and E-commerce, is entirely devoted to the regulatory framework of cooperation between the parties concerning free trade and e-commerce. As for e-commerce, on June 13, 2023, the Parliament of Georgia adopted

accessed November 23, 2023, https://www.businessperspectives.org/index.php/component/zoo/the-attraction-and-expansion-of-e-commerce-during-the-recent-economic-downturn.

2 Sonia Balhara, "Consumer Protection Laws Governing E-Commerce," *Law Essentials Journal* 1, no. 4 (April–June 2021): 20.

3 Fully entered into force on July 1, 2016, accessed November 23, 2023, https://www.matsne.gov.ge/document/view/2496959?publication=3.

the Law of Georgia on E-Commerce,[4] which aims at promoting the proper functioning of the internal market by ensuring the free movement of information society services, protecting the rights of consumers in the process of electronic commerce, determining the rights and duties of intermediate service providers and protecting them from the imposition of general monitoring obligations.[5] Therefore, Article 6 directly stipulates the protection of personal data in e-commerce transactions and, in cases of violation of the above-mentioned, as a basis of the liability to be imposed, is determined by specific norms of the Law of Georgia "On Personal Data Protection".

However, it should be noted that before the modernization of the above-mentioned legislative acts, as of January 20, 2020, there were already guidance recommendations on protecting personal data in e-commerce transactions.[6] The document regulated the details of the importance of personal data protection during e-commerce transactions, challenges and important procedures that trade organizations were obliged to protect and implement in practice. The aforementioned manual was a non-binding regulatory document for companies operating in the e-commerce sector, based on the best practice and general requirements of Georgian legislation, however, due to its non-binding nature, it can be said that it failed to create an effective system for personal data protection between the consumer and the trader within the process of e-commerce transactions.

Thus, the article aims to analyze how personal data is protected when B2C contracts are concluded between the consumer and the trader in e-commerce transactions in Georgia, and examine the experience and problems existing in the Georgian legal space in this regard. Based on best practices of the EU, court decisions and comparative analysis, the article shall present perspectives which would contribute to establishing high standards

4 Georgian Law No. 3110-XIმს of 20 January 2023.

5 Georgian Law on E-Commerce, Article 1(3).

6 Chantladze Tato et al., "Recommendation – Protecting Personal Data in the process of online E-commerce, thematic recommendations on personal data management during COVID-19 pandemic," State Inspector Servicedeveloped by United States Agency for International Development (USAID), Document is prepared with Tetra Tech support, 2022, accessed November 23, 2023, https://old.pdps.ge/cdn/2022/01/personaluri-monatsemebis-dacva-onlain-vachrobis-processhi.pdf.

of personal data protection when B2C contracts are concluded between the consumer and the trader in e-commerce transactions in Georgia.

2. Standard of Personal Data Processing and Protection in E-commerce Transactions in Georgia and the European Union

E-commerce, called online trading, is generally a trading activity that involves selling a product and/or service online, for non-cash payment and is defined by the Organisation for Economic Co-operation and Development (OECD)[7] as all transactions related to commercial activity. However, the World Trade Organization (WTO)[8] defines e-commerce as the production, distribution, marketing, sale or delivery of goods and services by electronic means.[9]

The formation of e-commerce is intertwined with digital society and economy and is caused by ICT (information and communication technology) achievements.[10] Digital society, which operates with tools such as social media and cloud computing, creates the basis of a digital economy and, due to its countless online connections, global economic activities are carried out rapidly and easily.[11] Thus, e-commerce is the practice of conducting business through processing digital information and electronic communication technologies,[12] which, on the one hand, allows business entities to

7 The OECD's Consumer Policy Advisory Group is the Commission's main forum for Regulations on–e-commerce at the global level. It should be noted that electronic commerce is a central element in the OECD's vision of the potential that our interconnected world holds for sustainable economic growth; accessed November 23, 2023, https://www.oecd.org/about/.

8 "The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments. The goal is to ensure that trade flows as smoothly, predictably and freely as possible." WTO, "The WTO," accessed November 23, 2023, https://www.wto.org/english/thewto_e/thewto_e.htm.

9 WTO, "Work Programme on Electronic Commerce," WT/L/274, September 30, 1998, accessed November 23, 2023, https://docs.wto.org/dol2fe/Pages/FE_Search/ExportFile.aspx?id=31348&filename=T/WT/L/274.DOC.

10 Amir Ebrahimi Darsinouei and Rashid S. Kaukab, *Understanding E-Commerce Issues in Trade Agreements: A Development Perspective Towards MC11 and Beyond* (Geneva: CUTS International, 2017), 9.

11 Ibid., 10.

12 Daksha Jha, "E-commerce and Consumer Protection: Critical Analysis of Legal Regulations," *Indian Journal of Law and Legal Research* 5, no. 1 (2023): 2.

establish themselves in certain markets and, on the other hand, provides online consumers with the convenience to purchase products and services without leaving their offices and homes.[13]

The beginning of the 1990's should be considered the initial stage of e-commerce.[14] As a result of technological development, since the 1990s, the relationship between businesses and consumers has undergone immense changes, it became possible to conclude contracts remotely and online, and the first secure online purchase was made in 1994.[15] Back then, the Internet was still at an early stage of its development and websites known as Web 1.0 resembled online catalogues, providing the consumers only with static content.[16] In the 21st century, the COVID-19 pandemic strengthened and increased online purchases and this tendency continues successfully up to the present day.[17] Thus, undoubtedly, e-commerce provided consumers with maximal convenience in online purchasing and, alongside technological progress, increased protection standards in the Georgian and EU legislation because consumers should be legally protected from possible damage caused by unfair business practices.[18]

2.1. Legal Regulation of Personal Data Protection in E-commerce Transactions

In Europe, the legal framework of e-commerce is based on two directives: Directive of the European Parliament and of the Council No. 1999/93/EC on a Community framework for electronic signatures[19] and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic

13 Tomáš Peráček, "E-commerce and Its Limits in the Context of the Consumer Protection: The Case of the Slovak Republic," *Juridical Tribune* 12, no. 1 (March 2022): 35.

14 OECD, "Toolkit for Protecting Digital Consumers. A Resource for G20 Policy Makers," 2018, 11.

15 Ibid.

16 Ibid.

17 Kamaraj Kanagayazhini, "Critical Analysis of Data Protection and Privacy in E-commerce," *Indian Journal of Law and Legal Research* 4, no. 6 (2022–2023): 3.

18 Rahmi Ayunda, "Personal Data Protection to E-commerce Consumer: What Are the Legal Challenges and Certainties?," *Law Reform* 18, no. 2 (2022): 145.

19 Directive of the European Parliament and of the Council No. 1999/93/EC concerning Community framework for electronic signatures (O.J.E.C. L013, 19 January 2000), 12–20, accessed November 24, 2023, https://eur-lex.europa.eu/eli/dir/1999/93/oj.

commerce, in the Internal Market ("Directive on electronic commerce"),[20] the purpose of which is to encourage the growth of the internal market by maintaining complete independence in the economic market with basic regulations. According to these directives, a common harmonized legal framework was to be created for EU member states. Nonetheless, it could be said that today there is still no common legal framework that would regulate the field of e-commerce not only globally but even within EU countries. Of note, the reason for this is believed to be the lack of the will of states to limit free trade by regulations.[21]

What is more, it should be noted that outside the European Union, the United Nations Organization attempted to regulate e-commerce at the international level in 2005, with the creation of UECIC[22] and the World Trade Organization, which adopted a declaration on international e-commerce in 1998.[23] However, none of the above-mentioned documents could serve as an international regulation, as it could not legally stay current with the accelerated development of Internet technologies.

Contrary to what has already been mentioned, it should be said that the flaws of the common regulation of the legal framework of e-commerce are not typical for the legislation regulating personal data protection. Starting with the adoption of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data in 1981 by the Committee of Ministers of the Council of Europe (the so-called Convention 108

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20 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce; O.J.E.C. L178, 17 July 2000), 1–16, accessed November 24, 2023, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex-%3A32000L0031.

21 Cf. Brian Bieron and Ahmed Usman, "Regulating E-commerce through International Policy: Understanding the International Trade Law Issues of E-commerce," *Journal of World Trade* 46, no. 3 (2012): 546, accessed November 24, 2023, https://www.researchgate.net/publication/290752964_Regulating_E-commerce_through_International_Policy_Understanding_the_International_Trade_Law_Issues_of_E-commerce.

22 United Nations Convention on the Use of Electronic Communications in International Contracts, accessed November 24, 2023, https://wipolex-res.wipo.int/edocs/lexdocs/treaties/en/uncitral-uecic/trt_uncitral_uecic.pdf.

23 United Nations, "UNCITRAL Model Law on Electronic Commerce 1996 with additional Article 5 bis as adopted in 1998," accessed November 24, 2023, https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce.

(CETS 108)),[24] which is the first and only binding international tool in the field of data protection and applies to all types of data processing, completed by the 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)[25] – a set of uniform data protection rules is being created. This directive also applies to the process of data processing in e-commerce. To be fair, it should be noted that the existing legal regulation of personal data protection[26] required harmonization[27] to ensure a high level of protection of personal data and their free transfer between member states. In the realm of data protection legislation, Germany led the charge by adopting the world's first data protection laws in 1970–1976. Shortly after, in 1973, Sweden followed suit and, in 1977, France also followed this example. The United Kingdom joined this trend by enacting the Data Protection Act in 1984, with the Netherlands following suit in 1989. It is worth noting that the purview of these regulations is extended to encompass the intricacies of data processing within the sphere of e-commerce.

The rapid changes in information technology and the fact that the free movement of goods, capital, services and people in the internal market required the free movement of data, which could not be achieved without an equally high standard of data protection in the member states, led to the need of a reform of the EU data protection legislation, which resulted in the adoption of the General Data Protection Regulation (GDPR). This

[24] Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, CETS No. 108, 1981, accessed November 24, 2023, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008db85.

[25] Regulation (EU) 2016/679 of the Eeuropean 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 (O.J.E.C. L119, 4 May 2016), 1–88, accessed November 24, 2023, https://gdpr-info.eu.

[26] In 1970–1976, Germany adopted the world's first data protection legislation, in 1973 Sweden did the same, in 1977 France followed in their footsteps, the UK adopted the Data Protection Act in 1984, and the Netherlands in 1989.

[27] Goshadze Kakhaber and Begiashvili Malkhaz, eds., *European Law on Data Protection*, handbook, translation (Tbilisi: "World of Lawyers", 2015), 20, accessed November 24, 2023, https://fra.europa.eu/sites/default/files/fra-2014-handbook-data-protection-ka.pdf.

act regulated and created a common standard for the process of data processing in e-commerce. Unified data protection rules were established with regard to the basic rights of the data subject[28] and the principles of data processing,[29] the protection of which is important in e-commerce. Organizations faced new obligations to prescribe and define data processing by default when designing a new product or service,[30] appoint personal data protection officers,[31] comply with requirements of the new right of data transfer[32] and obey the principle of accountability.

As for the national standard, Georgia started preparing the Association Agreement between the European Union and Georgia in July 2010. In 2011 the topic of Deep and Comprehensive Free Trade Area (DCFTA) was added to the issues,[33] the implementation of which creates a real mechanism for the gradual economic integration of Georgia into the internal market of the European Union. It also involves the gradual convergence of the legislation regulating the trade sphere and institutions with the relevant regulations and administrative mechanisms of the EU. Within the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (Article 76, Articles 127–128),[34] the parties agree to promote the development of e-commerce, which should be compatible with international standards to ensure the trust of e-commerce consumers.

Thus, with the Association Agreement with the European Union, Georgia has undertaken to bring the legislation into compliance with European standards, including the legal part of personal data protection and e-commerce, which the country is gradually fulfilling. One of the clear examples of the fulfilment of the obligation assumed under the Association Agreement is the adoption of the Law of Georgia on E-Commerce, which will significantly contribute to the deepening of the trade relationship

28 Ibid., Article 15–22.
29 Ibid., Article 5.
30 Ibid., Article 25.
31 Ibid., Article 37–9.
32 Ibid., Article 20.
33 DCFTA, "About Us," accessed November 24, 2023, https://dcfta.gov.ge/ge/about-us.
34 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (Article 76, Articles 127–128).

between the European Union and Georgia and the export of goods/services from Georgia to the EU. It is noteworthy that both of the abovementioned directives were fully transposed into Georgian legislation by the Law of Georgia on the Protection of Consumer Rights which entered into force in June 2022 and the Law of Georgia on Electronic Commerce which entered into force in January 2023, and by adopting these new laws, the scope of the contractual or pre-contractual relationship between the consumer and the trader was also regulated accordingly. Like Directive 2011/83/EU, Georgian legislation establishes the scope of the relationship of the consumer with the trader as any natural person who is offered goods or services, or who purchases or further consumes goods or services exclusively for private purposes and not for performing any commercial practice or industrial activity, crafting or other occupational activities.[35] Accordingly, the parties to a B2C legal relationship are, on the one hand, a natural person and, on the other hand, a trader, who may be either a natural person or a legal person. In addition, the Law of Georgia on the Protection of User Rights, like the Directive mentioned above, establishes the obligation of the consumer to share personal information only in case of withdrawal from a distance contract.

Moreover, in order to come closer to the European standard, Georgia changed the definition of data subject's consent with the new Law on Personal Data Protection and added to it the definition of electronic declaration of will,[36] which will be actively used in the process of implementing the Law on E-Commerce adopted on June 13, 2023. Thus, with the joint application of the said laws, the proper practice of personal data processing in the conditions of e-commerce should be established, which will be supervised by the Personal Data Service.

2.2. Protection of Personal Data Processed in E-commerce Transactions

Protection of the processed personal data of consumers is one of the key issues in the process of e-commerce implementation, because it is necessary to identify a person (e.g. name, surname, date of birth, personal number,

[35] Law of Georgia No. 240110010.05.001.020542 of 29 March 2022 on the Protection of Consumer Rights, Article 4(i).

[36] Law of Georgia on Personal Data Protection, Article 3(m, n).

citizenship, etc.), confirm their identity and contact data (e.g. address, phone number, e-mail, IP address, etc.) and often – bank and credit information of the counterparty (card data, income information, etc.) in order to enter into an e-commerce legal relationship. As much as special attention is paid to data security and processing in e-commerce, the importance of data protection in electronic legal proceedings should be first considered in this regard.

The Georgian Law on Personal Data Protection (both the one currently in force and the proposed one) establishes general rules and requirements for personal data protection and does not specifically address particular cases of lawfulness of data processing in e-commerce. However, according to the recommendations developed by the Georgian supervisory authorities,[37] it is reasonable for the Internet service provider (including the provider of electronic purchases) to have a clear and detailed internal standard for personal data protection, which reflects the specifics of its activities and regulates the rules of personal data collection, data access, storage, destruction and disclosure to third parties.[38] Information about the internal standards of the service provider should be available to the consumer through the so-called privacy policy, which would provide detailed information on processing the consumer's personal data when using the website, the period of data storage, the disclosure of data to third parties, and in case of service termination – on the further use of the data and the means of exercising the consumer's rights. On the one hand, the consumer should be enabled to become aware of the application of privacy policy before using the Internet service and express their consent to the processing of their personal data in accordance with the rules and proportionality principles contained in the application.[39] Thus, e-commerce providers are bound by a special obligation to provide the security of the personal data of consumers collected during the provision of services, on the one hand,[40] and not to

37 Recommendations of Personal Data Protection Inspector Apparatus about personal data protection on the Internet, 3, accessed November 24, 2023, https://old.pdps.ge/cdn/2018/12/Online-Privacy-Rec-for-Users-.pdf.

38 Ibid.

39 Ibid., 4–5.

40 Cf. Balhara, "Consumer Protection Laws," 20.

process unnecessary and large volumes of data,[41] which is not necessary for the scope of their legal relationship, on the other hand.

As for the legal practice of e-commerce in Georgia, in this regard, the results of planned inspections carried out by the Personal Data Protection Service are worth noting.[42] During the study of one of the large companies transporting parcels from different countries, the supervisory authority found that the terms and conditions provided on the website did not contain a text of consent through which the consumer would agree to the conditions of processing their data by the company.[43] Moreover, during the registration process on the website, the consumer necessarily agreed to the terms and conditions of the company's services, while the document did not contain information about the purpose of processing each type of data requested during the registration process on the website and the rights of the data subject.[44] Therefore, the fact that the company kept the collected data until the consumer requested to cancel the registration, is also important. Accordingly, from the perspective of data security, the fact that the company did not use the HTTPS protocol for secure transfer of data through the Internet, was considered a violation by the supervisory authority.[45]

In the practice of the Personal Data Protection Service regarding e-commerce, the inspection of acompany trading in household goods is also noteworthy.[46] Within its inspection, it was determined that through the website, technical support from an individual entrepreneur and one of the companies was used in data processing and that these persons had access to the consumers' data processed through the website without the consumers being informed about it.[47] As part of the inspection, it was also

41 Cf. Suzanne Mercer, "Data Protection and E-Commerce in the UK," *International Journal of Franchising Law* 4, no. 1 (2006): 22–3, accessed November 24, 2023, https://www.scribd.com/document/589056306/4IntlJFranchisingL20.

42 Decision of the Head of the Personal Data Protection Service No. g-1/192/2022 of 15 December 2022.

43 Ibid., 15–23.

44 Ibid., 19–23.

45 Ibid., 20–3.

46 Decision of the Head of the Personal Data Protection Service No. g-1/242/2023 of 26 October 2023.

47 Ibid., 23–9.

revealed that the security measures of data processing were also violated by the company, in particular, only one consumer with controller rights was registered for the system management of the server which was used by the individual entrepreneur providing technical support for the website and each employee of the limited liability company.[48]

It is noteworthy that the standards of the lawfulness of the processing of personal data of consumers in e-commerce, especially with regard to data security, are gradually improving along with increasing public awareness. This is also addressed by Article 33 of the new Law of Georgia on Personal Data Protection, according to which data processors, including trade organizations, should appoint a person responsible for protecting personal data (data protection officer (DPO)) and provide them with a mandate to implement personal data protection policy. However, for practical purposes, it is also important that an organization involved in e-commerce transactions has developed and implemented such control mechanisms that would ensure the confidentiality and integrity of personal data (for example: when processing personal data, persons authorized by the controls integrated in the IT system, should be granted access only to such personal data whose processing is necessary for the performance of the duties assigned to the person).[49]

Thus, in order to protect personal data processed in e-commerce transactions, service providers are obliged to remain within the framework of the legal relationship to the extent that is necessary and justified based on the legal purposes of information processing. Consequently, in order to provide the protection of personal data collected through contractual relations, it is advisable to appoint a data protection officer, as mandated by Article 26 of the new Georgian Law on Personal Data Protection, which mirrors Article 25 of the GDPR. This officer would be directly responsible for continuously improving the organization's data protection policies, monitoring ongoing data processing activities, and ensuring compliance with the relevant legal requirements. It is imperative that data processing

48 Ibid., 27–9.

49 Recommendations of State Inspector on: "Processing Of Personal Data In The Process Of Online Shopping," January 22, 2020, 3, accessed November 24, 2023, https://www.personaldata.ge/cdn/2022/01/personaluri-monatsemebis-dacva-onlain-vachrobis-processhi.pdf.

activities are outlined in an equitable and transparent manner, with priority placed on data privacy as a standard. Additionally, relevant technical and organizational measures should be implemented to enhance data coverage and mitigate the risks of security breaches and unauthorized disclosure, as stipulated by the aforementioned legal obligations.

3. Legal Nature of B2C E-contract

The e-contract is the main basis for establishing commercial legal relations in the digital world. It is impossible for e-commerce to exist and develop without e-contracts.[50] Therefore, the content and features of e-commerce relations are the main tools which make it possible, in general, to define and identify contextual aspects of the e-contract and, specifically, one of its types – the e-contract between the consumer and the trader.[51]

It should be noted that the transition to a market economy parallel to the digitalization of society enabled e-commerce to develop in the digital economy and ensured the development of four types of business models: (1) B2B–business-to-business, (2) B2C–business-to-consumer, (3) B2G–business-to-government, (4) C2C – consumer-to-consumer.[52]

Among the models listed above, the optimal and most common one is the B2C model, regulating contractual relations between business and consumer,[53] which significantly differs from the remaining three models. For example, the business-to-business (B2B) model of relations refers to trade relations between two or more entrepreneurs, whereas B2C is a trade model where goods and/or services are transferred directly from the entrepreneur to the final consumer. In the latter case, it is necessary to purchase

50 Sean O'Reilly, "E-Commerce and Contract Making," *Irish Business Law Quarterly* 4, no. 3 (2012): 19.

51 Anabela Susana de Sousa Gonçalves, "The E-Commerce International Consumer Contract in the European Union," *Masaryk University Journal of Law and Technology* 9, no. 1 (2015): 9.

52 Sreeramana Aithal, "A Review on Various E-business and M-Business Models & Research Opportunities," *International Journal of Management, IT and Engineering* 6, no. 1 (2016): 275.

53 Sugeng and Annisa Fitria, "Legal Protection of E-Commerce Consumers Through Privacy Data Security," in *Advances in Social Science, Education and Humanities Research*, vol. 549: *Proceedings of the 1st International Conference on Mathematics and Mathematics Education (ICMMEd 2020)*, eds. Trena L. Wilkerson et al. (Atlantis Press, 2020), 277.

goods or services for one's own personal consumption.[54] The B2C model is the most widespread model of e-commerce which refers to relations between business and consumer in the electronic space and enables the consumer to become acquainted with the information about specific goods, and other consumers' feedback, find the desired products without leaving home, and enter into contractual relations with the seller through the same virtual space.[55]

Even though B2C e-commerce includes relations related to the electronic purchase and sale of goods and services, it also involves two-way communications between the consumer and the trader, which means that besides sharing information about goods and services, the consumer provides the trader with personal data in the contract-making process. Facebook, a popular social media platform, is one of the most illustrative examples of B2C platforms. The variety of activities offered to consumers by this platform, both paid and free of charge (though with advertising materials), make it an immense B2C platform. For example, with regard to case C210/16,[56] the Court of Justice examined the persons responsible for personal data processing and controllers of the processing and came to the conclusion that Facebook/Facebook fan pages were jointly and severally liable to the consumer, since they provided the service to the consumer through an electronic platform, at the same time, used cookies, without consent, to keep and later use the personal data of the consumer.

Thus, B2C e-commerce can be defined as the provision of remote services and information exchange through electronic means for remuneration between entrepreneurs and final consumers, based on their individual requests.[57]

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54 Tony J. Jewels and Greg T. Timbrell, "Towards a Definition of B2C & B2B E-commerce," *ACIS Proceedings* 56 (2001).

55 Balhara, "Consumer Protection Laws," 19.

56 CJEU Judgment of 5 June 2018, UnabhängigesLandeszentrum für Datenschutz Schleswig-Holstein v. Wirtschaftsakademie Schleswig-Holstein GmbH, Case C-210/16, ECLI:EU:C:2018:388, accessed November 24, 2023, https://curia.europa.eu/juris/document/document.jsf?text=&docid=202543&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8060600.

57 Jewels and Timbrell, "Towards a Definition."

3.1. Personal Data of the Consumer Processed Under a B2C E-contract

The consumer, compared to the entrepreneur, is a vulnerable and less informed side of the contractual relationship within the framework of e-commerce. In order to eliminate this imbalance, a relatively high standard of information and protection at the legal regulation level is used.[58] The Law of Georgia on the Protection of User Rights establishes certain mechanisms for protecting natural persons, including the consumer, is obligation to send to the trader a completed form or other clear evidence, which reflects the consumer's decision to return the goods within the established period,[59] and the trader having no right to request more than the following information to be provided in the form by the consumer for the latter to withdraw from the contract: (a) name, actual address, fax number, e-mail address specified by the trader; (b) date of order; (c) date of receiving the order; (d) consumer name; (e) consumer's address; (f) consumer's signature (if the form is filled out on paper); (g) date of filling out the form.[60] At the same time, with regard to increased protection of consumers, it is necessary to respect their right to information and protect their personal data, which is confirmed by the clarifications made by the Court of Justice of the European Union[61] (hereinafter CJEU) in a number of essential cases regarding the protection of the rights of consumers as data subjects.

In particular, in this regard, an interesting case examined by the CJEU in 2016 should be mentioned at this point, as it was the first time the court explained the concept of personal data, which is successfully used in all cases of this category, also when protecting personal data in e-commerce transactions.[62] In this case, Mr Breyer, a German citizen, requested that

58 Tamar Lakerbaia, "Definition of the 'Consumer' in the practice of European Court of Justice," *Orbeliani Law Review*, no. 4 (2021): 74.

59 Law of Georgia No. 240110010.05.001.020542 of 29 March 2022 on the Protection of Consumer Rights, Article 13(4).

60 Ibid., Article 13(5).

61 Court of Justice of the European Unionconsists of two major courts: the Court of Justice, informally known as the European Court of Justice (ECJ), which hears applications from national courts for preliminary rulings, annulment and appeals; Court of Justice of the European Union, accessed November 24, 2023, https://curia.europa.eu/jcms/jcms/j_6/en/.

62 CJEU Judgment of 19 October 2016, Patrick Breyer v. Bundesrepublik Deutschland, Case C-582/14, ECLI:EU:C:2016:779, accessed November 24, 2023, https://curia.europa.eu/juris/

Germany prohibit, or instruct third parties to prohibit the storage of computerized data transmitted at the end of each consumer's consultation/visit to the websites of German federal institutions. Data included information about website access time and the consumer's IP address, which enabled the service provider to identify the consumer. The Court of Justice emphasized that European legislation does not provide for an obligation of one specific person to hold all information that allows the identification of a data subject. Consequently, the court considered the dynamic IP address, registered by the electronic service provider to constitute personal data when the consumer tries to visit a website.[63]

In 2003, as a result of subsuming actual circumstances within the legal regulations of the European Union, the Grand Chamber of the Court of Justice, with regard to Case C-101/01,[64] also clarified the concept of personal data processing. In particular, the court noted that specifying a person on the website, identifying them by name or by other means, for example, a phone number or information about their working conditions and hobbies, constitutes the processing of personal data.

It is also noteworthy that the consumer's personal data collected within e-commerce transactions often does not remain solely within the control of the trader with whom the consumer establishes a relationship. For example, the case considered by the Grand Chamber of the Court of Justice in 2015 concerns the disclosure of personal data collected within e-commerce

document/document.jsf?text=&docid=184668&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8059289; see also: CJEU Judgment of 20 December 2017, Peter Nowak v. Data Protection Commissioner, Case C-434/16, ECLI:EU:C:2017:994, accessed November 24, 2023, https://curia.europa.eu/juris/document/document.jsf?text=&docid=198059&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8059397; Court of Justice of the European Union, "Fact sheet on the Protection of Personal Data," 2021, 45–60, accessed November 24, 2023, https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-10/fiche_thematique_-_donnees_personnelles_-_en.pdf.

63 Ibid.

64 CJEU Judgment of 6 November 2003, Criminal proceedings v. Bodil Lindqvist, Case C-101/01, ECLI:EU:C:2003:596, accessed November 24, 2023, https://curia.europa.eu/juris/document/document.jsf?text=&docid=48382&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=305437; Court of Justice of the European Union, "Fact sheet," 45–60, accessed November 24, 2023, https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-10/fiche_thematique_-_donnees_personnelles_-_en.pdf.

transactions with a third country.[65] Regarding this case, Facebook user – Mr Schrems filed against Facebook Ireland, claiming that the user's personal data were being transferred to the United States of America and stored without adequate safeguards. The Grand Chamber overturned the Commission's decision regarding this case, noting that the "Safe Harbor" principle does not apply to any transfer of personal data to the US, but only to US self-certified organizations that receive personal data from the EU and the US State bodies are not required to protect them. Therefore, the court stated that because the issue concerned interference with the right to privacy guaranteed by the Charter of Human Rights, it was necessary to establish minimum guarantees so that the persons whose personal data might have been processed should have sufficient safeguards. The need for such guarantees is even greater when personal data is subject to automatic processing at a significant risk of illegal access to them.[66]

So, in order to ensure effective protection of consumers' personal data, first of all, it is important to identify such data, except for the data normally needed for concluding contracts (for example: name, surname, address, contact information, etc.), as far as, based on the examples of the court decisions mentioned above, it can be said that the realm of the Internet expands the definition of the concept of personal data even more.This is important, on the one hand, for the protection of good faith in business-to-consumer relations and, on the other hand, for promoting smooth functioning in accordance with the internal market law.

3.2. Rights and Obligations of Data Processor in the E-commerce Transactions

The main obligation of data processor is the safe protection of data security. E-commerce security is often defined as "the protection of an information resource from threats and risks over a network within the confidentiality, authenticity and integrity of transmitted electronic transactions." E-commerce can only develop if the system can provide the same level of trust and security as that provided in traditional business methods. This can be

[65] CJEU Judgment of 6 October 2015, Maximillian Schrems v. Data Protection Commissioner, Case C-362/14, ECLI:EU:C:2015:650, accessed November 24, 2023https://curia.europa.eu/juris/document/document.jsf?text=&docid=169195&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8061186.

[66] Ibid., para. 91.

achieved as long as e-commerce consumers are confident about the protection provided in e-commerce.[67]

In e-commerce transactions, the consumer provides their personal information, including personal identifiable information (name, surname, address, phone number, personal number, e-mail), financial history, health information, etc., to a specific website at the pre-contractual or contractual stage, exposing themselves to a breach of confidentiality and this is where the issue of consumer trust in the trader emerges.[68] In general, online traders create detailed profiles of consumers based on their online activities, where consumers, often very willingly, share their personal data,whereas traders control these data with implicit methods, such as cookies, often without clear consent.[69] Essentially, there are three basic methods of collecting consumers' data in legal literature: (1) Consumer's data could be shared by the consumer themselves, for example: by creating a social media profile or providing credit card information when making online purchases; (2) Data could be collected with implicit method, when the data subject's role is passive; for example: location sharing with mobile phones or websites; (3) And, finally, based on an individual's financial history, a trader might collect personal data from seemingly "anonymous" or "non-personal" data.[70]

Additionally, the EU General Data Protection Regulation (GDPR) requires vendors involved in e-commerce to align their trading policies with the standards for consumer confidentiality and personal data protection established by the abovementioned regulation.[71]

Legislation has stipulated that data processors should use consumer's personal data purposely. In this regard, the practice established by one of the largest entrepreneurs, Amazon, is quite remarkable. In September 2000, Amazon.com, which held the personal data of almost 23 million users

67 Balhara, "Consumer Protection Laws," 21.

68 Mayank Singhal, "Cross Border Data Protection and E-Commerce," *RGNUL Financial and Mercantile Law Review* 6, no. 2 (2019): 50.

69 Kanagayazhini, "Critical Analysis," 3.

70 OECD, "Toolkit for Protecting Digital Consumers," 41.

71 Ashok R. Patil and Akshay Yadav, "Suggested Legal Framework for Strengthening the Consumer Protection in E-Commerce Transactions," *Journal of Law, Development and Politics* 12, no. 206 (2022): 213.

registered on the website, made changes in its confidentiality policy. Afterwards, the consumers observed different prices of the same goods depending on location and browser. Amazon explained this as a price test, which analyzed consumers' online purchase behavior based on price changes. However, critics found specific patterns suggesting that consumers with higher spending habits were offered higher prices than the newly registered or low-budget consumers who were offered lower prices. This discrimination was linked to using cookie files. The consumers deleting or blocking cookie files received larger discounts, which highlighted potential flaws of internal, secondary use of personal data.[72]

Regarding B2C contracts, a recent case of a Romanian telecommunications firm "Orange" is also of interest to this study. The state sued the company for its unauthorized storage of hard copies identifying its consumers.[73] Despite the fact that the Romanian company presented the consumers' consents (in the form of a checkbox) obtained while concluding contracts, the court did not recognize the collection of personal data as legal and explained that in B2C relations, consumer' written consent alone is not enough, if it is not presented in an understandable and easily accessible form. The terms should be stated in a way that enables the consumer to make a free choice, the contractual terms should not mislead them about the possibility of contract conclusion, even if they refuse to give a consent about their personal data processing.[74] The court did not consider the pre-marking of the consent option by the data controller/person responsible for the processing of personal data during contract conclusion, or the obligation for the consumer to express their opinion in writing in the case of refusal, as an expression of legally valid will by the consumer and found such methods of collection of personal data to be illegal.[75] During one of the cases, the Grand Chamber of the Court of Justice did

72 Priya Singh, "Consumer Privacy in E-commerce," *Supremo Amicus* 25, (2021): 242.

73 CJEU Judgment of 11 November 2020, Orange Romania SA v. AutoritateaNațională de Supraveghere a PrelucrăriiDatelor cu Caracter Personal (ANSPDCP), Case C-61/19, ECLI:EU:C:2020:901, accessed November 24, 2023, https://curia.europa.eu/juris/document/document.jsf;jsessionid=341365AF1A5CF8612998306109611D26?text=&docid=233544&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=40182213.

74 Ibid., paras. 49–51.

75 Ibid., para. 52 and following.

not recognize as legally valid consents in which a service provider marks the consent option in advance, and in which the consumer should unselect the consent that has been marked in advance, or submit a written refusal about the consent marked in advance by service provider.[76]

It should be noted that e-commerce companies, according to GDPR provisions, in addition to being required to obtain the consent of consumers for the collection, storage and processing of their personal data, must also allow consumers to exercise full control and gain ownership of their data. This refers not only to European companies but also to foreign companies which have access to EU citizens' personal data. GDPR provides the "Right to be forgotten", right to limit processing and the right to data disclosure, which provide the confidentiality of the consumer in e-commerce platforms.[77] Indeed, one of the recent decisions in favour of consumers in e-commerce was made by the European Court of Justice (CJEU) and found that consumers whose data was collected in e-commerce transactions on a website or in an online shop have the right to correct the relevant information or, if necessary, delete it (de-referencing of personal data).[78] Granting consumers with this right should be considered a substantial step forward and one of the mechanisms for protecting e-commerce contracts.

Besides, GDPR makes it essential that data processors should process data legally, fairly and transparently.[79] Protection of the above-mentioned principles within the framework of such contractual relations, where the consumer is considered as the less informed side of the contract, is particularly important, because not only the proper functioning of the market, but also the reliability of the sharing of personal data of the contractual parties must be protected. It is significant that the current edition of the Law of

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76 CJEU Judgment of 1 October 2019, Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V. v. Planet49 GmbH, Case C-673/17, ECLI:EU:C:2019:801, accessed November 24, 2023, https://curia.europa.eu/juris/document/document.jsf?text=&docid=218462&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8062181.

77 Singh, "Consumer Privacy," 243.

78 CJEU Judgment of 24 September 2019, GC and Others v. Commission nationale de l'informatique et des libertés (CNIL), Case C-136/17, ECLI:EU:C:2019:773, accessed November 24, 2023, https://curia.europa.eu/juris/document/document.jsf?text=&docid=218106&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8061825.

79 Ayunda, "Personal Data Protection," 151.

Georgia on Personal Data Protection also provides for the necessity to process data fairly, legally and without infringement on the dignity of the data subject, although the new law, like the GDPR, establishes such a principle of data processing as transparency, which emphasizes the transparency and perceptibility of the entire process of data processing for the data subject,[80] which also refers to data processing within e-commerce.

4. Rights of the Supervisory Authority with Regard to Personal Data Processed in E-commerce

Each country of the European Union has a Data Protection Authority (DPA), which is responsible for the execution of the regulation (GDPR) in its member state and is entitled to perform investigative, punitive and supervisory functions. In the case of a violation of personal data processing rules, it is entitled to study the issue, detect the violation, and take appropriate legal measures to resolve the problem.[81] Therefore, measures taken by DPA include imposing a fine, ordering the collected personal data to be destroyed, issuing a warning to bring the process of collecting personal data in compliance with the law, liquidating the offender's business, etc.[82]

As for the supervision of the lawfulness of personal data processing in e-commerce transactions, the main function of the Data Protection Authority in this regard is to determine whether the rationale for data processing exists and if so, whether the processing complies with internationally recognized principles of personal data protection. Also, the function of the Data Protection Authority is to scrutinize the measures taken to ensure the security of personal data processed in e-commerce transactions.[83] As a sanction for the infringement of personal data revealed

[80] Georgian Law No. 010100000.05.001.016606 of 28 December 2011 on Personal Data Protection, Article 4(a).

[81] Ibid.

[82] EDPB Guidelines on the GDPR, especially the guidelines on the DPIA and guidelines on data breach notifications, accessed November 24, 2023, https://ec.europa.eu/newsroom/article29/items/611236, Chapters IV and VI of the GDPR.

[83] 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), Articles 51–9, accessed November 24, 2023, https://eur-lex.europa.eu/eli/reg/2016/679/oj.

in cases related to e-commerce, the supervisory authority may also use the non-material damage compensation mechanism. The latest practice of the Court of Justice uses the same approach and sets additional criteria for compensation of damages. In particular, within a 2023 decision,[84] the court clarified that not all types of personal data violations lead to the right to claim compensation for non-material damages. Rather, in such cases, it is important to prove the fact of private/personal damage. The court also clarified that damage could only be compensated in case of a GDPR violation, material and non-material damage caused by disputed violation and a direct cause-and-effect relation between the violation and the damage caused by it.[85]

In general, the imposition of fines is recognized as the most effective law enforcement mechanism for the protection of personal data in e-commerce transactions.[86] In the European Union, fines imposed by the competent authorities usually derive from and depend on the degree of personal violation, however, their amounts are substantial and have the nature of so-called punitive damages. For example, France fined Google 50 million euros, alleging that the company violated collecting personal data in e-commerce transactions, as the process was not transparent, the consumers were given inadequate and insufficient information, which is why they were not consents expressed based on the free will of consumers.[87] Another case is the UK Information Commissioner's Office (ICO) fining British Airways 20 million pounds for illegally disclosing the personal data and financial information of 500,000 consumers.[88] ICO also fined Marriot International 99 million pounds, as the latter failed to adequately protect

84 CJEU Judgment of 4 May 2023, Österreichische Post, Case C-300/21, ECLI:EU:C:2023:370, accessed November 24, 2023, https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-300/21&jur=C.

85 Ibid.

86 European Union Agency for Fundamental Rights, Access to data protection remedies in EU Member States, accessed November 24, 2023, https://fra.europa.eu/sites/default/files/fra-2014-access-data-protection-remedies-summary_en.pdf.

87 Administrative Court of Appeal, France vs. Google, April 2019, Case 17PA03065.

88 ICO, Penalty Notice, accessed November 24, 2023, https://ico.org.uk/media/action-weve-taken/mpns/2618421/ba-penalty-20201016.pdf.

the personal data of 339 million visitors from unauthorized disclosure.[89] In 2019, in turn, the Luxembourg Data Protection Agency fined Amazon – the e-commerce giant – 746 million euros as Amazon collected and stored consumers' personal data in an unauthorized way.[90]

At this point, is worth discussing the "one-stop-shop" mechanism, which the GDPR provides as one of the law enforcement mechanisms that "is aimed at organisations that operate in different member states of the European Union or carry out the transmission of personal data in several member states".[91] In such a case, the lead supervisory authority is authorized to supervise the collection and transfer of personal data collected in e-commerce transactions. The introduction of the "one-stop-shop" mechanism was aimed at simplifying the regulations imposed on businesses and, accordingly, encouraging electronic commerce.[92] As for Georgia, the Personal Data Protection Service considers statements and complaints related to the lawfulness of data processing through electronic contracts concluded with consumers in e-commerce transactions. Once a violation is detected, the Service imposes a relevant sanction on the data process or, the amount and type of which are regulated by legislation.[93] Unlike in the European Union, the amount of fines in Georgia is minimal (not only by European but also by Georgian standards), for example, the largest fine prescribed by law is 6000 GEL, which is almost equivalent to 2000 euros at today's exchange rate, and fine amount defined

89 Marriott International (2019), Information Commissioner's Office (ICO) – Marriott International, accessed November 24, 2023, https://www.edpb.europa.eu/news/national-news/2019/ico-statement-intention-fine-marriott-international-inc-more-ps99-million_en.

90 Order of the General Court (First Chamber) of 14 October 2021, Amazon.com, Inc. and Others v. European Commission, Case T-19/21, ECLI:EU:T:2021:730, accessed November 24, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62021TO0019.

91 Data Protection Commissioner, "One Stop Shop (OSS): Cross-border Processing and the One Stop Shop," accessed November 24, 2023, https://www.dataprotection.ie/en/organisations/international-transfers/one-stop-shop-oss.

92 Andra Giurgiu, Gertjan Boulet, and Paul De Hert, "EU's One-stop-shop Mechanism: Thinking Transnational," *Privacy Laws & Business. International Report*, no. 137 (2015): 1–7.

93 Georgian Law No. 010100000.05.001.020936 of 14 June 2023 on Personal Data Protection, Articles 66, 88.

by the GDPR starts from 20 million euros or is estimated at up to 4% of the company's annual income.[94]

In Georgia, there are almost no disputes arising from the contract concluded within e-commerce, among the few practices found in Georgia, we should highlight the decision taken by the supervisory authority on personal data protection against one of the large companies operating in the e-commerce sector, according to which, based on the contract concluded with the consumer in e-commerce transactions, the company (LLC) selling equipment incompletely recorded the data processing process, as well as there was no recording of the actions performed on the data (so-called logs).[95] Besides the wide scale of violation, one of the largest e-commerce operators in Georgia was fined only 500 GEL (approximately 200 euros).[96] Also, the decision against one of the largest household goods selling companies operating in Georgia, which was fined 500 GEL, is also very important, as the Personal Data Protection Service determined that in the process of remote service provided to consumers, the company was not able to record personal data obtained during the contract within e-commerce, including data viewing and data removal. Therefore, personal user portals of those who had access to the consumers' personal data were misallocated and, in some cases, non-existent, making it impossible to monitor those who had access to sensitive information.[97] For this category of infringement, in another case, an enormous electronic commerce entity was also fined 500 GEL.[98]

Based on the analyzed material, it can be said that the imposition of fines on companies in Georgia is characterized as an application form, because, first, the income of electronic traders is rather substantial, so

94 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; O.J.E.C. L119, 4 May 2016), 1–88.

95 Decision of the Head of the Personal Data Protection Service of 26 October 2023 No. ჯ-1/241/2023.

96 Decision of the Head of the Personal Data Protection Service of 26 October 2023 No. ჯ-1/242/2023.

97 Ibid.

98 Decision of the Head of the Personal Data Protection Service of 3 November 2023 No. ჯ-1/251/2023.

it is easier for them to pay "imperceptible" and "painless" fines than spend funds and time to create a policy for the protection of personal data. Second, such minor fines might not and cannot restore the violated rights of consumers to the extent to which material and non-material damage is caused to them, which is much more burden some than the fine imposed on the company, which as a consequence is only a formality. In this regard, bringing the Georgian legislation closer to the amount of the sanction in force in the EU would be an important step forward, so that the fine would not only serve as a deterrent but also perform a practical effective function, persuading electronic traders that without developing a policy for the effective protection of personal data of consumers, the sanction imposed on them could be so financially damaging that it would either threaten their operation in the market or damage their goodwill in a way that a large number of consumers would refuse to cooperate with them. It would also be important to include the "one-stop-shop" mechanism in Georgian legislation, which would limit the usage of Georgian jurisdiction as "a black hole", therefore, regulating the discussed mechanism at the legislative level would enable to bring together in the legal regime such companies, whose activities include the transfer to different countries of personal data obtained within e-commerce.

In this part, it is important to discuss the mechanism of cooperation of supervisory authorities of member states, which ensures a gradual use of regulations within the EU.[99] This mechanism includes cooperation among commissions, issuance of advisory opinions and resolving disputes among supervisory authorities of member states.[100] Georgian legislation does not consider such a mechanism of personal data protection in e-commerce and integration of it into national legislation is not much needed until Georgia becomes a member state of the European Union. However, it is noteworthy that despite not having a Status, during the European Data Protection Board ("EDPB") plenary session on June 20, 2023, it decided to grant the supervisory authority of Georgia the status of an observer of

[99] 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; O.J.E.C. L119, 4 May 2016), Articles 60–76.

[100] Ibid.

the European Data Protection Board (EDPB) activities. This is very important because the Personal Data Protection Service would be able to observe the practice of the European Data Protection Board in actual mode, including in the scope of the legitimacy of data processing of natural persons within e-commerce and, by analyzing the best practices, implement these approaches within the scope of its own activities.

5. Conclusion

E-commerce and its legal regulation are an innovation for Georgia, as e-commerce is of high interest today and will become even more important in the future, because the growing development of the Internet and digital technologies connect people, businesses, device, data and processes. This enhances the strengthening of the digital economy, implementation of services through electronic means and the transition to online market trading platforms.

As of today, the existing scarce practice and theoretical legal provisions in Georgia clearly define the obligations of the data processor, providing activities to thoroughly protect the consumers' personal data in contracts concluded in e-commerce transactions. Therefore, in case of a dispute, along with the supervisory authority liable for personal data protection, it also determines the issue of applying to the National Competition Agency, prospectivly aiming, even formally, to unambiguously and clearly define rules which would not leave any perceptions of not spreading cases about violation of personal data processing rules in e-commerce transactions. Even though the agency considers cases of harm as well as possible harm to the interests of service recipients, which might include violation of the rights of individuals or groups of individuals caused by illegal processing of personal data, it is within the direct competence of the Personal Data Protection Service.

To sum up, it should be noted that the Law of Georgia on Personal Data Protection and Law of Georgia on E-Commerce are new in Georgia's legal space and, at this moment, their joint consideration and analysis make it possible to only discuss the purpose of legislation, to bring national regulatory framework in compliance with international, especially European, regulatory framework standards. However, from a practical perspective, at present, it is difficult to predict its actual potential in reality and

how the importance of personal data protection in e-commerce relations will be perceived in the Georgian trade space, and in this regard, how will it compare to European practice and what major distinguishing trends will appear.

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General Characteristics of Service of Procedural Documents in Polish Civil Proceedings Compared to Selected European Countries

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Abstract: The institution of service by a court enforcement officer has had a significant impact on the regularity of the service of court letters. The provisions introduced put an end to the so-called fiction of service on individuals, which meant that after two attempts at service, the court could assume that the document had been effectively served. It was recognized that this too often led to prejudice to the rights of defendants, in particular those who had not lived at the addresses indicated by the plaintiffs for a long time – often, due to the correct (fictitious) service of payment orders, they were obliged to pay the amounts resulting from final court decisions. Unfortunately, under the previous legislation, there were cases of claimants giving unverified or even false information. The legislator obligatorily introduced into the Polish legal order, in Article 1391 of the Code of Civil Procedure, the service of letters through a court bailiff in the event that a statement of claim or any other writ of summons that gives rise to the need to defend the rights of the defendant has not been effectively served on the defendant in accordance with 131–139 of the Code of Civil Procedure. Thus, the legislator, contrary to the principle of routine service, imposed the resulting obligations not on the procedural authority, but on the initiator of the proceedings in the case. This study aims to present the institution of the bailiff in Polish civil proceedings and discuss its advantages and disadvantages.

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It is particularly relevant in light of the changes introduced by the amendment of the CPC of 9 March 2023, effective from 1 July 2023, which are designed to improve this type of service.

1. Introduction

Issues relating to service in civil proceedings[1] are crucial to the proper conduct of court proceedings. Indeed, the institution of service is a manifestation of the constitutional principle of the right to trial,[2] which in this aspect amounts to ensuring the gathering of evidence and the rights of the parties in civil proceedings. The provisions concerning service are therefore intended to enable the addressee of a procedural document to read its contents. They thus fulfil an important function of a guarantee, conditioning the observance of fair trial standards.[3]

The main purpose of this study is to demonstrate the essential role of the institution of service in the proper conduct of civil proceedings. This is because it constitutes an important intermediate goal that conditions the achievement of the end goal, which is the proper conclusion of civil proceedings. The main part of the article provides a systemic and dogmatic analysis of service in the Polish legal system and presents it against the background of regulations in selected European countries.

The study will first outline the role and importance of service for the proper conduct of civil proceedings. In the next step, it will present the general characteristics of the Polish service system in civil proceedings. Then, it will characterize the regulations on service in selected European countries. Finally, it will present findings and conclusions concerning legal solutions to remedy the shortcomings in this area and create a proposal for an optimal procedural model for the institution of service.

1 Act of 17 November 1964 – Code of Civil Procedure, Journal of Laws 2023, item 1550, consolidated text, hereinafter referred to as the CCP.

2 Article 45 of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws, no. 78, item 483, as amended, hereinafter referred to as the Polish Constitution.

3 Paweł Grzegorczyk, "Doręczenie na podstawie art. 139 § 1 k.p.c. a pierwsze pismo w sprawie," *Monitor Prawniczy*, no. 23 (2011): 1284.

2. Role and Significance of the Institution of Service in Polish Civil Proceedings

The active participation of a party or a participant in pending civil proceedings is one of the fundamental manifestations of the constitutional principle of the right to trial[4] which is one of the basic rights of an individual and one of the fundamental guarantees of the rule of law in a democratic state. The right to active participation under the Code of Civil Procedure is fully implemented by the institution of service, regulated in Part One, Book One, Title VI, Section I, Chapter 2 of the CCP. The institution in question secures the procedural interests of both parties to civil proceedings by ensuring a certain order of the actions performed and, consequently, guarantees the procedural effectiveness of such actions.[5]

The above institution influences the effectiveness of court proceedings and guarantees the parties' rights by obtaining real notice of the court's actions. Service is strongly functionally linked to the individual principles of civil proceedings, which is also of considerable importance for the direction of the systemic interpretation of the norms of procedural law that govern this institution. All this means that the proper manner of service often determines the proper conclusion of pending proceedings.[6]

The correctness of service of a document guarantees the correctness of the court proceedings and serves as an instrument for the protection of the procedural rights of its participants. Therefore, the legislator is obliged to shape the notification procedure – including its technical aspect – in a way that will reduce the risk of infringing a party's right to trial. While a properly functioning service system is intended to streamline civil proceedings, it is important that the regulations introduced in this area are precisely formulated. Vague and imprecise regulation of this area may lead

4 Article 45 of the Polish Constitution "Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court."

5 Arkadiusz Wudarski, "Doręczanie pism procesowych w ujęciu prawnoporównawczym," *Kwartalnik Prawa Prywatnego*, no. 4 (2003): 877.

6 Paweł Grzegorczyk, "Doręczenie zastępcze w postępowaniu cywilnym," in *Prawo wobec wyzwań współczesności. Materiały z sesji naukowej (Poznań 19–21 maja 2003 r.)*, ed. Paweł Wiliński (Poznań: Biuro Usługowo-Handlowe "PRINTER", 2004), 157.

to negative consequences not only for the work of courts and attorneys but, above all, for parties to proceedings.[7]

It is worth emphasizing that, contrary to appearances, the service of letters in civil proceedings is not always a simple task. This is because, in practice, the interpretation of service provisions often causes many problems not only for parties without a professional attorney at law but sometimes also for professionals representing parties or participants in the proceedings.

In recent years, there have been significant changes to the provisions in the Code of Civil Procedure concerning the service of documents. Above all, the computerization of the judiciary has necessitated the introduction of modern solutions enabling the electronic service of documents.[8] This is primarily reflected in proceedings which are, by definition, conducted exclusively in electronic form. Electronic service is also being increasingly introduced into proceedings hitherto conducted in traditional form.

In addition, the list of entities mediating court service was changed by the introduction into the Polish legal order, through the amendment of the CCP of 7 November 2019, the institution of substituted service through a court enforcement officer (pursuant to Article 139[1] of the CCP) in place of the so-called fiction of service. It is applicable when a statement of claim or other procedural document cannot be properly served on a person.[9] The institution in question was further strengthened by the amendment to the CCP of 9 March 2023 introducing several additional changes to streamline the process of court enforcement service.[10]

All these elements come together to ensure that the parties or participants in the proceedings have wide access to knowledge of the measures taken in the pending case. This is important because the lack of effective

7 Ibid.

8 See, decision: Decision of the Supreme Court of 25 January 2022, III CZ 58/22, OSNC 2022/9/91.

9 Henryka Bednorz-Godyń, "Doręczenia za pośrednictwem komornika sądowego," *Monitor Prawniczy*, no. 8 (2023): 499–501.

10 Por. Łukasz Zamojski, "Doręczenie pozwanemu pierwszego pisma procesowego wywołującego potrzebę obrony na podstawie art. 139[1] KPC," *Monitor Prawa Handlowego*, no. 3 (2019): 14; however, on page 25, the same author expresses doubts as to the advisability of introducing the provision in question, pointing to the defendant's existing defense mechanisms related to incorrect delivery of court correspondence.

delivery may make it difficult to collect the due benefit.[11] This has a direct impact on the efficiency and effectiveness of the proceedings and allows the entities involved to respond in a timely manner within their right of defense.[12]

3. The Principle of Routine Service of Procedural Documents

Service in Polish civil proceedings mainly concerns copies of procedural documents and judicial documents the main task of which is to inform the parties of the course of the proceedings.[13] In discussing the indicated subject matter, one should note a crucial principle which is of key importance for the course of the proceedings. This is a reference to the principle of routine service expressed in Article 131 *in principio* of the CCP.[14] This principle is a response to the principle of disposition, which is commonly applied in Polish civil proceedings. Thus, the legislator, when regulating the powers of the court in the area of service, was of the view that the principle of disposition does not sufficiently ensure the social function of the proceedings, nor does it secure the needs of practice in terms of the certainty of service.[15]

This means that service is the responsibility of the court and the court should serve the parties with copies of the statement of claim or statement of defense without the parties having to make a request. The court is responsible for the correctness and timeliness of the service. As a rule,

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11 More information on problems with pursuing claims based on the correct delivery of procedural documents: Aleksandra Sikorska-Lewandowska, "Problemy z dochodzeniem roszczeń po nowelizacji przepisów KPC o doręczeniach," *Nieruchomości*, no. 9 (2020): 4–6.

12 It may be very difficult to determine what types of documents, apart from the lawsuit, trigger the need to defend one's rights. This applies primarily to letters that may be served on the defendant before the lawsuit is served, such as an application to secure evidence or an application to secure a claim; Zamojski, "Doręczenie pozwanemu pierwszego pisma," 15.

13 Cf. Article 140 of the CCP and Witold Broniewicz, *Postępowanie cywilne w zarysie* (Warsaw: Wydawnictwo Prawnicze LexisNexis, 2008), 88.

14 Cf. Decision of the Supreme Court of 8 September 1993, III CRN 30/93, OSNCP 1994, No. 7–8, item 160.

15 Włodzimierz Berutowicz, "Funkcja ochronna postępowania cywilnego," in *Studia z prawa postępowania cywilnego Księga Pamiątkowa ku czci Zbigniewa Resicha*, eds. Maria Jędrzejewska and Tadeusz Ereciński (Warsaw: Państwowe Wydawnictwo Naukowe, 1985), 35; Mariusz Sorysz, "Doręczenie i jego wpływ na bieg terminów w postępowaniu cywilnym," *Monitor Prawniczy*, no. 15 (2003): 687.

the court effects service by means of a public postal operator or another postal operator, within the meaning of the Act of 23 November 2023 – Postal Law,[16] persons employed by the court, a court enforcement officer, or a court service unit. In cases specified in the Act, the court may effect service through the Police or the Military Police. Service shall be effected at the addressee's home, place of work, or another place where the addressee is to be found. At the request of a party, service may also be effected through a post-office box.[17]

An exception to the principle of routine service is service effected directly between advocates, legal counsels, patent agents, and lawyers of the General Counsel to the Republic of Poland. These entities are obliged to directly serve certain documents on each other in the course of a case. They are also obliged to attach to the procedural document filed with the court following Article 132 § 1 and § 1^1 of the CCP proof of service of a copy of the document on the other party or proof of sending it by registered mail. In the case of direct service, the competent attorney is responsible for the correctness of the service, although in this case, it is also at the discretion of the court to assess the effectiveness of the service.[18]

The above regulations are subject to certain modifications in case of a situation indicated in Article 132 § 1^3 of the CCP, where procedural documents with attachments, except for the documents listed in § 1^1, shall be served directly on each other by advocates, legal counsels, patent agents, and the General Counsel to the Republic of Poland exclusively in electronic form if they make unanimous declarations to the court to this effect and provide the court with the contact details used for that purpose, in particular their e-mail address or fax number.[19]

The current wording of Article 88 of the CCP has introduced into the Polish legal system a regulation making it possible to grant the so-called power of attorney for service. Any natural person may be an attorney for

16 Act of 23 November 2023 – Postal Law, Journal of Laws 2023, item 1640).

17 Dorota Markiewicz, in *Kodeks Postępowania Cywilnego. Komentarz Art. 1–505*[39], ed. Tomasz Szanciło (Warsaw: C.H. Beck, 2019), 537.

18 Cf., i.a., Decision of the Supreme Court of 2 August 2007, V CSK 155/07, Legalis/el; Decision of the Supreme Court of 14 April 2011, II UZ 10/11, Legalis/el; Judgement of the Supreme Court of 22 October 2013, III UK 154/12, Legalis/el.

19 Markiewicz, in *Kodeks Postępowania Cywilnego*, 541–3.

service, which is expected to improve the service of court correspondence and thus accelerate the course of proceedings.

4. General Characteristics of the Service System in Civil Proceedings

4.1. Time and Place of Service

Pursuant to Article 134 § 1 of the CCP, service should take place on weekdays. Only in exceptional cases it may take place on public holidays and during night time, by prior order of the President of the court. According to Article 134 § 2 of the CCP, night-time is considered to be between 9 p.m. and 7 a.m. The provisions also regulate the place where service should be effected, which, pursuant to Article 135 of the CCP, is the addressee's home, place of work, or another place where the addressee is to be found. At the request of a party, service may be effected to the post-office box address indicated by that party. In this case, a judicial document sent through a postal operator, within the meaning of the Act of 23 November 2012 – Postal Law,[20] shall be deposited at a post office of that operator, with a notice of it placed in the addressee's post-office box. Service on the addressee may also be effected by handing them the document directly at the court registry (Article 132 § 2 of the CCP).[21]

4.2. Service on Natural Persons

Pursuant to Article 133 § 1 of the CCP, where the addressee is a natural person, documents should be served on them personally or, if they do not have procedural capacity, on their legal representative. Service on natural persons may also take the form of so-called substituted service.[22]

If the addressee is not found at home by the serving party, pursuant to Article 138 § 1 of the CCP, the latter may serve the judicial document on an adult household member or, if such is not present, on the house administrator, the house caretaker, or the municipal authority, if these persons are not the addressee's opponents in the case and have undertaken to hand over the letter to the addressee. Bearing in mind a view which is well established

20 Act of 23 November 2012 – Postal Law, Journal of Laws 2022, item 896, 1933 and 2042.

21 Cf. Decision of the Supreme Court of 4 February 1970, II PZ 55/69, Legalis/el.

22 Władysław Siedlecki, in *Kodeks postępowania cywilnego. Komentarz*, eds. Władysław Siedlecki and Zbigniew Resich (Warsaw: Wydawnictwo Prawnicze, 1976), 1: 253.

in numerous Supreme Court judgments, substituted service is based on the presumption that the mail has reached the addressee.[23]

Like any presumption, however, it can be rebutted by proving the contrary. A party may therefore show that, despite the mail being received by another person, they were in fact unable to read it. In the doctrine, the view is represented that in a situation where the addressee proves that service under Article 138 § 1 or 2 of the CCP took place despite the failure to fulfil the conditions indicated in these provisions, it should be assumed that service did not take place at all. However, this is not a question of rebutting the alleged presumption of the correctness of service under the above provision, but of demonstrating that the event that occurred did not comply with the conditions stemming from those provisions and therefore did not constitute service as provided for therein.[24]

If the addressee refuses to accept the letter, service shall be deemed to have taken place. In such a situation, pursuant to Article 139 § 2 of the CCP, the serving party shall return the letter to the court with a note about the refusal to accept it.[25] If the serving party does not find the addressee at their place of work, the former may, pursuant to Article 138 § 2 of the CCP, serve the letter on a person authorized to receive letters designated by the employer.[26]

The legislator has imposed an obligation on the parties and their representatives to notify the court of any change in their place of residence. If this obligation is not complied with, the judicial document shall be left in the case file as effectively served, unless the new address is known to the court. The court shall instruct the party of this obligation and the consequences of failing to comply with it at the time of first service (Article 136 § 1 and 2 of the CCP).[27]

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23 See: Judgment of the Supreme Court of 28 February 2002, III CKN 1316/00, Legalis/el; Decision of the Supreme Court of 4 September 1970, I PZ 53/70, OSCP 1971/6, item 100; Decision of the Supreme Court of 10 February 2000, II CKN 820/99, Legalis/el; Decision of the Supreme Court of 5 February 2008, II PZ 72/07, Legalis/el.

24 Piotr Rylski, "Skuteczność doręczeń w procesie cywilnym," *Prawo w działaniu. Sprawy Cywilne*, no. 15 (2013): 57.

25 Decision of the Supreme Court of 25 September 2014, II CZ 46/14, Legalis/el.

26 Markiewicz, in *Kodeks Postępowania Cywilnego*, 561–3.

27 Judgment of the Supreme Court of 18 December 2003, I PK 117/03, Legalis/el.

If service cannot be effected in the manner envisaged above, the letter shall be served by means of the so-called advice note.[28] This means that a letter sent through a postal operator within the meaning of the Postal Law shall be deposited at a post office of that operator, and a letter served in another way shall be deposited at the office of a competent municipality, with a notice thereof left in the door of the addressee's home or letter box, with an indication where and when the letter has been left and with an instruction that it should be collected within seven days of the date of the notice. If this time limit expires without effect, the notice shall be repeated in accordance with Article 139 § 1 of the CCP. In such a case, service shall be deemed to have been effected when the addressee or an entitled person collects the letter from the post office or municipal office. If the mail is not collected within the time limit, it shall be deemed to have been delivered on the date of expiry of the time limit for its collection.[29]

4.3. Service Under Article 139[1] of the CCP

In Article 139[1] of the CCP, the legislator provided for a special mode of serving documents on a defendant who is a natural person. Very importantly, this regulation cannot be applied to natural persons in cases in which they act as entrepreneurs, nor does it apply to entities other than natural persons.[30]

Section (§) 1 of the above provision indicates that if a defendant is a natural person, despite a repeated notice under Article 139, inability to serve

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[28] With the exception of letters served on a defendant who is a natural person under Article 139[1] of the CCP through a court enforcement officer, as referred to in subchapter 4.3; however, the practice of obliging the court to deliver a copy of the lawsuit through a bailiff under Article 139[1] of the CCP, and after determining that the defendant actually resides at the address indicated in the statement of claim, the copy of the payment order, which was initially served together with a copy of the statement of claim, should be deemed served after two notifications. The regulation in question is intended to prevent not only lawsuits from being sent to fictitious or unverified addresses, but also to prevent the plaintiff from benefiting from knowledge about, for example, the defendant's longer absence from the place of residence.

[29] Cf. Resolution of the Supreme Court of 10 May 1971, III CZP 10/71, OSNCP 1971/11, item 187; Decision of the Supreme Court of 25 January 1995, III CRN 71/94, Legalis/el; Decision of the Supreme Court of 20 June 2000, III CZ 59/00, Legalis/el; Decision of the Supreme Court of 30 November 2007, IV CZ 89/07, Legalis/el; Decision of the Supreme Court of 5 June 2009, I CZ 26/09, Legalis/el.

[30] H. Bednorz-Godyń, *Doręczenia*, 499–501.

a judicial document or refusal to accept it, § 1, second sentence, has not received a statement of claim, another procedural document, or a judgment giving rise to the need to defend their rights sent to the address indicated, and they have not previously been served with any document in the case in the manner provided for in the preceding Articles, or if Article 139, inability to serve a judicial document or refusal to accept it, § 2 or any other special provision providing for the effect of service does not apply, the presiding judge shall inform the plaintiff accordingly, sending them a copy of the judicial document for the defendant and obliging them to serve that document copy on the defendant through a court enforcement officer.[31]

Then, in § 2, the legislator specifies the conditions for service. The plaintiff shall, within two months from the date of service on them of the obligation referred to in § 1, either file an acknowledgement of service of the correspondence on the defendant through the court enforcement officer or return the correspondence with written proof that the defendant resides at the address indicated in the statement of claim.[32] After this time limit expires without effect, the provision of Article 77, optional suspension of proceedings ex officio, § 1(6), shall apply. If the plaintiff demonstrates with written proof that the defendant resides at the address indicated in the statement of claim, correspondence that is sent in the manner provided for in Article 139, inability to serve a judicial document or refusal to accept it, § 1, shall be deemed served. The subsequent service of this correspondence by a court enforcement officer to the same address shall not restart the running of the time limits that the Act stipulates for service, of which the defendant shall be instructed while this action is taken (Article 139[1] § 3 of the CCP).[33]

The lack of effective bailiff service justifies an application to appoint a guardian for the defendant pursuant to Article 143 CCP. It is rightly said

[31] Marcin Uliasz, in *Kodeks postępowania cywilnego. Komentarz do ustawy z dnia 4 lipca 2019 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw*, eds. Jacek Gołaczyński and Dariusz Szostek (Warsaw: C.H. Beck, 2019), 99; Markiewicz, in *Kodeks Postępowania Cywilnego*, 570; Joanna Bodio, in *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych. Dochodzenie roszczeń w postępowaniu grupowym. Przepisy przejściowe. Komentarz do zmian*, ed. Tadeusz Zembrzuski (Warsaw: Wolters Kluwer, 2019): 1: 338–43.

[32] Zamojski, "Doręczenie pozwanemu pierwszego pisma," 13.

[33] Uliasz, in *Kodeks postępowania cywilnego*, 99.

that these are separate institutions, although it would be more appropriate to use the term "complementary." The need for first service so that the defendant has the opportunity to defend himself in the trial will facilitate the more frequent appointment of guardians ad litem.[34] Significant doubts may only be raised if the submission of an application for the appointment of a guardian was not preceded by an attempt to deliver the letter through the bailiff. It seems that such a request can be accepted, but it should be particularly carefully justified.[35]

4.4. Service on Other Entities

In the case of legal persons and organizations without legal personality, procedural documents or judgments shall be served in accordance with Article 133 § 2 of the CCP on the body authorized to represent them before the court or personally on an employee authorized to receive letters. In turn, § 2^1 of the above provision indicates that procedural documents or judgments for an entrepreneur entered in the Central Register and Information on Economic Activity shall be served to the service address made available in that register unless the entrepreneur has indicated a different service address.

The next section, § 2^2, refers to entrepreneurs entered in the court register, for whom procedural documents or judgments shall be served to the address made available in that register unless the entrepreneur has indicated a different service address. If the last address made available has been deleted as being inconsistent with the facts and no request has been made to enter a new address to be made available, the deleted address shall be deemed to be the address made available in the register.[36]

Procedural documents or judgments for persons representing an entity entered in the National Court Register, liquidators, commercial proxies, members of bodies, or persons entitled to appoint the management board

34 Zamojski, "Doręczenie pozwanemu pierwszego pisma," 14.

35 Marcin Borodziuk, *Doręczenie komornicze w praktyce sądowej po zmianach procedury cywilnej dokonanych 7 listopada 2019 roku*, *Prokuratura i Prawo*, no. 3 (2021): 119.

36 See: Decision of the Supreme Court of 14 February 2000, II CKN 1152/99, Legalis/el.

shall be served, under Article 133 § 2^3 of the CCP, to the service address indicated under separate provisions.[37]

Where an attorney ad litem or a person authorized to receive judicial documents has been appointed, service shall be made on such persons pursuant to Article 133 § 3 of the CCP. The above regulation does not apply to letters summoning a party to appear in person, which shall always be served only directly to the party summoned to appear (Article 133 § 3 sentence 2 of the CCP).[38]

Of particular importance is the sanction concerning entities subject to registration in the National Court Register or Central Register and Information on Economic Activity, if service cannot be effected in the manner provided for in the preceding articles due to the failure to disclose a change of address in the register. In such a case, the mail shall be left in the case file as effectively served, unless the new place of residence and address are known to the court (Article 139 § 3 of the CCP).[39]

It should be emphasized that in case law[40] it is rightly argued that the evidence that the defendant resides at the address specified in the complaint is subject to the rules of evidence contained therein in Article 227 et seq. of the Code of Civil Procedure. At the same time, nothing prevents the court from determining this fact, based on the evidence attached to the lawsuit, referred to the facts commonly known (Article 228 § 1 of the Code of Civil Procedure) or to facts known to the court *ex officio*.[41]

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37 Article 19a of the Declaration of consent to be appointed to represent the entity sec. 5–5b and 5d of the Act of 20 August 1997 on the National Court Register, Journal of Laws 2023, items 685 and 825.

38 See: Decision of the Supreme Court of 29 August 1995, I PRN 39/95, Prok. i Pr. 1995, no. 11–12, item 40.

39 Similarly, in Article 133 § 3^1 of the CCP: "Letters to persons representing an entity entered in the National Court Register, liquidators, commercial proxies, members of bodies or persons entitled to appoint the management board, if they cannot be served in the manner provided for in the preceding articles due to failure to submit a declaration of a change of the service address, shall be left in the case file as effectively served, unless another service address or place of residence and address are known to the court."

40 Decision of the Court of Appeal in Rzeszów of 23 February 2021, I ACz 254/20, Lex nr 3126763.

41 Michał Ptaszek, "Doręczenie pozwu lub pierwszego pisma wymagającego podjęcia obrony praw pozwanemu wpisanemu do rejestru lub ewidencji. Uwagi na tle art. 139^1 k.p.c.," *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury* 48, no. 4 (2022): 54.

5. General Characteristics of Service in Selected European Countries

5.1. Service in Germany

In Germany, the act of service is regulated by the Act of 30 January 1877 – *Zivilprozessordnung*.[42] As in Poland, service in the German procedure is a strictly formalized act.[43] The German legislator identifies two basic modes of service of documents during civil proceedings: routine (§ 166-190 of the GCCP) and at the request of a party (§ 191-195 of the GCCP), with clear primacy given to the former mode of service. Under German civil procedural law, pursuant to §168 of the GCCP, the court may entrust service to a postal operator or a court clerk, or, where the effectiveness of the service so requires, also to a court enforcement officer or another official.

Direct service between the parties' professional attorneys at law, which is also effected in a deformalized manner by fax or e-mail, is also admissible under § 195 in conjunction with § 175 of the GCCP. In addition, service by electronic means is also admissible for other participants in civil proceedings, provided that they have the technical means to receive an electronic document and have previously made an express declaration of consent to this method of service.

In German civil procedural law, the rule is personal service, whereby, pursuant to § 177 of the GCCP, a document may be handed over to the addressee at any location at which the person is found. Documents addressed to a legal person or to an organizational unit without legal personality admitted to legal transactions, shall be served on the body authorized to represent it before the court or on an employee authorized to receive letters. However, if such service proves impossible, the institution of substituted service shall apply (§ 178-181 of the GCCP).

In Germany, when a person's whereabouts are unknown and service on a representative or attorney for service is not possible, service by

[42] Zivilprozessordnung (German Code of Civil Procedure) of 30 January 1877, consolidated text BGBl. 2005 I p. 3202, 2006 I p. 431, 2007 I p. 1781, as amended, hereinafter referred to as GCCP.

[43] Gudrung Trauner, "Die elektronische Zustellung behördlicher Dokumente," in *Effizienz von e-Lösungen in Staat und Gesellschaft. Aktuelle Fragen der Rechtsinformatik. Tagungsband des 8. Internationalen Rechtsinformatik Symposions*, ed. Erich Schweighofer (Stuttgard, Verlag: Boorberg, 2005), 107; Bartosz Sujecki, *Mahnverfahren: mit elektronischem und europäischen Mahnverfahren* (Heidelberg: Müller, C F in Hüthig Jehle Rehm, 2007), 46.

publication becomes necessary (§ 185-188 of the GCCP). Pursuant to § 186 of the GCCP, the decision on whether or not to approve service by publication shall be made by the court. Service by publication shall be implemented by posting a notification on the court's bulletin board or by publishing the notification in an electronic information and communication technology system. As a general rule, a document shall be deemed served if a period of one month has elapsed since the notification has been posted on the bulletin board unless a longer period is specified by the court (§ 188 of the GCCP).

5.2. Service in Austria

In Austrian civil proceedings, court service is regulated in § 88-121 of the Austrian Code of Civil Procedure of 1 August 1895 (Zivilprozessordnung).[44] Judicial documents are most often served through a post office, court clerk, or municipality. In the Austrian law, as in the Polish and German law, a distinction is also made between personal service, which is the rule, and substituted service, which is an exception to it.[45] If the addressee fails to receive a letter, another letter shall be sent to them with a time limit for the second attempt at personal service of the letter. If the second attempt to serve the letter also fails, the letter shall be deposited at the post office in the case of service by post, or at the office of a relevant municipal authority in the case of service by another entity (§ 17 of the SOD Act). Such a letter shall be kept for a minimum period of two weeks and the addressee of the letter shall be notified of its being deposited, giving details of the place of collection and the time limit for collection, as well as the consequences of not collecting the letter in time.

Where both litigants are represented by professional attorneys at law, Austrian civil procedural law allows, in § 112 of the ACCP, for direct

[44] Austrian Code of Civil Procedure of 1 August 1895 (Zivilprozessordnung), Federal Law Gazette RGBl.1895, no. 113, as amended, hereinafter referred to as the ACCP. However, the Code regulation does not completely regulate the issue of service and refers one to special provisions. These are contained in the Federal Act of 1 April 1982 on the Service of Official Documents, Federal Law Gazette RGBl. 1982, no. 201, as amended, hereinafter referred to as the SOD Act.

[45] Hans W. Fasching, *Lehrbich des Österreichischen Zivilprozessrechts: Lehr- und Handbuch für Studium und Praxis* (Vienna: Manz, 1990), 535.

service of documents between them during the course of the case, after the court has served a copy of the statement of claim on the defendant also electronically.

In Austrian law, there is the institution of "forwarding a letter," as provided for in § 18 of the SOD Act. Forwarding a letter is possible when the addressee does not regularly reside at the service address they indicated. In such a case, the letter served by post or by the municipal authorities shall be deposited at another place of service indicated by the addressee, provided that the new address can be easily established. Other letters, which are less relevant to the pending civil proceedings, may be served vicariously through an adult household member.[46]

Also, as is the case in Polish and German procedures, in the Austrian law, the recipient of a letter may not be an opposing party of the addressee (§ 16(2) of the SOD Act). A copy of the judicial document may be served through a court clerk at the addressee's place of residence or place of work. Both direct and substituted services are possible. Service through a court clerk or municipal authority may be effected in the following cases: if service through a post office is obstructed, if there is no post office in the place, or if a letter served through the post office could arrive too late.

The Austrian law allows for the electronic service of the types of documents specified by the Minister of Justice. They may be served electronically on the subject of the proceedings, provided that the subject participates in electronic legal transactions or has given their prior consent to such service. Electronic service of judicial documents is only possible during the office hours of the court. It shall be effected by the competent service unit or private entities duly authorized to effect electronic service. The document to be served shall bear an official electronic signature, a specimen of which shall be published in advance by the court on its website to enable verification by the addressee. A document served by electronic means shall be deemed served at the moment the addressee is able to read it.[47]

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46 Walter H. Rechberger, *Kommentar zur ZPO* (Vienna: Springer-Verlag, 2000), 560.

47 Eberhard Schilken, *Zivilprozessrecht*, 6th ed. (Cologne: Vahlen Franz GmbH, 2006), 106; Martin Schwab, *Zivilprozessrecht*, 4th ed. (Heidelberg: C.F. Müller, 2012), 272; Sujecki, *Mahnverfahren*, 45–7.

5.3. Service in France

The institution of service in the French civil procedural law is understood as a formalized act of handing over a document, as a rule through a court clerk or electronically, to its addressee (Article 653 of the FCCP).[48] Due to the French law adopting as binding the concept of "remise au parquet" which is the basis for the national service system, the service of a document shall be deemed effective as soon as the necessary formal steps have been completed by the authorized serving entity and not as soon as the document reaches the addressee in such a way that they are able to read it.[49]

The French Code of Civil Procedure establishes the primacy of personal service over other forms of service. As a general rule, therefore, a document shall be served personally on the addressee or, if the addressee is not a natural person, on their legal representative, attorney, or another authorized person (Article 654 of the FCCP).[50] The court clerk of the court having jurisdiction over the place of residence of the document addressee shall be the serving party.

Documents may also be served on the addressee in person at the court registry against acknowledgement of receipt. The French Code Act also regulates the possibility to effect service through a public postal operator. Postal services for the service of documents are provided in smaller towns where access to a court clerk is difficult. A document shall be served by post in a sealed envelope or parcel.[51] If service is entrusted to a postal operator, they are obliged to draw up an appropriate report on the service, which is then filed in the case file (Article 661 of the FCCP).

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48 French Code of Civil Procedure (Nouveau Code de Procedure Civile) as adopted by Decree no. 75–1123 of 5 December 1975 (Journal Officiel of 9 December 1975), as amended, hereinafter referred to as the FCCP; René David, *Prawo francuskie. Podstawowe dane* (Warsaw: Państwowe Wydawnictwo Naukowe, 1965), 119.

49 Cf. Loïc Cadiet, "Introduction to French Civil Justice System and Civil Procedural Law," *Ritsumeikan Law Review*, no. 28 (2011): 355 et seq.; Roger Perrot, *Droit judiciaire privé* (Bruxelles 1980): 154; R. Thominette and G. Le Quillec, "Le régime méconnu des notifications á un État étranger," *JCP Semaine Juridique*, no. 24 (2006): 1167 et seq.

50 See: Aleksandra Machowska, "Doręczenia w postępowaniu cywilnym francuskim w kontekście regulacji unijnych," *Głos Sądownictwa*, no. 11 (2003): 15.

51 See: Loïc Cadiet and Soraya Amrani-Mekki, "Civil Procedure," in *Introduction to French Law*, eds. George A. Bermann and Etienne Picard (Alphen aan den Rijn: Kluwer Law International, 2008), 314; cf. also: Jean Vincent and Serge Guinchard, *Procédure civile*, 24th ed. (Paris: Dalloz, 1996), 194.

A separate and autonomous method of service provided for in French legislation is service by electronic means (Article 653 and Articles 662–1 et seq. of the FCCP). Service by electronic means may be effected with respect to case files, documentary evidence, notifications, notices or summonses, reports, minutes, copies, and duplicates of court judgements with an enforcement clause, provided that the addressee of the document agrees to such service in advance. Electronic service is effected by the court through the ICT system against electronic acknowledgement of receipt by the addressee of the document, including an indication of the date and, in special cases, the time of receipt of the document. The effectiveness of the service of an electronic document depends on proper identification of the court, security, and confidentiality of correspondence, proper storage of the data transmitted, inviolability and integrity of the document sent, and ability to determine the date of sending and receipt of the document.[52]

6. Conclusion

Bearing in mind the most important general provisions on service in Germany, Austria, and France cited above, it should be noted that particularly the two aforementioned generally do not differ from the regulations in the Polish civil procedure. This results, among other things, from the fact that Poland borders on these countries and from the direct influence of their legislation on Polish regulations. It is worth highlighting that there is a clear trend towards the introduction of innovative solutions in the field of electronic service. It can be seen that the Polish legislator makes extensive use of the regulations previously introduced by its Western neighbors, especially as they have already been tested in practice. It seems that the future will bring formalized electronic service, which should in time replace other forms of service of procedural documents. This is because, as in German and Austrian law, the rules governing service in the Polish procedure are strictly formalized and, as a rule, if the legally required formalities are not complied with, such service is deemed to be ineffective.

[52] Jean-Marie Coulon, *Réflexions et propositions sur la procédure civile: rapport au ministre de la justice* (Paris: Ministère de la Justice, 1997), 52.

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Defining Documents in the EU Integration of Bosnia and Herzegovina: Where Is the "European Choice" Heading?

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Abstract: Over the past two decades, Bosnia and Herzegovina's (BiH) European Union (EU) integration process has garnered significant scholarly attention in the context of Western Balkans studies. This article contributes to this discourse by employing a descriptive analysis approach to examine thirty-one key legal documents issued between 1992 and 2022 by the BiH Parliamentary Assembly, Council of Ministers, and Presidency. These documents serve as primary sources, offering crucial insights into BiH's legal framework governing its EU integration efforts. Through rigorous textual analysis, this article evaluates the efficacy of these documents in facilitating the necessary reforms for EU accession. The findings reveal a significant discrepancy between the rhetoric of reform in governmental papers and the actual implementation of these reforms in BiH's political landscape. This highlights systemic challenges within BiH's governance that hinder effective reform implementation and EU accession progress. By critically analyzing these legal documents, this article provides a nuanced understanding of BiH's EU integration trajectory, emphasizing the gap between policy formulation and implementation. It argues that mere rhetorical commitments in governmental documents are insufficient to drive meaningful reform in BiH and achieve EU membership.

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1. Introduction

The Western Balkans, a region of strategic importance for the European Union (EU), has seen a varied trajectory in its integration process, as highlighted in scholarly literature.[1] The overall progress on their path towards EU membership remains a significant concern and represents the greatest challenge faced by the EU since the first enlargement of the Union in 1973. Croatia stands out as the only country in this region to have successfully acceded to the EU in 2013 after a protracted accession process that began in 2005.[2] This contrasts sharply with the more rapid accession of Central and Eastern European countries (CEECs) earlier on.[3] In the EU Enlargement Strategy of 2018, Montenegro and Serbia were recognized as "frontrunners," Albania and North Macedonia as "midfielders," and Bosnia and Herzegovina (BiH) and Kosovo as being "in the rear" on their respective paths toward EU membership. The EU's enlargement strategy in the Western Balkans has faced challenges, with other countries in the region, including BiH, still distant from full membership prospects.[4] This disparity underscores concerns that the EU has struggled to replicate its earlier successes in the CEECs.[5] However, the accession of the Western Balkan countries (WBCs) to the EU is a natural step in the Union's completion.

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1 Jens Woelk, "EU Member State-Building in the Western Balkans: (Prolonged) Eu-Protectorates or New Model of Sustainable Enlargement? Conclusion," *Nationalities Papers* 41, no. 3 (2013): 469–82, https://doi.org/10.1080/00905992.2013.768978; Jelena Džankić, Soeren Keil, and Marko Kmezić, eds., *The Europeanization of the Western Balkans: A Failure of EU Conditionality?* (Switzerland: Palgrave Macmillan, 2019); Solveig Richter, "Two at One Blow? The EU and Its Quest for Security and Democracy by Political Conditionality in the Western Balkans," *Democratization* 19, no. 3 (2012): 507–34, https://doi.org/10.1080/13510347.2012.674360.

2 Džankić, Keil, and Kmezić, *Europeanization of the Western Balkans*; Adea Gafuri and Meltem Muftuler-Bac, "Caught between Stability and Democracy in the Western Balkans: A Comparative Analysis of Paths of Accession to the European Union," *East European Politics* 37, no. 2 (2020): 267–91, https://doi.org/10.1080/21599165.2020.1781094.

3 Milenko Petrović and Nikolaos Tzifakis, "A Geopolitical Turn to EU Enlargement, or Another Postponement? An Introduction," *Journal of Contemporary European Studies* 29, no. 2 (2021): 157–68, https://doi.org/10.1080/14782804.2021.1891028.

4 Marko Kmezić, "Recalibrating the EU's Approach to the Western Balkans," *European View* 19, no. 1 (2020): 54–61, https://doi.org/10.1177/1781685820913655.

5 Solveig Richter and Natasha Wunsch, "Money, Power, Glory: The Linkages between EU Conditionality and State Capture in the Western Balkans," *Journal of European Public Policy* 27, no. 1 (2019): 41–62, https://doi.org/10.1080/13501763.2019.1578815.

Scholars have extensively analyzed the efficacy and limitations of EU conditionality as a tool for fostering reforms in the Western Balkans.[6] Despite being considered potent, EU conditionality has not uniformly driven progress towards EU accession in the region, leading to divergent outcomes from initial expectations. This context frames the complexities and challenges inherent in BiH's EU integration journey.[7] Since gaining independence in 1992, BiH has consistently prioritized EU accession as a central objective of its foreign policy. However, despite the commitment, BiH lags behind its regional countries in the EU integration process, facing formidable challenges in translating its aspirations into tangible reforms.[8]

This article employs a descriptive analysis approach to explore BiH's EU integration efforts by comprehensively examining key legal documents and institutional frameworks. This article aims to elucidate the evolution, challenges, and potential implications of BiH's path towards European

6 Vedran Džihić and Angela Wieser, "Incentives for Democratization? Effects of EU Conditionality on Democracy in Bosnia & Hercegovina," *Europe-Asia Studies* 63, no. 10 (2011): 1803–25, https://doi.org/10.1080/09668136.2011.618681; Florian Bieber, "Building Impossible States? State-Building Strategies and EU Membership in the Western Balkans," *Europe-Asia Studies* 63, no. 10 (2011): 1783–802, https://doi.org/10.1080/09668136.2011.618679; Gergana Noutcheva and Senem Aydin-Düzgit, "Lost in Europeanization: The Western Balkans and Turkey," *West European Politics* 35, no. 1 (2012): 59–78, https://doi.org/10.1080/01402382.2012.631313; Arolda Elbasani and F. Senada Šelo Šabić, "Rule of Law, Corruption and Democratic Accountability in the Course of EU Enlargement," *Journal of European Public Policy* 25, no. 9 (2017): 1317–35, https://doi.org/10.1080/13501763.2017.131516; Asya Zhelyazkova et al., "European Union Conditionality in the Western Balkans: External Incentives and Europeanization," in *The Europeanization of the Western Balkans*, 15–39; Richter and Wunsch, "Money, Power, Glory"; Florian Bieber and Nikolaos Tzifakis, *The Western Balkans in the World: Linkages and Relations with Non-Western Countries* (Abingdon, New York: Routledge, 2020).

7 Gülnur Aybet and Florain Bieber, "From Dayton to Brussels: The Impact of EU and NATO Conditionality on State Building in Bosnia & Hercegovina," *Europe-Asia Studies* 63, no. 10 (2011): 1911–37, https://doi.org/10.1080/09668136.2011.618706; Pol Bargué and Pol Morillas, "From Democratization to Fostering Resilience: EU Intervention and the Challenges of Building Institutions, Social Trust, and Legitimacy in Bosnia and Herzegovina," *Democratization* 28, no. 7 (2021): 1319–37, https://doi.org/10.1080/13510347.2021.1900120; Cvete Koneska, "Ethnicisation vs. Europeanization: Promoting Good Governance in Divided States," 135–57.

8 Hamza Preljević and Mirza Ljubović, "Contested Statehood and EU Integration: The Case of Bosnia and Herzegovina," *Politics in Central Europe* 20, no. 3 (2024): 403–35, https://doi.org/10.2478/pce-2024-0018.

integration by focusing on normative aspects and institutional dynamics. Methodologically, it utilizes a legal framework analysis, systematically examining thirty-one legal documents issued between 1992 and 2022 by the BiH Parliamentary Assembly, Council of Ministers, and Presidency. Legal framework analysis involves a systematic examination of legal documents and institutional structures within a specific context, in this case, BiH's EU integration process. It seeks to understand how laws, regulations, and institutional frameworks align with EU standards and their effective implementation on the ground. These documents constitute the backbone of BiH's EU accession process, providing a normative framework guiding institutional reforms and policy developments. The legal framework analysis facilitates a detailed exploration of the legal and institutional landscape shaping BiH's EU integration efforts, highlighting both alignment with EU standards and challenges in implementation.

While descriptive analysis illuminates the normative foundations of BiH's EU integration, legal framework analysis also underscores the gap between legal frameworks and actual reforms. As discussed in existing literature, the EU integration in BiH faces significant barriers.[9] These include a consociational power-sharing model that complicates decision-making, weak institutional capacities, societal divisions, and contested statehood. These obstacles complicate the effective implementation of EU-related reforms, reflecting broader challenges in aligning BiH's governance structures with EU norms and standards. This article contributes uniquely to this discourse by scrutinizing the divergence between BiH's legal commitments, as articulated in its documents, and the practical actions taken.

[9] Gergana Noutcheva, "Fake, Partial and Imposed Compliance: The Limits of the EU's Normative Power in the Western Balkans," *Journal of European Public Policy* 16, no. 7 (2009): 1065–84, https://doi.org/10.1080/13501760903226872; Džihić and Wieser, "Incentives for Democratization"; Jelena Subotić, "Europe is a State of Mind: Identity and Europeanization in the Balkans," *International Studies Quarterly* 55, no. 2 (2011): 309–30, https://doi.org/10.1111/j.1468-2478.2011.00649.x; Adam Fagan, "EU Conditionality and Governance in Bosnia & Hercegovina: Environmental Regulation of the Trans-European Road Network," *Europe-Asia Studies* 63, no. 10 (2011): 1889–909, https://doi.org/10.1080/09668136.2011.618701; Woelk, "EU Member State-Building"; Bieber and Tzifakis, *The Western Balkans in the World*.

This paper is structured into five main sections, each addressing critical aspects of BiH's EU integration. The initial section contextualizes BiH's commitment and readiness for EU membership, emphasizing the country's historical trajectory and strategic alignment with EU objectives. Following this, the second section evaluates the roles and responsibilities of BiH's governmental entities in managing EU accession responsibilities, providing insights into the application process and institutional dynamics.

The third section delves into the evolution of BiH's institutional framework and coordination mechanisms for EU integration. It examines the development and current status of state-level coordination systems, crucial for navigating BiH's complex legal and institutional landscape. The fourth section comprehensively outlines BiH's reform agendas and action plans, highlighting key priority areas and measures to advance EU-related reforms. Subsequently, the fifth section critically examines the gap between BiH's formal commitments and its integration success, assessing ongoing critiques and evaluations from the European Commission's annual Country Reports spanning 2008 to 2022.

Thus, this article provides a comprehensive analysis of BiH's EU integration efforts through a legal framework analysis, elucidating its normative foundations and identifying implementation challenges. Despite BiH's steadfast rhetorical commitment to EU accession, the practical implementation of EU-related reforms faces significant challenges. These challenges are rooted in institutional complexities, societal divisions, and the intricate dynamics of post-conflict state-building. The gap between normative frameworks and actual reforms underscores the need for sustained political will, enhanced institutional capacities, and effective governance reforms.

Moving forward, addressing these challenges requires a strategic approach that goes beyond normative alignment to encompass meaningful reforms in governance, administration, and societal cohesion. BiH's journey towards EU membership demands not only legislative adjustments but also transformative changes that enhance democratic governance, the rule of law, and effective public administration.

2. Methodology

Documents encompass a wide array of written materials, as defined by various scholars. McCulloch describes them simply as "written items,"[10] while Denscombe refers to them as "written sources."[11] Guba and Lincoln broaden this definition to include "any written material other than a record that was not prepared specifically in response to some requests from the investigator."[12] For the purposes of this study, documents are understood as government and institutional written sources – official, original, and relevant materials accessible to researchers for study. This definition encompasses a spectrum from public and institutional publications to private and personal items like diaries and letters.

The selection of documents in this study adhered to specific criteria to ensure their relevance and reliability in illuminating BiH's integration process. These criteria involved identifying information-rich cases through purposive or judgmental sampling methods, expecting that selected documents would provide pertinent insights into BiH's EU accession journey.

John Scott's "quality control criteria" guided the assessment of selected documents across four dimensions: authenticity, credibility, representativeness, and meaningfulness of data.[13] Authenticity, the foundational criterion, addresses the genuine nature and reliability of document sources, which are crucial for determining their authorship and integrity. To uphold this standard, rigorous measures were employed to authenticate the sources before analysis, ensuring their reliability and trustworthiness.

Credibility assesses whether document information accurately reflects real-life events without distortion or manipulation of perceptions. Beyond literal readings, it necessitates a nuanced understanding of contextual nuances to present a clear and accurate portrayal of events. The study aimed

10 Gary McCulloch, *Documentary Research in Education, History and the Social Sciences* (London: Routledge Falmer, 2004), 1.

11 Martyn Denscombe, *The Good Research Guide for Small-Scale Social Research Projects* (McGraw Hill, England: Open University Press, 2010), 216.

12 Egon G. Guba and Yvonna S. Lincoln, *Effective Evaluation* (San Francisco: Jossey-Bass, 1981), 281.

13 John Scott, *A Matter of Record: Documentary Sources in Social Research* (UK: Polity Press, 1990).

to collect documents that offered a balanced and unadulterated view of BiH's integration process, free from biases or intentional distortions.

Representativeness gauges the extent to which selected documents represent the diversity and breadth of relevant materials available for study. This criterion underscores the importance of comprehensive access to documents providing a holistic view of the research topic. The acquisition process, guided by the Law on Freedom of Access to Information in Bosnia and Herzegovina (Official Gazette of BiH, No. 28/00, 45/06 and 102/09), ensured access to a broad spectrum of documents relevant to BiH's EU integration, although some required special requests from relevant government departments.

Meaningfulness pertains to the clarity and comprehensibility of evidence within documents. Scott distinguishes between literal and interpretive meanings, emphasizing texts' readability and the deeper implications conveyed. This study interpreted documents to extract clear and substantive insights into BiH's EU integration journey, ensuring that data analysis was both rigorous and insightful.

Documentary analysis, despite its advantages – efficiency, cost-effectiveness, unobtrusiveness, stability, and comprehensive coverage over time – is not without limitations.[14] Documents may lack detail, be challenging to retrieve, or exhibit biases not immediately apparent to researchers.[15] To mitigate these challenges, this study employed a qualitative approach that excluded quantification, focusing instead on rigorous thematic analysis.

The analytic process encompassed three iterative steps: initial document review, thorough examination, and interpretation.[16] The initial review involved skimming to identify pertinent passages and themes, facilitating data reduction to manage textual richness effectively. Subsequent close reading delved deeper into the texts, applying thematic analysis to categorize data and reveal connections between emerging themes.

Ultimately, the interpretation phase synthesized findings across documents, structuring them into five thematic categories: (1) Blueprint and

14 Glenn A. Bowen, "Document Analysis as a Qualitative Research Method," *Qualitative Research Journal* 9, no. 2 (2009): 27–40, https://doi.org/10.3316/QRJ0902027.

15 Sharan B. Merriam, *Qualitative Research and Case Study Applications in Education* (San Francisco, CA: Jossey-Bass, 1998).

16 Bowen, "Document Analysis."

Strategic Commitments to the EU; (2) From Strategy to Execution; (3) Creating the Coordinating System for EU Integration; and (4) From Action Plans to Acquis. This classification system streamlined analysis, providing a comprehensive framework to understand the complex dynamics underpinning BiH's EU integration journey. These four thematic units draw upon documents outlining BiH's normative foundations for EU integration. Section five, "Where Does Bosnia and Herzegovina Stand?" is derived from the European Commission's annual Country Reports spanning 2008 to 2022.

3. Blueprint and Strategic Commitments to the EU

BiH has long expressed its aspiration to have full membership in the EU. This journey began amidst the turmoil of war and has been marked by significant milestones that reflect the country's dedication to European integration. This section provides a comprehensive analysis of the pivotal documents and strategic commitments that have shaped BiH's EU accession trajectory.

As a federal unit of Yugoslavia, BiH had limited competence in international relations and foreign policy, lacking its own minister of foreign affairs. Critical foreign policy decisions were primarily made in Belgrade.[17] Following the dissolution of Yugoslavia, the former Yugoslav republics began formulating their own foreign policy documents. On June 26, 1992, the Presidency of the Republic of BiH published the document "Platform on the Activity of the Presidency of Bosnia and Herzegovina in War Conditions,"[18] which outlined self-interest strategies, foreign policy goals, and the country's political position in the international community. Among other issues, the document expressed BiH's interest in EU membership. Although this was not a formal EU membership application, the Platform

[17] Katrin Boeckh, "Allies Are Forever (Until They Are No More): Yugoslavia's Multivectoral Foreign Policy During Titoism," in *The Foreign Policy of Post-Yugoslav States, From Yugoslavia to Europe*, eds. Soeren Keil and Bernhard Stahl (New York: Palgrave Macmillan, 2014), 18–43.

[18] The document is accessible in: Miroslav Tuđman and Ivan Bilić, eds., *Planovi, sporazumi, izjave o ustavnom ustrojstvu Bosne i Hercegovine 1991–1995* [*Plans, Agreements, Statements on the Constitutional Arrangements of Bosnia and Herzegovina 1991–1995*] (Zagreb: Udruga Svetog Jurja, 2005), 99–102, accessed January 13, 2024, https://www.cidom.org/wp-content/uploads/2015/12/Ivan-Bili%C4%87-i-MiroslavTu%C4%91man-Planovi-sporazumi-izjave-o-BiH-91-95_opt.pdf.

marked a turning point in BiH's foreign policy orientation following the collapse of communist rule.

> BiH, according to its national composition, geographical position, historical ties, natural potentials, and the structure of the economy, BiH is interested in connecting with all neighboring countries and other states based on mutual respect and equality. Bosnia and Herzegovina has a special interest to become an equal member of the European Community.[19]

The EU recognizes that its formal relations with BiH began in the late 1990s and early 2000s. Post-war, BiH's aspiration for EU membership was rekindled and formalized through key documents to facilitate critical reforms. By the end of the 1990s, three seminal documents were brought in the first five years following the war, namely the European Council's Declaration on the Special Relations between the EU and BiH on June 8, 1998, the Council of Ministers' Decision on Launching the Initiative for BiH's EU Accession on January 28, 1999, and the Resolution by the Parliamentary Assembly of BiH on European Integration and Stability Pact for South-East Europe on July 27, 1999.[20] These documents laid the groundwork for BiH's European perspective and journey toward EU integration.

The European Council's Declaration on the Special Relations between the EU and BiH, adopted during the 2104th Council meeting on June 8–9, 1998, was particularly significant.[21] This two-page document, though concise, carried substantial political weight. It recognized BiH's path towards enhanced European integration and firmly rejected any ambitions to divide BiH between Croatia and Serbia, reinforcing the territorial integrity of BiH. This declaration was a critical acknowledgement by the EU of BiH's sovereignty and its future within the European structure, setting

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19 Ibid., 100.

20 European Commission, "European Council's Declaration on the Special Relations between EU and BiH," European Commission – Directorate General IA/F&, External Relations: Europe and the New Independent States, Common Foreign and Security Policy (DGIA/F6)," accessed February 8, 2024, http://aei.pitt.edu/33628/4/A527.pdf; BiH Council of Ministers (BiH CoM), *Decision on Launching the Initiative for BiH's EU Accession*, 1999, Official Gazette of BiH, No. 3/99; BiH Parliamentary Assembly, *Resolution on European Integration and Stability Pact for South-East Europe*, 1999, Official Gazette of BiH, No. 12/99.

21 European Commission, "European Council's Declaration on the Special Relations between EU and BiH."

a clear stance against any geopolitical aspirations that sought to undermine BiH's unity.

> Close and cooperative relations between Bosnia and Herzegovina and her neighbors are essential for peace and stability in the region, and to enable democracy and prosperity to take hold. But these relations must also uphold Bosnia and Herzegovina's independence, sovereignty and unity within her current borders. There is no place in the European Family for ambitions to establish Greater Serbia or Greater Croatia.[22]

The Council of Ministers' Decision on Launching the Initiative for BiH's EU Accession, passed on January 27, 1999, was another milestone.[23] This decision mandated the Ministry of Foreign Affairs and the Ministry of Foreign Trade and Economic Relations to spearhead political and economic activities related to EU integration. The decision established a foundational framework for BiH's subsequent efforts towards EU membership by assigning specific responsibilities to these ministries. It was essential in organizing and directing the country's resources and administrative efforts towards meeting EU standards and requirements.

The Resolution on European Integration and Stability Pact for South-East Europe, adopted by the Parliamentary Assembly of BiH on July 27, 1999, underscored BiH's commitment to EU integration.[24] This resolution highlighted the importance of political dialogue with the EU and demonstrated a unified political will within BiH to pursue the path of European integration. It emphasized the significance of regional stability and cooperation, aligning BiH's objectives with broader European goals for the region.

BiH's commitment to EU membership was further articulated in the "General Directions and Priorities for the Implementation of the Foreign Policy of Bosnia and Herzegovina," adopted in March 2003.[25] This document confirmed the European path as BiH's principal foreign policy objective, reflecting a strategic decision to prioritize EU integration above other foreign policy goals. By doing so, BiH aimed to further develop and

22 Ibid.

23 BiH CoM, *Decision on Launching the Initiative*.

24 BiH Parliamentary Assembly, *Resolution on European Integration*.

25 BiH Presidency, *General Guidelines and Priorities for Implementation of Foreign Policy of Bosnia and Herzegovina*, 2003, No. 01–645–30/03, Sarajevo.

institutionalize its relations with the EU, aligning its policies with the Stabilisation and Association Process (SAP), which is a critical step towards full EU membership.

> Geo-strategic position of Bosnia and Herzegovina restricts the priorities of its foreign policy activities, especially those of multilateral character. Strong and systematic step forward towards European and Trans-Atlantic integration, aiming at the improvement and institutionalization of mutual cooperation represents the strategic priority of Bosnia and Herzegovina.[26]

On January 29, 2015, the Presidency of BiH adopted the "Declaration on the Commitment of Government Institutions in BiH at All Levels to Implement the Necessary Reforms in the Framework of the EU Accession Process."[27] This declaration reaffirmed BiH's strategic objective of EU membership and emphasized the need for comprehensive reforms at all government levels. Unlike previous documents, this declaration incorporated all levels of government and addressed both shared and exclusive competences related to EU-affiliated reforms. It highlighted the imperative involvement of all levels of government in the EU enlargement process and domestic reforms, showcasing a holistic approach to the complex process of EU integration.

The "Foreign Policy Strategy 2018–2023," adopted on March 13, 2018, outlined BiH's strategic trajectory for EU integration.[28] This comprehensive eleven-page document provided a detailed framework, emphasizing security and stability, economic prosperity, the protection of BiH's nationals abroad, and the promotion of BiH on the global stage. Under the first pillar, it explicitly underscored one of BiH's principal objectives: achieving full membership in the EU. This reaffirms BiH's commitment to the aspiration of EU accession as a key component of its overarching foreign policy objectives.

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26 Ibid., 2.

27 BiH Parliamentary Assembly, *Declaration on the Commitment of Government Institutions in BiH at All Levels to Implement the Necessary Reforms in the Framework of the EU Accession Process*, 2015, Official Gazette of BiH, No. 16/15.

28 BiH Presidency, *Foreign Policy Strategy of Bosnia and Herzegovina 2018–2023*, 2018, No. 01-50-1-936-27-1/18, Sarajevo, accessed January 8, 2024, http://www.predsjednistvobih.ba/vanj/default.aspx?id=79555&langTag=en-US.

> One of the main strategic objectives of Bosnia and Herzegovina is its full membership in the European Union. Bosnia and Herzegovina, as a signatory to the Stabilization and Accession Agreement (SAA) with the European Union, as a country which filed its request for membership in the European Union and submitted its answers to the European Commission's Questionnaire, strives to obtain the candidate status as soon as possible, and to open its accession negotiations on membership.[29]

The consistency of BiH's commitment to EU membership was further demonstrated through various formal statements and agreements. On December 12, 2018, following the submission of the membership application, the "Joint Statement of the Presidency of BiH on European Integration" emphasized EU membership as a crucial strategic foreign policy objective.[30] The Presidency expressed dedication to implementing reforms while respecting the constitutional regulations of BiH and the DPA. This statement highlighted the potential of attaining candidacy status as a compelling incentive to drive necessary reforms.

In continuation of this commitment, on October 15, 2020, the Presidency issued an additional "Joint Statement about the European path of BiH," reiterating its unwavering commitment to expedited EU accession.[31] This statement called upon all governmental levels, operating within the constitutional framework and coordination mechanisms, to initiate the requisite procedures aligning with the Avis requirements. On June 12, 2022, in Brussels, the members of the Presidency of BiH and representatives of political parties participating in the Parliamentary Assembly of BiH reiterated their dedication to reforms essential for advancing BiH's European integration through the signing of the "Political agreement on principles for ensuring a functional BiH that advances on the European path."[32] This

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29 Ibid., 6.

30 BiH Presidency, "Joint Statement of the Presidency of BiH on European Integration Joint," 2018, accessed January 7, 2024, http://www.predsjednistvobih.ba/saop/default.aspx?id=89052&langTag=bs-BA.

31 BiH Presidency, "Statement about the European Path of BiH," 2020, accessed January 7, 2024, http://www.predsjednistvobih.ba/saop/default.aspx?id=82561&langTag=bs-BA.

32 Council of the EU, "Political Agreement on Principles for Ensuring a Functional BiH that Advances on the European Path," 2020, accessed January 7, 2024, https://www.consilium.europa.eu/en/press/press-releases/2022/06/12/political-agreement-on-principles-for-ensuring-a-functional-bosnia-and-herzegovina-that-advances-on-the-european-path/.

agreement encapsulated the core principles and commitments crucial for propelling BiH's European integration forward, highlighting the establishment of a functional, democratic state aligned with EU values.

BiH's journey towards EU membership has been marked by a series of strategic documents and commitments that reflect a consistent aspiration for European integration. BiH has demonstrated a steadfast commitment to aligning with EU standards and values from the early post-war years to recent strategic frameworks. As BiH continues its path towards EU membership, these foundational documents and strategic commitments will remain crucial in guiding the country's efforts and ensuring its integration into the EU.

4. From Strategy to Execution

BiH's path to EU membership has been marked by a series of strategic commitments and reforms, reflecting the country's dedication to this ambitious goal. This section examines the critical documents and actions that have shaped BiH's EU integration process, highlighting the challenges and achievements along the way.

The journey began with the adoption of the "Master Plan of the Process of Integrating BiH into the EU" on July 23, 2015 by the Presidency of BiH.[33] This document provided a structured, time-bound framework outlining specific activities for BiH's EU integration. It designated responsibilities across all levels of government, assigning specific duties and setting deadlines for each task. The Master Plan, finalized on October 3, 2016, included eleven core activities such as the adoption of a declaration on the EU by the Parliamentary Assembly, the creation of an effective coordination mechanism among government institutions, the submission of a credible EU membership application, and the implementation of the European Court of Human Rights (ECtHR) judgment in the case of Sejdić and Finci v. BiH.[34]

[33] BiH Presidency, *Master Plan of the Process of Integrating BiH into the EU*, BiH Presidency Conclusions, 2015, Document No. 01–50–1-1754–13/15.

[34] ECtHR Judgment of 22 December 2009, Case Sejdić and Finci v. Bosnia and Herzegovina, application no. 27996/06 and 34836/06, hudoc.int.

Initially scheduled for completion between 2015 and 2017, the Master Plan aimed for BiH to obtain candidate status by December 31, 2017. However, this timeline was not met; only seven activities were fully implemented, while the remaining four – implementation of the ECtHR judgment, adaptation of the integration plan, implementation of the Reform Agenda, and obtaining candidate status – were either partially or not implemented due to policy execution gaps and missed deadlines. For instance, the deadline for responding to the European Commission's Questionnaire was set for May 31, 2017, but BiH submitted its answers on February 28, 2018, indicating significant delays.[35]

Following the endorsement of the Master Plan, the Council of Ministers of BiH and all levels of government ratified the "Reform Agenda for the period 2015 to 2018" on June 10, 2015.[36] This agenda outlined reforms across six key domains: public finance, taxation, and fiscal sustainability; business climate and competitiveness; labor market; social welfare and pension reform; the rule of law and good governance; and public administration reform. Various government levels adopted action plans to implement the Reform Agenda, initiating a comprehensive wave of reforms. The action plans for BiH's entity Federation of BiH (FBiH) and its ten cantons included 61 measures, while the action plan for the entity Republika Srpska (RS) encompassed 78 measures, and the state-level plan included 33.

Building on these reforms, the Presidency of BiH decided to apply for EU membership eight years after signing the Stabilisation and Association Agreement (SAA). On January 28, 2016, the Presidency ratified the "Decision on BiH's EU membership application submission," authorizing the then-Chairman of the Presidency to submit the application.[37] The "BiH Presidency's EU membership application" was officially presented to the EU

35 DEI (Directorate for European Integration), "BiH's Responses to the European Commission's Questionnaire," 2018, accessed January 7, 2024, https://www.dei.gov.ba/en/odgovori-na-upitnik-ek.

36 BiH Council of Ministers, "Reform Agenda for Bosnia and Herzegovina 2015–2018," accessed February 4, 2024, https://www.vijeceministara.gov.ba/home_right_docs/default.aspx?id=20727&langTag=hr-HR.

37 BiH Presidency, "Decision on BiH's EU Membership Application Submission, January 28, 2016," BiH Presidency Decision, 2015, Document No. 01–50–1-227–29/16.

on February 15, 2016.[38] The application underscored BiH's commitment to implementing necessary reforms in line with Article 49 of the Treaty on EU.

The Council of the EU acknowledged BiH's application, and on December 9, 2016, the European Commission forwarded a questionnaire comprising 3,242 questions to BiH authorities. Fourteen months later, on February 28, 2018, BiH submitted its responses to this extensive questionnaire. On June 20, 2018, the European Commission issued an additional 655 questions, to which BiH responded on March 4, 2019. These responses allowed the EU to formulate its opinion on BiH's application for membership, known as the Avis, which was submitted to BiH authorities on May 29, 2019.

In response to receiving the European Commission's Avis and following the lapse of the Reform Agenda for 2015–2018, the Entity governments endorsed the "Joint Socio-Economic Reforms for the period 2019–2022" (termed Reform Agenda 2) on October 10, 2019.[39] Reform Agenda 2 aimed to continue the reform process, aligning its priorities with EU recommendations, the European Commission's Avis, and the Sustainable Development Framework (SDF) for BiH. This agenda focused on sustained and accelerated economic growth, depoliticization and public enterprise reform, health sector reforms, and strengthening policies for youth, women, and vulnerable categories. Both entities within BiH reaffirmed their shared strategic goal of EU accession through this document.

To ensure the proper alignment of BiH's legislation with the acquis communautaire, the "Decision on the Procedures in the Process of Harmonisation of Legislation of Bosnia and Herzegovina with the Acquis Communautaire" was adopted.[40] This decision aims to monitor and report on the compatibility of BiH's legislation with the acquis. It obliges legislative drafters and the Directorate for European Integration (DEI) to oversee the entire alignment process, from drafting through adaptation

38 BiH Presidency, "BiH Presidency's EU Membership Application, 2016," accessed January 13, 2024, https://www.dei.gov.ba/uploads/documents/zahtjev-original-hrv-pdf_1604308434.pdf.

39 CoM, "Joint Socio-Economic Reforms for the Period 2019–2022," accessed January 12, 2024, http://www.fbihvlada.gov.ba/file/zbhs-converted(1).pdf.

40 BiH Council of Ministers (BiH CoM), *Decision on the Procedures in the Process of Harmonisation of Legislation of Bosnia and Herzegovina with the Acquis Communautaire*, 2018, Official Gazette of BiH, No. 75/16 and 2/18.

and amendment. The decision established instruments to evaluate compliance of a draft or proposal with the acquis, such as the table of concordance and the statement of compatibility. The degrees of compliance are categorized as complete compliance, partially aligned, mismatched, and non-transferable. BiH is required to align its legislation with EU directives and decisions. Legislative drafters must translate the legislation into English after publication in the Official Gazette of BiH, and upon request from the European Commission, they must also translate drafts or proposals.

BiH's journey towards EU membership has involved significant strategic planning and implementation of comprehensive reforms. Despite encountering delays and challenges in executing these reforms, BiH has made substantial progress in aligning its policies and institutions with EU standards. The continuous efforts to address gaps and build on previous reforms demonstrate BiH's unwavering commitment to achieving full EU membership, underscoring the importance of strategic planning, effective policy execution, and collaborative governance in this complex integration process.

5. Creating the Coordinating System for EU Integration

BiH's organizational structure and institutional framework are notably intricate, presenting significant challenges in navigating the path towards EU membership. Effective internal coordination mechanisms are indispensable for meeting EU requisites and executing adopted policies. Recognizing this necessity, BiH established internal coordination mechanisms across various governmental levels to streamline communication between BiH institutions and EU officials, thereby facilitating the anticipated domestic changes required for EU integration.

From 2003 to 2009, the BiH Council of Ministers enacted six key decisions to institute coordination mechanisms and fortify internal communication among governmental tiers.[41] These were the following:

[41] BiH CoM, *Decision on the Directorate for European Integration*, 2003, Official Gazette of BiH, No. 41/03; BiH CoM, "Decision on the Realisation of Coordination in the Process of BiH's Accession to the EU," 2003, Official Gazette of BiH, No. 44/03; BiH CoM, *Decision on Establishment of Working Groups for Harmonization of Legal Regulations of BiH with Acquis Communautaire*, 2005, Official Gazette of BiH, No. 52/05; BiH CoM, *Decision on the Establishment*

1. Decision on the Directorate for European Integration (December 3, 2003);
2. Decision on the Realisation of Coordination in the Process of BiH's Accession to the EU (December 3, 2003);
3. Decision on Establishment of Working Groups for Harmonisation of Legal Regulations of BiH with the Acquis Communautaire (April 6, 2005);
4. Decision on Establishment of Organisational Units for European Integration in BiH's Administrative Bodies (July 3, 2008);
5. Decision on Establishment of the Commission for European Integration within the Provisional Stabilisation and Association Committee (October 6, 2008); and
6. Decision on Establishment of the Working Groups for European Integration (April 2, 2009).

These decisions formed an early framework for coordination within BiH, aimed at streamlining and facilitating the execution of EU-related tasks and domestic changes, thereby enhancing BiH's alignment with EU standards and protocols.

5.1. Establishing the Directorate for European Integration

The Council of Ministers of BiH adopted the "Decision on the Directorate for European Integration" on December 3, 2003, delineating its competencies, structure, and operational framework.[42] This decision marked a significant transition, as the Directorate supplanted the former Ministry of European Integration of BiH, established in 2000. Functioning as a permanent entity under the Council of Ministers, the Directorate assumed the crucial role of coordinating BiH's activities in the EU integration process. It oversees the execution of decisions endorsed by relevant BiH authorities and institutions concerning European integration processes, aligning BiH's legal

of Organisational Units for European Integration in BiH's Administrative Bodies, 2008, Official Gazette of BiH, No. 66/08; BiH CoM, *Decision on the Establishment of the Commission for European Integration within the Provisional Stabilisation and Association Committee*, 2008, Official Gazette of BiH, No. 92/08; BiH CoM, *Decision on the Establishment of the Working Groups for European Integration*, 2009/10, Official Gazette of BiH, No. 47/09 and 65/10.

42 BiH CoM, *Decision on Directorate for European Integration*.

framework with EU standards and serving as the primary operational liaison with the European Commission. Additionally, the Directorate coordinates EU assistance activities within BiH.

Despite its significant role, the initial decision establishing the Directorate lacked comprehensive provisions for achieving vertical coordination (between state-level and lower levels of government) and horizontal coordination (between state-level institutions), which are crucial for harmonizing with EU requirements. Nonetheless, this step laid the groundwork for subsequent advancements in developing a robust and comprehensive coordination mechanism among various governmental tiers within BiH.

5.2. Realization of Coordination in EU Accession

Furthermore, on December 3, 2003, the Council of Ministers adopted the "Decision on the Realisation of Coordination in the Process of BiH's Accession to the EU."[43] This decision aimed to establish a practical framework for managing the complexities of European integration processes, delineating both horizontal and vertical coordination mechanisms essential for preparing and executing all activities, measures, and tasks pertaining to BiH's EU accession process.

Vertical coordination involved the Council of Ministers of BiH, ministries, and other state-level administrative bodies and institutions, synchronizing their efforts with the ministries and administrative bodies of the entities – namely, the FBiH, RS, and the Brčko District. Notably, this coordination mechanism excluded the involvement of cantonal governments within the FBiH.

The Council of Ministers introduced a comprehensive framework, starting in 2003, to align BiH's legislation with the acquis communautaire, a significant requirement arising from Article 70 of the Stabilisation and Association Agreement (SAA) with the EU. The "Decision on the Procedures in the Process of Harmonisation of Legislation of Bosnia and Herzegovina with the Acquis Communautaire" mandated BiH authorities to consider compliance with the acquis when drafting new regulations and laws.[44]

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43 BiH CoM, *Decision on EU Accession Coordination*.

44 BiH CoM, *Decision on Harmonisation of Legislation*.

5.3. Establishment of Working Groups and Organizational Units

In April 2005, the Council of Ministers passed the "Decision on Establishment of Working Groups for Harmonisation of Legal Regulations of BiH with the Acquis Communautaire," which aimed to aid ministries and administrative bodies in the harmonization process.[45] This decision involved representatives from state and entity levels but excluded representatives from cantonal governments.

In 2008, the Council of Ministers enacted the "Decision on Establishment of Organisational Units for European Integration in BiH's Administrative Bodies," focusing on ensuring effective internal coordination within the responsibilities of state ministries and administrative bodies for the European integration process.[46] Additionally, the "Decision on Establishment of the Commission for European Integration within the Provisional Stabilisation and Association Committee" was adopted to facilitate efficient coordination and representation of BiH's authorities at meetings with the Provisional Stabilisation and Association Committee, a joint forum involving the European Commission and BiH's authorities.[47]

In 2009, the "Decision on Establishment of the Working Groups for European Integration" formed seven working groups representing BiH in various joint bodies and committees related to the Stabilisation Association Sub-committee, trade agreements, and the Reform Process Monitoring (RPM). Representatives from competent ministries and institutions at the state and entity levels were appointed to these working groups.[48]

5.4. The 2016 Decision on System Coordination

The "Decision on the System Coordination of the European Integration" enacted by the Council of Ministers in January 2016 instigated substantial changes to the vertical coordination structure in BiH.[49] This decision delineated the institutional and operational framework for coordinating BiH institutions concerning activities linked to BiH's integration into the EU. Grounded in

45 BiH CoM, *Decision on Working Groups for Harmonisation*.
46 BiH CoM, *Decision on Organisational Units for EU Integration*.
47 BiH CoM, *Decision on Commission for EU Integration*.
48 BiH CoM, *Decision on Working Groups for EU Integration*.
49 BiH CoM, *Decision on the System Coordination of the European Integration*, 2016, Official Gazette of BiH, No. 72/16.

BiH's post-Dayton internal legal and political structure, this decision aimed to ensure consistency and coherence across all governmental levels in BiH concerning fulfilling obligations stipulated by the SAA between the EU and BiH.

The coordination system established competent joint bodies within this framework, defining their compositions, competences, and interrelations. Its primary objective was to ensure institutional consistency and coherence across BiH's different levels of government and articulate a unified stance when engaging with EU institutions. This system was designed to operate based on consensus decision-making principles, paying particular attention to safeguarding competences prescribed by constitutional frameworks at various government levels.

Each government level independently regulated horizontal coordination structures, reflecting their respective administrative orders, legal specificities, and capacities. Vertical coordination encompassed mechanisms across different government levels, involving various joint bodies:

1. Collegium for European Integration: the highest political body within the coordination system; it fosters consensus on critical strategic and political matters concerning European integration. It involves representatives from diverse government levels and is presided over by the Chairman of the Council of Ministers of BiH.
2. Ministerial Conferences: forums for comprehensive and cohesive approaches to specific sectors covered by European integration. These conferences comprised relevant line ministers from various government levels, including the Council of Ministers, entity governments, cantonal governments, and representatives from the Government of the Brčko District. The "Instruction on Ministerial Conferences in the Coordination System of the European Integration Process in BiH" outlined 12 thematic Ministerial Conferences.[50]
3. Commission for European Integration: responsible for technical, operational, and methodological coordination, ensuring inclusive representation of competent institutions across all government tiers. The Commission included the Director of the DEI, representatives from entities' and cantonal governments, the Government of the Brčko District, and a designated representative from the DEI acting as Secretary.

[50] BiH CoM, *Instruction on Ministerial Conferences in the Coordination System of the European Integration Process in BiH*, 2017, Official Gazette of BiH, No. 43/17.

4. Working Groups for European Integration: These groups comprise representatives from diverse government levels tasked with finalizing technical documents, organizing EU assistance programs, and translating the acquis. They evaluated the necessity for financial and technical aid from the EU, translated the acquis, identified educational and training needs, exchanged best practices among relevant institutions, and negotiated BiH's position on specific aspects of the acquis. The Council of Ministers, on June 11, 2021, affirmed their significance in the integration process by endorsing the "Decision on the Establishment of Working Groups for European Integration," establishing 36 Working Groups aligned with the acquis and accession criteria.[51]

In addition to these bodies, BiH and the EU established joint bodies for monitoring the SAA implementation, including the Council, Committee, and Sub-Committee within the Stabilisation and Association and the joint Special Group on public administration reform established under the SAA.

Despite the aim of streamlining the EU integration process, the intricate coordination mechanism adds complexity to BiH's functionality in fulfilling its European obligations, given the country's complex administrative structure. This complexity poses challenges in effectively executing the assumed obligations along the European path. Nonetheless, the establishment of these coordination mechanisms represents a significant step forward in BiH's ongoing efforts to align with EU standards and advance towards full EU membership.

6. From Action Plans to Acquis

On May 29, 2019, the European Commission released its Opinion on BiH's application for EU membership, delineating 14 key priorities for BiH to address. This Opinion includes an Analytical Report, an exhaustive document outlining 115 specific priorities aligned with the political and economic criteria and the acquis chapters. In response, the Council of Ministers of BiH ratified an "Action Plan for the Implementation of Priorities from

[51] BiH CoM, *Decision on the Establishment of Working Groups for European Integration*, 2021, Official Gazette of BiH, No. 46/21.

the Analytical Report of the European Commission" on October 15, 2019.[52] Formulated by the DEI, this Action Plan established deadlines for executing measures from July 2019 to May 2020. It encompasses 691 measures aimed at fulfilling the 115 priorities identified in the European Commission's Analytical Report, distributed across various administrative levels: 230 for the state level, 391 for lower governmental tiers, and 70 spanning multiple levels of governance. The breakdown of planned measures includes:

1. laws – 115;
2. by-laws – 92;
3. strategic, planning, and program documents – 94;
4. strengthening of administrative capacities – 79; and
5. other measures – 311 (improvement of coordination, IT solutions, international agreements, memoranda of cooperation, operational activities, etc.).

A total of 231 institutions across all levels of government participated in formulating and executing measures in the Action Plan, including 47 at the state level, 32 from entities within the FBiH, 30 from RS, 17 from the Brčko District, and 105 associated with cantonal levels.

Despite these collaborative efforts, the Action Plan failed to yield significant performance outcomes. According to the "Final Report on the Action Plan for Implementing Measures from the Analytical Report" (endorsed by the Council of Ministers on October 22, 2020), only 288 out of the 691 planned measures (42%) were successfully implemented, leaving 403 measures (58%) unfulfilled.[53] The breakdown of implemented measures reveals the following:

1. Law adoption: 26 out of 115 measures (23%);
2. By-law directives: 26 out of 92 measures (28%);

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52 BiH CoM, "Action Plan for the Implementation of Priorities from the Analytical Report of the European Commission," 2019, accessed April 6, 2024, https://www.dei.gov.ba/uploads/documents/action-plan-for-the-implementation-of-the-priorities-from-the-ec-analytical-report_1620119866.pdf.

53 BiH CoM, "Final Report on the Action Plan for Implementing Measures from the Analytical Report," 2020, accessed April 5, 2024, https://www.dei.gov.ba/uploads/documents/finalni-izvjestaj-o-realizaciji-akcionog-plana-za-realizaciju-prioriteta-iz-analitickog-izvjestaja-evropske-komisije_1604657038.pdf.

3. Strategic planning and program documents: 28 out of 94 measures (30%);
4. Enhancement of administrative capabilities: 40 out of 79 measures (51%); and
5. IT, international agreements, memoranda of cooperation, and operational activities: 168 out of 311 measures (54%).

The DEI also formulated an Action Plan specifically addressing the 14 key priorities, but the Council of Ministers has not officially adopted this proposed plan.

6.1. The National Programme for Adopting the Acquis (NPAA)

By signing the SAA on 16 June 2008, BiH committed to formulating a comprehensive countrywide program known as the National Programme for Adopting the Acquis (NPAA), one of the 14 priorities highlighted in the European Commission's Opinion. Neighboring countries like Croatia (2003), Montenegro, and Serbia (2008) underscore the critical significance of the NPAA. In early 2019, the DEI prepared the "Information on the Programme for the Integration of BiH into the EU," approved during the 167th session of the Council of Ministers on February 26, 2019.[54] Consequently, the Council of Ministers mandated the DEI to inform the Collegium for European Integration about the imperative need to draft the Programme for the Integration of BiH into the EU. The Collegium, the highest political body within the coordination system, affirmed the necessity of formulating and adopting the Integration Programme on May 7, 2020 and entrusted the Commission for European Integration with preparing the "Methodology for the Preparation of the BiH Integration Programme in the EU," adopted on September 24, 2020.[55]

The timeframe for completing the Integration Programme was set at 15 months following the adoption of the Methodology. However, the program has not yet been adopted. This comprehensive program, which would span four years post-enactment, has encountered complexities during its

[54] DEI, *Information on the Programme for the Integration of BiH into the EU*, 2019, private archive.

[55] DEI, *Methodology for the Preparation of the BiH Integration Programme in the EU*, 2020, private archive.

drafting phase, involving active participation from administrative bodies across all levels of government in BiH. The adoption and implementation of the Integration Programme are crucial as they would establish a comprehensive database of all BiH regulations harmonized with the EU acquis, supplemented by essential information and indicators.

The Methodology mandates annual revisions to the Integration Programme, considering changes in EU legal acquis, feedback from the European Commission, and a deepened understanding of the European integration process within BiH. The DEI would also be tasked with quarterly reports on the program's implementation, requiring validation from the Commission for European Integration before submission to the European Commission.

Structured according to the adopted Methodology, the Integration Programme would include action plans for aligning legislation with the EU acquis and implementing European Commission recommendations unrelated to acquis transposition. It would address administrative capacities across negotiation chapters, outlining specific institutions needing legal alignment or regulatory adjustments to comply with EU standards. This comprehensive structure would integrate the three Copenhagen criteria (political, economic, and legal) alongside the Madrid criteria (administrative benchmarks) pertinent to EU membership considerations.

6.2. Future Steps

The formulation and partial implementation of the Action Plan addressing the 14 key priorities outlined in the Commission's Avis and NPAA underscore both advancements and persistent challenges within BiH's endeavors toward EU integration. The establishment of numerous measures and the involvement of a wide range of institutions demonstrate a robust commitment to aligning with EU standards. However, the significant proportion of unfulfilled measures underscores the difficulties inherent in BiH's complex administrative structure and the need for more effective coordination and implementation mechanisms.

Moving forward, BiH must prioritize the adoption of the Action Plan, which addresses the 14 key priorities and ensures its thorough implementation. Enhancing vertical and horizontal coordination among various governmental levels and institutions will be crucial in overcoming existing

challenges. Additionally, maintaining transparency and accountability through regular reporting and revisions of the Integration Programme will be essential for aligning with evolving EU requirements and achieving successful EU membership.

7. Where Does BiH Stand?

The rhetoric and legal commitments surrounding BiH's path to EU integration starkly contrast with the practical progress documented in EU assessments. The European Commission's annual Country Reports, formerly known as Progress Reports, serve as the authoritative measure of BiH's advancements towards fulfilling EU membership criteria. Established in 1997 to monitor CEECs' accession progress, these reports have since been adapted for the WBCs. They provide a rigorous evaluation framework, guided by the conditionality principle, which assesses BiH's institutional reforms and policy implementations essential for EU integration. This analysis explores the dynamics between the aspirational rhetoric of EU accession and the pragmatic realities reflected in EU assessments of BiH's progress.

The reports play a vital role in setting tasks, publicly monitoring, and evaluating pre-accession and accession countries across various policy domains, guided by the conditionality principle. They provide the Commission's annual assessment of each candidate's readiness for accession, systematically identifying strengths and shortcomings, often referred to as a "performance report". They also draw on assessments from institutions such as the European Court of Human Rights, the Venice Commission, the International Criminal Court, and the OSCE. Criticisms within these reports can significantly influence domestic debates in the WBCs, prompting governments to enact specific institutional and policy reforms.

The format of the reports, while highly standardized with occasional structural adjustments over time, adheres to the Copenhagen criteria and the acquis communautaire. They refrain from naming individual politicians, focusing instead on institutional functions. The Commission determines whether accession conditions are met, with reports promptly available online upon publication for governments, politicians, and experts.[56]

[56] Tatjana Sekulić, *The European Union and the Paradox of Enlargement: The Complex Accession of the Western Balkans* (Cham, Switzerland: Palgrave Macmillan, 2020).

They also attract substantial attention from domestic and international media annually, although voter engagement with the reports' contents and EU membership issues during political campaigns in BiH remains limited.

The accession and enlargement process reveals a significant asymmetry between the EU, which establishes stringent accession norms, standards, and procedures under rigorous conditionality, and the applicant countries, which must meet these conditions. Despite this dynamic, a concept of "negotiable conditionality" has emerged in BiH. The EU has at times adjusted its approach, exemplified by the postponement of the entry into force of the Stabilisation and Association Agreement (SAA) due to BiH's non-compliance with the Sejdić-Finci ECtHR ruling.[57] Subsequently, a "renewed approach" allowed for re-sequencing conditions without altering their fundamental requirements, demonstrating flexibility while upholding accession criteria.[58] In BiH's case, the EU reached a compromise on the voting rules of the Stabilisation and Association Parliamentary Committee (SAPC) in 2020, thereby resolving a five-year deadlock and fulfilling one of the requirements outlined in the Commission's Opinion on BiH. Established in 2015, the SAPC initially failed to adopt Rules of Procedure (RoP) due to the insistence of some BiH parliamentarians on including provisions based on ethnic voting principles, which diverged from European standards. The adopted RoP represents a compromise where decisions require a two-thirds majority of BiH parliamentarians (ensuring ethnic representation), contrary to the European Parliament's preference for a simple majority. Thus, this condition was also met through EU concessions on strict requirements.

Additionally, in October 2022, the European Commission, through its 2022 Communication on EU Enlargement Policy, once again adjusted its approach by granting conditional candidate status to BiH, allowing for a re-sequencing of conditionality while maintaining the fundamental

57 European Commission, "Bosnia and Herzegovina, 2014 Progress Report," Brussels, SWD(2014) 305, EUR-Lex: EU law, 2014, accessed 4 April 2024, https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=CELEX%3A52014SC0305.

58 European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions/SWD(2016) 365 final," 2016a, accessed February 12, 2024, https://www.ecoi.net/en/file/local/1015402/1226_1480929961_20161109-report-bosnia-and-herzegovina.pdf.

accession criteria.[59] This decision enabled BiH to attain candidate status after meeting eight specified reform conditions without full compliance with all 14 Key Priorities outlined in the 2019 Commission's Opinion on BiH. Notably, the EU deferred reforms on critical structural issues for BiH's candidate status, specifically neglecting reforms under points 4a (introduction of the substitute clause) and 4f (implementation of the Sejdić-Finci ECtHR ruling) of the 14 Key Priorities. This re-sequencing of conditionality is not unprecedented; for instance, in December 2014, the EU similarly re-sequenced conditionality, including the implementation of the Sejdić-Finci ECtHR ruling, to facilitate the entry into force of the SAA, which BiH signed in June 2015. Despite expectations that the application process would catalyze comprehensive reforms in BiH, progress on structural issues has remained stagnant.

The re-sequencing of conditionality has not proven effective in driving domestic reforms within BiH. However, it does not absolve BiH of its obligation to eventually comply with all 14 Key Priorities outlined in the Commission's Opinion for eventual EU membership. BiH still faces significant challenges spanning structural and civic space issues that hinder its EU integration prospects. The adjustment in conditionality could be interpreted in two ways: either as a strategic move by the Commission to compel action from BiH's political factions towards EU alignment or as a compromise where the EU appears to relax its stringent conditionality.

BiH often struggles to meet timelines for implementing necessary reforms, as reflected in the reports, which frequently highlight limited progress. Table 1 provides an overview of BiH's performance on established conditions from 2008 to 2022, crucial for its EU membership aspirations. Despite some achievements, the European Commission's annual reports on BiH have generally been critical, prompting scrutiny of the EU's efforts to facilitate BiH's EU integration process. An analysis of the EU reports concluded that BiH fulfilled only a minimal number of conditions between 2008 and 2022. The establishment of the coordination mechanism and progress on the SAPC were resolved, while most other requirements

[59] European Commission, "2022 Communication on EU Enlargement Policy," accessed February 8, 2024, https://neighbourhood-enlargement.ec.europa.eu/2022-communication-eu-enlargement-policy_en.

Table 1. *Requirements Mapping and Compliance Matrix for BiH 2008–2022*

EU conditions	*2008*	*2009*	*2010*	*2011*	*2012*	*2013*	*2014*	*2015*	*2016*	*2018*	*2020*	*2021*	*2022*	*Conditions met*
Sejdić-Finci ECtHR Ruling (and related cases)	BiH committed to full compliance with the ECtHR	---	No tangible results	Issue of serious concern, failure to reach an agreement	Little progress	Still pending, no progress, failure to implement	No tangible progress, a key element for BiH's membership application	BiH's Constitution remains in breach of the ECtHR	BiH's Constitution remains in breach of the ECtHR	BiH's Constitution remains in breach of the ECtHR	BiH's Constitution remains in breach of the ECtHR	BiH's Constitution remains in breach of the ECtHR	Significant reforms are needed to ensure equal rights for citizens	NO
Coordination mechanism	Lack of coordination in EU integration matters	A need for a stronger coordination mechanism	No proper coordination mechanism exists	A matter of urgency, lack of progress, need for one	A matter of priority, need for one	Urgent need for one	Needed, remain to be a key requirement	Needed, remain to be a key requirement	**Resolved**	---	---	---	No progress was made on the functionality	YES
Stabilisation and Association Parliamentary Committee	---	---	---	---	---	---	---	Established, a legal obligation under SAA	Failed to adopt Rules of Procedure, need for one	Failed to adopt Rules of Procedure, need for one	Some progress	**Good progress, Resolved**	BiH needs to ensure proper functioning of SAPC	YES
National programme for the adoption of the EU acquis	---	---	---	---	---	---	---	---	Remains to be adopted, need for one, a legal obligation under SAA	Remains to be adopted, need for one	No progress	No progress	Took no steps to develop NPAA	NO
Public administration reform	Some progress	Some progress	Little progress	Limited progress	Little progress	Limited progress	Very limited progress, serious concern	Early-stage with the reform, no progress	Early-stage with the reform, no progress backsliding has been recorded	Early-stage with the reform, no progress	Early-stage reforms, limited progress	Early-stage reforms, some progress	Limited progress	NO
Judicial system reform	Sustained efforts are needed	Limited progress	Limited progress	Limited progress	Limited progress	Limited progress	Little progress	Some progress	Some progress	Early-stage, some progress	Early-stage, no progress	Early-stage, no progress	Early-stage, no progress	NO
Fight against corruption	Little progress	Little progress	Limited progress	Early stage	Early stage	Early stage	Little progress	Some progress	Some progress	Some progress	Early-stage reforms, no progress	Early-stage reforms, no progress	Early stage, some level of preparation	NO
Death penalty repeal in RS entity	Needs to be repealed	Needs to be repealed	Needs to be repealed	Needs to be repealed	Needs to be repealed	Needs to be repealed	Needs to be repealed	Needs to be repealed	Needs to be repealed	Needs to be repealed	BiH Constitutional Court repealed the provision	The provision on the death penalty was not formally removed as requested by the BiH Constitutional Court	---	NO
Prevention of torture and ill-treatment	State and Entity constitutions prohibit torture and ill-treatment, failed to appoint a member to the Anti-Torture Committee	Failed to appoint a representative in the Anti-Torture Committee	Not appointed a representative to the Council of Europe Committee on the Prevention of Torture (CPT)	Pending	Pending	Pending	Appointed its representatives to CPT	National preventive mechanism against torture needed	Not established, pending, needed	Not established, pending, needed	Not established, pending, needed, international obligation	Designate preventive mechanism against torture and ill-treatment, needed, obligation	Designate preventive mechanism against torture and ill-treatment, needed, obligation	NO
Media freedom	No progress, serious concern	No progress, serious concern	No progress	In jeopardy, little progress	In jeopardy, little progress	Issue of concern	Limited progress	Backsliding	No progress	No progress	No progress	No progress	No progress	NO
Alignment with the EU Common Foreign and Security Policy	---	Aligned when invited (78% alignment)	Aligned when invited (91% alignment)	Aligned when invited (68% alignment)	Aligned when invited (56% alignment)	Aligned when invited (66% alignment)	Aligned when invited (52% alignment)	Aligned when invited (62% alignment)	Aligned when invited (77% alignment)	Alignment has to be improved (61% alignment)	Has been made and should be further pursued (75% alignment)	No progress (43% alignment)	Improved alignment with EU Foreign Policy (81% alignment)	NO
Cooperation with ICTY and later with IRMCT-Mechanism	Generally satisfactory	Satisfactory, remained good	Satisfactory, remained good, needs to be strengthened	Satisfactory	Generally satisfactory	Satisfactory	Satisfactory	Satisfactory	Satisfactory	---	Satisfactory	Satisfactory	Constructive cooperation with IRMCT Mechanism	IN PROGRESS
Good neighborly relations and regional cooperation	Essential for moving towards the EU, participate actively in regional cooperation	Essential for moving towards the EU, continued to participate actively in regional initiatives	Essential for moving towards the EU, continued to participate actively in regional initiatives	Essential for moving towards the EU, continued to participate actively in regional initiatives	Essential for moving towards the EU, continued to participate actively in regional initiatives	Essential for moving towards the EU, continued to participate actively in regional initiatives	Essential for moving towards the EU, continued to participate actively in regional initiatives	Essential for moving towards the EU, continued to participate actively in regional initiatives	Essential for moving towards the EU, continued to participate actively in regional initiatives	Remained relatively stable and good	Continued to participate actively and maintain good relations	Continued to participate actively and maintain good relations	Continued to participate actively and maintain good relations	IN PROGRESS

Source: Author's compilation; European Commission, Country (Progress) Reports for BiH (2008; 2009; 2010; 2011; 2012; 2013; 2014; 2015; 2016b; 2018; 2020; 2021; 2022b)

either remained unmet or showed limited progress. In spite of repeated commitments for the EU membership, European Commission reports consistently conclude that inertia prevails in BiH. According to Tobias Böhmelt and Tina Freyburg, BiH may encounter challenges in fully incorporating EU legislation by 2050, emphasising the complexity of aligning with the EU acquis.[60]

8. Conclusion

The analysis of legal documentation and records from the BiH Presidency, the Council of Ministers, and the Parliamentary Assembly of BiH has illuminated a comprehensive framework outlining BiH's dedication and responsibilities towards EU membership. BiH's aspiration for EU accession notably predates the DPA, a historical fact often overlooked in academic and policy circles. As early as June 1992, shortly after BiH's admission to the United Nations, the country formally expressed its keen interest in full EU membership through the "Platform on the Activity of the Presidency of BiH in War Conditions." This pivotal document, despite its foundational role in shaping BiH's foreign policy trajectory, has been overlooked in both local and EU-centric historical narratives, obscuring its significance.

During the 1992–1995 war, BiH was not on a trajectory towards EU accession, with the document explicitly addressing BiH's wartime constraints. Nevertheless, it serves as a critical artefact in understanding BiH's enduring commitment to European integration despite the challenges posed by conflict and post-war reconstruction efforts.

The theoretical commitment to EU integration has been fervently articulated within BiH's domestic reforms, aligning with the overarching "European choice." However, translating this commitment into tangible actions faces significant hurdles within BiH's complex political and societal landscape. Despite pronounced intentions, substantive reforms have been slow and sporadic, revealing a stark disparity between professed commitment and effective implementation. The gap between rhetoric and action underscores the formidable challenges inherent in achieving EU membership,

[60] Tobias Böhmelt and Tina Freyburg, "Forecasting Candidate States' Compliance with EU Accession Rules, 2017–2050," *Journal of European Public Policy* 25, no. 11 (2017): 1667–85, https://doi.org/10.1080/13501763.2017.1348385.

demanding comprehensive legislative amendments and practical implementations across all levels of governance.

The axiom that "commitment without action bears no fruit" resonates profoundly in BiH's journey towards EU integration. The discrepancy between articulated commitment and actual reform efforts underscores the need for a paradigm shift from symbolic gestures to substantial actions. Overcoming structural impediments, institutional complexities, and political obstacles is paramount for BiH to align with EU standards and expectations. This recalibration must prioritize transformative reforms that mirror the functionality and norms of EU member states.

Ultimately, achieving EU membership for BiH requires not only steadfast commitment but also resolute action in implementing necessary reforms. The path forward necessitates a concerted effort to bridge the gap between aspiration and achievement, ensuring that BiH's integration into the EU is grounded in substantive reforms that uphold European values and standards.

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Stabilitocracy as the Pitfall for Post-war Ukraine: A Lesson from the Western Balkans

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Abstract: This paper aims to detect possible pitfalls for post-war Ukraine with regard to establishing the rule of law and the path to joining the EU. Since countries in the Western Balkans were in a similar situation to that Ukraine is facing nowadays, the author explains what Ukraine should learn from their post-war experiences. The author identifies the main pitfall for Ukraine after the Russian aggression ends, which is stabilitocracy. The author then suggests what the post-war strategy for Ukraine should be, and what should be done to avoid the "stabilitocratization" of Ukraine.

1. Introduction

Ukraine is still fighting to liberate the whole of its territory from the Russian army. Nobody can be sure how long the war will continue, and what the consequences of this war will be in the context of the global security system. However, sooner or later the war will end. Ukraine has already begun its path to membership in the European Union (EU) and this paper suggests what pitfall Ukraine should avoid on this path. Western Balkans (WB) countries[1] have already faced many of the challenges that are expected to be

[1] WB countries are Albania, Bosnia and Herzegovina, North Macedonia, Montenegro, (Kosovo), and Serbia.

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faced by Ukraine.[2] In the context of the path to EU membership, the WB is known for its "long-waiting time" for the accession to the EU family. Yet, after Croatia successfully became a member state of the EU, other WB countries are still waiting for the next enlargement of the EU. Meanwhile, Albania (2009), Montenegro (2017), and North Macedonia (2020) became members of the North Atlantic Treaty Organization (NATO). So, the current situation in the WB is that the above-mentioned countries are members of NATO but not the EU, and Bosnia and Herzegovina and Serbia are not members of NATO or the EU. Regarding the path to EU membership of WB countries, Montenegro has been the candidate for accession since 2010, Serbia since 2012, Albania since 2014, and Bosnia and Herzegovina since 2022. Yet, the paths of WB countries toward membership in the EU are uncertain.[3]

Ukraine became the candidate state in 2022, and in December 2023, it opened negotiations with the EU. In this early phase of Ukraine's EU membership path, it seems that the EU opened a fast-track procedure for Ukraine. From this point of view, many politicians and advocators of the EU enlargement applaud this approach.[4] However, this paper considers why this approach will not necessarily ensure positive results for Ukraine, on the EU path, and in general, and, at the same time, presents what is the main pitfall for Ukraine in the near future in the context of accession to the EU. In the absence of the rule of law, fulfilling the EU's conditions would lead to long-wait accession like in WB countries. Thus, this paper argues that for Ukraine the first aim should be establishing the rule of law, as the main precondition for accession to the EU family.

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2 See: Arolda Elbasani, "Europeanization Travels to the Western Balkans: Enlargement Strategy, Domestic Obstacles and Diverging Reforms," in *European Integration and Transformation in the Western Balkans: Europeanization or Business as Usual*, ed. Arolda Elbasani (Oxon: Routledge, 2013), 3–22.

3 There is no consensus among EU member states on accession of new countries. Moreover, EU officials and scholars are unsure about the EU enlargement in the WB.

4 "Zelensky Hails 'Victory for Ukraine' as EU Agrees to Open Accession Talks," France 24, accessed December 17, 2023, https://www.france24.com/en/live-news/20231214-%F0%9F%94%B4-eu-leaders-agree-to-open-accession-talks-with-ukraine.

2. The EU Enlargement and the Rule of Law: Evidence from the WB

On the first reading of the thesis of this paper, a reader can ask, why establishing the rule of law in Ukraine should be prioritized over Ukraine's accession to the EU. In other words, the EU enlargement and establishing the rule of law are ordinarily regarded as processes that overlap. More precisely, the EU requires, among other things, that a candidate state must attain a high level of compliance with the rule of law before becoming a member of the EU.[5] As Ardit Memeti points out, the rule of law represents one of the crucial criteria for accession to the EU.[6] In that sense, the EU's conditions regarding the rule of law have been seen as the guideline for candidate states in the process of establishing the rule of law. This premise that EU conditions *per se* lead to the rule of law manifested as false in the case of the WB.[7] For example, WB countries such as Albania (2020), Montenegro (2012), North Macedonia (2020), and Serbia (2013) have already opened negotiations with the EU, and they are much closer to becoming member states than Bosnia and Herzegovina (which has still not opened negotiations), and Kosovo (which is not formally a candidate state yet). In accordance with the first premise (that EU conditions lead to the rule of law), Albania, Montenegro, North Macedonia, and Serbia ought to have made more progress regarding the rule of law than Bosnia and Herzegovina and Kosovo. The Rule of Law Index measures the level of compliance with the rule of law in several segments such as constraints on government power, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice.[8] Hence, the Rule of Law Index indicates compelling data about the level of rule of law in WB countries for 2023.

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5 See: Dimitry Kochenov, "The EU and the Rule of Law – Naïveté or a Grand Design?," in *Constitutionalism and the Rule of Law Bridging Idealism and Realism*, eds. Maurice Adams, Anne Meuwese, and Ernst Hirsch Ballin (Cambridge: Cambridge University Press, 2017), 419–45.

6 Ardit Memeti, "Rule of Law through Judicial Reform: A Key to the EU Accession of the Western Balkans," *Contemporary Southeastern Europe* 1, no. 1 (2014): 58–67.

7 On the reason why the EU is failing to establish the rule of law in the WB, see: Marko Kmezić, "Rule of Law and Democracy in the Western Balkans: Addressing the Gap Between Policies and Practice," *Southeast European and Black Sea Studies* 20, no. 1 (2020): 183–98.

8 WJP Rule of Law Index 2023, accessed December 18, 2023, https://worldjusticeproject.org/rule-of-law-index/global.

According to the Index, Montenegro is ranked in 57th place with an overall score of 0.56,[9] and at the same time, Kosovo is ranked in 58th place[10] with the same score. Albania is ranked in 91st place[11] with an overall score of 0.48, and Serbia is ranked in 93rd place[12] with the same score. Bosnia and Herzegovina for example is ranked in 75th place with an overall score of 0.51.[13] North Macedonia is ranked in 67th place with an overall score of 0.53.[14] This data reveals how countries from the WB that are formally closer to the EU do not have a higher level of compliance with the rule of law than Bosnia and Herzegovina and Kosovo. Particularly worrying is the decline in compliance with the rule of law in Albania and Serbia, both long-time EU candidates. In a more detailed manner, all WB countries have the worst results regarding corruption, civil and criminal justice, transparency of government, constraints of government power, regulatory enforcement, and fundamental rights. On the other hand, WB countries have the best result in order and security. Of course, this paper does not argue that the Rule of Law Index perfectly presents the situation regarding the rule of law in the WB. However, the Rule of Law Index reveals valuable data for analyzing the post-conflict building of the rule of law in the WB. This Index displays two main segments of the rule of law; the first being stability and security, and the second being human rights and freedoms, transparency, civil and criminal justice, and control over government. It seems that in its promotion of the rule of law in the WB, the EU has neglected the second segment of the rule of law for the sake of stability and security. Thus, as Kmezić points out, the promotion of the rule

9 WJP Rule of Law Index 2023: Montenegro, accessed December 18, 2023, https://worldjusticeproject.org/rule-of-law-index/global/2023/Montenegro.

10 WJP Rule of Law Index 2023: Kosovo, accessed December 18, 2023, https://worldjusticeproject.org/rule-of-law-index/global/2023/Kosovo.

11 WJP Rule of Law Index 2023: Albania, accessed December 18, 2023, https://worldjusticeproject.org/rule-of-law-index/global/2023/Albania.

12 WJP Rule of Law Index 2023: Serbia, accessed December 18, 2023, https://worldjusticeproject.org/rule-of-law-index/global/2023/Serbia.

13 WJP Rule of Law Index 2023: Bosnia and Herzegovina, accessed December 18, 2023, https://worldjusticeproject.org/rule-of-law-index/global/2023/Bosnia%20and%20Herzegovina.

14 WJP Rule of Law Index 2023: North Macedonia, accessed December 18, 2023, https://worldjusticeproject.org/rule-of-law-index/global/2023/North%20Macedonia.

of law in the WB has led to stabilitocratization, rather than to democratization.[15] Therefore, we can conclude that in the first, the evidence from the WB debunks the premise that the conditions for EU membership *per se* lead to compliance with the rule of law. Additionally, the Rule of Law Index shows us that WB countries attained an acceptable level of stability, under the influence of the EU, but they did not attain significant reform regarding human rights, civil and criminal justice, constraint of government, and transparency of public institutions.

3. What Went Wrong in the WB? The Pitfall of Stabilitocracy

What went wrong with the EU enlargement in the WB? As has been previously explained, the EU did not succeed in establishing the rule of law in the WB. Of course, the political elites of WB countries also obstructed the process of establishing the rule of law. The problem with the EU approach regarding the rule of law in the WB is that EU officials agreed to cooperate with political leaders of WB countries that obstruct building the rule of law. In other words, EU officials ostensibly negotiate the EU path with WB politicians, who are more in love with authoritarianism than with democracy. The consequences of this approach of the EU are the decline of the rule of law and deadlock on the path to EU membership for WB countries. Unfortunately, the WB as well as the EU have fallen into the trap of stabilitocracy. Because the term "stabilitocracy" was coined in particular to describe and explain the EU's approach to the WB, this paper needs to offer a brief definition of this term.

> The term stabilitocracy is derived from the Latin word *stabilis* meaning firm and Greek word *kratia*, meaning to rule. Stability is usually associated with the systems which maintain or achieve the state of balance after the cessation of the influence of the causes which previously disturbed such balance. Here we primarily refer to stability in (foreign) political context. When the term stabilitocracy is analysed in terms of the words composing it, then such a compound word should indicate the rule of stability.[16]

[15] Marko Kmezić, "EU Rule of Law Conditionality: Democracy or 'Stabilitocracy' Promotion in the Western Balkans," in *The Europeanisation of the Western Balkans A Failure of EU Conditionality?*, eds. Jelena Džankić, Soeren Keil, and Marko Kmezić (Cham: Springer, 2019), 87–110.

[16] Zoran Lutovac, *Populism, Stabilitocracy and Multiculturalism* (Belgrade: Institute of Social Sciences, 2020), 145.

Thus, there are two main features of stabilitocracy. The first is flawed stability established by a semi-authoritarian regime, and the second is the foreign legitimacy of this model of ruling.[17] Flawed stability is featured by the rule of political parties and para-legal actors. In this type of ruling, stability is not guaranteed by state institutions, but by a fragile balance between political leaders and agents of political parties. Thus, state institutions do not have a practical role in internal affairs, because their powers were taken over by political parties. On the other hand, legitimacy for all actions that guarantee stability in the region gives the EU false perception of stability in the region. In practice, thus, EU officials rather cooperate with semi-authoritarian leaders of WB countries, in exchange for guaranteed stability, than endorse politics that truly serve democracy. WB politicians accepted this EU approach to creating legitimacy for their long-term ruling in their countries, like Aleksandar Vučić in Serbia and, so far, Mile Đukanović in Montenegro.[18] In the political context, this satisfied the interest of WB political leaders, who ostensibly seek accession to the EU (but in fact, they do not), and the EU that manifestly wants WB countries in the EU family, but in fact, it is not so much interested in enlargement in the WB. So far, the WB has been a stable and secure region. In this context, Bieber explains, this "chasm between formal commitment to EU membership and authoritarianism at home undermined the assumption of the simultaneity of pro-EU positions and democracy. It is this gap that enabled the rise of stabilitocracy."[19] In other words, WB political leaders are pro-West and pro-EU abroad, and authoritarian at home.

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17 Florian Bieber, "What Is a Stabilitocracy?," accessed December 18, 2023, https://biepag.eu/article/what-is-a-stabilitocracy/.

18 Srđa Pavlović, "Montenegro's 'Stabilitocracy': The West's Support of Đukanović Is Damaging the Prospects of Democratic Change," accessed December 18, 2023, https://blogs.lse.ac.uk/europpblog/2016/12/23/montenegros-stabilitocracy-how-the-wests-support-of-dukanovic-is-damaging-the-prospects-of-democratic-change/; Srđa Pavlović, "West Is Best: How 'Stabilitocracy' Undermines Democracy Building In the Balkans," accessed December 18, 2023, https://blogs.lse.ac.uk/europpblog/2017/05/05/west-is-best-how-stabilitocracy-undermines-democracy-building-in-the-balkans/; Claudia Laštro, Florian Bieber, and Jovana Marović, "Mechanisms of Dominance: Understanding 30 Years in Power of Montenegro's Democratic Party of Socialists," *Comparative Southeast European Studies* 71, no. 2 (2023): 210–36.

19 Florian Bieber, *The Rise of Authoritarianism in the Western Balkans* (Cham: Springer, 2020), 101.

The previous section has shown all segments of the rule of law where WB countries attain the worst results. However, all WB countries show significant results in the segment of security and stability. This is the direct consequence of the stabilitocratic approach of the EU in the WB. Moreover, the EU and WB political leaders sacrificed all other segments of the rule of law such as civil and criminal justice, or respecting human rights, to preserve peace in the region. As Lutovac points out, "stabilitocracy is designed to preserve peace, even at the expense of liberal democracy's fundamental values."[20]

But, regarding this problem of stabilitocracy in the WB, this paper offers the answer as to why this happened in the particular case of the EU enlargement in the WB, so that a lesson can be offered to Ukraine. There is no doubt that EU officials were enthusiastic about the enlargement of the WB at the beginning of the process. The problem was that WB countries got into this process without completing democratization, and with an absence of rule-of-law institutions. EU officials thought that WB countries would become truly democratic states before they became member states, i.e. they expected that they would be democratized during the EU enlargement process. Moreover, they thought that EU investments in the WB would attract WB political leaders to change the course towards building democratic institutions based on the rule of law. Contrary to this assumption, WB political leaders have not changed the course, and they continue to rule in an authoritarian manner. The EU has neglected this fact, and it has been pursuing the stabilitocratic approach in the WB because it was aware that it did not have enough capacity to face semi-authoritarian leaders of the WB. Or, the lack of interest of the EU in establishing the rule of law in the WB also determined the EU's approach. Also, this was influenced by the fact that the only actors that can be truly interested in the rule of law are citizens and domestic political leaders (in the case of WB, mostly political leaders of an opposition). Therefore, the EU at best bolstered the security and stability of the WB, as the leading interest of the EU in the WB. Therefore, the lack of will and capacity to combat WB political leaders has been determined the EU's approach to the WB.

[20] Lutovac, *Populism*, 146.

The approach "if you can't beat them, join them" prevailed in the external politics of the EU, and instead of democratization in the WB, the EU bolstered the "stabilitocratization" of this region. In other words, EU officials accepted semi-authoritarian leaders of the WB as partners, who would not do much to access the EU, but would deliver stability and security in the region. In return, the EU delivered external legitimacy to WB political leaders. As Takács and Jancic point out, the EU "[t]o mitigate the negative effects thereof, the citizens and business operators of a number of the Western Balkans countries been given the 'carrot' of visa-free travel within the Schengen area and preferential trade arrangements."[21] This is one of the examples of how the EU has been using the "stick-and-carrot" strategy to attract or to bind the WB to the EU.

So, the first part of the lesson that should be learned from the WB in the context of the EU enlargement is that being on the path to EU membership does not mean building functional democratic institutions that comply with the rule of law standards. Otherwise, being a candidate state or in the process of negotiations *per se* means nothing regarding democratization and building the rule of law. Also, another part of this lesson is that EU officials are not going to build the rule of law instead domestic political leaders.

4. *Quo Vadis* Ukraine: Is Stabilitocracy a Pitfall for Ukraine?

Currently, Ukraine is in the process of negotiations with the EU. Not so long ago, Ukraine was considered one of the most corrupt countries in Europe.[22] The Rule of Law Index ranked Ukraine in 89th place with an overall score of 0.49.[23] If we compare Ukraine's ranking on this Index with other WB countries' rankings, we can see that only Albania and Serbia have worse rankings than Ukraine. The high level of corruption is not the only problem

21 Tamara Takács and Davor Jancic, "Fundamental Rights and Rule of Law Promotion in EU Enlargement Policy in the Western Balkans," in *Fundamental Rights in International and European Law: Public and Private Law Perspectives*, eds. Christophe Paulussen et al. (The Hague: Asser Press and Springer, 2016), 123–41.

22 Farah Stockman, "Corruption Is an Existential Threat to Ukraine, and Ukrainians Know It," *The New York Times*, 10 September 2023.

23 WJP Rule of Law Index 2023: Ukraine, accessed December 18, 2023, https://worldjusticeproject.org/rule-of-law-index/global/2023/Ukraine.

faced by Ukraine. Also, in other segments of the rule of law, Ukraine attains low-grade results. However, Ukraine has opened negotiations with the EU in a euphoric manner, with full optimism shown both by Ukraine and EU officials. Perhaps, this was the geostrategic decision of the EU to encourage Ukraine in the war against Russia, and at the same time, to show Ukraine that it belongs to the Western world. From this point of view, if we neglect the WB experience, we should applaud this decision. But the WB experience warns us that the same fate is expected for Ukraine as all other WB countries, if Ukraine and the EU do not change their approaches. It would be too optimistic to expect that the EU will change its stabilitocratic approach to new candidate states. Therefore, the crucial role in avoiding stabilitocracy has Ukraine's current regime. This paper will explain why the WB experience is so valuable for Ukraine. In other words, it will show that Ukraine is now in the same political position as the WB countries were 10 to 15 years ago.

Firstly, like the WB countries, Ukraine has never completed the process of democratization in the country. The absence of the rule of law in Ukraine is even higher than in WB countries. Also, similar to WB countries in the 90s, Ukraine is currently at war. Also, the outcome of the war will determine the future of Ukraine and its path to EU membership. Of course, the first objective for Ukraine after the war will be to stabilize the country. So, is the same scenario of stabilitocracy expected for Ukraine?

Ukraine has opened negotiations with the EU, although has a lower level of compliance with the rule of law than Bosnia and Herzegovina (which has not opened negotiations yet). The main goal of the EU will be to stabilize and secure Ukraine after the war, and accordingly, the EU will try to remove the Russian influence from Ukraine. To make this happen, the EU will legitimize Ukraine's actions, in internal and external contexts, and in return, the EU will expect to see stability in that part of Europe, and Ukraine that manifestly pivots to the West. In that sense, the EU will not rigorously demand crucial conditions to be fulfilled by Ukraine, to save its partnership with Ukraine's regime and because of the lack of interest in building the rule of law. On the other hand, if the outcome of the war is positive, Ukraine will stabilize and secure the situation in the country, but its democratization and the formation of the rule of law will depend on domestic political leaders. Accordingly, the EU will bolster the stabilization

and securitization of Ukraine as the first stage of building the rule of law, but the second stage of the rule of law, such as establishing an effective and independent judiciary, will exclusively depend on the will of domestic actors. Hence, the same scenario of stabilitocracy is expected in Ukraine, if Ukraine relies on the EU's support regarding the rule of law.

Of course, this is just a prediction based on the WB experience regarding the path to EU membership. Since Ukraine is now where WB countries were in the 90s and the beginning of the 2000s, this experience is a valuable caution for Ukraine. Accordingly, here we will offer what should be the solution for Ukraine to avoid the pitfall of stabilitocracy on the path towards EU membership.

5. The Rule of Law First, the European Union Second: Three Main Challenges for Post-war Ukraine

This subtitle might sound like advocating Euroscepticism. However, this paper argues that the rule of law ought to have priority over Ukraine's path to EU membership, and explains why this is not advocating Euroscepticism but rather proposing a sober view of the current occasions. Ukraine was struggling for a long time to get rid of the Russian influence, and one of the causes of the Russian aggression was Ukraine's shift to the West. Now, Ukraine's government is at a turning point; it can choose the path of frankly obeying the rule of law and other universal values, or it can choose the false path to the EU; namely, the path to stabilitocracy. This depends solely on the current government, which has a historic role to play in the context of Ukraine's future. EU officials will accept both scenarios. The EU's minimum conditions are stability and security in the region. If Ukraine's government decides to fulfill only a minimum of EU conditions, then Ukraine will fall into the same trap of stabilitocracy as WB countries did. On the other hand, if Ukraine begins with rigorous reform regarding the rule of law, then it might have the capacity to become a real candidate for the EU membership. Moreover, being a formal candidate state without an acceptable level of the rule of law undoubtedly leads to stabilitocracy. A candidate state with an acceptable level of the rule of law has the potential to become a member state. Of course, there is no guarantee that a candidate state will be admitted to the EU because, at the final stage of accession, all member states of the EU must ratify an accession of a new country. Thus, accession of a candidate

state does not depend only on fulfilling EU conditions but also on the benevolence of all EU member states.

Accordingly, there are two main reasons why Ukraine should aim to establish the rule of law first, instead of just formally being a candidate state. The first reason is that without rigorous reform regarding the rule of law, Ukraine will fall into the trap of stabilitocracy, which means that it may become a "long-waiting candidate" for the EU. The second reason is that Ukraine's path to EU membership is uncertain, like the paths of all other candidate states, since there is no consensus among member states on the accession of new countries. Thus, they should not rely on the promises of the EU officials, because the final word belongs to member states, since all of them have to ratify the accession of a new country. In the context of building the rule of law, Ukraine should follow the objectives of the "The Roadmap for Peaceful, Just and Inclusive Societies." Regarding the rule of law, this Roadmap suggests as follows: scale up the prevention of violence against women and children, and against vulnerable groups; build safe, inclusive, and resilient cities; ensure targeted prevention for countries and communities most likely to be left behind; increase justice and legal empowerment; ensure commitment to open and responsive government; reduce corruption and illicit financial and arms flows; introduce legal identity and birth registration for all; empower people as agents of change; respect all human rights and promote gender equality.[24]

For all of this to be fulfilled, Ukraine, in the first place, must build inclusive institutions that will have sufficient capacities to bolster the democratization of Ukraine. In other words, Ukraine regardless of the EU approach, in the first place should complete the process of democratization of the country. This does not necessarily mean, for example, a complete elimination of corruption. Rather, democratization means that all domestic actors, including politicians, judges, bureaucrats, and other state officials, together with citizens, will stand for the rule of law. This includes the transitions from electoral democracy to liberal democracy, where the rule of law

[24] See: Alistair D. Edgar, "The Rule of Law, Peacebuilding, and Agenda 2030: Lessons from the Western Balkans," in *Crime Prevention and Justice in 2030: The UN and the Universal Declaration of Human Rights*, eds. Helmut Kury and Sławomir Redo (Cham: Springer, 2021), 401–15.

will not depend on the benevolence of domestic actors, but on institutions. For this to be achieved, citizens, including the judiciary, play the key role in forcing (with soft power) political leaders to hold the course towards transition into a liberal democratic state. Of course, building the rule of law will be a long-term and laborious process. There are three main challenges at the beginning of this process, that need to be sidestepped.

"Power tends to corrupt and absolute power corrupts absolutely."[25] Ukraine postponed elections for 2024,[26] and in a time of war, the emergency can justify this action. However, Ukraine should be concerned about the outcomes of the war, not only about how much territory Ukraine's army will liberate. Moreover, Volodimir Zelenski is likely to become Ukraine's post-war hero. That will enable him to concentrate political power. So, the first challenge for Ukraine after the war, besides stabilizing and securitizing the country, will be to constrain the power of the government (regime). In line with the above citation on how absolute power corrupts absolutely, Ukraine's (heroic) regime will be tempted by absolute power. The task of institutions, in particular the judiciary, will be to constrain the regime's power. Thus, the judiciary will take the first step towards building the rule of law. Otherwise, Zelensky can become the new Vučić or Đukanović; Europe's favorite autocrat.[27] This threat ought to be recognized by the judiciary and citizens. The judiciary should use the constitutional framework to constrain the actions of the regime in the post-war period, and citizens should use elections to change the government if it gets corrupted by the power.

The second challenge is combating corruption. Accordingly, two main priorities for Ukraine should be the transparency and efficiency of government. These two priorities are key factors in combating corruption. Corruption is not the cause; it is the outcome of an inefficient and non-transparent

25 This statement was written by Lord Acton in a series of letters sent to Bishop Creighton.

26 "Zelensky Says 'Not the Time' for Presidential Elections in Ukraine," France 24, accessed December 19, 2023, https://www.france24.com/en/europe/20231107-ukraine-s-zelensky-says-not-the-time-for-presidential-elections.

27 Aleks Eror, "How Aleksandar Vucic Became Europe's Favorite Autocrat," accessed December 19, 2023, https://foreignpolicy.com/2018/03/09/how-aleksandar-vucic-became-europes-favorite-autocrat/.

public sector. Therefore, reforming the public sector by prioritizing these two factors is the key to fighting against corruption.

The third challenge is related to human rights issues. Ukraine authorities declared derogation of the European Convention on Human Rights (ECHR). Derogation of the ECHR provisions was done in line with Article 15 of the ECHR. Ukraine derogated Articles 4(3) (forced labor), 8 (right to private and family life), 9 (freedom of religion), 10 (freedom of expression), 11 (freedom of assembly and association), and 14 (prohibition of discrimination). Additionally, Ukraine also derogated from Articles 5 (right to liberty and security), 6 (right to a fair trial), and 13 (right to an effective remedy).[28] In this context, Ukraine will be challenged to go back to regular enforcement of the ECHR as soon as possible after the war ends. Solving the above-mentioned challenges, in my opinion, will determine the future of the rule of law, and it will determine whether Ukraine is going to be a liberal democracy or another example of stabilitocracy.

6. Concluding Remarks

This paper examines the main pitfall for post-war Ukraine regarding the building of the rule of law and Ukraine's path to EU membership. The main pitfall in this process is stabilitocracy. To avoid this pitfall, Ukraine should avoid the WB scenario. In other words, Ukraine should not be satisfied with the status of candidate state for EU membership, since being a candidate state means nothing in the context of the rule of law and democratization. As this paper has demonstrated, having the formal status of a candidate state does not lead to democratization, but to stabilitocratization, as the experience of WB countries has shown. Therefore, Ukraine should focus on building the rule of law in two segments. The first one concerns stabilizing and securing the country after the war. Simultaneously, the constraint of government, the fight against corruption, and human rights issues will be the three main challenges that Ukraine must deal with if wants to create a space for the democratization of the country.

[28] See: Kanstantsin Dzehtsiarou and Vassilis P. Tzevelekos, "Thorny Road to Democracy, Human Rights and the Rule of Law: Ukraine and the European Court of Human Rights," *European Convention on Human Rights Law Review* 3, no. 4 (2022): 427–34.

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A New Legal Framework for Online Platforms in the European Union (and Beyond)

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Abstract: In the early 2000s, the EU adopted the Electronic Commerce Directive to regulate information society service providers. An important part of this piece of legislation was the safe harbor provisions, which exempted intermediary service providers from liability for illegal content transmitted or hosted by their users, provided that they complied with specific conditions. After more than twenty years, the emergence of significant online platforms and the increased use of those services has resulted in new risks and challenges for individuals, companies, and society as a whole, which led the European Union to adopt a new regulatory framework for intermediary services. The Digital Services Act retains the liability exemption regime of the Electronic Commerce Directive but introduces new transparency and due diligence obligations for intermediary services, especially for online platforms. The new regulatory framework is expected to substantially impact globally, as it applies to all intermediary service providers offering services within the EU, regardless of their location. This study explores the main features of the DSA and their potential effects on the future development of the Internet.

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1. Introduction

More than 20 years have passed since the Electronic Commerce Directive (hereinafter ECD)[1] adopted a legal framework to regulate the activity of information society service providers. Among many issues, in order to encourage innovation and the development of the Internet, the ECD established a regime of exemption from liability for intermediary service providers (ISPs), including hosting service providers. The latter would be exempted from liability for illegal content hosted by service recipients provided that they had no actual knowledge of the illegality or, if they had such knowledge, that they acted promptly to remove or disable access to it. The regulation left many questions open, which case law tried to resolve while adapting a regulation meant for a very different economic and technological environment. The prominence acquired by online platforms in recent years and the risks they entail for Internet users and society as a whole have led the European Union legislator to intervene, adopting a new regulatory framework for Internet service providers in the Regulation (EU) 2022/2065 on a Single Market for Digital Services,[2] known as the Digital Services Act (DSA).

The DSA essentially maintains the liability exemption regime existing in the ECD but introduces significant new features in terms of transparency and duties of diligence for online platforms, in particular, for the very large ones. This new legal framework is expected to have a significant impact not only within the European Union but also globally since the new rules apply to intermediary service providers, regardless of their place of establishment or location, to the extent that they offer services in the Union.

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1 Directive (EU) No. 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (O.J.E.C. L178, 17 July 2000), 1–16, accessed June 4, 2024, https://eur-lex.europa.eu/eli/dir/2000/31/oj.

2 Regulation (EU) No. 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (O.J.E.C. L277, 27 October 2022), Document L: 2022:277:TOC, accessed June 6, 2024, https://eur-lex.europa.eu/eli/reg/2022/2065/oj.

2. The Shortcomings of the Electronic Commerce Directive Twenty Years Later

2.1. The Origin of the Safe Harbor Provisions and Their Impact on the Development of the Platform Economy

The origin of the exemption from liability of ISPs dates back to the late 1990s when the United States Congress passed the Communications Decency Act (CDA) of 1996 to resolve inconsistencies in previous judicial decisions and prevent intermediaries who take measures to prevent the commission of unlawful conduct through their services from being subject to a stricter liability regime than those who do not. In this regard, section 230 CDA laid down that the provider of an interactive computer service shall not be regarded as the publisher or originator of the information supplied by the provider of such content, nor could it be held liable for any action taken in good faith to restrict the availability of illegal content. This provision, coupled with the courts' broad interpretation, has effectively granted ISPs virtually absolute immunity.[3] However, certain matters are expressly excluded from the scope of application of the provision, such as federal crimes and trademark or copyright infringements.

Two years later, the Digital Millennium Copyright Act (DMCA) established a specific immunity regime for ISPs concerning copyright infringements. This regime is more nuanced than that of the CDA, which may be explained by the fact that, on this occasion, the telecommunications sector clashed with an equally powerful lobby, namely the content industries. The DMCA thus enshrined a compromise, which resulted in the establishment of a series of conditions under which ISPs were exempt from liability for copyright infringements committed by their users. These conditions, known as "safe harbors," depend on the type of service these intermediaries may perform (transmission of data, caching, storage and linking). Nevertheless, the liability exemption of ISPs under both the DMCA and the CDA responded to the same legislative policy decision: preventing the risk of

[3] On this question, for the criticism of the scope that the case law has given to section 230 CDA, see: Neville L. Johnson et al., "Defamation and Invasion of Privacy in the Internet Age," *Southwestern Journal of International Law* 25, no. 1 (2019): 12 ff.

liability became a disincentive to those who should be driving the emerging development of the Internet.[4]

The same concern that led the US legislator to protect ISPs is behind the creation of the ECD, which was adopted to promote the development of information society services.[5] In Europe, there was another equally important policy reason for regulating the liability of ISPs, though. The European legislator was concerned about the emerging disparity in the criteria applied in national jurisdictions regarding the liability of intermediary service providers, which was perceived as a potential obstacle to the proper functioning of the internal market, in particular by impairing the development of cross-border services and producing distortions of competition.[6] To overcome this regulatory disparity, the ECD followed the approach adopted two years earlier by the DMCA by merely providing liability exemption rules instead of attempting to harmonize the liability regime applicable to intermediary providers for the content transmitted or stored by their users, a task that would probably have been impossible to achieve, given the different legal traditions and doctrines applicable at a national level. The attribution of liability of intermediary service providers would, therefore, continue to depend on the substantive rules applicable in the different national systems,[7] where there might be (and indeed are) significant divergences.[8] The ECD only imposed on Member States the obligation to ensure that, in any case, and whatever the applicable national regime, intermediary service providers would be exempted from liability provided

4 It has been argued that section 230 CDA was key for the development of the Internet as we know it, see: Jeff Kosseff, *The Twenty-Six Words That Created the Internet* (Ithaca, London: Cornell University Press, 2019).

5 Recital 5 ECD.

6 Recital 40 ECD. On the existing state of affairs in the Member States prior to the adoption of the Directive, see: Rosa Julià Barceló, "Liability for On-line Intermediaries. A European Perspective," *E.I.P.R.*, no. 12 (1998): 456 ff.

7 See: CJEU Judgment of 11 September 2014, Sotiris Papasavvas v. O Fileleftheros Dimosia Etaireia Ltd and Others, Case C-291/13, ECLI:EU:C:2014:2209, 53.

8 As an authorized spokesperson of the European Commission said at the time of the adoption of the ECD, "[the Directive] determines only those cases in which a provider may benefit from an exemption or limitation of liability. This does not mean that the provider will necessarily incur liability if it does not comply with these conditions. In this case, the national liability regime will apply to determine the provider's liability," see: Emmanuel Crabit, "La directive sur le commerce éléctronique," *Revue du Droit de l'Union Européenne*, no. 4 (2000): 812.

that they comply with certain specific conditions, which vary depending on the type of service.

In this respect, the ECD distinguished three types of services: mere transmission (Article 12), caching (Article 13), and hosting (Article 14), defining for each the conditions under which those who transmitted, cached, or hosted content provided by the recipients of their services were exempted from liability. Undoubtedly, the most problematic in practice was the latter, partly because of the relevance that content hosting services gained with the emergence of Web 2.0, but mainly because the contours of their liability exemption were rather vague. Under Article 14 ECD, hosting providers were exempt from liability if they had no actual knowledge or awareness of the facts and circumstances from which the illegal activity or information was apparent. Hosting providers were also exempted from liability if they acted expeditiously to remove or disable access to the information upon obtaining such knowledge or awareness.

Furthermore, Article 15 ECD provided that Member States may under no circumstances impose on intermediary service providers a general obligation to monitor the information they transmit or store, nor a responsibility to actively seek facts or circumstances indicating illegal activity. This prohibition of imposing a general monitoring obligation does not affect the possibility of Member States requiring ISPs to apply the duty of care that can reasonably be expected from them and specified by national law to detect and prevent certain types of illegal activities.[9]

Even though the ECD was inspired by the US DMCA, there were significant differences.[10] First of all, the ECD adopted a horizontal approach to the extent that the safe harbor provisions apply to all types of unlawful activities (not only to civil copyright infringements), irrespective of the precise subject matter and the type of liability deriving from it.[11] Secondly,

[9] Recital 48 ECD. For the distinction between general and specific monitoring obligations, see: CJEU Judgment of 3 October 2019, Eva Glawischnig-Piesczek v. Facebook Ireland Limited, Case C-18/18, ECLI:EU:C:2019:821.

[10] For a detailed analysis of the differences between the two norms, see: Miquel Peguera Poch, "The DMCA Safe Harbors and Their European Counterparts: A Comparative Analysis of Some Common Problems," *Colum. J. L. & Arts* 32, (2009): 481 ff.

[11] It should be noted that the horizontal nature of the rules of exemption from liability of the ECD has recently been broken with the approval of Directive (EU) No. 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital

the Directive did not include a liability exemption for providers of linking services and search engines. Whereas the DMCA articulates a mechanism (subpoena) whereby rightsholders can require the ISPs to identify the provider of the allegedly infringing content,[12] the Directive did not require service providers to disclose the identity of their users.[13] Finally, although the European Directive did not establish when or how the service provider could become aware of the infringing content. In comparison, the DMCA lays down a "notice and takedown" procedure so that any interested person can bring it to the attention of the hosting service provider. Only if this notice procedure is followed and the service provider does not remove the content can the latter be held liable.

Nonetheless, many of the arguments that initially justified the exemption of liability for ISPs – especially for hosting providers – have been fading away due to the evolution of the Internet over the past 20 years.[14]

Firstly, safe harbor provisions were based on the assumption that it would be materially impossible for ISPs to check the legality of all the information they transmit or host since they handle millions of users. The information that passes through their system is just a sequence of bits, that is, a succession of 0's and 1's, which, without further processing, obscures the real meaning of the information itself. Besides, even if they could, it would possibly be illegal for them to assess the legality of this information

Single Market and amending Directives 96/9/EC and 2001/29/EC (O.J.E.C. L130, 17 May 2019, accessed June 6, 2024, https://eur-lex.europa.eu/eli/dir/2019/790/oj), which excludes the application of Article 14 ECD with respect to a very specific category of hosting service providers. i.e. online content-sharing platforms, with regard to infringements of copyright or related rights deriving from the content uploaded by their users.

12 Outside the scope of application of the Copyright Act, when the aim is to identify the author of allegedly defamatory comments, US courts are reluctant to consider requests addressed to ISPs to disclose the identity of their users, arguing that the court must weigh the arguments and evidence presented by the plaintiff against the constitutionally protected right of the alleged infringer to express himself anonymously. In that regard, see: *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

13 Nevertheless, EU law does not preclude Member States from imposing upon service providers a duty to provide competent authorities information enabling the identification of the user behind illegal content, see: CJEU Judgment of 29 January 2008, Productores de Música de España (Promusicae) v. Telefónica de España SAU, Case C-275/06, ECLI:EU:C:2008:54, 54.

14 See: Lilian Edwards, "'With Great Power Comes Great Responsibility?': The Rise of Platform Liability," in *Law, Policy and the Internet*, ed. Lilian Edwards (Oxford: Hart, 2019), 257–61.

without invading the privacy and confidentiality of their subscribers. However, technical mechanisms are being developed to detect infringing and illegal material and prevent it from being transmitted or uploaded in the first place. Filtering technology is still far from perfect, but machine learning and artificial intelligence (AI) might help to make such systems much more accurate, even in areas like libel and hate speech, where semantic meaning has been so far dependent on human interpretation.[15]

Secondly, the idea that hosting service providers, like other ISPs, are totally unrelated to the content that their users store on their servers may hold true with regard to the service model they typically provided when the ECD was drafted, long before the emergence of social networks and the development of Web 2.0. However, the emergence of social networks and other user-generated content platforms has raised the question of whether they really deserve to be treated as simple carriers or distributors of information and not as publishers of content provided by third parties, since they have control over the dissemination of the information they store, and they use this power to promote their business. Indeed, their entire business model is based on monetizing user data and attention, and thus the amount of information hosted, its content, and how it is presented and ranked is no longer irrelevant for the service provider.

Finally, the initial approach to the liability of ISPs was based on the assumption that the promotion of e-commerce and the information society required the development of new and innovative services and the involvement of the emergent ISP industry in order to expand Internet infrastructure. Making this market more attractive and creating a safe environment for start-ups and innovators to grow a feeling of safety against liability claims were key. This narrative could be plausible in the mid- and late-1990s but not today, particularly concerning the big players from Silicon Valley and large companies that dominate global markets, such as Meta, Google, or Amazon.

[15] With regard to the possibility that an automated system would be able to properly apply the doctrine of fairness to copyright, see: Niva Elkin-Koren, "Fair Use by Design," *UCLA Law Review* 66, (2017): 1097–9.

2.2. The Role of the Court of Justice in Shaping the Liability Regime of Online Platforms

In response to the evolution of hosting service providers, the Court of Justice was asked on different occasions whether new services were eligible for the liability exemption under Article 14 ECD, which led to the delimitation of the concept of hosting service provider.

The question was first raised before the Court of Justice in the Google France case in which the CJEU was asked, among other things, whether the search engine could rely on the exemption from liability rule of Article 14 ECD if advertisers using Google's AdWords service were found to be infringing a trademark. In his opinion, Advocate General Poiares Maduro had considered that, unlike the natural results of Google searches, which are underpinned by automatic algorithms that apply objective criteria to generate websites that may be of interest to the user,[16] the AdWords service offered by the search engine is not a neutral vehicle of information since it takes place in an advertising context in which Google has a direct interest so that the exemption from liability for data hosting under Article 14 ECD should not be applied.[17] The Court of Justice of the European Union (CJEU) did not follow the Advocate General's reasoning. Despite embracing the requirement of neutrality as a determining factor, it did so with a different meaning. Based on recital 42 ECD,[18] the Court concluded that, for a hosting service provider to fall within the scope of Article 14 ECD, the provider must be an "intermediary" within the meaning intended by the legislator in the title of Section 4 of Chapter II of that Directive, which depends on whether the role played by that service provider is merely technical, or instead it plays an active role of such a kind as to give it knowledge of, or control over, the information provided by their users.[19] However,

16 Opinion of Advocate General Poiares Maduro, delivered on 22 September 2009, Joined Cases C-236/08, C-237/08 and C-238/08 (Google France), ECLI:EU:C:2009:569, 144.

17 Ibid., 145.

18 Recital 42 ECD provides that the exemptions from liability only apply to cases where the activity of the information society service provider "is of a mere technical, automatic and passive nature which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored."

19 CJEU Judgment of 23 March 2010, Google France SARL and Google Inc. v. Louis Vuitton Malletier SA, Google France SARL v. Viaticum SA and Luteciel SARL, and Google France

the mere fact that the referencing service is subject to payment, that Google sets the payment terms or that it allows for general information to its customers cannot have the effect of depriving Google of the exemptions from liability provided for in Article 14 ECD.[20]

The neutrality requirement has been the subject of much criticism. It has been said that it breaks the delicate balance established by the ECD,[21] which is not supported by the text of the Directive itself, and that could lead to divergent interpretations by national courts.[22] Some commentators have pointed out that the source of the confusion is the unfortunate wording of recital 42 ECD, which gives the impression that it refers to the three categories of intermediation service providers referred to in Section 4 of Chapter II ECD, when, in fact, it only refers to activities of mere conduit and proxy caching, which are purely technical, automatic, and passive.[23]

Advocate General Jääskinen was particularly critical of the neutrality requirement in his opinion on the L'Oréal case, which originated in an action brought by the well-known cosmetics brand against eBay after finding that counterfeit products were being marketed in the UK via eBay's website. L'Oréal claimed that eBay was liable for infringement of its trademarks, both by displaying those products for sale on its website and by the fact that eBay had placed advertisements through Google's AdWords service to promote some of them. The Advocate General considered that "'neutrality' does not appear to be quite the right test under the directive for this

SARL v. Centre national de recherche en relations humaines (CNRRH) SARL and Others, Joined Cases C-236/08 to C-238/08, ECLI:EU:C:2010:159, 114.

20 Ibid., 116.

21 Ian Walden, "Mine Host Is Searching for a 'Neutrality' Principle!," *Computer Law & Security Review* 26, no. 2 (2010): 208–9.

22 Stéphane Lemarchand and Marion Barbier, "Le fournisseur d'hébergement au sens de l'article 14 de la directive 2000/31 e la (nouvelle?) condition de neutralité," *Revue Lamy Droit de l'Immatériel*, no. 54 (2009): 54–6; Sophie Stalla-Bourdillon, "Internet Intermediaries as Responsible Actors? Why It Is Time to Rethink the E-Commerce Directive as Well," in *The Responsibilities of Online Service Providers*, eds. Mariarosaria Taddeo and Luciano Floridi (Cham: Springer, 2017), 280–1.

23 Patrick van Eecke, "Online Service Providers and Liability: A Plea for a Balanced Approach," *Common Market Law Review* 48, no. 5 (2011): 1482; the author is arguing that, unlike mere transmission or caching activities, which are passive, the activity of hosting service providers implies a certain degree of involvement with the conduct of their users, so it is incorrect to make its exemption from liability dependent on the requirement of neutrality.

question" and that "[he] would find it surreal that if eBay intervenes and guides the contents of listings in its system with various technical means, it would by that fact be deprived of the protection of Article 14 regarding the storage of information uploaded by the users."[24] In his view,

> provided that the listings are uploaded by the users without any prior inspection or control by the electronic marketplace operator involving interaction between natural persons representing the operator and the user, we are faced with the storage of information which is furnished by a recipient of the service.[25]

However, the Advocate General considered that the answer would be different if the same hosting provider carried out other activities which do not consist of data storage and are therefore not covered by Article 14. In this respect, after recalling that Articles 12, 13 and 14 ECD provide for exemptions from liability for certain types of activity and not for a certain type of service provider as such, he stated that "the hosting of the information provided by a customer may well benefit from an exemption if the conditions of Article 14 ECD are satisfied. Yet the hosting exception does not exempt eBay from any potential liability it may incur in its use of a paid internet referencing service."[26] In short, the Advocate General said that if it could be proved that eBay selected certain sale offers and used them to promote its website through Google's AdWords, it would have acted as a content provider and not as a mere intermediary.

Despite the criticisms, the Court of Justice confirmed the requirement of neutrality as a defining element of an intermediary. However, the conclusion it reached is not very different from that of the Advocate General. Indeed, after insisting that the provider of a hosting service is only covered by Article 14 ECD when it plays a neutral position with regard to the data provided by its customers, it points out that the mere fact of storing sale offers on its server, determining the conditions of its service, receiving remuneration in exchange for the service, or providing general information

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24 Opinion of Advocate General Jääskinen delivered on 9 December 2010, Case C-324/09 (L'Oréal), ECLI:EU:C:2010:757, 146.

25 Ibid., 143.

26 Ibid., 151.

to its customers, are not criteria which, in themselves, allow the provider to be considered to have played an active role. On the contrary, if an operator provides assistance consisting of optimizing the presentation "of certain sales offers" or promoting "such offers," it is no longer possible to speak of purely technical and automatic processing of data provided by its customers, but an active role enabling it to acquire knowledge or control of the data relating to those offers.[27]

Therefore, in the light of the jurisprudence, the neutrality requirement does not mean that hosting providers should be completely passive towards the information hosted by their users, let alone that 2.0 hosting providers should, by definition, be excluded from the protection offered by Article 14 ECD. The constant references made by the Court of Justice to the specific infringing content and the connection of the neutrality requirement with knowledge and control over the content hosted by third parties seem to indicate that the Court of Justice is seeking to distinguish between intermediaries who maintain their independence from the infringing content and those who, on the contrary, take sides with such content to the point of being participants in the infringement, which is what makes them not deserving of protection.[28] With regard to providers of mere conduit and caching services, recital 44 ECD states that "a service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of 'mere conduit' or 'caching' and as a result cannot benefit from the liability exemptions established for these activities" and the same should apply to hosting providers.

The Court of Justice has recently clarified that the fact that the operator of an online content-sharing platform automatically indexes content

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27 CJEU Judgment of 12 July 2011, L'Oréal SA and Others v. eBay International AG and Others, Case C-324/09, ECLI:EU:C:2011:474, 115–6.

28 See: van Eecke, "Online Service Providers," 1463; Tatiana-Eleni Synodinou, "Intermediaries' Liability for Online Copyright Infringement in the EU: Evolutions and Confusions," *Computer Law & Security Review* 31, (2015): 65; Giovanni Sartor, "Providers Liability: From the eCommerce Directive to the Future. In-Depth Analysis for the IMCO Committee," October 2017, 26, accessed June 4, 2024, https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/614179/IPOL_IDA(2017)614179_EN.pdf. These authors argue that the idea that only hosting service providers who take a passive role are shielded from liability should be abandoned, in particular if indexing content uploaded by users or providing search tools is to be considered as an active action.

uploaded to that platform, has a search function, or recommends videos based on users' profiles or preferences is not sufficient ground to conclude that it plays an active role and therefore loses the protection granted by Article 14 ECD to hosting providers.[29]

2.3. Online Harms as the Driving Force Behind the Regulation of Intermediaries

All in all, what actually led the European lawmakers to intervene was the realization that intermediaries, mostly online platforms and social networks, are not only a channel of expression and access to information that contribute to the democratization of public discourse but also carry serious risks for individuals and society as a whole. Beyond their obvious benefits, social media have been increasingly used over the last two decades to disseminate illegal and harmful content, spread misinformation, or influence electoral processes. There is extensive evidence that the architecture behind some online platforms is part of the problem. Moreover, despite the technology-neutral approach of the ECD, it became apparent that its provisions were no longer sufficient to address the challenges of modern digital reality. New rules were needed to keep up with the overwhelming evolution of digital technology and the transformation of business models.[30]

Initially, the European Commission focused on promoting self-regulation under Article 16 ECD. On September 28, 2017, the Commission adopted a Communication with guidance on the responsibilities of online service providers in respect of illegal content online.[31] In that Communication, the Commission explained that it would assess whether additional measures were needed, inter alia, by monitoring progress on the basis of

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29 CJEU Judgment of 22 June 2021, Frank Peterson v. Google LLC, YouTube LLC, YouTube Inc., Google Germany GmbH and Elsevier Inc. v. Cyando AG, Joined Cases C-682/18 and 683/18, ECLI:EU:C:2021:503, 114.

30 As one commentator pointed out, "even though key principles might endure, the transformation of the context is too drastic and substantial to simply force adaptation of existing rules." See: Teresa Rodríguez de las Heras Ballell, "The Background of the Digital Services Act: Looking Towards a Platform Economy," *ERA Forum* 22, (2021): 78, https://link.springer.com/article/10.1007/s12027-021-00654-w.

31 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Tackling Illegal Content Online. Towards an Enhanced Responsibility of Online Platforms*, Brussels, 28 September 2017, COM(2017) 555 final.

voluntary arrangements. As a follow-up on that Communication, the Commission Recommendation of 2018 on measures to effectively tackle illegal content online acknowledged that illegal content online remains a serious problem within the European Union despite the progress that had been made through voluntary arrangements of various kinds and encouraged Member States and hosting service providers to take effective, appropriate, and proportionate measures to tackle illegal content online.[32]

The succession of social media-related scandals that followed the Cambridge Analytica affair proved that self-regulatory efforts of platforms against online harms had not been efficient.[33] Some Member States adopted their own regulations targeting specific online harms, which again raised concerns about the risk of fragmentation of intermediary regulation within the European Union.[34] The European Commission decided to intervene. In early 2020 the Commission made a commitment to update the horizontal rules that define the responsibilities and obligations of providers of digital services,[35] and on December 15, 2020 published a proposal for a Digital Services Act.[36] After a political consensus was reached, the final text was adopted on October 19, 2022.[37]

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32 European Commission, Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, C/2018/1177 (O.J.E.C. L63, 6 March 2018), 50–61, accessed June 4, 2024, https://eur-lex.europa.eu/eli/reco/2018/334/oj.

33 Amelie P. Heldt, "EU Digital Services Act: The White Hope of Intermediary Regulation," in *Digital Platform Regulation. Global Perspectives on Internet Governance*, eds. Terry Flew and Fiona R. Martin (Cham: Palgrave Macmillan, 2022), 70, accessed June 4, 2024, https://link.springer.com/chapter/10.1007/978-3-030-95220–4_4.

34 Matthias Cornils, *Designing Platform Governance: A Normative Perspective on Needs, Strategies, and Tools to Regulate Intermediaries*, Governing Platforms (Algorithm Watch, May 2020), 77, accessed June 4, 2024, https://algorithmwatch.org/de/wp-content/uploads/2020/05/Governing-Platforms-legal-study-Cornils-May-2020-AlgorithmWatch.pdf.

35 European Commission, Communication: Shaping Europe's Digital Future, 19 February 2020, COM/2020/67 final, accessed June 6, 2024, https://commission.europa.eu/system/files/2020-02/communication-shaping-europes-digital-future-feb2020_en_4.pdf.

36 Proposal for a Regulation of the European Parliament and of the Council on a single market for digital services (Digital Services Act) and amending Directive 2000/31/EC, Brussels, 15 December 2020, COM(2020) 825 final.

37 Regulation (EU) No. 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a digital single market for services and amending Directive 2000/31/EC (Digital Services Regulation) (O.J.E.C. L277, 27 October 2022), Document L: 2022:277:TOC, accessed June 6, 2024, https://eur-lex.europa.eu/eli/reg/2022/2065/oj.

3. Online Platforms: A New Player in the European Union Legal Order

Unlike the ECD and contrary to what its name suggests, the DSA does not regulate all digital services (or "information society services" in the terminology of the ECD),[38] only the "intermediary services."

The DSA's scope of application is thus narrower than that of the ECD. However, as far as the regulation of intermediation services is concerned, the DSA is much more ambitious since it does not merely reproduce the liability exemption provisions already enshrined in the ECD, but it also contains rules on specific due diligence obligations tailored to certain specific categories of intermediary services and on the implementation and enforcement of these obligations. This is consistent with the goal of the new standard, which is to create a safe, predictable, and trusted online environment for intermediary services in order to both contribute to the proper functioning of the internal market and facilitate innovation and also ensure that fundamental rights, including consumer protection, are effectively protected.[39]

The notion of intermediary service providers is not new but comes from the ECD. As opposed to content providers, intermediary service providers are digital services that transmit or store content that a third party has provided. Like the ECD, the DSA does not provide a definition of intermediary services but merely describes the services that fall into this category, namely conduit, caching, and hosting.[40] Firstly, mere conduit services provide access to a communication network or transmit the information provided by users, including Internet access, wireless access points, virtual private networks, DNS services and resolvers, IP telephony, or instant

[38] The definition of "information society service" may be found in Article 1(1)(b) of Directive (EU) No. 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (O.J.E.C. L241, 17 September 2015), 1–15, accessed June 6, 2024, https://eur-lex.europa.eu/eli/dir/2015/1535/oj. According to this provision, an information society service is any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. Within this broad definition, two categories of information society service providers can be distinguished, content providers and intermediary providers.

[39] Article 1(1) DSA.

[40] Article 3(g) DSA.

messaging. Caching services are also related to the transmission of information provided by a recipient of the service in a communication network, but it involves the automatic, intermediate, and temporary storage of that information for the sole purpose of making the information's onward transmission to other recipients more efficient upon their request. Such services are crucial to ensure the smooth and efficient transmission of information delivered on the Internet. Finally, hosting services consist of the storage of the information supplied by the service recipient. Typical examples are web hosting and cloud service providers.

However, the DSA introduces new subcategories that did not appear in the ECD. First and foremost, Article 3(i) defines "online platforms" as a subcategory of hosting service providers characterized by the fact that they do not only store data at the request of the recipient of the service but also disseminate this information to the public, as is the case with social networks, online marketplaces, app stores, or content-sharing providers.

Moreover, the DSA identifies a specific subcategory of online platforms that are likely, due to their size, to have a greater impact on the dissemination of illegal or harmful content, the propagation of fake news, incitement to hatred, etc. These are known as "very large online platforms" (VLOPs), subject to additional due diligence obligations that overlap with those imposed on other online platforms. The threshold for an online platform to be considered "very large" is to have a number of average monthly active users in the Union equal to or higher than 45 million, a number roughly corresponding to 10 % of the Union population.[41]

Finally, the DSA extends the specific obligations of VLOPs to "very large online search engines" (VLOSEs). This category was not included in the Proposal of the Commission and does not fit very well with the overall structure of the DSA.[42] They are considered intermediary services,[43] but they are not listed in Article 3(g), along with mere conduit, proxy caching, or hosting services, nor are they included in Chapter II on the liability of providers of intermediary services.

41 Article 33 and recital 76 DSA.

42 Folkert Wilman, "The Digital Services Act (DSA): An Overview," December 2022, 4, https://ssrn.com/abstract=4304586.

43 See Article 3(j) DSA.

4. What Remains and What Is New in the DSA Liability Regime

With regard to the liability exemption regime, Articles 5–7 DSA virtually reproduce the wording of Articles 12–14 ECD, as does Article 8 DSA, prohibiting imposing a general monitoring obligation previously enshrined in Article 15 ECD. The aforementioned provisions of the ECD are repealed and replaced by their equivalents in the DSA,[44] which is more relevant than it might seem. Indeed, although, in essence, the liability exemption rules have not changed, the normative instrument in which they are now contained is no longer a directive but a regulation with direct effect in all Member States. This should resolve the numerous issues arising from the varying implementations of the ECD by the Member States.[45]

Apart from reproducing the pre-existing liability exemptions for the different categories of ISPs, the DSA contains some clarifications and adds new features to the liability regime of intermediary service providers.[46]

First, the DSA codifies the neutrality requirement for intermediary service providers to benefit from the liability exemptions. However, as one commentator has sharply observed, there seems to be a slight variation from previous case law since the reference to neutrality is not dependent on the intermediary's merely passive role.[47] In this regard, recital 18 DSA clarifies that

> the exemptions from liability should not apply where, instead of confining itself to providing the services neutrally by a merely *technical and automatic* processing of the information provided by the recipient of the service,

[44] Article 89(1) DSA. Therefore, references to Articles 12 to 15 ECD is construed as references to Articles 4, 5, 6 and 8 DSA, respectively.

[45] However, as some commentators have pointed out, this does not entirely exclude the risk of fragmentation and uncertainty since the DSA does not provide a positive basis for establishing when a provider can be held liable, which will still be determined by national law (recital 17 DSA). See: Aina Turillazzi et al., "The Digital Services Act: An Analysis of Its Ethical, Legal, and Social Implications," January 12, 2022, 9–11, https://ssrn.com/abstract=4007389.

[46] Pursuant to Recital 16, the DSA seeks to preserve the intermediary liability framework of the ECD and clarify certain elements of that framework with regard to the case law of the Court of Justice of the European Union. A closer look reveals that the new regulation also incorporates some novelties that had no precedent either in the ECD or in previous decisions of the CJEU.

[47] Wilman, "The Digital Services Act," 5.

> the provider of intermediary services plays an active role of such a kind as to give it knowledge of, or control over, that information.[48]

A service provider may thus benefit from the liability exemption regime even if it has been active to a certain extent as long as it does not lead to knowledge or control over the illegal content. As we discussed above, this was already the interpretation adopted by the Court of Justice, but the references to the passive role of the intermediary made in some cases by the Court could be misleading.

A second important clarification is found in Article 7, which contains what is known as *the Good Samaritan clause* inspired by section 230 CDA. A question that has always haunted ISPs is whether taking proactive steps to moderate illegal content rather than merely responding to take-down notices would be understood as taking control of the information they host and consequently becoming liable for unlawful content supplied by third parties.[49] This would send a dangerous message for a safe digital environment since it could discourage intermediaries from carrying out activities that aim to detect, identify, and act against illegal content on a voluntary basis.[50] Confirming the interpretation of the Court of Justice[51]

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48 Emphasis added to point out that the reference to the passivity of the service provider that appeared in recital 42 ECD has been dropped.

49 The Prodigy case, considered the driving factor for the US Congress to pass section 230 CDA, is a good example. The New York State Supreme Court concluded that a service provider qualified as a publisher of defamatory content hosted on a forum because it exercised some control over the comments posted by users on its website insofar as it used software to detect offensive terms and had moderators who removed inappropriate comments [Stratton Oakmont, Inc. v. Prodigy Services Co., 1995 WL 323710 (N.Y. Sup. Ct. 1995)].

50 European Commission, Staff working document, *Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and Amending Directive 2000/31/EC*, Brussels, 15 December 2020, SWD(2020) 348 final, Part 1/2, 24–5.

51 See: CJEU Judgment of 22 June 2021, Frank Peterson v. Google LLC and Others, and Elsevier Inc. v. Cyando AG, Joined Cases C-682/18 and 683/18, ECLI:EU:C:2021:503, 109, where the Court of Justice concluded that only because the operator of a video-sharing platform (YouTube) implements technological measures aimed at detecting content which may infringe copyright, it does not mean that operator plays an active role giving it knowledge of and control over the content of those videos.

and the European Commission,[52] Article 7 DSA clarifies now that the mere fact that providers undertake voluntary, proactive measures to fight against illegal content does not automatically render unavailable the exemptions from liability, provided those activities are carried out in good faith and a diligent manner.

Like the ECD, the DSA clarifies that the exemption from liability does not affect the possibility that courts or administrative authorities require intermediary service providers to terminate or prevent infringements committed by their users. However, Article 9 DSA further elaborates and harmonizes certain information that such orders have to contain, such as the legal basis for the order, a statement of reasons explaining why the information is illegal content, the identification of the issuing authority, and clear information enabling the provider of intermediary services to identify and locate the illegal content concerned. Similarly, Article 10 DSA contains the conditions to be met by orders that relevant national authorities might issue to request specific information about the recipients of intermediary services.

One of the key novelties of the DSA is the obligation for hosting service providers to implement a notice-and-action procedure, which is meant to facilitate that any person concerned by a specific item of information that they consider to be illegal can report to the hosting provider (notification) so that the later can remove or disable access to such content (action). This notice and action mechanism is closely connected with the liability exemption regime of hosting service providers since notifications that meet the conditions laid down by the law will be considered to give rise to actual knowledge or awareness for the purposes of Article 6 DSA in respect of the specific item of information reported where they allow a diligent provider of hosting services to identify the illegality of the relevant activity or information without a detailed legal examination.[53]

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52 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Tackling Illegal Content Online. Towards an Enhanced Responsibility of Online Platforms*, Brussels, 28 September 2017, COM(2017) 555 final, 10; after suggesting that in light of their central role and capabilities and their associated responsibilities, online platforms should adopt effective proactive measures to detect and remove illegal content and not only limit themselves to reacting to notices received.

53 Article 16(3) DSA.

The requirement that the illegality of the information is manifest, without the need for an individualized assessment by the service provider, had already been established by courts.[54] Indeed, the notification by the concerned party may prove that the provider is aware of the existence of a certain piece of information hosted in its servers, but this is not sufficient to exclude the application of the liability exemption set out in Article 6 DSA because it is one thing to be aware of the existence of certain content and quite another to have actual knowledge that this content is illegal. This may be the case if there is a prior decision by a competent body declaring the illegality. Otherwise, it is not sufficient to inform the provider of the presence of the allegedly unlawful content, but the illegality of such content must be self-evident without the service provider having to carry out a complex legal assessment to determine the illegality of the content. For example, intermediary service providers would not bear the burden of assessing whether the content is illegal when the alleged illegality consists in the falsehood of the information or when fundamental rights such as the right to honor and freedom of expression come into conflict, which would require a complex balancing exercise.

The DSA also contains a specific provision for a subcategory of hosting providers, namely online marketplaces that allow consumers to conclude a distance contract, like Amazon or eBay. According to Article 6(1) DSA, these platforms should not benefit from the general liability exemption for hosting service providers with respect to liability arising from consumer protection rules, where such online platforms present the relevant information relating to the transactions at issue in such a way as to lead an average consumer to believe that the information, product, or service is provided by the online platforms itself or by traders acting under their authority or

[54] See: CJEU Judgment of 3 October 2019, Eva Glawischnig-Piesczek v. Facebook Ireland Limited, Case C-18/18, ECLI:EU:C:2019:821, 45, which considers that if the hosting provider were required to make an "autonomous assessment" in order to determine the illegality of the content at issue, this would amount to a general monitoring obligation, prohibited by Article 15 ECD; ECtHR Judgment of 2 February 2016, Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, application no. 22947/13, 64, distinguishing the case at issue from Delfi [ECtHR Judgment of 16 June 2015, Delfi As v. Estonia, application no. 64569/09)] on the grounds that the incriminated comments could be considered offensive and vulgar but did not constitute "clearly unlawful speech," nor certainly amount to hate speech or incitement to violence.

control, so that the platform has knowledge of or control over the information, even if that may in reality not be the case. An example would be when an online platform markets the product or service in its own name rather than in the name of the trader who will supply that product or service or when the platform only reveals the identity or contact details of the trader once the contract between the trader and the consumer has been concluded.[55] This provision aims to ensure the effective protection of consumers when engaging in intermediated commercial transactions online.

5. With Great Power Comes Great Responsibility: Obligations for Online Platforms Under the DSA

The DSA goes far beyond the liability exemptions regime under the ECD. After more than 20 years, the digital landscape has drastically changed. Online activities are an important part of our lives, ranging from connecting to friends and family, accessing information, cultural products, or educational content to the performance of all kinds of contracts. New and innovative business models and services have emerged, creating new risks and challenges for individuals, companies trading online, and society as a whole. Accordingly, the aim of the DSA is not only to contribute to the proper functioning of the internal market for intermediary services and to facilitate innovation but also to set out harmonized rules for a safe, predictable, and trusted online environment in which fundamental rights enshrined in the Charter, including consumer protection, are effectively protected.[56] To achieve this goal, providers of intermediary services must behave responsibly and diligently,[57] which explains why a big part of the DSA deals with due diligence obligations for intermediary service providers.[58]

As we have already seen, the DSA differentiates one kind of provider of intermediary services from another by their type, the nature of the service

55 Recital 24 DSA.

56 Article 1(1) DSA.

57 Recital 3 DSA. As a commentator nicely put it, the DSA has chosen a "procedure before substance" approach, creating a series of procedural obligations and redress avenues rather than setting forth any bright-line substantive rule on the limits of online freedom of expression; Pietro Ortolani, "If You Build It, They Will Come The DSA's 'Procedure Before Substance' Approach," Verfassungsblog, November 7, 2022, accessed June 4, 2024, https://verfassungsblog.de/dsa-build-it/.

58 Chapter III, Articles 11–48 DSA.

they provide, and their size. Based on the resulting categories, the new regulation designs an "asymmetric" system of due diligence obligations.[59] General obligations, such as the designation of a single point of contact to enable communication with authorities and a legal representative when they do not have an establishment in the European Union, apply to all intermediary service providers, including mere conduit, proxy caching, and hosting providers.[60]

A second layer of due diligence obligations is tailored to hosting service providers based on their potential role in tackling illegal content online.[61] Regardless of their size, hosting providers must put in place easily accessible and user-friendly notice and action mechanisms. They are also required to provide a clear and specific statement of reasons when they impose restrictions because the information provided by the service recipient is illegal or incompatible with their terms and conditions. Moreover, providers of hosting services are required to promptly inform the competent national law enforcement or judicial authorities if they become aware of any information giving rise to a suspicion of certain serious criminal offences.

A number of additional obligations address, in particular, online platforms, such as social networks, content-sharing platforms, app stores, online marketplaces, and online travel and accommodation platforms.[62] For instance, providers of these services are required to set up an internal redress mechanism to handle complaints against any decision they make on the grounds that the information provided by the recipients is illegal or

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59 Due diligence obligations under the DSA apply in a cumulative manner to those intermediary services that fall within a number of different categories. For instance, the provider of an online platform must not only comply with the specific obligations foreseen for online platforms but also with those for hosting services and intermediary services in general. See: Recital 41 DSA.

60 Articles 11–15 DSA.

61 Articles 16–18 DSA.

62 Articles 20–29 DSA. However, with regard to obligations imposed on online platforms, Article 19 DSA makes an important caveat: they do not apply to providers that qualify as micro or small enterprises, that is, enterprises which employ fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million. This cap is included to avoid disproportionate burdens on relatively small providers of online platforms (Recital 57 DSA), which in turn responds to the goal of encouraging innovation and promoting the entry of newcomers to the platform economy.

incompatible with the terms and conditions of the platform.[63] Other obligations imposed on online platforms may have a direct impact on certain common business practices, such as the prohibition of designing, organizing, or operating their online interfaces (i.e. website or apps)[64] in a way that misleads or manipulates users or that materially distorts or impairs users' ability to make free and informed decisions. These practices, known as "dark patterns," include design choices to direct users to make decisions that are not beneficial for them but for the provider of the online platform, presenting choices in a non-neutral manner, repeatedly requesting a recipient of the service to make a choice where such a choice has already been made, making the procedure of cancelling a service significantly more cumbersome than signing up to it or making certain decisions more difficult or time-consuming than others.[65] Transparency obligations imposed on online platforms are also particularly intense, affecting how they present advertisements on their online interfaces to their recommender systems.[66]

In addition, those online platforms allowing consumers to conclude distance contracts with traders must comply with specific obligations.[67] To begin with, providers of B2C online marketplaces have to obtain certain specific information from traders and make "reasonable efforts" to verify the reliability of the information submitted ("know your business customer obligation"). Besides, they have to design their online interfaces to enable traders to comply with their obligations regarding pre-contractual information, compliance, and product safety information. Finally, if the provider of an online platform becomes aware that a trader has offered an illegal product or service through its service, it has to inform the consumers who purchased the unlawful product or service.

The more demanding obligations concern very large online platforms (VLOPs), which are considered to have a significant societal and economic

63 On this issue, see: Sebastian Kuclar Stiković, "The EU's Digital Services Act and Its Impact on Online Platforms," *European Union Law Working Papers*, no. 84 (2024): 55, accessed June 4, 2024, https://law.stanford.edu/wp-content/uploads/2024/02/EU-Law-WP-85-Stikovic.pdf. This author argues that the lack of detail in the regulation of the redress mechanism may prove detrimental to ensure effective access to justice.

64 Article 3(m) DSA.

65 Recital 67 DSA.

66 Articles 26–27 DSA.

67 Articles 30–32 DSA.

impact and therefore bear more responsibility in curbing illegal content online.[68] Once designated as such, these entities are required to carry out a yearly self-assessment of systemic risks caused by the design or the functioning of their services, including the dissemination of illegal content, any negative effect on the exercise of fundamental rights, or any actual or foreseeable negative effects on civic discourse and electoral processes. When systemic risks are identified, VLOPs must put in place reasonable, proportionate, and effective mitigation measures that may affect, inter alia, their online interfaces, terms and conditions, content moderation processes, or algorithmic systems, including their recommender systems. Moreover, compliance with these obligations and any commitments undertaken under codes of conduct or crisis protocols have to be audited at least once a year by independent private firms. In addition, VLOPs are also subject to additional transparency reporting obligations and have to provide data access for legal authorities and researchers.

In order to ensure that due diligence obligations are fulfilled, the DSA contains an extensive set of provisions on supervision and enforcement by national and EU authorities, which is reinforced by the possibility of imposing penalties, including financial fines, that amount up to 6% of the global turnover of a service provider for the case of VLOPs and VLOSEs.[69] Therefore, it can be argued that providers of intermediary services are exempted from liability for the content transmitted or hosted by their users as long as they comply with the requirements of the safe harbor provisions, but now they may also be held liable if they fail to comply with the due diligence obligations imposed by the DSA.

6. Territorial Scope of the DSA and the So-Called "Brussels Effect"

The DSA is likely to have a major impact even beyond the borders of the European Union.[70] This may happen in two different ways. Firstly, since the regulatory problems faced by the DSA are universal, lawmakers around

68 Articles 33–43 DSA.

69 Articles 49–88 DSA.

70 Daphne Keller, "The EU's new Digital Services Act and the Rest of the World," Verfassungsblog, November 7, 2022, accessed June 4, 2024, https://verfassungsblog.de/dsa-rest-of-world/. This author argues that some effects of the DSA will be positive and probably lead to real benefits for users, but others may be problematic.

the world might be tempted to adopt their own platform regulations along the lines of the European model, especially in developing countries that do not have the regulatory expertise of the European Union.[71] Secondly, digital companies operating globally will likely extend compliance measures meant for the European Union to all their customers regardless of the country in which they are based, thus making the DSA rules the de facto standard.[72] This phenomenon, known as "the Brussels effect," has already some precedents in other areas of law.[73]

The spillover effect of the DSA in the rest of the world is partly a consequence of its broad scope of application. Needless to say, the DSA is only enforceable in the European Union, where, as a regulation, it applies directly without the need for transposition into national law by the Member States. However, its scope is not limited to service providers who have their place of establishment or are located in the European Union but under Article 2(1) DSA applies to all intermediary service providers who offer their services to users who have their place of establishment or are located in the European Union. In other words, the DSA applies to intermediary service providers irrespective of their place of establishment or location so far as they offer services in the Union. In order to determine whether an operator offers its services in the European Union, it will be necessary to assess whether there is a "substantial connection" with the Union.[74] Such a substantial connection to the Union should be considered to exist where the service provider has an establishment in the Union or, in the absence of such an establishment, where the number of recipients of the service in one

71 Anu Bradford, "The European Union in a Globalised World: The 'Brussels Effect'," *Groupe d'études géopolitiques*, no. 2 (2021): 75; Zingales Nicolo, "The DSA as a Paradigm Shift for Online Intermediaries' Due Diligence: Hail to Meta-Regulation," Verfassungsblog, November 2, 2022, accessed June 4, 2024, https://verfassungsblog.de/dsa-meta-regulation/.

72 Some author suggests that the European Union could also promote the DSA as a global model, incorporating parts of it into its model free trade agreements. See: Anupam Chander, "When the Digital Services Act Goes Global," *Berkeley Technology Law Review* 38, no. 3 (2023): 1072–3.

73 The phrase "Brussels effect" was first coined by Anu Bradford in 2012 to describe the growing role that the EU plays in imposing standards that multinational companies voluntarily extend to govern their global operations, see: Anu Bradford, "The Brussel Effect," *Northwestern University Law Review* 107, no. 1 (2012): 1–68.

74 Recital 7 DSA.

or more Member States is significant in relation to the population thereof, or based on the targeting of activities towards one or more Member States. The targeting of activities towards one or more Member States can be determined considering all relevant circumstances, such as the use of a language or a currency generally used in that Member State, the use of a relevant top-level domain, or the provision of local advertising, to name a few.[75] In contrast, just because a website is accessible from the European Union is not enough for it to be considered a substantial connection to the Union.

Presumably, if platforms are obliged to make some changes to comply with the strict requirements of the DSA, they will likely extend these benefits in other countries where they operate since it is not economically, legally, or technically practical to maintain lower standards in non-EU markets. For instance, more clearly articulated terms and conditions under Article 14 DSA or the explanation of their recommender systems under Article 27 DSA will improve transparency both inside and outside the European Union. The same logic applies to many other provisions of the DSA.

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[75] Recital 8 DSA.

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Applying Soft-Law Mechanisms and Responsive Regulation Theory to Labor Law: A Case Study of Poland

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Abstract: Focusing on selected international experiences, this article explores the role of soft regulation in the context of responsive enforcement of labor law. The analysis aims to answer the main research question of whether there is a method for the effective application of soft regulation in the responsive procedure of enforcing labor law in Polish legislation based on the experiences of Anglo-Saxon countries. Formal-dogmatic and comparative methods were used to address this question. The analysis includes experiences from the Canadian province of Ontario and Australian and British legislators. This article describes the mechanism of using soft regulation in the responsive procedure of enforcing labor law, which enabled the description of potential legal and governmental system consequences of its hypothetical application in Poland. The significant reliance of the responsive regulation model on soft regulation may, among other things, limit the ability of employers to challenge unresponsive treatment by public authorities. It also conflicts with certain constitutional principles, including the exclusivity of statutes and the principle of a democratic legal state. This, in turn, could prevent the implementation of responsive regulation in European legal systems. Finally, this article considers ways to minimise the risk of violating the Polish Constitution while maintaining the flexibility and potential effectiveness of responsive regulation.

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1. Introduction

The world of work is currently confronted with a number of challenges. The report, "Regulating Working Conditions – EU Employment Law Outlook and Challenges,"[1] outlines some of these, including the further expansion of precarious work (platform work, gig work). In turn, the development of teleworking and other forms of work using new technologies (ICT mobile work) is blurring traditional notions of place and time of work. Instead, the issue of an "always-on work culture" and the associated "anytime, anywhere" work has emerged.[2] These changes have occurred primarily due to the development of mobile devices and the expansion of flexible forms of work organization. In addition, the development of modern technologies, including artificial intelligence, may have a negative impact on the protection of workers' personal rights and privacy. The development of previously unknown forms of workplace organization, such as the "fissured workplace,"[3] is also worth mentioning. These developments could have a significant impact on the reduction of labor protection standards, including occupational health and safety.

New challenges are influencing the development of regulatory concepts in which hopes are placed for effective labor protection, especially in the context of the shortcomings of traditional regulatory strategies identified in doctrine.[4] The new approach emphasizes the need to create flexible and contextual regulations that will primarily engage employers in cooperation to improve compliance with labor law. Such a new approach is

1 Frank Hendrickx, "Regulating Working Conditions – EU Employment Law Outlook and Challenges," 2019, 8–10, accessed February 7, 2024, https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/638430/IPOL_BRI(2019)638430_EN.pdf.

2 "Working Anytime, Anywhere: The Effects on the World of Work," Eurofound and the International Labour Office, 2017, 3, accessed November 2, 2024, https://www.eurofound.europa.eu/en/publications/2017/working-anytime-anywhere-effects-world-work.

3 David Weil, *The Fissured Workplace* (Cambridge: Harvard University Press, 2014), 7 et seq.

4 See: Robert Baldwin, Martin Cave, and Martin Lodge, *Understanding Regulation. Theory, Strategy, and Practice* (Oxford: Oxford University Press, 2011), 108–9; see also: Yoval Feldman, *The Law of Good People. Challenging States' Abilities to Regulate Human Behavior* (Cambridge: Cambridge University Press, 2008), 68–9; Keith O. Boyum, "Review: The Politics of 'Regulatory Unreasonableness': Bardach and Kagan's 'Going by the Book'," *American Bar Foundation Research Journal* 8, no. 3 (1983): 753 et seq.

the method of responsive regulation,[5] which appears to make extensive use of soft regulation, whose general utilization and effectiveness are also topics of academic debate.[6]

In the literature on responsive regulation, issues concerning the development of its theoretical aspects are particularly prevalent. These include the addition of more enforcement pyramids, creating three-dimensional pyramids, expanding tripartism, or methods of self-regulation,[7] as well as analyses of psychological mechanisms influencing compliance with the law and their use in responsive regulation.[8] However, in the academic discussion on this method, there is still an insufficient number of publications addressing legislative problems related to the potential implementation of the described theory, particularly in European legal systems. One such issue is the use of soft regulation in the responsive regulation model against the backdrop of the constitutional principles of democratic legal states belonging to the continental legal culture. This research problem will be the subject of this article. Hence, the importance of such studies is also derived. They serve as a tool to solve future practical implementation problems, thus enabling the transition from theoretical assumptions to their effective application by public authorities.

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5 Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992), 24–7; Feldman, *The Law of Good People*, 65–8; John Braithwaite, *Crime, Shame and Reintegration* (New York: Cambridge University Press 1989), 54–65; numerous papers in the collective work: Peter Drahos, ed., *Regulatory Theory: Foundations and Applications* (Canberra: ANU Press, 2017).

6 For the most recent, see: Ian Cunningham et al., "Introducing Fair Work through 'Soft' Regulation in Outsourced Public Service Networks: Explaining Unintended Outcomes in the Implementation of the Scottish Living Wage Policy," *Industrial Law Journal* 52, no. 2 (2023): 314 et seq.

7 See: John Braithwaite, Valerie Braithwaite, and Mary Ivec, "Applications of Responsive Regulatory Theory in Australia and Overseas: Update," *RegNet Research Paper,* no. 72 (2015); Ayres and Braithwaite, *Responsive Regulation*; collective work in Drahos, *Regulatory Theory,* and Gale Burford, John Braithwaite, and Valerie Braithwaite, eds., *Restorative and Responsive Human Services* (New York, London: Routledge, 2019).

8 Feldman, *The Law of Good People*; see also: Christine Parker, "The 'Compliance' Trap: The Moral Message in Responsive Regulatory Enforcement," *Law & Society Review* 40, no. 3 (2006): 591–622; Christine Jolls and Cass R. Sustain, "Debiasing through Law," *The Journal of Legal Studies* 35, no. 1 (2006): 199–242.

Soft regulation has been employed by public bodies in the field of labor law for a considerable period of time, both in common law systems[9] and in EU law. Even before the Lisbon Treaty, there were numerous debates on its use in regulating and harmonizing social policy and labor law,[10] including the European Employment Strategy.[11] However, the article focuses on applying soft regulation as a "legal" basis for labor inspectors' actions in the responsive enforcement of labor law regulations. This article specifically aims to theoretically capture how soft regulation is used in Anglo-Saxon practices of responsive enforcement of labor law and then to determine whether, and if so, to what extent, the experiences of these countries can be valuable for the European legislator, who does not utilize either soft or responsive regulation in labor protection. The example of Poland will be used to illustrate this issue.

This article poses three research questions. The first concerns the application extent of soft regulation in implementing responsive regulation. The second deals with identifying potential problems in grounding responsive regulation on soft regulation in countries with a continental legal culture, such as Poland. After conceptualizing these issues, the article raises the question of whether there is a method for the effective application of soft regulation in the responsive procedure of enforcing labor law in Polish legislation based on the experiences of Anglo-Saxon countries. To analyze individual national responsive labor protection systems, legal-theoretical, formal-dogmatic, and comparative methods were used to answer the first question. In the context of the second and third questions, the formal-dogmatic method was employed.

The structure of the article includes an introduction, a detailed description of the assumptions of the responsive regulation concept, an analysis of the material and procedural aspects of the law enforcement pyramid,

9 See the examples of Canada, Australia, and the UK described in the article and the cases described in the English-language literature regarding the use of soft regulation as a labor law technique, e.g. Cunningham et al., "Introducing Fair Work," 314.

10 Anna Di Robilant, "Genealogies of Soft Law," *The American Journal of Comparative Law* 54, no. 3 (2006): 504–6; Cunningham et al., "Introducing Fair Work," 329–36.

11 "Ten Years of the European Employment Strategy (EES)," European Commission, 2007, 5 et seq., accessed February 15, 2024, https://eur-lex.europa.eu/resource.html?uri=cellar:9fea25eb-5f5b-4cb6–986d-fa084bf99953.0007.03/DOC_2&format=PDF.

a review of international experiences with a focus on the case of Ontario, a discussion of the characteristics of soft regulation, a critical consideration of the possibilities of grounding responsive regulation on soft mechanism, and a discussion of the ways of incorporating soft-law mechanisms into hard regulation framework, summed up with synthetic conclusions.

2. The Concept and the Material and Procedural Preconditions of Responsive Regulation

Until the late 20th century, the two main regulation methods were the command-and-control method and the deregulatory method. The former relies on ensuring law compliance through deterrence, thus applying sanctions that are painful and strictly associated with specific behaviors. In contrast, the latter avoids sanctions, and the mechanism of law compliance is based on building cooperation and trust. In the 1980s and 1990s, the method of responsive regulation emerged, combining the advantages of these two methods. It is based on flexibility and contextuality, considering various aspects of an employer's operation.[12] The responsive method rejects the approach based solely on punishment or persuasion. Its creators argue that an effective regulatory system requires a balanced combination of compliance and deterrence.[13] This is based on the observation that relying solely on deterrence results in a focus on the letter of the law and the search for loopholes, which in turn leads to the creation of new, stricter regulations. At the same time, treating sanctions as a last resort, as in the case of deregulatory legislation, can encourage employers to break the law.[14]

The most important principles of responsive regulation include the enforcement pyramid, tripartism, and coercive self-regulation.[15] All are essential for creating a responsive model of labor protection. However, due to the focus of this article, tripartism and self-regulation will not be analyzed. Emphasis will instead be placed on the enforcement pyramid and procedures for navigating it.

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12 Ayres and Braithwaite, *Responsive Regulation*, 5.

13 John Braithwaite, *To Punish or to Persuade: Enforcement of Coal Mine Safety* (New York: State University of New York Press Albany, 1985), 84–118.

14 Baldwin, Cave, and Lodge, *Understanding Regulation*, 107.

15 Ayres and Braithwaite, *Responsive Regulation*, 6–10.

In technical terms, the law enforcement pyramid involves a hierarchical arrangement of many potential legal measures that the controlling authority can apply in response to an employer's behavior.[16] At the bottom of the pyramid should be measures based on compliance, whose main addressees, according to the theory of the law of good people, are morally good employers (those who unknowingly violate the law) and employers who situationally violate the law (those whose unethical behavior is primarily justified by their rationalizations for wrongdoing under certain circumstances). Establishing separate measures for them is crucial because, according to research on behavioral ethics, applying painful and costly sanctions is counterproductive in many situations.[17] This section of the pyramid advocates for measures based on educating and informing violators, including notifying the regulated entity about detecting a violation, ordering the implementation of remedial measures, or reaching a settlement.[18] If the employer's attitude does not demonstrate a willingness to change, regulation should be moved to a higher level of escalation while continuing the dialogue and remaining open to continued cooperation.[19]

The second level of the pyramid comprises a set of legal measures that combine elements of compliance and deterrence.[20] These include a warning letter, an order or prohibition of specific behavior, compensation, restitution of benefits, restoration to the previous condition, and an administrative monetary penalty.[21] Limiting access to public procurement can be similar.[22]

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16 Todd Lochner, Dorie Apollonio, and Rhett Tatum, "Wheat from Chaff: Third-Party Monitoring and FEC Enforcement Actions," *Regulation & Governance* 2, no. 2 (2008): 219–20.

17 Feldman, *The Law of Good People*, 68–80.

18 Lochner, Apollonio, and Tatum, "Wheat from Chaff," 218–20.

19 John Braithwaite, "The Essence of Responsive Regulation," *UBC Law Review* 44, no. 3 (2011): 493–7.

20 John Braithwaite, "Types of Responsiveness," in *Regulatory Theory*, 121.

21 Ayres and Braithwaite, *Responsive Regulation*, 35–7.

22 Generally subject to a specific panel agreement with the regulator. An example is the Australian Victorian Government Schools Contract Cleaning Program. See: John Howe and Ingrid Landau, "Using Public Procurement to Promote Better Labour Standards in Australia: A Case Study of Responsive Regulatory Design," *Journal of Industrial Relations* 51, no. 4 (2009), 575–83.

Measures that rely exclusively on deterrence, including criminal sanctions or deprivation or suspension of the rights to conduct business, should be applied only as a last resort. Research indicates that the more severe the sanction at the top of the pyramid is, the less frequently it is applied. Sanctions in this part of the pyramid serve two functions. On the one hand, they impact the psyche of typical violators. On the other hand, they target irrational employers who, for the good of society, should be deprived of the ability to conduct business.[23]

An equally crucial aspect of the law enforcement pyramid is the procedure by which the regulator executes its mandate. In legal theory, two strategies for navigating the pyramid are mentioned: the tit-for-tat strategy and the restorative justice strategy.[24]

The tit-for-tat strategy is employed in game theory and was presented based on the so-called prisoner's dilemma by Anatol Rapoport. Its purpose is to escalate to de-escalate and return to cooperation through forgiveness.[25] Applying it as the ground of responsive regulation in labor protection, the strategy essentially involves two actors. The first is the employer, who wants to minimize the costs associated with regulation. Meanwhile, the second (the regulator) aims to achieve the highest possible compliance with the regulations. Consequently, the two actors begin the regulatory game from a position of cooperation, but then the employer, motivated by a desire to minimize their losses, exploits the regulator's submissive stance and deviates from complying with the law. This, in turn, causes the regulator to impose sanctions to discourage avoidance of the law. Ultimately, when the entrepreneur is willing to cooperate, the regulator de-escalates the situation, returning to cooperation.[26] In the above scheme, the regulator is an intelligent guide who freely chooses the most appropriate legal measure.[27]

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23 Braithwaite, "The Essence of Responsive Regulation," 486.

24 Vibeke Lehmann Nielsen and Christine Parker, "Testing Responsive Regulation in Regulatory Enforcement," *Regulation & Governance* 3, no. 4 (2009): 377–81; Braithwaite, "Types of Responsiveness," 118–20.

25 Shirli Kopelman, "Tit for Tat and Beyond: The Legendary Work of Anatol Rapoport," *Negotiation and Conflict Management Research* 13, no. 1 (2019): 8–10.

26 Ayres and Braithwaite, *Responsive Regulation*, 20–2.

27 Nielsen and Parker, "Testing Responsive Regulation," 379–81.

Within responsive regulation, restorative justice is employed at the lowest level of the enforcement pyramid. This involves collaboration, dialogue, negotiations, mediation, and other forms of engagement in cooperation to achieve compliance with the law. Therefore, it requires moving away from a strictly described procedure that mandates specific behaviors from the regulator.[28] Its essence is the direct accountability of the offender to the victim. This accountability entails compensation or reparation for the damages incurred, with the involvement of all parties: employers, employees or their representatives, and the regulator. Restorative justice is implemented as an alternative to or voluntarily after the process. Meanwhile, the procedure of responsive regulation should generally always pass through it and is expected to end there.[29]

In summary, both procedures for navigating the enforcement pyramid contradict procedural formalism. J. Braithwaite pointed out responsiveness is about reconciling conflicting interests and preventing further escalation. It is not about "similar treatment for similar cases"; achieving the desired outcome in each case is of greater importance.[30] Responsive regulation is flexible, contextual, and sometimes iterative. It is impossible to reduce it to a strict procedure that will always proceed the same way.[31] Nevertheless, the objective should be to reach the lowest possible level on the enforcement pyramid.[32]

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28 Gale Burford, John Braithwaite, and Valerie Braithwaite, "Introduction," in *Restorative and Responsive Human Services*, eds. Gale Burford, John Braithwaite, and Valerie Braithwaite (New York, London: Routledge, 2019), 1–5.

29 Brenda Morrison and Tania Arvanitidis, "Burning Cars, Burning Hearts and the Essence of Responsiveness," in *Restorative and Responsive Human Services*, 56–7.

30 Kathy Daly, "Restorative Justice and Responsive Regulation," *The Australian and New Zealand Journal of Criminology* 36, no. 1 (2003): 110.

31 Sometimes, the freedom of the regulator is very limited, even reduced to a non-responsive and therefore pre-regulated response; see: Neil Gunningham and Darren Sinclair, "Smart Regulation," in *Regulatory Theory*, 138–9.

32 John Braithwaite, Valerie Braithwaite, and Gale Burford, "Broadening the Application of Responsive Regulation," in *Restorative and Responsive Human Services*, 29–31.

3. International Practice of Implementing Responsive Regulation in Labor Protection: A Case Study of Ontario, Canada

In 2015, the RegNet association published a report titled "Applications of Responsive Regulatory Theory in Australia and Overseas."[33] It identified legislators recognized in the academic community as responsive. In the context of the research question, analyzing a legislator who introduces responsive regulation according to the aforementioned principles was crucial. This included flexibility in law enforcement and using soft regulation for this purpose. One such legislator is the regulator of Ontario. Similarly, this also applies to British and Australian legislators.

In Ontario, occupational health and safety are regulated by several statutory acts. From the perspective of law enforcement, the most important of these is the Occupational Health and Safety Act (OHSA),[34] which applies to the majority of employers.[35]

This Act does not explicitly refer to responsiveness. Although it is based on the normative approach, some responsiveness elements are noticeable. However, it must be highlighted that a full implementation of the theory into normative content has not been accomplished. This is partly due to the lack of a statutory obligation to start regulation by applying cooperation and restorative justice, although the regulator can implement them.[36] The potential pyramid itself is quite narrow and particularly covers two levels, i.e. an order for specific behavior combined with a possible compliance plan and cessation of work, among other things, if there is a threat to the safety and health of workers. Additionally, according to section 66, violation of the OSHA regulations and non-compliance with the inspector's orders is a criminal offence, and the possibility of initiating proceedings has been entrusted to

33 Braithwaite, Braithwaite, and Ivec, "Applications of Responsive Regulatory Theory."

34 Occupational Health and Safety Act, RSO 1990, c O.1, accessed February 7, 2024, https://www.ontario.ca/laws/statute/90o01.

35 Leah F. Vosko et al., "New Approaches to Enforcement and Compliance with Labour Regulatory Standards: The Case of Ontario, Canada," *Comparative Research in Law & Political Economy. Research Paper*, no. 31 (2011): 41.

36 See: Sections 54, 57(4), and 59(1), which provide space for cooperation and education. However, the Act does not explicitly impose an obligation to cooperate with the inspector other than to share sources of information during inspections.

employees of the Ministry of Labour.[37] The penalty, however, is imposed by the court.[38] In a general sense, the use of tit-for-tat is therefore limited. The regulator is also essentially deprived of the ability to start regulation from any place other than the order of specific behavior, especially when it knows it is dealing with an unreformable, recidivist employer. There is also no regulated moment, which the literature describes as "forgiveness" and a return to cooperation. In summary, it can be said that while the Ontario legislator grants sufficiently broad discretionary power, the inspector has a chance to be responsive, and this is not derived from the Act itself.

In 2021, The Ontario Gazette, a legal publisher, published a document that, in a European context, can be considered an example of soft regulation, namely "Regulators' Code of Practice: Working together to protect the public interest in Ontario".[39] Its aim is to build transparent cooperation and the practice of enforcing labor law. The word "responsive" is not mentioned, yet its message is clear. The Code of Practice develops traditional regulations, emphasising cooperation with regulated entities. The document indicates that non-compliance frequently arises from misunderstandings or errors rather than deliberate action. It promotes a proactive approach to compliance based on cooperation, communication, and education. Inspectors are encouraged to clarify irregularities and define expected actions. Punishment should be proportional, based on the principle of gradation. Escalation should proceed from education and encouragement to warnings and penalties, depending on the situation. Inspector decisions should be contextually appropriate. These postulates thus align with the theory of responsive regulation.

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37 The ministry may initiate a prosecution against any person for contravening the act or the regulations or failing to comply with an order or requirement of an inspector or a director or an order from the minister (OHSA, Section 66). These prosecutions are conducted by the Ministry of the Attorney General lawyers or paralegals on behalf of the Ministry of Labour, Immigration, Training and Skills Development.

38 Ministry of Labour, Immigration, Training and Skills Development's Guide to the Occupational Health and Safety Act, Ontario Gazette 2017, accessed February 7, 2024, https://www.ontario.ca/document/guide-occupational-health-and-safety-act.

39 Ministry of Labour, Immigration, Training and Skills Development's Regulators' Code of Practice: Working together to protect the public interest in Ontario, Ontario Gazette 2017, accessed February 7, 2024, https://www.ontario.ca/page/regulators-code-practice-working-together-protect-public-interest-ontario.

As previously emphasized, such a regulatory scheme is not an exception and is not only applicable to Canadian legislation. For example, the Australian government agency Safe Work Australia issued "The National Compliance and Enforcement Policy."[40] This document is a basic guideline for occupational health and safety inspectors operating under the Work Health and Safety Act.[41] Similarly, the British regulator bases its work on the Health and Safety at Work Act of 1974 (HSWA)[42] and the "Enforcement Policy Statement."[43]

In summary, the regulatory technique, whether of the legislator of Ontario or the aforementioned Australian and British legislators, occurs on two levels. The first level is the statute. It regulates issues of legal measures, as well as the principles of employee participation in external and internal control. It also fulfils the postulate to informalize responsive regulation. For this purpose, a second level of regulation can be distinguished, which is characterized by soft regulation. At this level, definitions of strategies such as tit-for-tat, the discretionary power of labor inspectors, and an emphasis on a cooperative approach are formulated.

4. Concerns about Basing the Responsive Regulation Procedure on Soft Regulation

To broaden the context of the gains and risks associated with soft regulation in the procedure of enforcing labor law, it is necessary to answer the question regarding the definition of soft regulation and then determine the differences between it and hard regulation. In the doctrine of community law, soft regulation is defined as rules of conduct that, in principle, do not have legally binding power but can still have practical effects, including legal ones.[44] The CJEU revealed the sense of this doctrinal definition in

40 "The National Compliance and Enforcement Policy," Safe Work Australia, March 19, 2020, accessed February 10, 2024, https://www.safeworkaustralia.gov.au/resources-and-publications/legislation/national-compliance-and-enforcement-policy.

41 Work Health and Safety Act 2011, 29 September 2012, ACT Legislation Register no. A 2011–35.

42 Health and Safety at Work etc. Act 1974, 31 July 1974, UK Public General Acts 1974, ch. 37.

43 "Enforcement Policy Statement," Health and Safety Executive, October 2015, accessed February 10, 2024, https://www.hse.gov.uk/pubns/hse41.pdf.

44 Oana Stefan, "European Union Soft Law: New Developments Concerning the Divide Between Legally Binding Force and Legal Effects," *The Modern Law Review Limited* 75, no. 5 (2012): 879–80 and the literature cited therein.

the Grimaldi v. Fonds case.[45] This ruling concerned the question of whether recommendations could be binding for national courts when they are sufficiently clear, unconditional, certain, and unambiguous. The Court indicated that although recommendations are not binding, which means they cannot be invoked in court – as they are not the basis for rights and obligations – they cannot be said to be irrelevant or legally ineffective. They set the direction of interpretation and explain the purpose of regulation. Moreover, they supplement community law, for instance, where it leaves certain gaps and interpretative spaces.[46] Similarly, the literature emphasizes that the fundamental difference between soft and hard regulation lies in enforceability. In the case of hard regulation's enforceability, it is guaranteed by the state and formalized sanctions. The concept of soft regulation, however, presupposes the existence of many quasi-legal orders.[47] Producers of this regulation can be both private entities[48] and public bodies.[49] Given its amorphous nature, soft regulations take various forms and names, including listing agreements on stock exchanges, advisory resolutions, codes of good practice, declarations, or corporate control mechanisms.[50] Regardless of the form and nomenclature in national or community law, their essence, which needs to be emphasized again, lies in the lack of binding force.[51]

From a linguistic standpoint, the concept of soft regulation reveals a certain paradox. On the one hand, the softness of norms implies their

45 CJEU Judgment of 13 December 1989, Case Salvatore Grimaldi v. Fonds des maladies professionnelles, C-322/88, paras. 15–19.

46 "(...) where they are designed to supplement binding Community provisions."

47 The phrase quasi-legal orders refers to the concept of legal pluralism. A concept that critically approaches the paradigm of the state as a monopolist in regulating human behavior. These occur in almost every organization intermediate between the state and the individual. In all organizations, therefore, a quasi-legal order is produced, which is a hybrid of formal (hard regulation) and informal (soft regulation) norms – living law. See, for instance, Di Robilant, "Genealogies of Soft Law," 534–8. See also: Miranda Forsyth, "Legal Pluralism: The Regulation of Traditional Medicine in the Cook Islands," in *Regulatory Theory*, 235.

48 Di Robilant, "Genealogies of Soft Law," 499–500.

49 Dimity K. Smith, "Governing the Corporation: The Role of 'Soft Regulation,'" *UNSW Law Journal* 35, no. 1 (2012): 396–7.

50 Ibid., 380–2.

51 Stefan, "European Union Soft Law," 879–80. See also: Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," *International Organization* 54, no. 3 (2000): 421–2.

unenforceability. On the other hand, any regulation is a deliberate action[52] aimed at setting requirements for human behavior and influencing it. To achieve such influence, some form of enforceability is necessary. Otherwise, soft regulation would be a collection of wishes hoping for their voluntary execution. This would consequently result in the concept of soft regulation being marginalized, which is in contradiction to the practice of law application.[53]

In doctrine, it is posited that soft regulation can be an effective tool to complement universally established law. An example of this is the concept of legal pluralism, understood as nodal regulation.[54] In a similar vein, J. Braithwaite emphasized that responsive regulation is about coherence and achieving the desired outcome in each case, but this cannot be accomplished through a rigidly predefined procedure.[55]

In adapting Anglo-Saxon practices of soft regulation to Continental legal systems, including the Polish one, two main problems may arise. The first is the uncertainty that an employer subject to regulation would face. It concerns the ambiguity as to whether the "soft" responsive approach will be applied in their case at all. If it is not applied, there arises a doubt whether the employer will have the opportunity to appeal against the decision taken, contrary to the soft procedure but still within the framework of the law. This is the well-known problem in the literature of weakening hard regulations that guarantee a clear level of protection by soft regulations that dilute them.[56] Secondly, in some countries with a Continental legal culture based on the principle of constitutionalism, it appears that there is no room for creating a second soft legal system operating without direct statutory authorization. These doubts arise from the principle

52 Smith, "Governing the Corporation," 393–4.

53 On soft regulation having its own alternative enforcement regime, see: Benedict Sheehy et al., "Shifting from Soft to Hard Law: Motivating Compliance When Enacting Mandatory Corporate Social Responsibility," *European Business Organization Law Review* 24, (2023): 696, 700. See also: Smith, "Governing the Corporation," 391.

54 Cameron Holley and Clifford Shearing, "A Nodal Perspective of Governance: Advances in Nodal Governance Thinking," in *Regulatory Theory*, 164–5.

55 Daly, "Restorative Justice," 110.

56 Isabelle Duplessis, International Labour Organization, Bureau for Workers' Activities, and International Labour Organization, Bureau for Workers' Activities, 2006, *Soft Law and International Labour Law*. *Labour Education*, 42–4.

of legalism and are stronger the more important the position of the parliament in the legislation.

The principle of legalism is one of the most important constitutional principles, probably due to its substantive capacity. In its broadest sense, it is equivalent to the sum of the constitutional features of a modern democratic state.[57] The role of the Constitutional Tribunal is to interpret its content in the Polish legal order.[58] This principle can be understood both formally and materially.[59]

In interpreting its formal content, certain discrepancies exist regarding its national and EU understanding.[60] For example, in the jurisprudence of the CJEU, this principle has been present since 1986[61] when the Court expanded its interpretation, indicating that fundamentally its core is the ability to verify the legality of an action by a public authority, and not the form in which the action was taken. Similarly, some representatives of EU doctrine emphasize that an evolutionary approach to the actions of public authorities should be accepted. J. Figueiredo pointed out the necessity of moving from the principle of legalism to the principle of efficiency, which governs administration in the private market. Thus, the essence is the realization of the goal – meeting the needs of the community – whereas the form in which this occurs, even using new governance instruments like soft regulation, is secondary.[62]

The traditional approach to the formal principle of legalism, which dominates, among others, in Polish law, means that public authorities act on the basis and within the limits of the law. Only legal provisions define the material, organizational, and procedural aspects of the authorities'

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57 Leszek Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu* (Warsaw: Wolters Kluwer Poland, 2016), 76.

58 Polish Constitutional Tribunal, Judgment of 4 June 2013, Ref. No. P 43/11, Journal of Laws 2013, item 692.

59 Monika Florczak-Wątor, "Art. 7," in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. Piotr Tuleja, 2nd ed. (Warsaw: Wolters Kluwer Poland, 2023).

60 Jan Siudecki, "Zasada legalizmu a sankcjonowana samoregulacja: analiza na przykładzie porozumienia Prezesa UKE z Telekomunikacją Polską," *Kwartalnik Prawa Publicznego* 11, no. 3/4 (2011): 65.

61 CJEU Judgment of 23 April 1986, Case Parti écologiste "Les Verts" v. European Parliament, Case 294/83, EUR-Lex 61983 CJ 0294.

62 Siudecki, "Zasada legalizmu a sankcjonowana samoregulacja," 49–51.

activities.[63] When it is violated, a compensation claim arises on the part of the citizen. This claim constitutes, on the one hand, a subjective right and, on the other, a guarantee of the implementation of the principle of legalism. Where the influence of the state's "imperium" is significant, the implementation of the discussed principle and claims should be best.[64]

In the substantive interpretation, the principle of legalism includes the concept of citizens' trust in the state, which originates from German judicial practice. It imposes on state authorities the duty to clearly inform citizens about the bases and legal effects of their actions.[65] An individual should be able to determine the consequences of specific behaviors and events based on the existing law and reasonably expect that the legislator will not change this law arbitrarily.[66]

From the substantive interpretation of the principle of legalism in countries with a strong parliamentary democracy, the principle of statutory exclusivity also follows. According to Article 2 of the Constitution of the Republic of Poland,[67] there is no place for sub-statutory norms that are not directly based on laws and do not serve their execution.[68] Moreover, the more important the issue for the citizen, the more detailed the statutory regulation should be, limiting the scope for references to executive acts. This criterion applies especially in criminal and constitutional law, but more broadly concerns any matter of a repressive nature.[69] Undoubtedly, the procedure for implementing a given strategy for enforcing labor law has a repressive character. Therefore, the legislator cannot "create normative structures that constitute an illusion of law and, consequently, provide only

63 Florczak-Wątor, "Art. 7."

64 Polish Constitutional Tribunal, Judgment of 1 September 2006, Ref. No. SK 14/05, Journal of Laws, No. 164, item 1166.

65 Garlicki, *Polskie prawo konstytucyjne*, 76–82.

66 Polish Constitutional Tribunal, Judgment of 14 June 2000, Ref. No. P 3/00, Journal of Laws 2000, No. 50, item 600.

67 The Constitution of the Republic of Poland, Journal of Laws 1997, No. 78, item 483, as amended.

68 Polish Constitutional Tribunal, Judgment of 26 June 2001, Ref. No. U 6/00, Journal of Laws 2001, No. 69, item 722.

69 Garlicki, *Polskie prawo konstytucyjne*, 156–8.

an appearance of protecting individual interests."[70] These views are even more applicable to all forms of soft regulation, which seem to mimic hard laws, thereby creating an illusion of enforceable law.

Within the aforementioned comments, the "subthreshold" implementation of responsive regulation in the form of soft regulation, as is the case with the legislature of the province of Ontario, may raise doubts in a continental legal culture. Soft regulation is fundamentally non-binding and does not provide adequate certainty to citizens that the public authority will behave exactly as declared. By "committing" to more favorable treatment under soft regulation, the authority makes an unfunded promise. The legal consequences are also unclear when, despite the "duty" of the labor inspector, he does not behave responsively towards the employer in a specific case. Such a situation undoubtedly violates the principle of the definiteness of the law and citizens' trust in the state.

Highlighting the scope of the issue, it must be noted that the current theoretical form of responsive regulation raises more constitutional doubts. Among the greatest are the principle of equality before the law and the principle of proportionality. According to the first of these principles, employers should be treated equally in identical situations. This means that all entities characterized by a given relevant feature to the same degree should be treated equally.[71] This principle is not absolute, and under certain conditions, deviations from its application are possible. In this light, the question arises whether soft regulation, defining a procedure that, by definition, should be contextual and flexible, provides adequate guarantees in this respect. From the principle of proportionality, it follows, among other things, that the legislator, or more broadly, the public authority,[72] to achieve a given goal may only use the least burdensome means for the regulated entity.[73] In responsive regulation, the regulator (and not abstractly the legislator or court) within the framework of soft law, under conditions

70 Polish Constitutional Tribunal, Judgment of 10 January 2012, Ref. No. P 19/10, Journal of Laws 2012, item 76.

71 Polish Constitutional Tribunal, Decision of 9 March 1988, Ref. No. U 7/87, Official Gazette of the Republic of Poland (OTK) 1988/1/1.

72 Provincial Administrative Court in Kraków, Judgment of 17 May 2017, Ref. No. III SA/Kr 345/17, LEX No. 2298882.

73 Garlicki, *Polskie prawo konstytucyjne*, 123.

of extremely broad discretionary power, will choose one of several or more legal measures, including the suspension of economic activity.[74] The conditions and form of the responsive regulator's action take on a scale unknown to many legal systems and rightfully raise concerns and uncertainty among citizens regarding the protection against excessive interference by the public authority.

It is not entirely clear why, in legislative practice, soft regulation is used to complement hard regulation in defining the procedure for responsive regulation. Considering the current state of knowledge on soft regulation, three likely answers can be proposed.

On the one hand, it can be assumed that this is a necessary action resulting from the nature of soft and responsive regulation. They are complementary. Soft regulation provides a regulatory environment that catalyzes cooperation between the regulator and the employer.[75] Flexibility, organic nature, greater motivation to adhere to one's own solutions, and the non-adversarial nature of meetings provide the contextuality and flexibility of responsive regulation.[76] These elements promote innovation in compliance and learning through discourse,[77] which is also a premise of responsiveness. The fact that soft regulation initially developed within international law suggests its resilience to the variability and complexity of the regulatory subject.[78] These arguments are also known in EU doctrine. Soft regulation as an element of new governance is intended to increase the effectiveness and democratic nature of EU law and to be an effective deregulatory tool.[79] These remarks justify J. Braithwaite's thesis that attempts to rigidly regulate proceedings often have the opposite effect to what is intended, causing compliance with the law to worsen.[80]

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74 See comments in: Zofia Duniewska, "Zasada proporcjonalności a prawo administracyjne – zagadnienia wybrane," *Studia Prawno-Ekonomiczne* 123, (2022): 15 et seq.

75 Di Robilant, "Genealogies of Soft Law," 505–7.

76 Smith, "Governing the Corporation," 415–6.

77 Kenneth and Snidal, "Hard and Soft Law," 422–4.

78 Pavlina Hubkova, "Soft Rulemaking through Multi-level Administrative Practice: Replicating the Aesthetics of Law," *Transnational Legal Theory* 14, no. 4 (2023): 499–502.

79 Siudecki, "Zasada legalizmu a sankcjonowana samoregulacja," 42.

80 John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002), 29–31.

On the other hand, it is likely that legislators did not conduct detailed analyses of the properties of hard and soft regulation. Soft regulation is undoubtedly more beneficial for understanding the effectiveness of an experimental regulatory strategy. It is non-binding and easily reformable. Thanks to this, it is possible to ascertain the outcome in a cheaper and faster way, and it is easier to withdraw.[81]

Of course, a possible scenario is also the simultaneous occurrence of both described motivations. Using soft regulation to implement responsive regulation to the cause of the problem will influence how it is solved. In the second case, the response to the threats resulting from using soft regulation is incorporating responsive regulation into universally binding law. In the first and third cases, it is necessary to consider how to legally use soft regulation to introduce responsive regulation.

Assuming such an approach would be possible, it must be emphasized that some co-occurrence of both types of regulation is inevitable. Limitations on rights and freedoms, including the freedom of economic activity, both in international agreements and, for example, in Article 22 of the Polish Constitution, are permissible only by statute and only due to an important public interest. This means that soft regulation can only regulate the procedure of responsive regulation. Thus, issues such as the catalogue of legal measures, the right to appeal, the scope of authority to conduct inspections, etc., must be governed by hard regulation.

5. The Incorporation of Soft Regulation through Hard Regulation

In the context of responsive regulation in labor protection, there is a lack of a bridging solution that would combine the necessity of using soft regulation with the principles of legality, especially in legal systems with a strong position of the parliament. Soft regulation appears to be a convenient tool for implementing contextual and flexible regulation. Considering the EU's legal experience, it appears possible to combine both regulations in countries like Poland. A bridging solution could be incorporating soft regulation through hard regulation, whose mechanism has been described by P. Hubková.

It is erroneous to assume that soft regulation is entirely unenforceable. Indeed, it has developed its own alternative system for enforcing

[81] Duplessis, *Soft Law and International Labour Law*, 41.

compliance with its provisions.[82] However, it is recognized that the most effective means of enforcing behavior that is compliant with non-binding regulations is achieved by incorporating soft regulation through hard law. A perfect example here is the EU law. In this context, soft regulation is issued by an authoritative supervisory body as a means of filling in the details of a legal loophole created by the vagueness of terms in hard regulation. In this way, soft regulation is valorized and legitimized as a tool helping interpret and apply hard regulations. Moreover, the body's authority guarantees that adherence to its guidelines will minimize the risk of violating binding regulations. In such a case, although soft regulations would not be legally binding at the level of lawmaking, they become legally binding – indirectly – in law application.[83] In addition, EU hard law even forces the creation and application of soft regulation. For example, Directive 2003/51/EC requires companies to report on their implementation of corporate social responsibility – expressed through soft regulation – in relation to employees and the environment.[84]

Similarly, if responsive regulation cannot be detailed in the provisions of hard regulation, as this would distort its essence, soft regulation may be used instead if it is incorporated into the legal order through an authoritative body. This condition can be met by including declarations of responsive action by authorities in the legislation and using vague terms to define its general guidelines. Then, the regulatory body could issue soft regulations that would fill the vague expressions of the law with detailed content. In addition, hard regulation could further strengthen the application of responsive regulation, for example, by introducing reporting on responsive actions in the post-inspection report.

In that case, a mechanism known from corporate governance case law would arise. For example, when the principles of good market practices codified in soft regulation gain approval, they become a measure of careful action that influences court rulings on the fault of a company's body. This happens especially when the prevailing laws leave a certain degree of

82 Hubkova, "Soft Rulemaking," 500–4, 509 et seq.

83 Ibid., 509–14.

84 Mario Vinković, "The Role of Soft Law Methods (CSR) in Labour Law," in *Recent Developments in Labour Law* (Budimpešta: Akadémiai Kiadó, 2013), 102–7.

discretionary power to the company's management. In this way, like general clauses, they influence the application of law by judicial or administrative bodies.[85] Similarly, if soft regulation that frames responsive actions were established by an authoritative supervisory body and gained doctrinal acceptance, it could serve as a criterion for courts in determining the appropriateness of regulatory bodies' behavior. This, in turn, would provide a certain range of guarantees and legal security for employers. Over time, some soft regulatory guidelines of responsive regulation could be incorporated into statutory regulation. However, such actions would require caution to maintain flexibility in applying the law.[86]

It should be emphasized that it is essential for the legislator to use vague terms to define general principles of responsiveness at the level of hard regulation. This is important because the greatest enemy of soft regulation is the strict use of literal interpretation in applying the law. For soft regulation to retain its effectiveness, it requires the use of teleological interpretation, which takes into account the broader context of the functioning of the regulated entity. In countries where the legal culture requires the literal application of provisions, the use of vague terms by the legislator forces the authority applying the law to take a flexible and contextual approach to its interpretation, necessarily following soft guidelines issued, for example, by the central labor regulator.[87]

6. Conclusions

In doctrine, two distinct strategies for navigating the enforcement pyramid have been identified. At the base, the regulatory body should typically begin with the strategy of restorative justice, while at higher levels, it should transition to the tit-for-tat tactic. In both approaches, the broad discretionary power of the regulator is a fundamental element. The regulator should have the freedom to understand the regulatory context and the characteristics of the regulated employer, ultimately deciding where to start the regulation. This implies that regulation may proceed differently for each employer due to changing circumstances. The objective is to achieve the desired outcome

85 Smith, "Governing the Corporation," 402–4.
86 Vinković, "The Role of Soft Law Methods (CSR) in Labour Law," 106–9.
87 Ibid., 105–9.

by employing escalation for de-escalation. Consequently, responsive regulation may prove incompatible with the traditional procedural code, which is inherently rigid, not flexible, abstract, and not contextual.

Soft regulation effectively supplements the shortcomings of hard regulation. Firstly, its informal nature, non-adversarial approach, organicity, and openness to innovation fit perfectly with the tactics of restorative justice and tit-for-tat. These factors have likely contributed to the widespread use of soft regulation by responsive regulators (including Canadian, Australian, and British ones). In response to the first research question, these observations may indicate the necessity of using soft regulation in the procedure of responsive regulation.

Moving on to the second research issue, using soft regulation in responsive regulation for labor protection raises several doubts. First, it should be emphasized that soft regulation is not inherently secured by state coercion. Although there is an alternative system for enforcing its provisions, it is noticeably weaker, mainly due to low pressure and lack of accountability. For this reason, there is a trend in law to move away from its use in matters related to labor law. Thus, soft regulation leads to a blurring of regulatory accountability in case of non-compliance. The regulated employer will not have guarantees whether appropriate claims will be available to them. The lack of proper guarantees in hard regulation breeds distrust among citizens, which, in turn, is inconsistent with the material aspects of the principle of legality. Additionally, there are doubts about using soft regulation instead of statutory regulation to norm the procedure of enforcing labor law. Such a regulatory technique is inconsistent, among other things, with the Polish Constitution.

Given the attractiveness of responsive regulation and its potential to solve the problems facing labor law, instead of abandoning the idea of soft regulation and thus weakening the effectiveness of responsive regulation, it is necessary to seek bridging solutions. Without them, implementing responsive regulation into some legal systems will be impossible. One of the solutions, which is important to emphasize, only resolves some doubts, is the incorporation of soft regulation through hard regulation. This solution could lead to the legitimization of soft regulation.

In conclusion, further research on the problems and their solutions is necessary to translate the responsive regulation theory into different legal

systems. There are many doubts, some of which have already been indicated in the article. They mainly concern issues related to constitutional principles of proportionality, equality before the law, and the exclusivity of statutes. These issues must be considered when creating theoretically implementable solutions.

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Prohibition of Discrimination Based on Sexual Orientation: Analysis of CJEU and ECtHR Case Law Concerning Human Rights

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Abstract: This article analyzes the importance of the prohibition of discrimination based on sexual orientation in light of the primary and secondary legislation of the European Union, as well as the case law of the Court of Justice of the European Union and the European Court of Human Rights. In the context of human rights protection, the prohibition of discrimination based on sexual orientation is a key element of modern judicial rulings in Europe. Both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) play crucial roles in shaping the standards for the protection of LGBT+ persons by interpreting legal provisions and issuing judgments that influence national legislation. Both institutions emphasize the importance of equal treatment within the framework of human rights, and their rulings contribute to the elimination of prejudice and discrimination. The analysis of the case law of the CJEU and ECtHR demonstrates how LGBT+ rights are integrated into the broader context of human rights protection, which in the long term may lead to changes in social norms and legislation in member states. The prohibition of discrimination, including on the grounds of sexual orientation, undoubtedly constitutes one of the main social and economic objectives of the European Union. This is reflected in the incorporation of this matter into EU primary law, secondary law, and CJEU jurisprudence. The Treaty on the European Union (TEU) and the Treaty on the Functioning of the European

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Union (TFEU) identify equality as one of the Union's values, mandate its promotion, and call for combating all forms of discrimination, prohibiting discrimination based on specified criteria. Furthermore, national measures can be examined in light of the treaty provisions only to the extent that they apply to situations not covered by the treaty's specific anti-discrimination provisions. The author proposes the following theses: firstly, an analysis of CJEU case law reveals a noticeable dissonance between the application of national regulations by member states and EU law in the examined area, which significantly complicates the practical implementation of the prohibition of discrimination based on sexual orientation. Discrepancies mainly arise in national law due to improper drafting of national legal provisions or their erroneous interpretation by relevant national authorities. In particular, the author compares the regulations of member states with Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. An analysis of the directive's content, considering its interpretation by the CJEU, leads to the conclusion that member states implement the directive incorrectly, and the level of protection against discrimination based on sexual orientation is insufficient compared to the requirements of EU law. Member states are obliged to comply with EU law, which includes not only the duty of state authorities to respect directly applicable acts or implement them into national law but also the obligation to interpret and apply national law in accordance with the requirements of EU law. The second thesis results from the analysis of CJEU case law regarding the prohibition of discrimination based on sexual orientation. Although anti-discrimination directives form the foundation of the European Union's anti-discrimination system, particularly in the areas of employment and occupation, the phenomenon of unequal treatment also occurs in other spheres such as access to goods and services or education. This necessitates the adoption of comprehensive legal measures to effectively combat discrimination. The study employs a comparative legal method, involving a comparative analysis of the legal acts of EU member states and the European Union regarding the prohibition of discrimination based on sexual orientation. The comparison of EU acts and national norms reveals the extent of the implementation of

the provisions of EU law in this area within the legal systems of EU member states. The aim of this analysis is, among other things, to diagnose areas where these states have improperly implemented provisions of EU law or have incorrectly interpreted them. However, due to the limited amount of case law in this area, the author has limited the analysis to a few judgments. The second method applied is the analysis of the case law of the CJEU. Its rulings constitute a significant part of the study, compelling the author to use the comparative method to analyse judgments based on the same or similar legal grounds in analogous circumstances within the framework of the prohibition of discrimination based on sexual orientation.

1. The Essence and Legal Basis of the Prohibition of Discrimination

The unquestioned foundation of the European Union is the general principle of equality, understood as the mandate for equal treatment in a positive sense or as the prohibition of discrimination in a negative sense. The Treaty on European Union (TEU[1]) and the Treaty on the Functioning of the European Union (TFEU) identify equality as one of the Union's values (Article 2 TEU), mandate its promotion and the combating of all discrimination (Articles 8 and 10 TFEU[2]), and prohibit discrimination based on the criteria specified in them (Articles 18 and 19 TFEU).[3]

Initially, EU treaties only contained references to the prohibition of discrimination based on nationality within the context of internal market freedoms.[4] After the adoption of the Maastricht Treaty (TEU), the principle of equal treatment began to evolve and was linked to the concept of European Union citizenship.[5] Today, the prohibition of discrimination is classified as

1 The Treaty on European Union, consolidated version (O.J.E.C. C326, 26 October 2012).

2 The Treaty on the Functioning of the European Union, consolidated version (O.J.E.C. C326, 26 October 2012).

3 Elise Muir, *EU Equality Law: The First Fundamental Rights Policy of the EU* (Oxford: Oxford University Press, 2018), 15.

4 Sandra Fredman, "Transformation or Dilution: Fundamental Rights in the EU Social Space," *European Law Journal* 12, no. 1 (2006): 41 et seq.

5 Stefan Kadelbach, "Union Citizenship," in *The Evolution of EU Law*, eds. Paul Craig and Gráinne de Búrca (Oxford: Oxford University Press, 2018), 465 et seq.; Paul O'Neill and Susan R. Sandler, "The EU Citizenship Acquis and the Court of Justice: Citizenship Vigilante

a principle underpinning the protection of individual rights within the European Union (EU). The scope of this prohibition has been expanded in subsequent EU amending treaties, secondary legislation, and the case law of the CJEU, categorizing it as a general principle of law.[6] The Court of Justice has stated in numerous rulings that "the prohibitions of discrimination provided for in the treaty are specific expressions of the general principle of equality, which is one of the fundamental principles of EU law,"[7] and that fundamental rights include the principle of non-discrimination, meaning that different treatment of comparable situations is not permissible unless the difference is objectively justified.[8]

The prohibition of discrimination based on sexual orientation is enshrined in both primary legislation (Article 21 of the Charter of Fundamental Rights,[9] Articles 10 and 19 TFEU) and secondary legislation of the EU (Council Directive 2000/78/EC,[10] Council Directive 2000/43/EC[11]). However, it was the Amsterdam Treaty[12] that led to the adoption of legal measures aimed at preventing such discrimination.[13] The TFEU establishes

or Merely Vigilant Treaty Guardian?," *Richmond Journal of Global Law and Business* 7, no. 3 (2008): 205.

6 Anna Zawidzka-Łojek, *Zakaz dyskryminacji ze względu na wiek w prawie Unii Europejskiej* (Warsaw: Instytut Wydawniczy EuroPrawo, 2013), 95; Andrea Biondi and Paul Everson, *European Union Law: A Very Short Introduction* (Oxford: Oxford University Press, 2016), 41 et seq.

7 Justyna Maliszewska-Nienartowicz, "Rola zasady równości w prawie Wspólnoty/Unii Europejskiej," *Studia Europejskie*, no. 4 (2011): 73; Tamara Hervey and Jeff Kenner, *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal and Comparative Analysis* (Cambridge: Cambridge University Press, 2016), 98.

8 CJEU Judgment of 12 December 2002, Ángel Rodríguez Caballero v. Fondo de Garantía Salarial (Fogasa), Case C-442/00, ECLI:EU:C:2002:752, para. 32; Nigel Foster, *Foster on EU Law* (Oxford: Oxford University Press, 2017), 126.

9 EU (2000) Charter of Fundamental Rights of the European Union, 2000/C361/01, 7 December 2000.

10 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (O.J.E.C. L303, 02 December 2000), 16.

11 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (O.J.E.C. L180, 19 July 2000).

12 Amsterdam Treaty amending the Treaty on European Union, the Treaties establishing the European Communities, and related acts (O.J.E.C. C340, 10 November 1997).

13 Robin Allen, QC, "Article 13, Evolution and Current Contexts," in *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives*, ed. Helen Meenan (Cambridge: Cambridge University Press, 2007), 44–5.

not only the prohibition of discrimination based on nationality but also empowers the Council of the European Union to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation (Article 10 TFEU). This provision does not have direct effect[14] and therefore cannot be the source of individual rights.

Article 19 TFEU (Article 13 of the EC Treaty) provides the basis for adopting key directives in the area of secondary legislation.[15] In practice, as an enabling provision[16] granting the Union the competence to adopt legal regulations to implement treaty provisions on the prohibition of discrimination, it empowered the Council of the EU to adopt, through a special legislative procedure and with the consent of the European Parliament, the necessary measures to combat discrimination based on the following criteria: sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation.[17] Council Directive 2000/78/EC, which includes the prohibition of discrimination based on these criteria, prohibits its application solely in the areas of employment, work, and vocational training. The directive's scope includes the public and private sectors, including public authorities.[18]

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14 Melania Skalik, "Prawnomiędzynarodowe instrumenty ochrony osób LGBT. Wybrane zagadnienia," *Student Journal of Law, Administration and Economics* 44, (2023): 79–94, accessed July 5, 2024, https://repozytorium.uni.wroc.pl/Content/139887/PDF/06_M_Skalik_Prawnomiedzynarodowe_instrumenty_ochrony_osob_LGBT_Wybrane_zagadnienia.pdf.

15 Pursuant to Article 19 TFEU, directives of key importance for shaping the EU anti-discrimination acquis were adopted: Directive 2000/43/EC on equal treatment irrespective of racial or ethnic origin (O.J.E.C. L180, 19 July 2000), 22 Directive 2000/78/EC on equal treatment in employment and occupation (O.J.E.C. L303, 2 December 2000), 16), and Directive 2004/113/EC, implementing the principle of equal treatment between men and women in the access to and supply of goods and services (O.J.E.C. L373, 21 December 2004), 37; Lina Papadopoulou, *Sexual Orientation and Gender Identity Law in the European Union and Its Court of Justice* (London: Routledge 2021), 43 et seq.

16 Andrzej Wróbel, ed., *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Tom 1* (Warsaw: 2012), 405.

17 Hamza Darbouche and Adriana R.H. van den Bos, *The Law of the European Union: A Comprehensive Study* (Abington: Routledge, 2019), 55–7; Miguel Eduardo da Costa, "Sexual Orientation Discrimination: A Global Perspective," *International Journal of Human Rights*, no. 4 (2020): 15–30

18 Biondi and Everson, *European Union Law*, 43–4; Brian W. O'Brien, "The Scope of EU Anti-Discrimination Law: A Comparative Perspective," *European Law Review* 46, no. 1

It is worth emphasising, however, that while anti-discrimination criteria such as nationality, sex, and age had the status of general principles of EU law, sexual orientation did not hold this status.[19] The inclusion of the prohibition of discrimination based on sexual orientation in Article 21 of the Charter of Fundamental Rights (CFR), combined with its binding force, created a certain dualism in the sources of fundamental rights protection in EU law. On one hand, fundamental rights are general principles of law,[20] but on the other hand, their character was not unequivocally defined in the Charter itself. This interpretative crisis appears to have been resolved with the Court's position confirming that the prohibition in Article 21(1) CFR independently grants individuals a right they can directly invoke in disputes concerning areas covered by Union law.[21] However, doctrinal positions remain divided.[22]

In comparison to Article 10 of the TFEU, the Charter expands the grounds for the prohibition of discrimination to include sex, race, colour, ethnic or social origin, genetic straits, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, and sexual orientation (Article 21 of the CFR).[23] Un-

(2021): 78–81.

19 Anna Pudło, "Charakter zakazu dyskryminacji ze względu na orientację seksualną w prawie UE," *Roczniki Administracji i Prawa* 16, no. 1 (2016): 49 et seq.; Walter Kälin, *The Impact of the Charter of Fundamental Rights on EU Law* (Oxford: Hart Publishing, 2018), 102.

20 Mark Bell, "The Principle of Equal Treatment: Widening and Deepening," in *The Evolution of EU Law*, eds. Paul Craig and Gráinne De Búrca (Oxford: Oxford University Press, 2011), 626 et seq.

21 CJEU Judgment of 15 January 2014, Association de médiation socjale v. Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT), Case C-176/12, ECLI:EU:C:2014:2, para. 47. See: Anna Pudło-Jaremek, "Zakaz dyskryminacji ze względu na orientację seksualną w prawie UE po wyroku TSUE w sprawie Egenberger," *Roczniki Administracji i Prawa* 20, no. 2 (2020): 72 et seq.

22 Elise Muir, "The Essence of the Fundamental Right to Equal Treatment: Back to the Origins," *German Law Journal* 20, no. 6 (2019): 818 et seq.; Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis* (Oxford: Oxford University Press, 2019), 90.

23 Jonathan Bishop, *The Prohibition of Discrimination in the EU: Comparative Perspectives* (London: European Union Agency for Fundamental Rights, 2021), 20–5; Hamza Darbouche and Adriana R.H. van den Bos, *The Charter of Fundamental Rights of the European Union: A Commentary* (Oxford: Hart Publishing, 2020), 150 et seq.

like Article 19 of the TFEU, which provides an exhaustive list of grounds for prohibition, Article 21 of the CFR contains an open-ended list of prohibited grounds for discrimination and does not include a hierarchy of reasons.[24] This grants entities the same right to equal treatment. Therefore, it seems reasonable to extend the prohibition of discrimination based on sexual orientation beyond the field of employment. There is no justification for differentiating between persons discriminated against on the grounds of sexual orientation and those discriminated against on racial or ethnic grounds, who enjoy protection not only in the field of employment but also in education, social protection (including access to social security and healthcare), social benefits, and access to goods and services.[25]

The need to harmonize the legal protection system and, consequently to adopt further regulations concerning the prevention of discrimination based on various grounds has been recognized at the level of EU legislative bodies. This recognition resulted in the proposal for a Council Directive on implementing the principle of equal treatment of persons irrespective of religion or belief, disability, age, or sexual orientation,[26] adopted by the Committee on European Affairs on July 8, 2016.[27] The aim of adopting the new equality directive is to establish a framework for combating discrimination based on religion or belief, disability, age, or sexual orientation, "which is intended to ensure the implementation of the principle of equal treatment in Member States in areas other than employment and work."[28] Thus, the prohibition of discrimination based on sexual orientation should be extended to ensure protection beyond employment and include access to goods and services, in the same manner as for persons discriminated against on racial

24 Nigel Foster, *European Union Law* (Oxford: Oxford University Press, 2019), 134–6.

25 Diana Schiek, *European Union Non-Discrimination Law and Intersectionality: Investigating the Intersection of Protected Grounds* (Abington: Routledge, 2018), 112–5.

26 Anna Śledzińska-Simon, "Zasada równości i zasada niedyskryminacji w prawie Unii Europejskiej," *Studia BAS* 26, no. 2 (2011): 72.

27 European Commission, "Proposal for a Council Directive on Implementing the Principle of Equal Treatment," Brussels 2016, 1.

28 Anna Zawidzka-Łojek, *Opinion on the Position of the Polish Government Regarding the European Commission's Proposal of 4 July 2008 for a Council Directive on the Implementation of the Principle of Equal Treatment of Persons Irrespective of Religion or Belief, Disability, Age, or Sexual Orientation*, Warsaw 2016, 5; Council of the European Union, "Outcome of Proceedings of the Council Meeting," Brussels 2016, 5.

or ethnic grounds.[29] However, several Member States have decided to go beyond the requirements of EU law and have extended protection beyond the workplace. This ensures that lesbians, gays, bisexuals, and transgender persons (LGBT) are protected in many other areas of social life, such as education, social protection, social security and healthcare, and access to goods and services, including housing. In eight Member States (Belgium, Bulgaria, Germany, Spain, Austria, Romania, Slovenia, and Slovakia), anti-discrimination laws regarding sexual orientation cover not only employment but also additional areas specified in the Racial Equality Directive.[30] In ten Member States (Latvia, Lithuania, Hungary, the Czech Republic, Ireland, Luxembourg, the Netherlands, Finland, Sweden, and the United Kingdom), anti-discrimination laws have been partially extended to cover other areas beyond employment.[31] In contrast, in Denmark, Estonia, Greece, France, Italy, Cyprus, Malta, and Poland, anti-discrimination laws cover only the areas specified in the Directive on equal treatment in employment and work.[32]

An additional reinforcement in this area is the obligation of Member States to implement Council Directive 2024/1499 of May 7, 2024, on standards regarding the functioning of equality Dobies (...),[33] which requires them to enact the necessary legislative, executive, and administrative provisions to set minimum requirements for the operation of bodies supporting equal treatment. This aims to increase their effectiveness and ensure their independence, thus strengthening the application of the principle of equal treatment, as derived from Council Directive 2000/78/EC, among others. Most anti-discrimination directives require Member States to designate

29 Schiek, *European Union Non-Discrimination Law*, 112–5.

30 European Union Agency for Fundamental Rights, "Comparative Analysis of Anti-Discrimination Laws in Europe," Vienna 2021, 30.

31 European Commission, "Report on the Implementation of the Racial Equality Directive," Brussels 2019, 18.

32 Bishop, *The Prohibition of Discrimination in the EU*, 20.

33 Council Directive 2024/1499 of 7 May 2024 on the Standards for the Operation of Equality Bodies in the Field of Equal Treatment Irrespective of Racial or Ethnic Origin, Equal Treatment in Employment and Occupation Irrespective of Religion or Belief, Disability, Age, or Sexual Orientation, Equal Treatment of Women and Men in Social Security Matters, and in Access to and Provision of Goods and Services, and Amending Directives 2000/43/EC and 2004/113/EC (O.J.E.C. L1499, 29 May 2024).

a body or bodies responsible for promoting equal treatment,[34] including analyzing, monitoring, and supporting equal treatment of all persons without discrimination on grounds covered by the respective directives.[35] However, such a requirement was not included in Council Directive 2000/78/EC. Although it does not mandate Member States to designate equality bodies to address issues within its scope, in most Member States, equality bodies have competencies in these matters under national law.[36] Nevertheless, this is not the case in all Member States, which leads to varying levels of protection against discrimination in areas covered by this directive across the Union. Therefore, Council Directive 2024/1499 should apply to the work of equality bodies in matters within the scope of Directive 2000/78/EC. The minimum requirements set out in this directive pertain solely to the functioning of equality bodies and should not extend beyond its material and personal scope.

It should be emphasized that the existing anti-discrimination directives form the basis of the EU's system for combating discrimination, primarily in the fields of employment and work. However, issues of unequal treatment still persist in many other areas, such as education, access to goods and services, and healthcare. In the EU legal system, except for the sphere of employment, there is no uniform minimum level of protection for entities affected by discriminatory actions, which negatively impacts decisions in individual Member States.

2. Case Law

Finally, the prohibition of discrimination based on sexual orientation, as an aspect of human rights protection, is reflected in the Universal Declaration of Human Rights.[37] Although this declaration does not explicitly list sexual orientation as a protected category, Article 2 clearly emphasizes

[34] Such an obligation is provided for in Directives 2000/43/EC, 2004/113/EC, 2006/54/EC, and 2010/41/EU.

[35] European Union Agency for Fundamental Rights, "Comparative Study on Equality Bodies," Vienna 2020, 10.

[36] Schiek, *European Union Non-Discrimination Law*, 67.

[37] Eric Heinze, "Sexual Orientation and International Law: A Study in the Manufacture of Cross-Cultural 'Sensitivity'," *Michigan Journal of International Law Michigan Journal of International Law* 22, no. 2 (2001): 285.

equality and protection against all forms of discrimination. This indicates that all people should be treated equally, regardless of personal or social differences, which includes sexual orientation. Similarly, the International Covenant on Civil and Political Rights (ICCPR) expands protections against discrimination in international law. The United Nations Human Rights Committee, responsible for monitoring ICCPR compliance, has underscored that the term "other status" in Article 26 includes sexual orientation, effectively establishing a prohibition of discrimination on this ground. In the well-known 1994 Toonen v. Australia judgment,[38] a human rights activist challenged Tasmania's laws criminalising consensual homosexual acts among adults, arguing that these laws violated his rights to privacy and non-discrimination under the ICCPR. The UN Human Rights Committee sided with Toonen, finding that Tasmania's criminalization of homosexual acts indeed infringed on Article 17 of the ICCPR, which protects the right to privacy. Notably, the Committee also ruled that Article 26, which prohibits discrimination based on "other status," includes sexual orientation.

This decision interpreted sexual orientation as a characteristic protected against unequal treatment in international law. The Committee emphasized that public morality could not justify limiting fundamental human rights, such as the right to privacy and the prohibition of discrimination against homosexual individuals. They noted that penalizing intimate relations, even if driven by social or religious norms, constitutes unwarranted interference in individuals' private lives. As a result of this ruling, Australia was obligated to revoke criminal laws targeting homosexual individuals, and Tasmania ultimately became the last state in the country to decriminalize homosexuality in 1997. The Toonen v. Australia decision was groundbreaking, as it set a precedent for LGBT+ rights protection within international human rights frameworks. This decision influenced other countries to adopt an approach recognizing sexual orientation as a protected characteristic, impacting subsequent international human rights case law.

In the European context, the European Convention on Human Rights (ECtHR)[39] plays a key role in establishing legal standards on this issue. Although the Convention does not explicitly list sexual orientation as

[38] Human Rights Committee, 4 April 1994, Toonen v. Australia, Case no. 488/1992.

[39] ECtHR, Convention on Human Rights of 4 November 1950, CETS No. 005.

a protected category, it contains general anti-discrimination provisions. Article 14 of the ECtHR prohibits all forms of unequal treatment, and the ECtHR has repeatedly interpreted this article as extending protection to LGBT+ individuals.[40]

One of the landmark rulings in this area is the Dudgeon v. the United Kingdom[41] case from 1981. In this ruling, the Court determined that the criminalization of homosexuality in Northern Ireland violated the right to privacy and equality. This case was brought by Patrick Dudgeon, a Northern Irish citizen, who challenged the British government's laws that penalized private sexual acts between consenting male adults. Dudgeon argued that these laws infringed on his right to privacy and led to discrimination based on sexual orientation. The ECtHR found that the right to privacy, protected under Article 8 of the ECtHR, also encompasses an individual's sexual life. In its reasoning, the Court emphasized that the unjustified interference in Dudgeon's private life contradicted the principles of a democratic society. Furthermore, the Court ruled that the criminalization of consensual homosexual relations in private was not only disproportionate but also amounted to discrimination.

This ruling was groundbreaking as it established that sexual orientation deserves protection against discrimination. Dudgeon v. the United Kingdom provoded a precedent for later ECtHR decisions concerning LGBT+ rights. The ruling also contributed to the repeal of many restrictive laws across various European countries. Furthermore, this case was among the first to highlight the importance of protecting human rights in the context of sexual orientation, demonstrating how discriminatory laws are inconsistent with international human rights standards. As a result, this judgment strengthened the foundations for ongoing efforts toward equality and respect for the rights of all citizens, regardless of their sexual orientation.

A significant ruling by the ECtHR concerning the discrimination of LGBT individuals in the context of freedom of assembly was

40 See: Paul Johnson, "Sexual Orientation Discrimination and Article 14 of the European Convention on Human Rights: The Problematic Approach of the European Court of Human Rights," *European Human Rights Law Review*, (2023): 552 et seq.

41 ECtHR Judgment of 22 October 1981, Case Dudgeon v. the United Kingdom, application no. 7525/76, hudoc.int.

the Genderdoc-M v. Moldova case.[42] This case involved the organization of an equality march by the Moldovan NGO Genderdoc-M. The Moldovan authorities denied permission for the march, arguing that it could incite riots and pose a threat to public order. The organizers decided to challenge this decision before the ECtHR, claiming that it violated their rights to freedom of assembly and protection against discrimination. The Court ruled that the Moldovan authorities had violated Articles 11 (freedom of assembly) and 14 (prohibition of discrimination) of the European Convention on Human Rights, emphasizing that authorities are obligated to ensure protection for participants in assemblies, particularly for groups representing minorities. This ruling represents an important step toward recognizing the rights of LGBT individuals in Moldova and underscores the responsibilities of states to protect freedom of assembly for all citizens, regardless of their sexual orientation. The Court noted that the proper management of assemblies should be based on respect for diversity and tolerance within society. The Genderdoc-M ruling reaffirms the state's duty to uphold and promote human rights for all citizens, regardless of their sexual orientation.

The ruling in Schalk and Kopf v. Austria[43] is significant for human rights protection, particularly regarding equality and respect for private and family life. The case involved a same-sex couple seeking recognition of their registered partnership as equivalent to marriage after Austria enacted a law allowing registered partnerships in 2010. The couple argued that their rights to family life were being violated due to the lack of formal recognition of their relationship, which they viewed as discriminatory based on sexual orientation. The ECtHR found that Austria had violated Article 8 of the European Convention on Human Rights, which concerns the right to respect for private and family life. The Court acknowledged that while states have some discretion in regulating marriage, they also have an obligation to ensure equal treatment for all citizens, regardless of sexual

[42] ECtHR Judgment of 12 June 2010, Case Genderdoc-M v. Moldova, application no. 9106/06, hudoc.int; ECtHR Judgment of 3 May 2007, Case Bączkowski and others v. Poland, application no. 1543/06, hudoc.int; ECtHR Judgment of 21 October 2010, Case Alekseyev v. Russia, application no. 4916/07, hudoc.int; ECtHR Judgment of 12 May 2015, Case Identoba and others v. Georgia, application no. 73235/12, hudoc.int.

[43] ECtHR Judgment of 24 June 2010, Case Schalk and Kopf v. Austria, application no. 30141/04, hudoc.int; see also: Council of Europe Publishing, "Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe," Jouve, Paris 2011, 92.

orientation. The refusal to recognize the couple's partnership constituted discrimination and infringed on their rights to family life. The Court emphasized that every individual, regardless of orientation, should have access to the same privileges and legal protections as heterosexual couples. This ruling is pivotal as it underscores the importance of equal rights for same-sex couples and reinforces the principles of human rights protection within Europe. It illustrates that discrimination based on sexual orientation is incompatible with the standards set forth in the European Convention on Human Rights.

The issue of respect for private life was also addressed in the case of Fretté v. France.[44] Fretté was a man who sought to adopt children, but his application was rejected by French authorities due to his sexual orientation. It was argued that being homosexual rendered him unfit to be a parent, which Fretté considered discriminatory. The ECtHR ruled that France violated Article 14 (prohibition of discrimination) and Article 8 (right to respect for private and family life) of the European Convention on Human Rights. The Court emphasized that sexual orientation could not be a justification for denying adoption, as this leads to discrimination. It stressed that authorities must assess potential parents based on their ability to provide a suitable environment for children, rather than their sexual orientation. In other words, sexual orientation cannot serve as a basis for limiting rights to respect for family life. This ruling aimed to promote equality and eliminate discrimination, highlighting the need to ensure that all citizens, regardless of sexual orientation, have equal access to rights and privileges.

An analysis of the case law of the ECtHR indicates a growing recognition of LGBT rights in Europe and the obligation of states to ensure equality and respect for human rights. The rulings of the ECtHR affirm that the lack of equality based on sexual orientation leads to violations of fundamental human rights. The Court consistently emphasizes that sexual orientation cannot serve as a basis for limiting human rights. This trend in jurisprudence is significant as it reinforces the idea that all individuals should be

[44] ECtHR Judgment of 26 February 2002, Case Fretté v. France, application no. 36515/97, hudoc.int; see also: International Commission of Jurists, *Sexual Orientation and Gender Identity in Human Rights Law. References from the Council of Europe and the European Union*, Geneva 2007, 74.

entitled to the same rights and protections, irrespective of their sexual orientation. The ECtHR's judgments contribute to a broader understanding of human rights that includes safeguarding the rights of marginalised groups, including the LGBT community.

The case law of the CJEU plays a significant role in the area of the prohibition of discrimination based on sexual orientation. In the case of J.K. vs. TP S.A.,[45] the Court held that national regulations allowing for the refusal to conclude a civil law contract for the provision of services, under which a self-employed person is to perform work personally, if such a refusal is motivated by the sexual orientation of that person, are contrary to Council Directive 2000/78/EC. In this case, the complainant, an audiovisual material installer, collaborated with public television based on a B2B contract.[46] As part of this cooperation, the parties concluded successive contracts for specific work. In December 2017, the complainant and his partner published a holiday clip on YouTube promoting tolerance towards same-sex couples. Shortly after that, the television station cancelled the complainant's shifts and did not conclude further contracts with him, despite previous assurances of continued cooperation. The self-employed individual perceived this as discrimination based on sexual orientation and decided to file a compensation lawsuit against the company. The national court raised doubts about the compatibility of Article 5(3) of the Act on Equal Treatment[47] with EU law, as this provision excludes the freedom to choose the party to a contract from the scope of this Act, and thus from the scope of protection against discrimination provided for in Directive 2000/78/EC, as long as the choice is not based on sex, race, ethnic origin, or nationality.[48]

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45 CJEU Judgment of 12 January 2023, J.K. v. TP S.A., Case C-356/21, ECLI:EU:C:2023:9; see: Anna Kalisz and Robert Krasoń, "Commentary on the Judgment of the Court of Justice of the European Union of 12 January 2023 in Case C-356/21, J.K. v TP S.A.," *Przegląd Sejmowy* 179, no. 6 (2023): 161–76.

46 Marta López, *Discrimination Law in the EU: An Overview* (Cambridge: Cambridge University Press 2021), 45.

47 Act of 3 December 2010 on the Implementation of Certain EU Regulations Concerning Equal Treatment, Journal of Laws 2024, item 834.

48 Article 5 of the Act provides: "The Act does not apply to: 3) freedom of contract, provided it is not based on sex, race, ethnic origin, or nationality."

According to Article 3(1)(a) of Directive 2000/78/EC, within the limits of the Union's competences, this directive applies to all persons, both in the public and private sectors,[49] including public bodies, with respect to conditions for access to employment or self-employment and to occupation, including selection criteria and recruitment conditions, regardless of the sector of activity and at all levels of the professional hierarchy, including promotion.[50] The directive does not refer to the law of the Member States to define the term "conditions for access to employment, self-employment or occupation" contained in this provision. Thus, the scope of this directive covers the conditions for access to all professional activities, regardless of their nature and characteristics.[51] Recent case law has confirmed that Directive 2000/78/EC has a broad scope of application,[52] which is not limited solely to conditions for access to positions held by "workers" within the meaning of Article 45 TFEU.[53] It applies to all persons, both in the public and private sectors, including public bodies, regardless of the sector of activity and at all levels of the professional hierarchy.[54] It should be emphasized that Directive 2000/78/EC was adopted based on Article 13 EC (currently Article 19(1) TFEU), which grants the Union the power to take necessary measures to combat all discrimination, including on the grounds of sexual orientation.[55] Discrimination based on sexual orientation can hinder the achievement of the objectives of the TFEU, particularly in terms of high employment levels, social protection, improving living standards and quality of life, economic and social cohesion, solidarity, and free

49 CJEU Judgment of 26 September 2013, Dansk Jurist- og Økonomforbund v. Indenrigs- og Sundhedsministeriet, Case C-546/11, ECLI:EU:C:2013:603, para. 24.

50 Article 3(1)(a) of Directive 2000/78/EC.

51 Isabella Marengo, *EU Anti-Discrimination Law* (Cambridge: Cambridge University Press, 2019), 57.

52 CJEU Judgment of 23 April 2020, Associazione Avvocatura per i diritti LGBTI v. Ministero della Giustizia, Case C-507/18, ECLI:EU:C:2020:289, para. 39; CJEU Judgment of 2 June 2022, Ligebehandlingsnævnet acting on behalf of A v. HK/Danmark and HK/Privat, Case C-587/20, ECLI:EU:C:2022:419, para. 27.

53 Article 5 of the Treaty on the Functioning of the European Union, consolidated version (O.J.E.C. C326, 26 October 2012).

54 CJEU Judgment of 2 June 2022, Ligebehandlingsnævnet acting on behalf of A v. HK/Danmark and HK/Privat, Case C-587/20, ECLI:EU:C:2022:419, para. 29.

55 CJEU Judgment of 23 April 2020, Associazione Avvocatura per i diritti LGBTI v. Ministero della Giustizia, Case C-507/18, ECLI:EU:C:2020:289, para. 35.

movement of persons. To fall within the scope of Directive 2000/78/EC, professional activity must be genuine and performed within a legal relationship characterized by some degree of stability. Nevertheless, the activity carried out by the claimant constitutes genuine and effective professional activity, performed personally on a regular basis for the same client, allowing the claimant access, in whole or in part, to means of subsistence. Whether the conditions for access to such activity are covered by Article 3(1)(a) of Directive 2000/78/EC does not depend on whether the activity is classified as "employment" or "self-employment."[56] Moreover, the CJEU confirmed that the concept of "conditions for access" to self-employment within the meaning of Article 3(1)(a) of Directive 2000/78/EC can include the conclusion of a contract for specific work. Therefore, the refusal to conclude a contract for specific work with a contractor operating independently on grounds related to the contractor's sexual orientation falls within the scope of this provision and, consequently, within the scope of the directive.

Article 3(1)(c) of Directive 2000/78/EC applies to "employment and working conditions, including dismissals and pay."[57] It should be emphasized that, similar to an employee who may unintentionally lose their job due to "dismissal," a self-employed person may also be forced to cease their activities due to the actions of their client, potentially finding themselves in a particularly difficult situation comparable to that of a dismissed employee.[58] Unlike Article 3(1)(a) of the directive, Article 3(1)(c) does not explicitly refer to self-employment but solely to employment and working conditions. Although the directive does not refer to the law of the Member States to define the term "conditions for access to employment," both the requirements of uniform application of Union law and the principle of equality imply that the content of an EU law provision, which does not contain a clear reference to the law of the Member States for defining its

56 CJEU Judgment of 12 January 2023, J.K. v. TP S.A., Case C-356/21, ECLI:EU:C:2023:9, para. 47.

57 CJEU Judgment of 26 September 2013, Dansk Jurist- og Økonomforbund v. Indenrigs- og Sundhedsministeriet, Case C-546/11, ECLI:EU:C:2013:603, para. 24; Darbouche and van den Bos, *The Law of the European Union*, 105.

58 CJEU Judgment of 20 December 2017, Florea Gusa v. Minister for Social Protection and Others, Case C-442/16, ECLI:EU:C:2017:1004, para. 43.

meaning and scope, should typically be given an autonomous and uniform interpretation throughout the Union.[59] As established in the consistent case law of the CJEU, the protection provided by Directive 2000/78/EC cannot depend on the formal classification of the employment relationship in national law or the choice made at the time of employing a person between one type of contract or another,[60] as the terms used in the directive should be understood broadly. The objective of the directive could not be achieved if the protection it provides against any form of discrimination, particularly on grounds such as sexual orientation, could not ensure the observance of the principle of equal treatment after access to self-employment, particularly concerning the conditions of performing and terminating such activities.

Nevertheless, the Court ruled that it is within the competence of the referring court to determine, in light of all relevant circumstances of the dispute before it, particularly the Act on Equal Treatment, which is solely within its jurisdiction to interpret, whether the exclusion of the free choice of contracting party from the scope of this Act constitutes direct or indirect discrimination based on the claimant's sexual orientation. This is subject to the condition that such discrimination cannot be justified by one of the reasons specified in Article 2(5) of Council Directive 2000/78/EC,[61] which constitutes an exception to the prohibition of discrimination and should be interpreted strictly.[62] The principles established in the directive do not apply to measures that cause differential treatment for one of the reasons listed in Article 1 of the directive, provided that these measures

59 CJEU Judgment of 2 June 2022, Ligebehandlingsnævnet, acting on behalf of A v. HK/Danmark and HK/Privat, Case C-587/20, ECLI:EU:C:2022:419, para. 25.

60 CJEU Judgment of 11 November 2010, Dita Danosa v. LKB Līzings SIA, Case C-232/09, ECLI:EU:C:2010:674, para. 69.

61 This Directive does not affect measures provided for by national laws that are necessary in a democratic society for the protection of public security, the maintenance of public order, the prevention of criminal offenses, the protection of health, and the protection of the rights and freedoms of others.

62 CJEU Judgment of 7 November 2019, Gennaro Cafaro v. DQ, Case C-396/18, ECLI:EU:C:2019:929, para. 42; CJEU Judgment of 22 January 2019, Cresco Investigation GmbH v. Markus Achatzi, Case C-193/17, ECLI:EU:C:2019:43, para. 55.

are necessary to achieve the stated objectives.[63] Thus, Article 5(3) of the Act of December 3, 2010, on the implementation of certain provisions of European Union law regarding equal treatment constitutes such a measure as provided for by national regulations within the meaning of Article 2(5) of Council Directive 2000/78/EC.

On the other hand, Article 5(3) of the Act of December 3, 2010, on the implementation of certain provisions of European Union law appears to uphold the protection of freedom of contract, ensuring the freedom to choose a contracting party, provided that this choice is not based on sex, race, ethnic origin, or nationality. The fact that Article 5(3) of the Equal Treatment Act provides for a certain number of exceptions to the freedom to choose a contracting party indicates that the Polish legislator itself considered that discriminatory actions cannot be deemed necessary to guarantee the freedom of contract in a democratic society. Furthermore, nothing suggests that the situation would be different depending on whether the discrimination is based on sexual orientation or one of the other reasons explicitly mentioned in this provision. Additionally, acknowledging that the freedom of contract allows the refusal to contract with someone due to their sexual orientation would render Article 3(1)(a) of Directive 2000/78/EC ineffective, to the extent that this provision precisely prohibits any discrimination on such grounds concerning access to self-employment. Consequently, the Court rightly noted that Articles 3(1)(a) and (c) of Directive 2000/78/EC preclude a national regulation that results in the exclusion, based on the freedom of choice of the contracting party, from the protection against discrimination granted by this directive, of a refusal, based on a person's sexual orientation, to enter into or extend a contract intended for the performance of specific services by that person within the framework of their self-employed activity.

This ruling is significant as it delineates the boundary between the free choice of the contracting party and the risk of discrimination. The freedom to conduct a business includes the freedom to choose business partners,[64]

63 CJEU Judgment of 7 November 2019, Gennaro Cafaro v. DQ, Case C-396/18, ECLI:EU:C:2019:929, para. 41; CJEU Judgment of 22 January 2019, Cresco Investigation GmbH v. Markus Achatzi, Case C-193/17, ECLI:EU:C:2019:43, para. 54.

64 CJEU Judgment of 21 December 2021, Bank Melli Iran v. Telekom Deutschland GmbH, Case C-124/20, ECLI:EU:C:2021:1035, para. 79; CJEU Judgment of 15 April 2021, Federazione

but it is not an absolute right,[65] as unjustified actions or discriminatory grounds can constitute a limitation on the conditions of access to work for self-employed individuals.

In its judgment C-356/21, the CJEU emphasized the importance of protection against discrimination based on sexual orientation in the workplace. It stated that the prohibition of discrimination should be interpreted broadly to encompass all aspects of working conditions. The Court reinforced the obligation of member states to implement effective measures to combat discrimination, indicating that rights granted under EU law are universal and cannot be weakened by national regulations.

In the case of Dr David L. Parris v. Trinity College Dublin and others,[66] the Court confirmed that a national regulation, which under a professional pension scheme makes the entitlement of surviving registered partners of scheme members to a survivor's pension conditional upon the registered partnership being entered into before the member reaches the age of 60, does not constitute discrimination on the grounds of sexual orientation when national law did not allow the member to enter into a registered partnership before reaching that age. The complainant, David L. Parris, born in 1946, is a citizen of both Ireland and the United Kingdom. He had been in a long-term relationship with a same-sex partner for over 30 years. In 1972, he was employed by the Irish institution, Trinity College Dublin, as a lecturer, and simultaneously became a member of the college's pension scheme. Under this scheme, if a member dies after retirement, the surviving spouse or, from the specified date, the registered partner, is entitled to a lifetime

nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others v. Ministero dello Sviluppo economico, Gestore dei servizi energetici (GSE) SpA, Cases C-798/18 and C-799/18, ECLI:EU:C:2021:280, para. 57.

65 CJEU Judgment of 22 January 2013, Sky Österreich GmbH v. Österreichischer Rundfunk, Case C-283/11, ECLI:EU:C:2013:28, para. 45; CJEU Judgment of 9 September 2004, Kingdom of Spain and Republic of Finland v. European Parliament and Council of the European Union, Cases C-184/02 and C-223/02, ECLI:EU:C:2004:497, w całym tekście przy zakresach stron: pt. zmienić na: paras.as. 51–52; CJEU Judgment of 6 September 2012, Deutsches Weintor eG v. Land Rheinland-Pfalz, Case C-544/10, ECLI:EU:C:2012:526, para. 54.

66 CJEU Judgment of 24 November 2016, David L. Parris v. Trinity College Dublin, Higher Education Authority, Department of Public Expenditure and Reform, Department of Education and Skills, Case C-443/15, ECLI:EU:C:2016:897.

pension equal to two-thirds of the amount due to the member before their death (Rule 5 of the scheme). However, this survivor's pension is paid only if the member entered into marriage or a registered partnership before the age of 60. In 2009, at the age of 63, D. Parris registered his partnership in the United Kingdom, and at the end of 2010, he took early retirement and applied to Trinity College Dublin for the recognition of his registered partner's right to a survivor's pension upon his death. At that time, no provision of Irish law allowed for the recognition of the registered partnership entered into by D. Parris. The Irish Civil Partnership Act, which came into effect in 2011,[67] ruled out any retroactive recognition of civil partnerships registered in another state. According to Section 99 of the Civil Partnership Act, "pension benefits provided for the spouse of a person shall be available on the same terms to the registered partner of that person." At the time of the factual circumstances of this case, only marriages between opposite-sex couples were recognized in Ireland. The recognition of same-sex marriage required a constitutional amendment following a national referendum. Such a referendum was held on May 22, 2015, and the proposal to allow marriage between two people regardless of gender was approved. However, for the amended constitutional provision to become effective, legislative acts had to be adopted. In this regard, according to the submissions by Trinity College Dublin, Irish law has recognized same-sex marriages since November 16, 2015.

The complainant's application was rejected by a decision dated November 15, 2010. Trinity College Dublin's decision was upheld by the Higher Education Authority, which stated that D. Parris had retired before his registered partnership was recognized by the Irish state. The complainant appealed to the Labour Court, which decided to suspend proceedings and refer a preliminary question to the CJEU. The Labour Court essentially sought to determine whether Article 2 of Directive 2000/78/EC should be interpreted to mean that a national regulation, which makes the entitlement of surviving registered partners of members of professional pension schemes to a survivor's pension conditional upon the registered partnership being entered into before the member reaches the age of 60 constitutes

[67] On July 19, 2010, the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 was enacted, which came into force on January 1, 2011.

discrimination on the grounds of sexual orientation when national law did not allow the member to enter into a registered partnership before that age.

The Court has previously recognized that a survivor's pension provided under an occupational pension scheme falls within the scope of Article 157 TFEU. In the circumstances of this case, it should also be considered that the survivor's pension resulting from the employment relationship between D. Parris and his employer falls within the category of "remuneration" as defined by Article 157 TFEU. This assertion is not undermined by the fact that the pension fund, now managed by a national authority, is financed by the Irish state, as the Court has repeatedly indicated that the financing and management conditions of a scheme are not decisive in determining whether a pension scheme falls within the concept of "remuneration."[68] Furthermore, the fact that the pension in question is, by definition, paid not to the employee but to the surviving family member does not undermine such an interpretation, given that the benefit derives from the membership in the insurance scheme of the surviving spouse. Therefore, the pension is granted to the surviving spouse within the context of the employment relationship between the spouse and the employer and is paid due to the spouse's employment.[69] However, a Member State regulation that does not grant the surviving partner the right to a family pension equivalent to that given to the surviving spouse, while national law treats same-sex partnerships as comparable to marriages for the purpose of such a pension, should be regarded as constituting direct discrimination based on sexual orientation within the meaning of Article 1 and Article 2(2)(a) of Directive 2000/78/EC.[70]

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68 CJEU Judgment of 28 September 1994, Bestuur van het Algemeen Burgerlijk Pensioenfonds v. G.A. Beune, Case C-7/93, ECLI:EU:C:1994:350, para. 38; CJEU Judgment of 29 November 2001, Joseph Griesmar v. Ministre de l'Economie, des Finances et de l'Industrie and Ministre de la Fonction publique, de la Réforme de l'Etat et de la Décentralisation, Case C-366/99, ECLI:EU:C:2001:648, para. 37; CJEU Judgment of 12 September 2002, Case C-351/00, ECLI:EU:C:2002:480, para. 43; CJEU Judgment of 26 March 2009, Commission of the European Communities v. Hellenic Republic, Case C-559/07, ECLI:EU:C:2009:198, para. 46.

69 CJEU Judgment of 1 April 2008, Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen, Case C-267/06, ECLI:EU:C:2008:179, para. 45.

70 CJEU Judgment of 1 April 2008, Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen, Case C-267/06, ECLI:EU:C:2008:179, paras. 72–73.

The referring court's decision reveals that on July 19, 2010, Ireland enacted the Civil Partnership Act and that since this act came into force on January 1, 2011, Principle 5 of the pension scheme under review in the main proceedings provides that survivor's pensions are granted to both surviving spouses and surviving registered partners of members. The entitlement to such a benefit, for both surviving spouses and registered partners, is subject to the condition that the marriage or registered partnership was entered into before the member reached the age of 60. This condition is not directly related to the employee's sexual orientation. On the contrary, it is formulated in a neutral manner and applies equally to all employees, regardless of whether they are homosexual or heterosexual, excluding their partners from the benefit of the survivor's pension if the marriage or registered partnership was not concluded before the employee turned 60. Therefore, surviving registered partners are not treated less favourably than surviving spouses with regard to the survivor's pension in the main proceedings, and thus the national regulation concerning this benefit does not result in direct discrimination based on sexual orientation.

From the case file submitted to the Court, it appears that on January 1, 2011, the date the Civil Partnership Act came into force, D. Parris was 64 years old and was already retired. Therefore, his pension rights, which he had acquired for himself and for any surviving spouse or partner, pertain to his period of professional activity, all of which was completed before the Act entered into force. The file also indicates that the registered partnership entered into by D. Parris in the United Kingdom on April 21, 2009, when he was 63 years old, was recognized in Ireland only from January 12, 2011. It is therefore undisputed that at the time the claimant retired, he did not meet the criteria set by the national regulation for his registered partner to qualify for the survivor's pension being considered in the main proceedings. This is because the registered partnership he entered into in the United Kingdom was not yet recognized in Ireland at that time, and even if it had been recognized, such a partnership could not have served as the basis for entitlement to such a benefit, as it was entered into after he turned 60.

Although the claimant's inability to meet this condition is primarily a consequence of the legal situation in Ireland at the time he turned 60, particularly the absence of any legislation recognizing same-sex civil unions at

that time, it must be noted that civil status and resulting benefits fall within the competence of Member States, and EU law does not infringe upon this competence. However, Member States must adhere to Community law, particularly the principle of non-discrimination, when exercising this competence.[71] Member States therefore have the freedom to introduce same-sex marriage or an alternative form of legal recognition of their relationships and to determine, if necessary, the moment from which such marriage or alternative relationship will take effect. As a result, EU law did not obligate Ireland to introduce same-sex marriage or a civil union form before January 1, 2011, nor to grant retroactive effects to the Civil Partnership Act and the regulations adopted under it, nor to establish transitional measures for same-sex couples in relation to the survivor's pension being considered in the main proceedings, in the event that a member of the scheme had already reached the age of 60 when the Act came into force. In these circumstances, the national regulation under consideration in the main proceedings does not result in indirect discrimination based on sexual orientation.

In the present proceedings, the CJEU emphasized the necessity of equal treatment and the prohibition of discrimination based on sexual orientation in all areas of life, not just in employment. The Court clarified that Member States must ensure effective legal protection against discrimination and implement measures that enable individuals to assert their rights. This ruling reinforced the principle that EU law requires comprehensive protection of individuals, promoting equality and safeguarding against discrimination in various contexts.

In the case of Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen,[72] the Court ruled that Articles 1 and 2 of Council Directive 2000/78/EC preclude a national regulation under which a registered partner does not receive a survivor's pension equivalent to that granted to a surviving spouse, where national law treats registered partnerships as comparable

71 CJEU Judgment of 16 May 2006, The Queen, on the application of Yvonne Watts v. Bedford Primary Care Trust and Secretary of State for Health, Case C-372/04, ECLI:EU:C:2006:325, para. 92; CJEU Judgment of 19 April 2007, Aikaterini Stamatelaki v. NPDD Organismos Asfaliseos Eleftheron Epangelmation (OAEE), Case C-444/05, ECLI:EU:C:2007:231, para. 23.

72 CJEU Judgment of 1 April 2008, Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen, Case C-267/06, ECLI:EU:C:2008:179, para. 80.

to marriages in the context of the case at hand. In this case, Tadao Maruko (the complainant) was in a registered partnership with another man under German law. Maruko's partner had been insured with VddB (Pension Fund of German Theaters) since September 1, 1959, and continued to make voluntary contributions during periods when membership was not mandatory. After the death of his partner in 2005, Maruko applied for the so-called widow's pension. VddB refused to award him the pension, arguing that the internal regulations of the fund provide for such pensions only for spouses and do not cover partners in registered partnerships. Maruko contended that VddB's refusal violated the principle of equal treatment, as German legislation has sanctioned such equality between registered partnerships and marriages, notably through the inclusion of Section 46(4) into the Social Security Code, since 2005.[73] Maruko argued that denying him a survivor's pension although his circumstances are the same as those of a surviving spouse constitutes discrimination based on sexual orientation. Moreover, Maruko argued that the refusal to grant the survivor's pension to a surviving registered partner constitutes indirect discrimination under Directive 2000/78/EC, since same-sex couples cannot marry in Germany and therefore cannot access benefits reserved for surviving spouses. He claimed that registered partners and spouses are in a comparable legal situation, which justifies the granting of such a benefit to the surviving partner. Conversely, VddB argued that there is no constitutional obligation to treat marriage and registered partnerships as equivalent from the point of view of social or pension law. According to VddB, registered partnerships are a *sui generis* institution and a new civil status, and thus, the German law does not entail any obligation to equalise the treatment of registered partners and spouses.

The Court confirmed that the survivor's pension in dispute in the national case derives from the employment relationship of the complainant's

[73] Section 46(4) of the Sozialgesetzbuch VI – Gesetzliche Rentenversicherung (Social Security Code – Statutory Pension Insurance) provides: "For the purposes of determining the right to a widow's pension, the conclusion of a registered civil partnership is treated as equivalent to the conclusion of a marriage; a registered civil partnership is treated as a marriage; the surviving partner is treated as a widow or widower; and the partner is treated as a spouse. The termination or annulment of a remarriage corresponds to the termination or dissolution of a new civil partnership."

partner and, consequently, should be classified as "remuneration" and falls within the scope of Council Directive 2000/78/EC. Even though this pension is not, by definition, paid to the employee but rather to the surviving family member, this does not undermine such an interpretation, since the pension is a benefit resulting from the surviving spouse's employment relationship with the employer.[74] Furthermore, the Act on Registered Partnerships of December 15, 2004 (LPartG)[75] contributed to the gradual alignment of the legal regime for registered partnerships with the legal regime for marriage. This legislation introduced amendments to Book VI of the Social Security Code in the form of Section 46(4),[76] which stipulates that for widow's pensions covered by this provision, a registered partnership is treated as equivalent to marriage. However, under VddB regulations, eligibility for the survivor's pension is limited exclusively to surviving spouses, while surviving registered partners are denied this benefit. Consequently, surviving registered partners are treated less favorably with regard to the survivor's pension compared to surviving spouses. If the referring court finds that surviving spouses and surviving registered partners are in a comparable situation concerning the survivor's pension, the national regulation should be considered to directly discriminate based on sexual orientation[77] under Articles 1 and 2(2)(a) of Council Directive 2000/78/EC. The Court explicitly emphasized in its ruling that while it does not have jurisdiction

74 CJEU Judgment of 6 October 1993, Gerardus Cornelis Ten Oever v. Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf, Case C-109/91, ECLI:EU:C:1993:833, paras. 12–13; CJEU Judgment of 17 April 1997, Dimossia Epicheirissi Ilektrismou (DEI) v. Efthimios Evrenopoulos, Case C-147/95, ECLI:EU:C:1997:201, para. 22; CJEU Judgment of 9 October 2001, Pensionskasse für die Angestellten der Barmer Ersatzkasse VVaG v. Hans Menauer, Case C-379/99, ECLI:EU:C:2001:527, para. 18.

75 Act on Registered Civil Partnerships (Gesetz über die Eingetragene Lebenspartnerschaft) of 16 February 2001 (BGBl. 2001 I, p. 266), as amended by the Act of 15 December 2004 (BGBl. 2004 I, p. 3396).

76 "For the purposes of determining the right to a widow's pension, the conclusion of a registered civil partnership is treated as equivalent to the conclusion of a marriage; a registered civil partnership is treated as a marriage; the surviving partner is treated as a widow or widower; and the partner is treated as a spouse. The termination or annulment of a remarriage corresponds to the termination or dissolution of a new civil partnership."

77 Dorota Dzienisiuk, "Dyskryminacja ze względu na orientację seksualną i wyrok ETS w sprawie C-267/06 Tadao Maruko," *Ubezpieczenia Społeczne, Teoria i praktyka* 121, no. 4 (2014): 38.

to intervene in the civil law of individual EU member states, it does have the authority to issue a binding ruling when a member state's law permits unequal treatment based on sexual orientation in the field of employment and occupation.

In Case C-267/06, the CJEU emphasized that the prohibition of discrimination based on sexual orientation also extends to self-employed individuals. This ruling indicates that protection against discrimination should have a broader scope, encompassing not only employment relationships but also other forms of professional activity. The Court highlighted that Member States must ensure effective legal protection measures, which are crucial for realizing the principle of equality in various professional contexts.

In the case of Frédéric Hay v. Crédit Agricole Mutuel de Charente-Maritime et des Deux-Sèvres, the Court ruled that Article 2(2)(a) of Council Directive 2000/78/EC of November 27, 2000,[78] establishing a general framework for equal treatment in employment and occupation, should be interpreted as precluding a collective agreement provision, such as the one under review in the main proceedings, which excludes an employee who enters into a PACS (Civil Solidarity Pact) with a same-sex partner from benefits such as special leave and a salary supplement granted to employees who enter into marriage, where the national law of a member state does not allow same-sex marriages. This is because, given the nature of these benefits and the criteria for granting them, the employee is in a comparable situation to that of an employee entering into marriage.[79]

The complainant, an employee of Crédit Agricole, requested 10 days of special leave and a financial bonus in 2007, which were granted to employees of the bank upon the conclusion of a marriage according to the national collective agreement. This request was made in connection

[78] Article 2(1) and (2)(a) of Directive 2000/78/EC – Concept of Discrimination states: "For the purposes of this Directive, 'the principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1. For the purposes of paragraph 1: (a) direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been, or would be treated in a comparable situation, on any of the grounds referred to in Article 1."

[79] CJEU Judgment of 12 December 2013, Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres, Case C-267/12, ECLI:EU:C:2013:823, para. 48.

with the conclusion of a PACS (Civil Solidarity Pact) with his partner. At that time, the Crédit Agricole collective agreement did not provide for the granting of these benefits for a PACS. Article 20 of the Crédit Agricole national agreement granted employees 10 working days of fully paid leave in the event of marriage, while Article 34 of the agreement entitled employees to a bonus equivalent to one thirty-sixth of their monthly salary for the month preceding the marriage, for each month of their employment. The complainant alleged discrimination based on sexual orientation against the bank in the court proceedings. The national courts of first and second instance dismissed the claim, emphasizing that the benefits the complainant sought were not based on employment status but on changes in civil status. While the French law in 2007 treated marriage and the Civil Solidarity Pact (PACS) differently, during the court proceedings, the legal situation changed as collective agreement rights were granted to PACS partnerships, and same-sex marriages were introduced. The court of first instance ruled that the benefit related to marriage was not connected to employment but to civil status, and that the Civil Code distinguished between marriage and PACS. Although the Crédit Agricole collective agreement was amended to include individuals in PACS, it could not be applied retroactively. The court of second instance concluded that the different treatment of spouses and individuals in PACS did not stem from sexual orientation but from differences in civil status, placing them in different situations. However, it should be noted that legislation concerning civil status falls within the competencies of member states. Nevertheless, according to Article 1 of Council Directive 2000/78/EC, its aim is to combat certain forms of discrimination in employment and occupation, including discrimination based on sexual orientation, to ensure the principle of equal treatment in member states.[80]

Since Articles 20 and 34 of the Crédit Agricole national collective agreement provide for paid leave and a financial bonus for employees who marry, they effectively set standards related to employment conditions, particularly remuneration, as defined by Article 3(1)(c) of Council Directive 2000/78/EC. The concept of remuneration under this provision includes, in particular, all monetary benefits or in-kind payments, whether agreed

[80] CJEU Judgment of 10 May 2011, Jürgen Römer v. Freie und Hansestadt Hamburg, Case C-147/08, ECLI:EU:C:2011:286, para. 38.

upon, present, or future, received by an employee directly or indirectly from an employer as a result of employment, based on an employment contract, statutory provisions, or at the employer's discretion.[81] Therefore, Council Directive 2000/78/EC covers the situation in question in this case. Regarding direct discrimination, Article 2(2)(a) of Council Directive 2000/78/EC stipulates that this form of discrimination occurs when a person is treated less favourably on one of the grounds listed in Article 1 of the Directive, including sexual orientation, than another person in a comparable situation. The situations need not be identical but should be comparable. The comparison should be made in a specific and concrete manner in light of the particular benefit in question.[82]

In this context, the Court has previously ruled concerning registered partnerships under the Gesetz über die Eingetragene Lebenspartnerschaft, that comparisons should focus on the rights and obligations of spouses and registered partners under the relevant national laws, significant in light of the purpose and conditions of the benefit being examined, rather than a general and complete legal equivalence between registered partnerships and marriage.[83] As for benefits related to remuneration or working conditions granted upon the conclusion of a civil relationship such as marriage, like those considered in the main proceedings (i.e., leave and bonus), same-sex couples in a PACS are in a comparable situation to couples who marry since same-sex marriage was not legally available under French law at the time. The Court found that such a situation constituted direct discrimination, stating that if national legal norms provide benefits related to remuneration or working conditions only for employees who marry, while marriage is legally possible in that member state only between opposite-sex individuals, this establishes direct discrimination based on sexual orientation against employees with a homosexual orientation who have entered

81 CJEU Judgment of 6 December 2012, Bundesrepublik Deutschland and Jörg-Detlef Müller v. Karen Dittrich and Others, Cases C-124/11, C-125/11, and C-143/11, ECLI:EU:C:2012:771, para. 35.

82 CJEU Judgment of 10 May 2011, Jürgen Römer v. Freie und Hansestadt Hamburg, Case C-147/08, ECLI:EU:C:2011:286, para. 42; CJEU Judgment of 1 April 2008, Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen, Case C-267/06, ECLI:EU:C:2008:179, paras. 67–69.

83 CJEU Judgment of 10 May 2011, Jürgen Römer v. Freie und Hansestadt Hamburg, Case C-147/08, ECLI:EU:C:2011:286, para. 43.

into a PACS and are in a comparable situation.[84] By recognizing the comparability of the status of spouses and PACS partners under the provisions of Council Directive 2000/78/EC, the Court deemed it significant that at the time relevant to the main proceedings, same-sex couples could not legally marry in France.

In Case C-267/12, the CJEU ruled that discrimination based on sexual orientation is intolerable in any context, including access to self-employment. The Court emphasized that protection against discrimination should encompass various forms of contracts, including employment contracts. This ruling reinforces the principle that EU law requires equal treatment of all individuals, regardless of their employment status, which is crucial for promoting equality in society.

In the case of Jürgen Römer v. Free and Hanseatic City of Hamburg,[85] the Court undertook to determine whether there is discrimination based on sexual orientation when a supplementary pension benefit paid to a partner in a registered partnership is lower than the benefit paid in the case of marriage.

The complainant, Jürgen Römer, employed as an administrative staff member by the city of Hamburg, who has been living permanently with his partner since 1969, entered into a registered partnership with him in 2001 under the German law. In this context, he requested that his supplementary pension be recalculated using a more favorable tax deduction provided for under Class III/0, which would have increased his pension according to the tax provisions applicable to married couples. The Free and Hanseatic City of Hamburg informed the complainant that it would not change the calculation of the pension benefit because, under § 10(6)(1) of the Hamburg State Law on Supplementary Pensions and Benefits for Surviving Family Members of Employees (RGG),[86] only beneficiaries who are

[84] CJEU Judgment of 1 April 2008, Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen, Case C-267/06, ECLI:EU:C:2008:179, para. 73; CJEU Judgment of 10 May 2011, Jürgen Römer v. Freie und Hansestadt Hamburg, Case C-147/08, ECLI:EU:C:2011:286, para. 52.

[85] CJEU Judgment of 10 May 2011, Jürgen Römer v. Freie und Hansestadt Hamburg, Case C-147/08, ECLI:EU:C:2011:286.

[86] The State Law of Hamburg on Supplementary Pension Benefits and Benefits for Surviving Dependents of Employees (Erstes Ruhegeldgesetz der Freien und Hansestadt Hamburg), HmbGVBl. S. 431.

married and not in permanent separation, as well as beneficiaries eligible for family benefits or similar allowances, are entitled to have their pension calculated with reference to Class III/0. Therefore, since the regulations stipulate that only married beneficiaries are eligible for the more favorable pension calculation, the complainant was denied this right. Disagreeing with the authorities' argumentation, the complainant asserted that such provisions are contrary to the principle of non-discrimination based on sexual orientation in employment. In the legal proceedings, he argued that he should be treated as if he were married and that the regulations should be interpreted to include beneficiaries who have entered into a registered partnership under the German law.[87]

The Court first recognized that such benefits fall within the scope of Directive 2000/78/EC and confirmed that the Registered Partnership Act (LPartG)[88] mitigates the differences between marriage and registered partnership. This law was amended by the Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts of December 15, 2004,[89] which significantly aligned the status of registered partnerships with that of marriage. A registered partner is in a legally comparable situation to a married person, so introducing different criteria for accessing such benefits under national law may constitute direct discrimination based on sexual orientation. Furthermore, the Court confirmed that the complainant could not claim the right to equal treatment before the deadline for its implementation had passed. A national provision such as § 10(6)(1) RGG, which provides that a partner in a registered partnership receives supplementary pension benefits at a lower level than a married beneficiary who is not in permanent separation, is also inadmissible under Directive 2000/78/EC[90] if: marriage is reserved for opposite-sex couples in the member state and coexists with registered partnerships, as provided for in the Gesetz über die Eingetragene Lebenspartnerschaft, which is reserved for same-sex couples, and there is

87 Gesetz über die Eingetragene Lebenspartnerschaft (Act on Registered Partnerships) of 16 February 2001, BGBl., p. 266.

88 Gesetz über die Eingetragene Lebenspartnerschaft (Law on Registered Life Partnerships) of 16 February 2001, BGBl. 2001 I, p. 266.

89 Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts (Act on the Revision of the Civil Partnership Law) of 15 December 2004, BGBl. I, p. 3396.

90 Article 1 in conjunction with Article 2 and Article 3(1)(c) of Council Directive 2000/78/EC.

direct discrimination based on sexual orientation, as the registered partner is in a legal and factual situation comparable to that of a married person concerning the benefit in question. The assessment of comparability falls within the competence of the national court and should focus on the relevant rights and obligations of married individuals and those in registered partnerships, regulated under their corresponding institutions, in light of the purpose and conditions of the benefit in question.[91]

The Court also addressed in the ruling the issue of when the complainant could claim the right to equal treatment. In the case where § 10(6)(1) RGG is classified as discriminatory under Article 2 of Directive 2000/78/EC, a person such as the complainant in the national proceedings could have claimed the right to equal treatment as early as after the deadline for the implementation of the directive had passed, that is, from December 3, 2003, without having In Case C-147/08, the CJEU emphasized that discrimination based on sexual orientation in the context of pension policies is unacceptable. This ruling reinforces the principle that protection against discrimination must be guaranteed across various areas of life, including access to pension benefits. The Court indicated that discrimination due to sexual orientation should not result in different levels of legal protection and all individuals should be treated equally, regardless of their orientation.

3. Conclusions

The analysis of the ECtHR rulings regarding the prohibition of discrimination based on sexual orientation leads to several conclusions drawn from the presented judgments. Undoubtedly, in the case of Toonen v. Australia, sexual orientation was formally recognized as a protected category against discrimination within the framework of international human rights. This recognition is reflected in the requirement that member states not only refrain from discriminating against LGBT+ individuals but also actively protect their rights. The Toonen ruling had broad implications for other international human rights instruments, serving as an inspiration for later judgments by the ECtHR, which began to interpret its provisions in the context of sexual orientation. ECtHR judgments, such as Dudgeon v. the United Kingdom

[91] CJEU Judgment of 10 May 2011, Jürgen Römer v. Freie und Hansestadt Hamburg, Case C-147/08, ECLI:EU:C:2011:286, para. 67.

and Schalk and Kopf v. Austria, largely rely on the precedent established by the Toonen ruling. Consequently, many countries began implementing changes in national legislation to align with international norms. In essence, the Toonen v. Australia judgment not only transformed how international law perceives sexual orientation but also had far-reaching consequences for human rights protection. The Dudgeon ruling, in turn, allows for the invocation of Article 14 of the Convention as a basis for protecting the rights of sexual minorities. This entails an obligation for member states to prevent discrimination and ensure equality before the law. The judgments of Dudgeon and subsequent rulings, such as Schalk and Kopf v. Austria and Fretté v. France, form crucial foundations for the argument advocating for the recognition of sexual orientation as a protected category. The Genderdoc-M ruling emphasizes that the rights of LGBT+ individuals are an integral part of the human rights protection system in Europe. The ECtHR clearly indicated that state authorities have a duty to protect all individuals, including sexual minorities, from discrimination and violence. This judgment gains significance as it demonstrates that these rights are not merely optional but are fundamental in the context of human rights protection. The Genderdoc-M ruling highlights the necessity of respecting diversity and tolerance in society, which is foundational for a democratic state. From this perspective, the ECtHR rulings can be viewed as a catalyst for legislative and social changes toward greater acceptance and support for LGBT+ individuals.

The ruling Schalk and Kopf v. Austria sets an important precedent for future equality initiatives, which may be referenced in subsequent cases involving discrimination. It is clear that, in the context of this judgment, sexual orientation should be treated equally alongside other grounds for discrimination. Many countries have begun to adjust their legal frameworks to ensure greater equality. This ruling was a significant factor influencing those changes. The judgment imposed an obligation on states to provide all citizens, regardless of sexual orientation, with access to the same rights afforded to heterosexual couples.

In summary, the case law of the ECtHR regarding the prohibition of discrimination based on sexual orientation plays a crucial role in the protection of human rights in various respects. Through its judgments, the Court establishes precedents that impact not only national legislation but also international standards concerning the rights of LGBT+

individuals.[92] The rulings of the ECtHR compel member states that have signed the European Convention on Human Rights to align their legislation with human rights protection standards. For example, the judgment in the case of Schalk and Kopf highlighted the necessity of equal treatment for same-sex couples, prompting many countries to implement changes in laws governing marriage and partnerships. As the ECtHR develops its case law, it simultaneously shapes new international standards for the protection of human rights.

Nonetheless, the case law of the CJEU has also highlighted several key issues in its rulings. Firstly, it has defined the scope of protection against discrimination. Cases C-356/21 and C-443/15 focus on discrimination in the workplace, emphasising that discrimination based on sexual orientation is explicitly prohibited and that member states must provide effective legal remedies for those affected. In cases C-267/06 and C-267/12, the Court expanded the definition of protection to include self-employed individuals, indicating that they also have the right to protection against discrimination. This is particularly relevant in the context of a developing labour market where many individuals work independently. Therefore, the rulings emphasise the broad scope of protection against discrimination based on sexual orientation, encompassing not only employment but also self-employment and social benefits. Secondly, the CJEU stressed the necessity of applying an autonomous and uniform interpretation of EU law, regardless of national regulations. Judgment C-267/12 confirms that the definition of "conditions for access" to self-employment also includes contracts for specific work, which is crucial for the legal protection of self-employed individuals. Judgment C-147/08 addressed pension policy, where different treatment based on sexual orientation was deemed discriminatory. In this context, the Court indicates that protection cannot vary based on the form of employment. Thirdly, the Court has addressed the obligation of member states to implement effective legal protections, as confirmed in ruling C-443/15. These obligations not only include enacting legal provisions but

[92] See also: Dimitrina Petrova, "The Use of Equality and Anti-discrimination Law in Advancing LGBT Rights," in *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change*, eds. Corinne Lennox and Matthew Waites (London: Human Rights Consortium, Institute of Commonwealth Studies, School of Advanced Study, University of London, 2013), 479.

also ensuring that individuals who experience discrimination have real opportunities to seek justice. Finally, all judgments point to practical implications, as they stress the need for harmonizing national laws with EU legislation. Case C-267/06 illustrates the importance of preventing member states from limiting individual rights based on local regulations that contradict EU directives. Ruling C-147/08 provides context regarding the broad scope of the concept of discrimination, showing that it pertains not only to employment but also to other life areas, such as social policy.

These judgments clearly demonstrate the evolving nature of anti-discrimination law in the European Union and the need for domestic regulations to align with EU requirements. The common message across all judgments is the Court's determination to promote equality and combat discrimination based on sexual orientation, regardless of the form of employment. These guidelines are crucial for equality policy in the EU, placing a responsibility on member states to ensure that all citizens are treated equally and that their rights are respected in accordance with the values of the European Union.

As evidenced by the CJEU's case law, the transposition of EU regulations and the decisions made by competent authorities at the national level regarding the prohibition of discrimination based on sexual orientation are unsatisfactory. A significant obstacle is the restrictive and often incorrect interpretation of EU law and the lack of appropriate mechanisms aimed at implementing protection against discrimination based on sexual orientation at the national level. The idea of gradually introducing relevant national provisions and implementing appropriate practices by member states to strengthen the protection of individual rights, including by means of eliminating all forms of discrimination in employment, was intended to address this issue. Therefore, the statement that "the European Union needs not so much judicial protection of individual rights as progressive human rights policies and their effective implementation" seems misplaced. Effective EU law in the area of prohibition of discrimination cannot be achieved without individual guarantees of protection at the national level.[93]

[93] Philip Alston and Joseph Weiler, "An 'Ever Closer Union' in Need of Human Rights Policy: The European Union and Human Rights," in *The EU and Human Rights*, ed. Philip Alston (Oxford: Oxford University Press, 1999), 3.

An exploration of CJEU case law confirms the application and implementation of national provisions regarding the prohibition of discrimination based on sexual orientation, revealing their disparities with EU law standards. A significant factor contributing to this discrepancy is the creation of national regulations that are inconsistent with EU law, leading to a high risk of their practical application against interested parties, and varying interpretations of the principle of equality by member states, which significantly impacts the implementation of EU law.[94] Following CJEU case law, it must be stated that differences and divergences in the application and enforcement of EU law provisions within national legal systems of member states negatively affect the proper functioning of the principle of non-discrimination on their territories.

National courts and other authorities in member states are required to interpret national law in accordance with the EU law, its content, and purpose, and, as far as possible, to interpret national law in light of EU law provisions to ensure the results prescribed in that law.[95] As was demonstrated by the analysis of CJEU rulings, they do not satisfactorily fulfill their function, leading to violations of subjective rights in the discussed matter. Furthermore, the analysis of existing anti-discrimination provisions confirms that the creation of legal instruments guaranteeing effective legal protection against discrimination, including based on sexual orientation, cannot be sufficiently achieved by member states; better results will be achieved at the EU level. Thus, there is a fully justified need for a revision of legislative acts and administrative practices of member states in this area. Currently, the only mechanism to combat discrimination based on sexual orientation is normative acts adopted under Article 19 TFEU (formerly Article 13 EC), but their limited scope and the inability to shape civil status at the EU level prevent, for example, the recognition of registered partnerships as equivalent to marriages. Therefore, there is a need for a legal act that standardises

94 Christopher McCrudden and Sacha Prechal, "The Concepts of Equality and Non-Discrimination in Europe: A Practical Approach," *Oxford Legal Studies Research Paper*, no. 4 (2011): 1.

95 Agnieszka Sołtys, "Wykładnia prawa krajowego zgodnie z dyrektywami jako środek zapewnienia skuteczności orzeczeniom Trybunału Sprawiedliwości Unii Europejskiej (podjętym w trybie art. 267 TFUE) w polskim porządku prawnym," in *Zapewnienie efektywności orzeczeń sądów międzynarodowych w polskim porządku prawnym*, ed. Andrzej Wróbel (Warsaw: Wolters Kluwer, 2011), 499.

a minimum, uniform level of protection against discrimination across all areas of life, not only within employment and work, which will ensure a balance between the achievement of EU objectives and the competencies of member states.

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Instructions to Perform in Contract Negotiations: Comparative and Interdisciplinary Approach

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Abstract: Contract negotiation is the phase before the conclusion of the main contract. Although contract performance consists in the fulfilment of obligation, and therefore mostly occurs after the conclusion of a contract, in practice, contract negotiators may provide instructions to perform before contract conclusion, particularly in the sectors of national defense, construction and consulting services. This paper examines the legal consequences of instructions to perform provided during negotiations and whether or not they lead to the conclusion of the main contract. According to the legal policy of protection of the weaker party that in law and economics is consistent with the cheapest cost avoider principle and the Gunderson decision in the USA, a conclusion is reached that if the stronger party imposes the instructions to perform on the weaker party, it should be accepted that the main contract is concluded, because the stronger party in these type of cases will mostly be the cheapest cost avoider and should take the risk of non-reliance or incomplete reliance.

1. Introduction

Contract performance consists in the fulfilment of an obligation, which is why it mostly occurs after the conclusion of a contract. At this stage, performance has an important legal function of extinguishing an obligation

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in the narrow sense and obligational relation in a broad sense.[1] However, in practice, contract negotiators may provide instructions to perform before contract conclusion. Instructions to perform in contract negotiations are frequently provided in the defense industry, consulting services, construction services and other similar sectors. For instance, while the contract negotiations are ongoing, it may be the case that one of the negotiators sends instructions to the other party to start the performance and the other party begins preparations such as procuring goods and services and hiring employees in advance for the performance stage of the main contract.

The purpose of this paper is to examine and discuss the legal nature and consequences of instructions to perform in contract negotiations from the perspective of protection of the weaker party which is embraced as a fundamental and social-liberal principle in the law of obligations. The paper analyses the issue with regard to civil law and common law and compares both. There are numerous examples of protection of the weaker party in private law, specifically in the law of obligations. For example, in consumer protection law, weak consumers are protected by consumer law against professional sellers and providers.[2] It can be found in European legislation[3] in the form of formalities and withdrawal rights and also in Turkish consumer legislation.[4] Consumer credit contracts, for

1 It has two exceptions. First, performance does not extinguish an obligation if it is inconsistent with the obligation. Second, in continuous contracts (as in lease and employment contracts), monthly performance does not extinguish the whole obligational relation.

2 For different consumer protection policy models, see: Zeynep Dönmez, "Avrupa Birliği'nde Tüketici Hukuku Alanında Kanunlaştırma Hareketleri ve Tüketicinin Korunması Modelleri," *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi: Özel Sayı Prof. Dr. Cevdet Yavuz'a Armağan* 7, no. 3 (2016): 964–67.

3 Directive (EU) No. 2019/2161 of the European Parliament and of the Council amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernization of Union consumer protection rules, the Unfair Contract Terms Directive 93/13/EEC, the Price Indication Directive 98/6/EC, the Unfair Commercial Practices Directive 2005/29/EC, the Consumer Rights Directive 2011/83/EU.

4 Consumer Protection Law (Law No. 6502), The Product Safety and Technical Regulations (Law No. 7223), Regulation on distance contracts, Regulation on commercial advertisement and unfair commercial practices, Regulation on after-sales services and guarantees, Regulation on electronic commerce, Regulation on consumer arbitration committees.

instance, must be drawn up in writing and the professional party must provide all information on products to consumers including withdrawal rights in doorstep selling and distance sales, and consumers' rights of remedies against defective and unsafe goods and services and other similar information. Another example of the protection of the weak party is the principle of "objective good faith"[5] which is regulated by the civil codes of continental Europe and has the function of adjusting legal norms (*Billigskeitskorrektur*).[6] It finds application in cases where the provisions of the law are inadequate against socio-economic developments.

The remainder of the paper is organized as follows. Section 2 reviews the legal essentials of contract negotiations. In this section, the paper examines the starting moment of negotiations, the documents used in negotiations and the mutual obligations of negotiators. Section 3 discusses the nature and consequences of instructions to perform in terms of pre-contractual liability. Finally, Section 4 concludes.

2. Legal Essentials of Contract Negotiations

The negotiation phase allows parties to "test the feasibility of a mutually beneficial transaction."[7] Contract negotiations are set to be founded on

5 English version of the Swiss Civil Code (Schweizerisches Zivilgesetzbuch, ZGB) uses "good faith" both for Article 2 and Article 3. However, ZGB Article 2 is about objective good faith (principle of honesty) and ZGB Article 3 regulates subjective good faith. Today, the terms "objective" and "subjective" are not used in Turkey to refer to good faith. The term "good faith" in ZGB Article 2 and Turkish Code of Obligations (TCO) Article 2 indicate the "principle of honesty" that matches objective good faith. On the other hand, ZGB, Article 3 and TCO Article 3 regulate "good faith" that matches subjective good faith. Objective good faith and subjective good faith are different in terms of applicability and legal consequences. For detailed information on the difference, see: Hüseyin Hatemi, *Medeni Hukuk'a Giriş* (İstanbul: On İki Levha Yayıncılık, 2020), 187 ff.; Hasan Erman, *Medenî Hukuk Dersleri* (İstanbul: Der Yayınları, 2021), 101 ff.; M. Kemal Oğuzman and Nami Barlas, *Medenî Hukuk*, (İstanbul: On İki Levha Yayıncılık, 2021), 229 ff.

6 Wolfram Mauser, "Billigkeit. Zum Konzept der Modernität im 18. Jahrhundert," *Recherches germaniques*, no. 21 (1991): 49–77.

7 Eleonora Melato and Francesco Parisi, "A Law and Economics Perspective on Precontractual Liability," in *Precontractual Liability in European Private Law*, eds. John Cartwright and Martijn Hesselink (Cambridge: Cambridge University Press, 2009), 431.

mutual reliance[8] (interpersonal and institutional trust)[9] between negotiators that create obligational relations without regard to obligation based on (objective) good faith (Turkish Civil Code (TCC), Article 2).[10] Contract negotiations is the stage that precedes the main contract (promissory transaction, *borçlandırıcı işlem*). In this context, negotiators must act in good faith and not abuse the reliance of other party.[11] Although contract negotiations follow the common practice, except for hand-to-hand sales (*elden satış*) and hand-to-hand gifts (*elden bağışlama*), this phase is not regulated by Turkish or Swiss legislators.[12] However, its legal consequences are associated with pre-contractual liability[13] referred to as *culpa in contrahendo* in the civil law tradition.[14] On the other hand, neither English Law according to the Wal-

8 From a law and economics perspective, reliance of negotiators means "reliance investment" for a prospective contract and "a reliance investment increases both the expected benefits and the expected costs of the transaction" for each negotiator. See: Melato and Parisi, "A Law and Economics," 431–2.

9 Stefanie Jung and Peter Krebs, *The Essentials of Contract Negotiation* (Switzerland: Springer, 2019), 12. See also: John Klein and Carla Bachechi, "Precontractual Liability and the Duty of Good Faith Negotiation in International Transactions," *Houston Journal of International Law* 17, no. 1 (1994): 1–25.

10 Necip Kocayusufpaşaoğlu, *Borçlar Hukukuna Giriş – Hukukî İşlem – Sözleşme* (İstanbul: Filiz Kitabevi, 2017), 9.

11 Rona Serozan, *İfa – İfa Engelleri – Haksız Zenginleşme* (İstanbul: Filiz Kitabevi, 2016), 254–5; Michael Tegethoff, "Culpa in Contrahendo in German and Dutch Law – A Comparison of Precontractual Liability," *Maastricht Journal of European and Comparative Law* 5, no. 4 (1998): 342.

12 However, TCO Article 35 (Swiss Code of Obligations, OR Article 26) and TCO Article 47/1 (OR Article 39) are the legal rules relating to pre-contractual liability. See: M. Kemal Oğuzman and M. Turgut Öz, *Borçlar Hukuku Genel Hükümler* (İstanbul: Vedat Kitapçılık, 2022), 496–7; İlhan Helvacı, *Turkish Contract Law* (Switzerland: Springer International, 2017), 163.

13 As Melato and Parisi states, "the primary problem is therefore identifying a legal rule that would create incentives for optimal reliance, avoiding both under-investment (inefficient because it prevents the maximisation of the total surplus obtainable from the transaction) and over-investment (inefficient because it leads to a waste of resources when negotiations are unsuccessful)." See: Melato and Parisi, "A Law and Economics," 433.

14 Larry A. DiMatteo et al., *International Sales Law: A Critical Analysis of CISG Jurisprudence* (Cambridge: Cambridge University Press, 2005), 33; Gunther Kühne, "Reliance, Promissory Estoppel and Culpa in Contrahendo: A Comparative Analysis," *Tel-Aviv University Studies in Law* 10, (1990): 279–96; Oğuzman and Öz, *Borçlar*, 38 and 495 ff.; Serozan, *İfa*, 252 ff.; Jan Smits, "The Law of Contract," in *Introduction to Law*, eds. Jaap Hage, Antonia Waltermann, and Bram Akkermans (Switzerland: Springer International, 2017), 66; Nili Cohen, "From the Common Law to the Civil Law: The Experience of Israel," in *Precontractual Liability in*

ford and Others v. Miles and Another [1992] 2 AC 128 case[15] (hereinafter the Walford case), nor American Law does not embrace pre-contractual liability.[16] Lord Ackner argued that

> (…) the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest (…). A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of the negotiating parties (…).[17]

It shows that while the position of the common law system corresponds to classical liberalism, the civil law system coincides with social liberalism (*Sozialliberalismus*) in terms of the ideological infrastructure of legal and jurisprudential policy.

It is important to determine the starting point of contract negotiations because the obligations of the negotiators start at that moment. The starting point of contract negotiations is a controversial issue in the doctrine. Opinions on this subject are as follows:

– It starts when one negotiator offers to begin contract negotiations with the other party in order to conclude the main contract.[18]

European Private Law, eds. John Cartwright and Martijn Hesselink (Cambridge: Cambridge University Press, 2009), 400–1.

15 House of Lords, Walford and others v. Miles and another, accessed December 9, 2024, https://www.ius.uzh.ch/dam/jcr:0ad63435-bcb7-490f-ab7b-154d9acc497f/Walford%20v.%20Miles.pdf.

16 Cohen, "From the Common Law," 398. As DiMatteo et al. state, "According to American and English common law, a negotiating party owes no duty of good faith to the other party. One may terminate negotiations in bad faith without liability for the other parties' expenses. One major exception to this freedom of negotiation without liability is promissory estoppel or reliance theory (...) the American Uniform Commercial Code (UCC) mandates good faith only during the performance and enforcement of contracts. Good faith under the civil law system, however, means more than the breaking off of negotiations in bad faith." See: DiMatteo et al., *International Sales Law*, 32. Although the negotiation creates a positive surplus, pre-contractual liability may deter parties from negotiating, because it increases transaction costs that intimidate them. See: Melato and Parisi, "A Law and Economics," 433.

17 House of Lords, Walford and others v. Miles and another, accessed December 9, 2024, https://www.ius.uzh.ch/dam/jcr:0ad63435-bcb7-490f-ab7b-154d9acc497f/Walford%20v.%20Miles.pdf; see also: Smits, "The Law of Contract," 66.

18 Pelin Işıntan, "Sözleşme Müzakereleri" (PhD diss., Galatasaray University, İstanbul 2009), 11.

- It starts with an intention agreement of negotiators to begin contract negotiations.[19]
- It starts with a serious act of a negotiator in order to conclude the main contract.[20]
- It starts with the offeree's positive reaction.[21]
- It starts from the moment that one of the negotiators decides to contact the other negotiator.[22]
- It starts with acts that may lead to concluding the main contract according to law, customary law or local custom.[23]

A presumption should be accepted that contract negotiation starts if a negotiator contacts the other negotiator entering their social contact area. For example, if one of the negotiators enters the social contact area of the other negotiator who is a merchant, contract negotiation is presumed to start from the moment of entering the merchant's social contact area. The presumption must be refuted by the person who enters the merchant's social contact area.[24] On the other hand, if none of the negotiators is a merchant, the negotiation starts when the other negotiator accepts the first negotiator's declaration of negotiation (*müzâkere beyanı*).

Contract negotiations continue until one of the negotiators makes an offer to conclude the main contract. The starting of contract negotiations is not subject to any formal requirements.[25]

Negotiators may prepare a variety of documents some of which are legally binding and others are not. Documents used in negotiations are not *numerus clausus* (limited number), but most preferred documents can

19 Hamdi Yılmaz, "Sözleşme Görüşmelerinde Kusur "Culpa in Contrahendo" ve Sorumluluğun Hukuksal Niteliğinde Yeni Görüşler," *Yargıtay Dergisi* 11, no. 3 (1985): 238.

20 Erhan Adal, *Akit Öncesi Sorumluluk (Culpa in Contrahendo)* (İstanbul: İstanbul University, 1970), 27.

21 Kurt Ballerstedt, "Zur Haftung für culpa in contrahendo bei Geschäftsabschluß durch Stellvertreter," *Archiv für die civilistische praxis* 151, (1951): 506.

22 Işıntan, "Sözleşme Müzakereleri," 11, footnote 13.

23 Rainer Gonzenbach, *Culpa in Contrahendo im schweizerischen Vertragsrecht* (Bern: Verlag, 1987), 34.

24 For example, if (A) enters (B)'s tobacco shop (social contact area) only to ask for the address, then the presumption regarding the conclusion of the contract is refuted.

25 Işıntan, "Sözleşme Müzakereleri," 12.

be listed, such as the letter of intent (*niyet mektubu*), individual contracts (*münferit sözleşmeler*), memorandum of understanding (*mutabakat zaptı*, *Punktationen*), meeting notes (*toplantı notları*), gentlemen's agreement (*centilmen anlaşması*) and instructions to perform (*îfâ tâlimâtları*).

A letter of intent is a text consisting of a unilateral declaration sent by one party to the other during the negotiations, in which it commits itself to start or continue negotiations for the purpose of entering into a contract.[26] Even if the other party accepts the letter of intent, it is not binding, that is, it does not create an obligation for the parties to conclude a contract.[27] However, in some cases, "mutual letters of intent" may become legally binding. For example, it can provide grounds for establishing negotiation contracts or a preliminary contract that is concluded at the negotiation stage and is independent of the original contract. One of the ways used in practice is to prepare the letter of intent by dividing it into two parts – binding provisions and non-binding provisions.[28] The letter of intent is not subject to any formal requirements, but for the purpose of proof, it should be sent in written form.[29]

Negotiators may conclude individual contracts at the stage of contract negotiations. It is important to prevent conflicts that may arise in the future. In addition, if one of the negotiators breaches the obligations arising from the individual contracts, positive damages can be claimed instead of negative damages of *culpa in contrahendo* liability in principle.[30] Individual contracts concluded at the negotiation stage are as follows:[31]

– confidentiality or non-disclosure agreement (clauses *de confidentialité*): it is concluded when one of the parties needs to provide the other party with some information that it wants to be kept confidential;
– a non-negotiation agreement (exclusive negotiation clause, *clause d'exclusivité de la négociation)* – it is a contract stipulating that parallel

[26] Kocayusufpaşaoğlu, *Borçlar Hukukuna Giriş*, 111; Işıntan, "Sözleşme Müzakereleri," 72–3.
[27] Kocayusufpaşaoğlu, *Borçlar Hukukuna Giriş*, 111; Işıntan, "Sözleşme Müzakereleri," 74.
[28] Ibid., 76.
[29] Ibid., 73.
[30] However, in exceptional cases, the court can determine positive damages in *culpa in contrahendo* liability. If the fault of the person causing the damage is at the level of intent or gross negligence and if equity requires it, compensation for positive damage may be requested under *culpa in contrahendo* liability. Kocayusufpaşaoğlu, *Borçlar Hukukuna Giriş*, 9.
[31] Ibid., 170.

negotiations with a competitor should not be conducted for a certain period of time during negotiations;
– agreement regarding how to share the costs of the negotiations.

Negotiators may prepare a memorandum of understanding (*Punktationen*) which is a draft contract that establishes the issues on which they agree at a certain stage of the contract negotiations. As a rule, the draft contract is not binding, it can only be used to interpret the main contract in the future.

Meeting notes which include discussions of the parties are preferred by professionals. They are non-binding, i.e. they do not create any contractual obligations for the parties.

Gentlemen's agreements can be used frequently in corporate and professional commercial relations. They are not legally but morally binding. The main function of Gentlemen's agreements is to ensure that the negotiators can keep each other's commercial reputation under control and such agreements play an important role in the control of commercial ethics.[32]

For negotiators contract negotiations generate obligations that arise from the rule of good faith (TCC Article 2).[33] They are as follows:[34]
– obligation to initiate, conduct and continue the negotiations to the end of the stage;
– confidentiality obligation (financial information, trade secrets, technical secrets, know-how information, information obtained from market research, etc.);[35]
– obligation to share the costs of the negotiations (legal consultancy and supervision fees, travel and accommodation expenses of

[32] Işıntan, "Sözleşme Müzakereleri," 96, fn. 328; Kocayusufpaşaoğlu, *Borçlar Hukukuna Giriş*, 111–2.

[33] DiMatteo et al., *International Sales Law*, 27–8.

[34] Kocayusufpaşaoğlu, *Borçlar Hukukuna Giriş*, 9 and 737; Safa Reisoğlu, *Türk Borçlar Hukuku Genel Hükümler* (İstanbul: Beta Yayıncılık, 2014), 345; Burcu Oğuztürk, *Güven Sorumluluğu* (İstanbul: Vedat Kitapçılık, 2008), 95. For cases from Israel, see: "From the Common Law," 403 ff.

[35] Publicly available information and information held by competitors are not within the scope of trade secrets. See: 11th Civil Division of Turkish Court of Cassation, 28/10/2005, File No. 2005/11731, Decision No. 2005/10513 (www.kazanci.com.tr).

the negotiators, feasibility studies to be carried out for the negotiated transaction, etc.);
- obligation not to engage in parallel negotiations with others (exclusivity, *münhasırlık*, *exclusivité*);
- obligation not to harm the other negotiator;[36]
- obligation to provide correct information (*Pflichten bei Vertrags-verhandlungen*);[37]
- obligation not to commit oneself to an act that is impossible to perform;
- obligation not to terminate negotiations without reasonable justification or reasonable notice period.

If negotiations are individually contracted, breaching these individual contracts is subject to the rules of breach of contract (Turkish Code of Obligations (TCO Article 112 ff.). On the other hand, if negotiations are not individually contracted, breaching the behavioral obligations is subject to the liability of *culpa in contrahendo*. Even though the provisions of TCO Article 112 ff. are also applicable to the liability of *culpa in contrahendo*,[38] it is more advantageous that negotiators should have individually contracted negotiations. After all, the injured negotiator has the right to claim their positive damages, because, in the case of *culpa in contrahendo*, the injured negotiator can only claim their negative damages, but if equity so requires, the judge may increase the compensation to include positive damages.

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36 As Helvacı states, "the negotiating parties must take precautionary measures in order to protect the assets and personal rights of each other." See: Helvacı, *Turkish Contract Law*, 12 and 162.

37 See: Dieter Medicus, *Allgemeiner Teil des BGB* (Heidelberg: Verlag, 2006), 176; Hans Stoll, "Haftungsfolgen fehlerhaften Erklärungen beim Vertragsschluss," in Gerhard Kegel and Marcus Lutter, *Ius inter nationes: Festschrift für Stefan Riesenfeld aus Anlaß seines 75. Geburtstages, Jurist* (Heidelberg, 1983), 275–99. See also: BGE 105 II 75, accessed September 30, 2024, https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=atf%3A%2F%2F105-II-75%3Ade&lang=de&type=show_document&zoom=YES&.

38 However, some scholars stand for the traditional perspective that pre-contractual liability is governed by tort liability rules (TCO Article 49 ff.) because they argue that there is no contract at this stage. See: Hugo Oser and Wilhelm Schönenberger, *Kommentar zum Schweizerischen Zivilgesetzbuch*, Vol. 5, *Das Obligationenrecht, Erster Halbband: Art. 1–183* (Zürich: Schulthess, 1929), Articles 26–39.

Although the parties fail to conclude the contract or a voidable contract, pre-contractual liability continues.[39]

3. Instructions to Perform

While contract negotiations are ongoing, it may be the case that one of the parties sends instructions to the other party to start contract performance and the other party begins preparations for the performance stage of the main contract. Instructions to perform are common and specifically observable in various market sectors, especially the construction and defense industries. The main question is whether the instructions to perform in the negotiation phase lead to the conclusion of the main contract. Some scholars[40] argue that instructions to perform are a separate contract specific to the negotiation phase and providing them does not mean that the main contract is concluded. On the other hand, the author of this article agrees with the opinion which is based on the court decision of Gunderson & Sons, Inc. v. Albert L. Cohn 596 F. Supp. 379, D.C. Mass. 1984[41] (hereinafter: Gunderson case) that the conclusion of a main contract should be accepted in the case of instructions to perform.

In practice, instructions to perform are generally used as a "condition" that the stronger party offers to the other party in order to continue contract negotiations. The weaker party is forced to accept them in order to continue the talks and carry out the instructions to perform in order to conclude the main contract. It is consistent with the social-liberal legal policy that if the performance instructions at the negotiation phase are "imposed" on the weaker party, it is necessary to presume that the main contract has been concluded. On the other hand, if the performance instructions are given as a "recommendation" and not as an "imposition," then the presumption that the main contract has been concluded does not come to the fore. Therefore, if the other/weaker negotiator has fulfilled the recommended instructions to perform and the negotiations have a negative result, the other/weaker

39 Helvacı, *Turkish Contract Law*, 163.

40 Hasan Ayrancı, *Ön Sözleşme* (Ankara: Yetkin Yayınları, 2006), 94; Gül Doğan, *Ön Sözleşme (Sözleşme Yapma Vaadi)* (İstanbul: Yeditepe University, 2006), 83.

41 U.S. District Court for the District of Massachusetts, Gundersen & Son, Inc. v. Cohn, 596 F. Supp. 379 (D. Mass. 1984), accessed June 22, 2024, https://law.justia.com/cases/federal/district-courts/FSupp/596/379/1676951/.

negotiator cannot claim compensation from the person giving instructions. The author's view is consistent with the cheapest cost avoider (least-cost-avoider or best cost avoider) approach according to the economics of law in line with Katz's opinion that

> [f]or purposes of promoting optimal reliance in preliminary negotiations, the metaphor of the least-cost avoider is more useful than the algorithm of the Hand Formula. It is much easier for a tribunal to identify which party was in the better position to make the reliance decision than for the tribunal to make that decision itself after a dispute has arisen.[42]

4. Conclusion

According to *de lege lata* (what is), different legal families provide different solutions, but *de lege ferenda* (what should be) requires optimality, such as optimal pre-contractual reliance and liability for the maximization of social welfare. The author agrees with Melato's and Parisi's view that Calabresi's and Katz's cheapest cost avoider approach is more useful than Bebchuk and Ben Shahar's incentive model regarding searching for intermediate rules, because

> (…) none of the proposed intermediate rules resemble existing legal rules. The analysis is eminently 'normative', suggesting new legal solutions rather than analysing the efficiency of existing rules. For this reason, Bebchuk and Ben-Shahir's model will not be much used in the analysis of the following hypothetical cases.[43]

Therefore, the decision in the Gunderson case seems perfectly justified in stating that if the stronger party imposes the instructions to perform on the weaker party, it should be accepted that the main contract is concluded, because the stronger party in this type of case will mostly be the cheapest cost avoider (especially in the sectors of defense, construction, consulting

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42 Avery Katz, "When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations," *Yale Law Journal* 105, (1996): 1249 and 1271. See also: Bebchuk and Ben-Shahar's model: searching for an efficient "intermediate" rule that is based on parties' incentives for precontractual reliance. Lucian Arye Bebchuk and Omri Ben-Shahar, "Precontractual Reliance," *Journal of Legal Studies* 20, (2001): 423.

43 Melato and Parisi, "A Law and Economics," 439.

services and other similar areas) and should take the risk of non-reliance or incomplete reliance.

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Approaches of the ECtHR and the US Supreme Court to the Conflict Between "The Best Interests of the Child and Parents' Rights" on Home Education (Homeschooling)

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Abstract: Home education (homeschooling), a practice that has been increasingly popular especially since the Covid-19 pandemic, has recently begun to be discussed again in the academic environment. The main questions revolve around whether homeschooling is an alternative to mainstream school education; whether home education serves the child's interests better than conventional school education; whether parents' right to determine the education of their children can be interfered with by the state and what role the state plays in balancing parents' rights and the children's best interests regarding home education. This paper outlines the concept of home education and its criticism in general, and then evaluates the question of balancing parents' rights and the best interests of the child in homeschooling, by taking into account the international instruments that protect the rights of parents and children. In this context, the Convention on the Rights of the Child, as an international human rights treaty that fully recognizes and ensures the rights of children will be looked at in terms of the best interest of the child. The European Court of Human Rights and the US Supreme Court have different approaches to home education practice. In the rest of this paper, home education case law will be analyzed from a comparative perspective. This will be done with reference to the landmark decisions of the European Court of Human Rights and the US Supreme Court in order

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to understand these two judicial authorities' approaches to the conflict between the best interests of the child and parents' rights on homeschooling. In conclusion, evaluations will be provided in line with the jurisprudence of both Courts on cases regarding home education.

1. An Overview of the Concept of Homeschooling

Education provided to children in the comfort of their own homes, rather than in public or private schools, is known as homeschooling (home education). Homeschooling is most often defined as "parent-directed education."[1] In homeschooling, parents typically educate their children themselves or employ tutors. Home education has been a common practice for families throughout history and across various cultures; however, it fell into disfavor as legislation requiring children to attend school was passed in the 19th and 20th centuries. Since then "classroom schooling" or conventional school education has been the most widely accepted form of education in modern societies.[2]

During the COVID-19 pandemic, when schools were temporarily closed to prevent children from contracting the virus, many families began homeschooling their children. Since the pandemic, home education has been on the rise, as distance learning became more accessible and digital learning tools became more widespread. However, this development has also given rise to the question whether homeschooling serves the best interests of the child. The fact that home education is not an alternative to face-to-face education in schools and the possible negative effects of this form of education are still being debated. Indeed, the criticisms raised against homeschooling are noteworthy and they emphasize

1 Brian Day, "Homeschooling Associated with Beneficial Learner and Societal Outcomes but Educators Do Not Promote It," *Peabody Journal of Education* 88, no. 3 (2013): 324; Andrew Bauld, "Considering Homeschooling? Here's What to Know: The Flexibility of Homeschooling Makes It an Attractive Option for Some Parents," US News, May 26, 2022, accessed July 18, 2024, https://www.usnews.com/education/k12/articles/considering-homeschooling-heres-what-to-know.

2 Anna Distefano, Kjell Erik Rudestam, and Robert Silverman, eds., *Encyclopedia of Distributed Learning Archived* (Sage Publications: Thousand Oaks, 2004), 221.

that the practice of unregulated home education poses serious risks to both society and children.

Many factors influence parents' decisions to homeschool their children. Motives for homeschooling have split parents into two main groups, namely, "elective" and "second-choice" homeschoolers.[3] "Elective homeschooling" is based on the belief that families choose to homeschool their children due to moral principles, religious values, faith or specific philosophies or approaches to education.[4] In this context, religious extremism, for example, may lead some parents to keep their children away from conventional schools to prevent exposing them to ideas that contradict their beliefs. However, homeschooling may be an appealing alternative for a variety of reasons other than religious beliefs and convictions. For example, economic circumstances can have a significant impact on decision to homeschool children when parents cannot afford to live in a community where adequately equipped public schools exist.

As for the "second choice" approach, this approach offers an alternative perspective on homeschooling. Some parents decide to homeschool their children in an effort to protect them from potentially harmful situations, such as exposure to illegal substances, harassment, bullying, social pressure, and other types of social challenges that are common in public and private schools.[5] Parents who feel they do not have a safe option for their children may consider homeschooling as an alternative.[6] Homeschooling may also be seen as advantageous for disabled or gifted children whose parents struggle to get the education system to adapt the curriculum to their children's special needs. Parents who are financially able to homeschool may also choose to do so because they believe homeschooling is the best form of education for their children. Some parents find homeschooling

3 Chris Forlin and Dianne Chambers, "Is a Whole School Approach to Inclusion Really Meeting the Needs of All Learners? Home-schooling Parents' Perceptions," *Education Sciences* 13, no. 6 (2023): 1–12.

4 Paula Rothermel, "Can We Classify Motives for Home Education?," *Evaluation and Research in Education* 17, no. 2 (2005): 74–89.

5 Graham Badman, *Report to the Secretary of State on the Review of Elective Home Education in England* (London: The Stationary Office, 2009), 25, 32.

6 Sarah Parsons and Ann Lewis, "The Home-education of Children with Special Needs or Disabilities in the UK: Views of Parents from An Online Survey," *International Journal of Inclusive Education* 14, no. 1 (2009): 67–86.

a desirable option because of its flexibility, which reduces their children's exposure to stress. Finally, the rise in home education may also be a reflection or expression of public distrust in the ability and capacity of educational institutions to meet the needs of children.[7]

On the other hand, criticisms of home education focus on a variety of reasons. It is alleged that many parents choose homeschooling to distance their children from democratic values and ideas that conflict with their religious values and beliefs; that many parents support "racial segregation" and "female subservience" or question science and technology, and therefore choose home education as an ideal option for them. It is also suggested that parents who abuse and neglect their children have the option of keeping them at home without fear that their teachers will report them to child protection authorities.[8] Numerous studies have shown that parents who abuse their children and neglect their education are more likely to use home education as a cover for their abusive behavior.[9] Homeschooling has also been criticized because parents may not have the necessary academic skills to teach their children.

A longstanding criticism of home education is that it isolates children from society and deprives them of experiences, communication skills, and social competences that are essential for thriving in society. Children's interactions with their classmates have a significant impact on the identity-formation process;[10] therefore, keeping children away from their peers may prevent them from experiencing views that differ from what they are taught at home. As a consequence of this, homeschooling may hinder children's ability to develop an identity independent from their parents.[11] Moreover, homeschooled children are more vulnerable to emotional and

7 Mitchell L. Stevens, "The Normalisation of Homeschooling in the USA," *Evaluation & Research in Education* 17, no. 2–3 (2003): 90.

8 Elizabeth Bartholet, "Homeschooling: Parent Rights Absolutism vs. Child Rights to Education & Protection," *Arizona Law Review* 62, no. 1 (2020): 1.

9 Rebecca Webster, "The Relationship Between Homeschooling and Child Abuse," Symposium of University Research and Creative Expression, 2013, 137, accessed July 20, 2024, https://digitalcommons.cwu.edu/source/2013/oralpresentations/137.

10 Emily Buss, "The Adolescent's Stake in the Allocation of Educational Control Between Parent and State," *The University of Chicago Law Review* 67, no. 4 (2000): 1234.

11 Judith G. McMullen, "Behind Closed Doors: Should States Regulate Homeschooling?," *South Carolina Law Review* 54, no. 6 (2002): 75, 85.

physical abuse in their families since they lack the protection of adult supervision outside their own homes.[12]

Children who are educated in a diverse environment are forced to confront prejudices that can help enlighten them about concepts such as "democratic participation, civic responsibility and citizenship."[13] Depriving a child of a school experience has been seen as a rejection of children's rights and failure to fulfill parenting duties and responsibilities.[14] Horace Mann, known as the "Father of American Education,"[15] has mentioned that the only way to ensure the continued existence of a democratic government is to expose children to others who are not like them.[16] Similarly, in its Board of Education v. Pico Decision,[17] the US Supreme Court has put forward that "access to ideas prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."[18]

2. The Issue of Balancing Parents' Rights and the Best Interests of the Child

The legal argument used to support the practice of homeschooling is based on the idea that parents should have authority over their children's growth, experiences, and lives. Universal Declaration of Human Rights Article 26/3 has established the right of parents to determine the education of their children. According to this article, "parents have a prior right to choose the kind of education that shall be given to their children."[19] Parents' rights

12 Robin L. West, "The Harms of Homeschooling," *Philosophy & Public Policy Quarterly* 29, no. 3–4 (2009): 7, 9.

13 Martha Fineman and George B. Shepherd, "Homeschooling: Choosing Parental Rights Over Children's Interests," *University of Baltimore Law Review* 46, no. 1 (2016): 74.

14 Andrew Bainham, *Children: The Modern Law* (Bristol: Family Law, 1999), 542.

15 Barbara Finkelstein, "Perfecting Childhood: Horace Mann and the Origins of Public Education in the United States," *Biography-An Interdisciplinary Quarterly* 13, no. 1 (1990): 7.

16 Mark Groen, "The Whig Party and the Rise of Common Schools: 1837–1854," *American Educational History Journal* 35, no. 1–2 (2008): 251–60.

17 Board of Education v. Pico, 457 U.S. 853 (1982).

18 Ibid. at 868.

19 UN Universal Declaration of Human Rights of 10 December 1948, accessed July 20, 2024, https://www.un.org/en/about-us/universal-declaration-of-human-rights. The International Covenant on Economic, Social and Cultural Rights (ICESCR) Article 13/3 and the International Covenant on Civil and Political Rights (ICCPR) Article 18/4 provides support to parents

are also enshrined in Article 5 and Article 14 of Convention on the Rights of the Child as "States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child."[20] However, this principle should be interpreted to mean that state's obligation to recognize the rights of the parents to guide a child diminishes as the child matures, and, given the "evolving capacities of the child," it should be recognized that parents have limited authority to decide what their children should think, feel or believe.[21] In other words, parents' rights are restricted by the child's developing skills and abilities. The CRC recognizes that children's ability to participate in decision-making processes about their own lives should increase as they grow up. This applies to education as well as other issues. Parental rights should not be seen as the "ownership rights of children as property."[22] However, as the concept of homeschooling practice developed, parental rights began to be perceived as "absolute parental control" over their children's education.[23] In fact, "parent-led home-based education" is a term that many homeschoolers prefer to define their educational endeavors. In this approach, parents supervise and control every aspect of their children's education.[24]

UN Convention on the Rights of the Child (CRC), as the most universally accepted and promptly ratified international human rights instrument that fully recognizes and guarantees the rights of children, is considered to be the cornerstone of children's rights. According to Article 29 of the Convention,

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who prefer to homeschool their children for "religious reasons." See: Michael P. Donnelly, "Religious Freedom in Education: Real Pluralism and Real Democracy Require Real Choices for Parents," *The International Journal for Religious Freedom* 4, no. 2 (2011): 61, 65–6.

20 UN Convention on the Rights of the Child of 20 November 1989, accessed July 20, 2024, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child.

21 Geraldine Van Bueren, *International Law on the Rights of the Child* (Dortrecht: Martinus Nijhoff, 1998), 73, 80.

22 Jeffrey Shulman, "Meyer, Pierce and the History of the Entire Human Race: Barbarism, Social Progress, and (the Fall and Rise of) Parental Rights," *Hastings Constitutional Law Quarterly* 43, no. 2 (2016): 343.

23 Fineman and Shepherd, "Homeschooling: Choosing," 65.

24 Ibid.

> the child has the right to an education that develops their talents to their fullest potential and prepares them for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.[25]

Article 13 of the Convention states that children have "the right to freedom of expression," which includes "freedom to seek, receive and impart information and ideas of all kinds."[26] Isolating children by preventing them access to information that opposes the ideas, views, and values of their parents and depriving them of developing social skills such as "tolerance" and integration into society is contrary to the provisions of Article 13 and Article 29 of the CRC.

Article 12 of the Convention recognizes the children's right to participate in decision-making processes regarding their own lives and states that "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."[27] In the light of this provision, children's voices should be given more consideration when their best interests are the priority in matters such as education; however, Article 12 can be criticized for enabling parents to decide to what extent their children's voices should be taken into account and valued, by authorizing parents to designate whether their children are mature or not, or even to silence their children's voices.[28]

The best interests of the child are considered the core principle of the CRC and it was added to the original version of the CRC as "(…) the best interests of the child shall be the paramount consideration."[29] The argument

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25 United Nations, Convention on the Rights of the Child, Article 29.

26 Ibid., Article 13.

27 Ibid., Article 12.

28 Noam Peleg, "A Children's Rights Dilemma – Paternalism versus Autonomy," in *The Rights of the Child*, ed. Rebecca Adami, Anna Kaldal and Margareta Aspán (Leiden, Boston: Brill, Nijhoff, 2023), 9.

29 UN Economic and Social Council, Commission on Human Rights, Thirty-sixth Session, Item 13 of the Draft Provisional Agenda, "Question of A Convention on the Rights of the Child: Note verbale dated 5 October 1979 addressed to the Division of Human Rights

that parents are always the most qualified individuals to make decisions about their children associates parental preferences with the best interests of the children. It is accurate to say that the majority of parents are aware of their children's best interests and act in accordance with them. However, while some parents act to serve the best interest of their children, some parents are unable or unwilling to do so, for various reasons. In fact, the high rate of severe child mistreatment proves that not every parent is able or willing to prioritize the best interests of their children. Compulsory education laws are implemented because some parents are unable or reluctant to ensure that their children receive a sufficient education. Similarly, child labor laws are enforced because some parents cannot resist the temptation of the potential for higher family income.[30]

The discussion of homeschooling is a unique opportunity for discussing the limits of the rights of parents, the best interests of the child, and also the authority of the state over the education of children.[31] While striking a balance between the best interests of the child and parents' rights to determine the education of their children, courts consider several factors such as the child's academic requirements, their social needs and integration into society, the parents' competence and ability to provide adequate educational materials and guidance, as well as the child's wishes when the child is mature enough to express his/her preferences. The ECtHR and the US Supreme Court have different approaches to the conflict between the best interests of the child and the rights of parents in the context of home education.

by the Permanent Representation of the Polish People's Republic to the United Nations in Geneva" (E/CN.4/1349), 17 January 1980, 2.

30 Anne C. Dailey and Laura A. Rosenbury, "The New Parental Rights," *Duke Law Journal* 71, no. 1 (2021): 98.

31 Rob Reich, "Testing the Boundaries of Parental Authority over Education: The Case of Homeschooling," in *Moral and Political Education*, eds. Stephen Macedo and Yael Tamir (New York: NYU Press, 2001), 275, 280–1.

3. The European Court of Human Rights (ECtHR) Approach to the Conflict between the Best Interests of the Child and Parents' Rights on Home Education (Homeschooling)

The European Convention on Human Rights contains two provisions regarding parents' rights in education. According to Article 8 of the Convention, "Everyone has the right to respect for his private and family life." This right also includes the duty and responsibility of the parents to provide their children with an education in accordance with their beliefs. Article 2 of the First Protocol to the Convention states that

> no person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.[32]

It is alleged that parents' preference to educate their children, and therefore, parents' decision to homeschool their children, is included in the scope of Article 8 and Article 2 of the First Protocol to the Convention.[33]

The ECtHR has given a broad interpretation for "philosophical convictions," and it is similar to the term "belief" in Article 9 of the Convention which protects "freedom of thought, conscience and religion"[34] and stands for the "views that attain a certain level of cogency, seriousness, cohesion, and importance."[35]

The ECtHR has ruled on cases regarding home education. In this context, although the ECtHR has rejected the complaint regarding the refusal of parents to homeschool their children as "manifestly ill-founded" and

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32 Article 2 of the First Protocol: Right to Education (20 March 1952), accessed August 2, 2024, https://www.equalityhumanrights.com/human-rights/human-rights-act/article-2-first-protocol-right-education.

33 Joke Sperling, "Home Education and the European Convention on Human Rights," in *International Perspectives on Home Education*, ed. Paula Rothermel (London: Palgrave Macmillan, 2015), 180.

34 The Council of Europe, European Convention of Human Rights, accessed August 2, 2024, https://70.coe.int/pdf/convention_eng.pdf.

35 ECtHR Judgment of 23 March 1983, Case Campbell and Cosans v. the United Kingdom, application no. 7511/76, 7743/76, § 36, hudoc.int; ECtHR Judgment of 18 December 1996, Case Valsamis v. Greece, application no. 21787/93, § 25, hudoc.int.

has found the application inadmissible,[36] the case of Konrad and Others v. Germany[37] is noteworthy since it has concluded that the absolute ban on homeschooling issued to fulfill compulsory education legislation did not mean that the state had violated parents' rights. In this case, the applicant parents who were affiliated with a conservative Christian group, refused to send their children to public or private schools due to concerns about sex education, the presentation of fairy tales in the classroom, and the rise in physical and emotional bullying among students. They homeschooled their children themselves, following the curriculum of an institution that lacked state recognition as a "private school" but specialized in helping conservative Christian parents with this task. The parents submitted a petition on behalf of their children to be excused from compulsory primary school attendance[38] based on their religious beliefs; however, their request was rejected by the school authorities, and German administrative courts upheld the rejection. After the German Constitutional Court had decided that the parents' right to educate their children and their freedom of religion were not violated by the administrative courts and had refused to admit the constitutional complaint, the parents applied to the ECtHR and complained under Article 8 "Right to respect for private and family life," Article 9 "Freedom of thought, conscience and religion" of the Convention and Article 2 of the First Protocol to the Convention that they were not allowed to homeschool their children in accordance with their religious beliefs and values.[39]

Upon the applicant parents' allegation that their right to educate their children at home in accordance with their religious beliefs, protected by Article 2 of the First Protocol, was violated by not allowing them to homeschool their children, the ECtHR emphasized that since the first sentence of Article 2 of the First Protocol dominates the entire clause, it was necessary to read the Protocol's first sentence, which guarantees everyone's right to education, and the second sentence "together." According to the Court, the parents' right to "respect for their religious and philosophical beliefs"

36 ECtHR Judgment of 11 September 2006, Case Konrad and Others v. Germany, application no. 35504/03, Section "The Law", § 20, hudoc.int.

37 Ibid.

38 Ibid., Section "The Facts/The Circumstances of the Case," § 1–4.

39 Ibid., Section "Complaints."

was also embedded in the right to education. Therefore, "respect" only applied to beliefs or convictions that did not interfere with the child's right to education.[40] This interpretation has implied that parents could not deprive their children of their right to education on the grounds of their own convictions.

The German Federal Constitutional Court emphasized the significance of integrating minorities into society in order to prevent the emergence of "parallel societies" built on different beliefs.[41] The ECtHR found this approach consistent with its own precedent on "pluralism in democracy"[42] and upheld Germany's ban on home education, despite the right of parents to determine the education of their children, on the grounds that it would lead to the creation of parallel societies and hinder the ability of minorities to integrate.[43]

The ECtHR found that the German courts had reasoned their rulings thoroughly and had highlighted that the acquisition of academic knowledge was not the only significant purpose of primary school education.[44] According to the German courts, society was represented by schools and it was in the best interest of children to attend school. Integration into society and acquisition of new skills were equally essential purposes of primary school education; however, these purposes could not be achieved in the same way by homeschooling, even if it granted children an opportunity to learn at the same level as they would in primary schools. The ECtHR concluded that this assumption was not inaccurate and that it was within the states' margin of appreciation to formulate and interpret standards regarding their education systems.[45]

The German Administrative Court had put forward that the state's duty and responsibility to provide education would also promote the interests of children and contribute to the protection of their personal rights.

40 Ibid., Section "The Law," § 4.

41 Ibid., Section "The Facts/The Circumstances of the Case," § 9.

42 See: ECtHR Judgment of 13 February 2003, Case Refah Partisi (the Welfare Party) and Others v. Turkey, applications nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 89, hudoc.int.

43 ECtHR Judgment of 11 September 2006, Case Konrad and Others v. Germany, application no. 35504/03, Section "The Law," § 7, hudoc.int.

44 Ibid..

45 Ibid., Section "The Facts/The Circumstances of the Case," § 7.

According to the Court, children did not have the maturity to comprehend the ramifications of their parents' decision to homeschool. It was therefore unlikely that they could make a decision in their best interests. The Administrative Court had emphasized that the parents' right to educate their children was not violated since they could homeschool their children after school and on the weekends.[46] After stating that it agreed with the assessment of the Administrative Court,[47] the ECtHR stressed that compulsory attendance at primary school did not deprive the applicant parents of their ability to fulfill their role as educators or to guide their children in a path consistent with their beliefs[48] and that the applicant parents were able to educate their children at home on weekends and after school. Therefore, parents' right to educate their children in accordance with their religious beliefs was not disproportionately interfered with.[49]

The ECtHR determined that any interference with the applicants' rights under Article 8 "Right to respect for private and family life," Article 9 "Freedom of thought, conscience and religion" of the Convention would be justified under Article 8/2 and 9/2 accordingly, as they were required by law and necessary in a democratic society.[50]

In response to the allegations made by the applicant parents that certain families were treated differently in that their children were excused from attending school, in violation of Article 14 "Prohibition of discrimination" of the Convention, the ECtHR noted that the Court had observed that the applicant children were treated differently from other children who were excused from attending school; however this exemption was granted because the circumstances of the other children were considered exceptional and the "exemption from compulsory school attendance in exceptional circumstances" such as situations where children were physically incapable of attending school or where parents had to leave the country for

46 Ibid., § 6.

47 Ibid., Section "The Law," § 5.

48 Ibid., § 8; also see: ECtHR Judgment of 18 December 1996, Case Efstratiou v. Greece, application no. 24095/94, § 32, hudoc.int.

49 ECtHR Judgment of 11 September 2006, Case Konrad and Others v. Germany, application no. 35504/03, Section "The Law," § 8, hudoc.int.

50 Ibid., § 12.

work, was based on the German School Act.[51] Therefore, the ECtHR determined that the alleged distinction could not be regarded as discrimination and that it justified a "difference in treatment."[52] Finally, the ECtHR rejected the application as "manifestly ill-founded" and declared it inadmissible.[53]

In establishing its jurisprudence on Article 2 of the First Protocol, the ECtHR has made an effort to strike a balance between three contradicting interests which are the child's right to education, the parents' right to influence their children's education, and the state's objective of ensuring "pluralism" in education.[54] The ECtHR held that pluralism is essential for maintaining a "democratic society" as defined by the European Convention of Human Rights[55] and that the state has the responsibility to regulate education in accordance with Article 2, as well as to ensure pluralism.[56] The Court added that this role does not preclude a state from enacting laws requiring compulsory education. All that the ECtHR required was that such education be provided in a pluralistic and impartial manner.[57]

Wunderlich v. Germany[58] is a landmark ECtHR case on home education. This remarkable case concerned the revocation of certain parental rights of the applicant parents and the removal of their children from their house for several weeks due to the parents' persistent refusal to send their children to school.[59]

In 2005, the applicant parents refused to enroll their eldest daughter in school and were therefore charged with administrative fines for breaching the rules on compulsory school attendance. They paid the fines; however, they still chose not to send her to school. The family lived abroad for two years between 2008 and 2011 and when they finally moved back to Germany

51 Ibid., § 18.
52 Ibid.
53 Ibid., § 20.
54 Ibid., § 3.
55 Ibid., at 6.
56 Ibid., at 6–7.
57 Ibid., § 7; ECtHR Judgment of 13 September 2011, Case Dojan and Others v. Germany, applications nos. 319/08, 2455/08, 7908/10, 8152/10 and 8155/10, Section "The Law," § 12, hudoc.int.
58 ECtHR Judgment of 24 June 2019, Case Wunderlich v. Germany, application no. 18925/15, hudoc.int.
59 Ibid., § 10–15.

in 2011, they refused to enroll their four children in any school. In 2012, the Education Authority of the State informed the court that the applicant parents were intentionally and continuously refusing to enroll all of their children in school and were putting the children's best interests at risk by raising them in a "parallel world."[60] The Family Court removed the applicant parents' rights "to determine the children's place of residence" and to decide on school-related issues, such as where they would go to school, and assigned these rights to the "Youth Office."[61] The Family Court determined that the parents' failure to enroll their children in school prevented them from developing social skills such as "tolerance" and integration into society.[62] In 2013, the applicant parents' appeal to the Family Court was rejected by the Court of Appeal on the grounds that the interests of the children were in tangible danger since the education provided by their parents could not be seen as compensation for their absence from school.[63] The applicant parents' attempt to submit a constitutional complaint against the court's decision was rejected by the German Constitutional Court.[64]

In 2013, the children were removed from their parents' house and transferred to a "children's home."[65] After the assessments had been completed within a few months and the consent of the applicant parents had been obtained for their children to attend school, the children were sent back home.[66] In 2004, after one year of school attendance, the applicant parents removed their children from school and the Education Authority of the State initiated the legal procedure once again.[67] However, in August 2014, the Court of Appeal returned the right to determine the place of residence of their children to the applicant parents.[68] The decision was based on the fact that the circumstances had changed since the previous decision. According to the Court of Appeal , earlier concerns about physical mistreatment had turned out to be unproven and the evaluation had

60 Ibid., § 10.
61 Ibid., § 12.
62 Ibid.
63 Ibid., § 15.
64 Ibid., § 16.
65 Ibid., § 19.
66 Ibid., § 20–21.
67 Ibid., § 22.
68 Ibid., § 22–23.

concluded that the children were not prevented from attending school by force and that the children's academic knowledge level was "not alarming." As a result, the Court of Appeal determined that the permanent removal of the children, although considered the only means to ensure their school attendance, was no longer proportionate as it would have a worse impact on the children than home education. On the other hand, the Court stressed that its decision should not be interpreted as an approval of homeschooling.[69]

The parents applied to the ECtHR, claiming that the state authorities had violated their "right to respect for private and family life" protected under Article 8 of the Convention by depriving them of their right to determine "the children's place of residence," by giving the aforementioned rights to the youth office, by forcibly removing their children from their homes and by keeping them in an orphanage for weeks.[70]

The ban on homeschooling in Germany[71] was described as the "underlying issue"; however, applicants' objections to this rule were deemed

69 Ibid., § 23.

70 Ibid., § 46; ECtHR Judgment of 13 July 2000, Case Elsholz v. Germany, application no. 25735/94, § 48, 50, hudoc.int; ECtHR Judgment of 10 May 2001, Case T.P. and K.M. v. the United Kingdom, application no. 28945/95, § 70, hudoc.int; ECtHR Judgment of 5 December 2002, Case Hoppe v. Germany, application no. 28422/95, § 48, 49, hudoc.int; ECtHR Judgment of 22 March 2018, Case Wetjen and Others v. Germany, application no. 68125/14, 72204/14, § 68, hudoc.int.

71 The recognition and regulation of home education varies throughout European countries. While some countries accept and permit home education without constraints, some countries such as Albania, Andorra, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Germany, Greece, Lithuania, Montenegro, North Macedonia, San Marino, Sweden and Turkey ban home education and consider it illegal. See: European Commission, "Home Education Policies in Europe Primary and Lower Secondary Education," Luxembourg 2018, accessed August 10, 2024, https://eurydice.eacea.ec.europa.eu/publications/home-education-policies-europe-primary-and-lower-secondary-education; Jaida Stewart, "Homeschool Laws in Europe by Countries," Progressive Schooling, accessed August 10, 2024, https://progressiveschooling.com/homeschool-laws-in-europe-by-countries/. As an example, in Germany, the Netherlands, Spain and Sweden attendance in schools is required by law. See: Daniel Monk, "Regulating Home Education: Negotiating Standards, Anomalies, and Rights," *Child and Family Law Quarterly* 21, no. 2 (2009): 155–84. On the other hand, in the UK, France, Austria, Belgium, Estonia, Italy, Norway, Portugal, Luxemburg, Switzerland, Denmark, Finland and Ireland home education is recognized as legal. Some European countries consider home education legal only in specific cases. For example, in Romania home education is considered legal only when a child is disabled or has special needs that make him/

"inadmissible" based on Konrad and Others v. Germany case.[72] The ECtHR examined the question of whether the measures taken to deprive the parents of some of their rights and to place the children in a children's home[73] were proportionate. The Court found that the administrative fines previously imposed on the parents did not deter the applicant parents from refusing to enroll their children in school and concluded that the decisions of the German Courts were proportionate and acceptable given the facts of the current case.[74] The ECtHR noted that the children were returned to their parents following the completion of the children's academic evaluation and the applicant parents' agreement to enroll their children in school. Therefore, the removal of the children was not carried out in a severe or unusual manner and it did not last longer than was necessary to ensure the best interests of the children.[75]

The ECtHR found that the measures of the authorities were taken with the "legitimate aim of protecting the best interests of the children"[76] and served the purpose of "protecting health or moral and rights and freedoms of others."[77] Regarding the issue of whether the measures were "necessary in a democratic society" and "relevant and sufficient," the Court emphasized that Article 8 required a fair balance between the interests of the child and those of the parents. In striking such a balance, special consideration had to be given to the best interests of the child, which, depending on their "nature and seriousness," could take priority over those of the parents.[78] The Court held that a wide margin of appreciation should be granted, recognizing the necessity of "taking a child into care"[79] and factors such as

her incapable of going to a traditional school and when a qualified and licensed teacher supervises the child. See: European Commission, "Home Education"; Stewart, "Homeschool Laws."

72 ECtHR Judgment of 24 June 2019, Case Wunderlich v. Germany, application no. 18925/15, § 42, hudoc.int.

73 Ibid., § 54.

74 Ibid.

75 Ibid., § 55.

76 Ibid., § 40.

77 Ibid., § 45.

78 Ibid., § 46.

79 ECtHR Judgment of 24 June 2019, Case Wunderlich v. Germany, application no. 18925/15, hudoc.int., § 47; also see: ECtHR Judgment of 27 April 2000, Case K. and T. v. Finland, application no. 25702/94, § 155, hudoc.int.

"traditions relating to the role of the family and to State intervention in family affairs"; yet, in all cases, it was crucial to consider the best interest of the child.[80] The ECtHR mentioned that the potential for harm to the children served as a justification for the German authorities' decision to suspend the parents' rights.[81] The ECtHR relied on the earlier Konrad and Others v. Germany case, in which "avoiding the emergence of parallel societies" and "the importance of pluralism for democracy" were established as "legitimate aims" within the State's margin of appreciation in relation to education systems.[82] Finally, the ECtHR concluded that there were relevant and sufficient grounds for both "social isolation" and "integration into society" concerns.[83]

As to the claim of the applicant parents that the children's learning assessments had proved that they had an adequate level of academic and social competence, as well as a close bond with their parents, the ECtHR found that they had not been given access to this information when the Youth Welfare Office and the courts decided on the temporary deprivation of parental rights and the placement of the children in a child care facility.[84] On the contrary, the courts reasonably presumed that the children had no contact with anyone other than their parents and that there was a risk to their physical and mental well-being based on the applicant father's statement that "the children are the property of their parents."[85] The ECtHR added that the state authorities had a duty and responsibility to protect children and they could not be held accountable if it was later found that legitimate concerns for the child's safety in relation to his/her family members were misinformed.[86] The ECtHR stated that the lack of this information was due

80 ECtHR Judgment of 24 June 2019, Case Wunderlich v. Germany, application no. 18925/15, hudoc.int, § 47; also see: ECtHR Judgment of 10 July 2022, Case Kutzner v. Germany, application no. 46544/99, § 66, hudoc.int.

81 ECtHR Judgment of 24 June 2019, Case Wunderlich v. Germany, application no. 18925/15, hudoc.int., § 49.

82 Ibid., § 50.

83 Ibid., § 51.

84 Ibid., § 52.

85 Ibid.

86 Ibid.; also see: ECtHR Judgment of 30 September 2008, Case R.K. and A.K. v. the United Kingdom, application no. 38000/05, § 36, hudoc.int.

to the applicant parents' refusal to have their children's education level assessed prior to their removal.

Finally, the ECtHR concluded that the best interests of the children and the interests of the applicant parents were proportionately balanced by the German authorities within the margin of appreciation granted to them,[87] and ruled that Article 8 of the Convention was not violated.[88]

In the light of the ECtHR's approach based on its jurisprudence regarding Article 8 of the Convention, the Court takes into account both the government's assessment of necessity and its assessment of the best interests of the child.[89] The ECtHR must establish two requirements to determine that Article 8 is violated: (a) "government interference" in private or family life, and (b) that the interference is not "necessary in a democratic society" for a particular interest or not "in accordance with the law."[90] Under ECtHR's jurisprudence "necessity" corresponds to "a pressing social need and, in particular, (…) it is proportionate to the legitimate aim pursued."[91] The ECtHR allows a wide margin of appreciation for the actions of the state, believing that the state is best qualified to judge social needs.[92]

4. The US Supreme Court's Approach to the Conflict Between the Best Interests of the Child and Parents' Rights on Home Education (Homeschooling)

The US Supreme Court has held that although education is an important function of the state, the right to education is not among the other fundamental rights which are "explicitly" guaranteed by the US Constitution[93] and has avoided establishing a federal right to education under the Fourteenth

87 ECtHR Judgment of 24 June 2019, Case Wunderlich v. Germany, application no. 18925/15, hudoc.int., § 57.
88 Ibid., § 58.
89 Ibid., § 47.
90 Ibid., § 43–44.
91 ECtHR Judgment of 24 March 1988, Case Olsson v. Sweden (no. 1), application no. 10465/83, § 67, hudoc.int.
92 ECtHR Judgment of 24 June 2019, Case Wunderlich v. Germany, application no. 18925/15, § 47, hudoc.int.
93 San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) at 35.

Amendment.[94] The Court has not formulated a constitutional right to homeschooling, nor has it decided a case directly focusing on homeschooling; however, in its landmark decisions of Meyer v. Nebraska[95] and Pierce v. Society of the Sisters,[96] the Court has established parents' right to determine the education of their children and has clarified that these rights were limited by the state's right to enact "reasonable" regulations to assure a sufficient education.[97]

Meyer v. Nebraska case is noteworthy since it is the first time that the US Supreme Court has established that parents have the right to determine their children's education. According to the Court, it was "the natural duty of the parent to give his children education suitable to their station in life."[98] This case concerned a child who was illegally taught the German language at school.[99] Under a Nebraska law at the time, teachers could only teach English in schools while foreign languages could not be taught until after the eighth grade.[100] Those who disobeyed the aforementioned law were fined.[101] Robert Meyer, who was a teacher at a religious school in Nebraska, was convicted of teaching German language to a 10-year-old child in violation of the Nebraska Law.[102] The conviction was upheld by the Supreme Court of Nebraska.[103] However, The US Supreme Court overturned the decision and stated that the Nebraska Law in question had violated the liberty interests guaranteed under Due Process Clause of the Fourteenth Amendment[104] on the grounds that the Law was "unreasonable, arbitrary

94 San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); Amback v. Norwick, 441 U.S. 68 (1979); Plyler v. Doe, 457 U.S. 202 (1982).
95 Meyer v. Nebraska, 262 U.S 390 (1923).
96 Pierce v. Society of Sisters, 268 U.S. 510 (1925).
97 Bartholet, "Homeschooling: Parent Rights," 27.
98 Meyer v. Nebraska at 400.
99 Ibid. at 396.
100 Ibid. at 397.
101 Ibid.
102 Ibid. at 396.
103 Ibid. at 397.
104 Ibid. at 399–403. States are prohibited by the Fourteenth Amendment from enacting laws that restrict "liberty interests" when those laws are not reasonably related to a legitimate state interest.

and, therefore, unconstitutional."[105] The US Supreme Court determined that the word "liberty" in the Fourteenth Amendment had a broader scope than "freedom from bodily restraint"[106] and that Robert Meyer's right to teach, as well as the parents' right to determine their children's education, including "the language in which their child was taught"[107] were within the rights protected under the Fourteenth Amendment[108] and for this reason, the state had to respect the "natural duty of the parent to give his children education."[109]

Two years after the Meyer v. Nebraska judgement, in Pierce v. Society of the Sisters case,[110] the US Supreme Court repeated its ruling in Meyer case, invalidating an Oregon Act that mandated all children to attend public school. Pierce v. Society of the Sisters case concerned a religious school's challenge to an Oregon Act that required all children between the ages of 8 and 16 to attend public school.[111] According to this Act, parents who sent their children to a "private school" were subject to administrative fines and even imprisonment. A business organization in Oregon called "the Society of Sisters" which established and operated religious schools, provided education, and supported orphans, claimed that the Oregon Act violated parents' right to send their children to a school where they would get religious education. The US District Court for the District of Oregon ruled that the aforementioned Oregon Act violated the Due Process Clause of the Fourteenth Amendment, and the US Supreme Court affirmed the decision, overturning the Compulsory Education Act on the grounds that it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[112] The US Supreme Court held that although states were entitled to control and regulate their schools, to set criteria for both teachers and students, and to

105 Ibid. at 403; James W. Tobak and Perry A. Zirkel, "Home Instruction: An Analysis of the Statutes and Case Law," *University of Dayton Law Review* 8, no. 1 (1982): 15.

106 Meyer v. Nebraska at 399.

107 Ralph D. Mawdsley, "The Changing Face of Parents' Rights," *Brigham Young University Education and Law Journal*, no. 1 (2003): 168.

108 Meyer v. Nebraska at 400.

109 Ibid. at 400.

110 Pierce v. Society of Sisters, 268 U.S. 510 (1925).

111 Ibid. at 510/2.

112 Ibid. at 534.

mandate all children of a certain age to attend school, they could not compel children to attend "public schools" and the government could not prohibit parents from choosing a religious school for their children unless there was proof that such a school was unfit to provide an education.[113] The US Supreme Court declared that "rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State"[114] and that the "fundamental theory of liberty" which the US Constitution was based upon, would be violated by any interference by the state to "standardize its children by forcing them to accept instruction from public teachers only."[115]

In Pierce v. Society of the Sisters decision, the US Supreme Court has held that parents' right to determine their children's education includes their right to choose private schools that they believe to be in the best interest of their child.[116]

In both Meyer v. Nebraska and Pierce v. Society of the Sisters cases, the US Supreme Court has ruled that it was unconstitutional under the "Due Process Clause of the Fourteenth Amendment" to interfere with a parent's right to direct his or her children's education.[117] The US Supreme Court's precedent on regulating homeschooling is based on two main principles: the Court has established that parents have the right to determine

113 Ibid.

114 Ibid. at 535.

115 Ibid.

116 Mawdsley, "The Changing Face," 173.

117 In the US Constitution, there are two Due Process Clauses. The first one is seen in the Fifth Amenment as "No person shall be (...) deprived of life, liberty, or property, without due process of law"; the second Due Process Clause is seen in the Fourteenth Amendment as "No State shall make or enforce any law which shall (...) deprive any person of life, liberty, or property, without due process of law." The Due Process Clause of the Fifth Amendment is very similar to that of the Fourteenth Amendment's; however, the Fifth Amendment is applied solely against the federal government. The "substantive due process" has been considered as one of the most contentious areas of the US Supreme Court judication since the Court finds itself competent to apply the Due Process Clause of the Fourteenth Amendment to prohibit specific practices. For instance, the US Supreme Court has decided that rights that are not explicitly stated in the Constitution are protected by the Due Process Clause. See: National Constitution Center, "The Fourteenth Amendment Due Process Clause," accessed August 17, 2024, https://constitutioncenter.org/the-constitution/articles/amendment-xiv/clauses/701.

their children's education and reinforced this right when combined with the freedom of religion.[118]

In 1972, the US Supreme Court, in its landmark Wisconsin v. Yoder case, overturned a state law that required compulsory attendance at public schools on the grounds of "freedom of religion."[119] Due process and freedom of religion are two key constitutional provisions for which homeschooling freedom advocates have sought constitutional protection and the Court has upheld this claim. Parents' right to determine their children's education has been the foundation of the legislation supporting home education. The Wisconsin v. Yoder case is the only case in which the US Supreme Court has ever issued a decision regarding home education. In this case, Jonas Yoder along with two other parents who were members of the Conservative Amish Community were fined for infringing Wisconsin Law which mandated public school attendance for all children until the age of sixteen by refusing to send their children to public or private schools once they completed the eighth grade, asserting that high school education was against their religious convictions.[120] The parents claimed that this law had violated their rights protected under the First and the Fourteenth Amendments since they believed that "children's attendance at high school, public or private, was contrary to the Amish religion and way of life."[121] While the Wisconsin Circuit Court found that the state law was "reasonable and constitutional," the Supreme Court of Wisconsin ruled that it had violated the "free exercise of religion clause" under the First Amendment of the US Constitution.[122] The case was appealed to the US Supreme Court, which ruled that the Amish community's religious convictions and their way of life had been "inseparable and interdependent" and had not been "altered in fundamentals for centuries."[123] The US Supreme Court added that high school education would disrupt Amish children's religious

118 Chad Olsen, "Constitutionality of Home Education: How the Supreme Court and American History Endorse Parental Choice," *Brigham Young University Education and Law Journal*, no. 2 (2009): 411.

119 Wisconsin v. Yoder, 406 U.S. 205 (1972).

120 Ibid. at 205–208.

121 Ibid. at 209.

122 Ibid. at 213, 218.

123 Ibid. at 215–217.

growth and their integration into the Amish way of life by exposing them to ideas and values that were against what they believed by stating "the values and programs of the modern secondary school are in sharp conflict with the fundamental mode of life mandated by the Amish religion."[124] According to the US Supreme Court, another year or two of high school would not provide the benefits of public education that the state used to support the law.[125] The Court argued that forcing Amish children to attend public or private schools after the eighth grade would compel them "either to abandon their belief or to emigrate to another and more tolerant region."[126] Ultimately, the US Supreme Court ruled that states could not compel children to attend school if doing so violated the parents' right to "direct the religious upbringing of their children" protected under the First Amendment and that the exercise of a religious conviction was infringed by the State of Wisconsin's interference. Therefore, the application of Wisconsin's Compulsory School Attendance Law to Amish parents violated the "free exercise of religion clause" under the First Amendment.[127]

The US Supreme Court has asserted that the state's interest in education is not independent of a "balancing process" when it conflicts with fundamental rights, such as those guaranteed under the First Amendment.[128]

The decision in the Wisconsin v. Yoder case has prioritized freedom of religion over the interests of the states and has established the precedent that parents have the authority to educate their children outside of traditional schools. The ruling has been used to justify allowing individuals to receive education outside of conventional schools, including at home. Following the Wisconsin v. Yoder decision, proponents of homeschooling have begun to use this case as the legal ground to legitimize withdrawing their children from the conventional school system.

Wisconsin State and the Amish parents had different interpretations of what was in the best interest of the children. According to the State, the best interest of the child required that children be sent to public and private schools until the completion of the eighth grade for the "preparation of

124 Ibid. at 217.
125 Ibid. at 224–225.
126 Ibid. at 218.
127 Ibid. at 218, 234.
128 Ibid. at 214.

the child for life in modern society as the majority live."[129] On the other hand, the Amish parents believed that it was in the best interest of their children to provide "continuing informal vocational education designed to prepare their children for life in the rural Amish community"[130] in accordance with their religious convictions, which required them to withdraw their children from public and private schools. However; the US Supreme Court has been criticized for deciding the case based merely on the rights of the Amish parents and disregarding the rights of the Amish children, especially their "right to an open future"[131] which is seen as closely related to the "autonomy rights" of the future individual that the child will become.[132]

Justice Douglas has clearly stated in his dissenting opinion that

> if a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today (…). It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny.[133]

In line with Justice Douglas's approach, Justice White has put forward in his concurring opinion that

> it is possible that most Amish children will wish to continue living the rural life of their parents (…). Others, however, may wish to become nuclear physicists, ballet dancers, computer programmers, or historians, and for these occupations, formal training will be necessary.[134]

In this regard, it can be argued that the parents' behavior violates the children's "right to an open future" since it may deprive them of some of the options they might have when they become adults.[135] It can also be argued that in the Wisconsin v. Yoder case the US Supreme Court has not

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129 Ibid. at 222.

130 Ibid. at Syllabus.

131 Joel Feinberg, "The Child's Right to an Open Future," in Feinberg, *Freedom and Fulfillment: Philosophical Essays* (Princeton University Press, 1992), 76–8.

132 Ibid., 77–8.

133 Wisconsin v. Yoder, 406 U.S. 205 (1972) at 245.

134 Ibid. at 240.

135 Feinberg, "The Child's Right," 77–8.

fully recognized that children have fundamental constitutional rights separate from those of their parents.

5. Conclusion

The ECtHR's and the US Supreme Court's approaches to home education differ due to their different interpretations of parents' rights to influence the education of their children, the child's right to education, and the role of the state in public education. The US Supreme Court appears to have a more liberal approach to homeschooling, emphasizing parental rights and freedom of religion in its rulings. The US Supreme Court believes that parents are the best judges of what is in the best interest of their children[136] and generally favors allowing parents to educate their children in line with their values,[137] whether through public schools, private schools[138] or homeschooling.[139] This emphasis on individual rights mirrors the American legal heritage that highly esteems family autonomy and limited government interference.[140] The US Supreme Court has held that state intervention in education and family matters should be kept to a minimum and that individual liberties such as parental rights and freedom of religion should take priority over state-imposed universal education goals.[141]

On the other hand, the ECtHR stresses the role of the state in providing children with an education that is consistent with democratic values, social inclusion, and collective welfare. It is based on the idea that education benefits not only the child but also the community by encouraging social integration and discouraging social isolation.[142] The ECtHR essentially

136 Parham v. J.R., 442 U.S. 584 (1979) at 602–604.

137 Meyer v. Nebraska, 262 U.S. 390 (1923) at 400; Luke Julian, "Parents Versus Parens Patriae: The Troubling Legality of Germany's Homeschool Ban and a Textual Basis for Its Removal," *Emory International Law Review* 36, no. 1 (2022): 233.

138 Ibid., 218; Pierce v. Society of Sisters, 268 U.S. 510 (1925).

139 Eugene Volokh, "Homeschooling: Constitutional Right to Home-School?," Reason Foundation, October 23, 2018, accessed August 27, 2024, https://reason.com/volokh/2018/10/23/constitutional-right-to-home-school/.

140 Wisconsin v. Yoder, 406 U.S 205 (1972) at 232.

141 Ibid. at 214, 215.

142 ECtHR Judgment of 7 December 1976, Case Kjeldsen, Busk Madsen And Pedersen V. Denmark, applications nos. 5095/71, 5920/72, 5926/72, § 50, 53, hudoc.int; ECtHR Judgment of 18 March 2011, Case Lautsi and Others v. Italy, application no. 30814/06, at Concurring

strikes a balance between parental rights, children's rights, and the state's obligation to provide education; however, states have the authority to control or even ban homeschooling when there are legitimate grounds to do so. For instance, in Konrad and Others v. Germany case, the ECtHR upheld Germany's ban on homeschooling and confirmed the state's obligation to ensure the social integration of children and protect pluralism.[143] The ECtHR grants states a significant discretion of "margin of appreciation" in education matters. This can be understood to mean that states can more easily impose restrictions on home education by emphasizing the best interests of the child as well as social values such as social cohesion and the role of the public education system in pluralistic democracies.[144] The ECtHR has held that pluralism is essential to maintaining a "democratic society" as defined by the European Convention on Human Rights. All that the ECtHR requires is that education be provided in a pluralistic and impartial manner. Education is considered by the European states as a way to expose children to a variety of social values and experiences. Therefore, policies and regulations that prioritize the social interests and participation of children as democratic citizens in pluralistic societies, are supported by the ECtHR decisions.

In cases related to home education, the ECtHR analyses whether the child's right to education and social development may be impeded by restrictions on home education. States are recognized by the ECtHR as the ultimate protectors of the children's right to education, ensuring their autonomous development and exposure to views and ideas outside their family environments. This gives states greater flexibility to restrict home education in favor of public education that fosters democratic values and social integration.

The ECtHR is of the opinion that society is represented by schools and that it is in the best interest of children to attend school. Academic knowledge is not the only significant purpose of primary school education and integration into society and learning new skills are equally essential

Opinion Of Judge Rozakis Joined By Judge Vajić (iii); ECtHR Judgment of 29 June 2007, Case Folgerø and Others v. Norway, application no. 15472/02, §15, hudoc.int.

143 ECtHR Judgment of 11 September 2006, Case Konrad and Others v. Germany, application no. 35504/03, Section "The Law", § 7, hudoc.int.

144 Ibid. at "The Law," § 7, 12.

purposes of school education; however, these purposes cannot be achieved in the same way by home education, even if it provides children with the same level of learning as in primary schools. The ECtHR has determined that parents cannot refuse their children's right to education due to their own convictions and has upheld Germany's ban on home education, despite parents' right to determine their children's education on the grounds that it would lead to the creation of parallel societies and hinder the ability of minorities to integrate.[145] According to the ECtHR, refusing to send children to school means putting the best interests of the children at risk by bringing them up in a "parallel society."

The United Nations Convention on the Rights of the Child (CRC) is given considerable significance in the ECtHR's rulings on home education; however, the United States has not ratified and not recognized the CRC so far.[146] The main argument used by individuals against international human rights treaties is that their ratification and recognition could threaten fundamental rights enshrined in the US Constitution and jeopardize the US legal system[147] and that these treaties could restrict the rights of the American citizens.[148] In parallel to this approach, the US policymakers have seen the CRC as a treaty conflicting with "parents' rights" and "privacy rights." In their view, the ratification of the CRC could enable the UN to decide what is in the best interest of the American children. They also argued that the CRC could intrude on family privacy, especially the parents' rights to educate their children.[149] The US Supreme Court, in Meyer v. Nebraska and Pierce v. Society of the Sisters cases, has established that parents have

145 Ibid. at "The Law," § 7.

146 As the most universally accepted and promptly ratified international human rights instrument, CRC has been ratified by 197 countries so far; however, only Somalia and the United States have not ratified this treaty. See: Congressional Research Service, "The United Nations Convention on the Rights of the Child," July 27, 2015, 1, accessed August 28, 2024, https://crsreports.congress.gov/product/pdf/R/R40484/25#:~:text=Opponents%20argue%20that%20ratification%20would,educate%20or%20discipline%20their%20children.

147 Natalie Hevener Kaufman, *Human Rights Treaties and The Senate: A History of Opposition* (Chapel Hill: The University of North Carolina Press, 1990), 149–50.

148 Ann Elizabeth Mayer, "Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution be an Obstacle to Human Rights?," *Hastings Constitutional Law Quarterly* 23, no. 3 (1996): 748–9, supra note 22.

149 Congressional Research Service, "The United Nations Convention on the Rights of the Child," 7–9.

the right to determine their children's education, stating that the word "liberty" in the Fourteenth Amendment of the US Constitution has a broader scope than "freedom from bodily restraint"[150] and that the parents' right to determine their children's education falls within the rights protected under the Fourteenth Amendment and for this reason states have to respect the "natural duty of the parent to give his children education."[151] On the other hand, like any other category of rights, parental rights are limited. In this regard, states may interfere with parents' rights to educate their children if there is substantial evidence or indication of child abuse or neglect.

The ECtHR's approach that refusing to exempt a child from compulsory school attendance does not violate a parent's right to bring up their child in line with their religious convictions stands in stark contrast to that of the US Supreme Court. In fact, the US Supreme Court has ruled in its case law that interference with a parent's right to decide on their children's education is unconstitutional under the Due Process Clause of the Fourteenth Amendment. The US Supreme Court's precedent on the regulation of homeschooling rests on two main pillars, where the Court has established that parents have the right to determine the education of their children and has reinforced this right by linking it to freedom of religion. The US Supreme Court, in its landmark Wisconsin v. Yoder case, has overturned a state law requiring compulsory attendance in public schools on the grounds of "freedom of religion." Due process and freedom of religion are the two key constitutional provisions for which homeschooling freedom advocates have sought constitutional protection, and the Court has upheld this claim. The US Supreme Court has ruled that states cannot compel children to attend school if it violates the parents' right to "direct the religious upbringing of their children" protected under the First Amendment. The decision in the Wisconsin v. Yoder case has given priority to freedom of religion over states' interests and has also established the precedent that parents have the authority to educate their children outside of public and private schools. This case has been used to justify allowing individuals to be educated outside conventional schools, such as at home; however, the US Supreme Court in this case, has given weight to the rights of the parents

150 Meyer v. Nebraska at 399.
151 Ibid. at 400.

and disregarded children's rights, in particular their "right to an open future." The US Supreme Court's approach to prioritizing parental rights over the best interests of the child in educational matters has led to parents being seen as the main decision-makers regarding their children's education. In other words, children's autonomy in education is largely defined through the lens of parental preferences.

In Pierce v. Society of the Sisters judgement, the US Supreme Court has determined that "children were not mere creatures of the state."[152] However, this evaluation should not be interpreted to mean that children are solely the property of their parents. It is essential to remember that every individual, regardless of age, has human rights. The conception that children are "mini human beings with mini human rights,"[153] implying that children either do not have rights at all or have limited rights, is incompatible with contemporary human rights discourse. In this regard, the interpretation of children as independent beings with independent rights should be adopted by the judicial authorities. Children are more prone to mistreatment such as neglect and abuse due to their vulnerability. Therefore, granting significant authority to parents who have dominant power over their powerless children may create danger when the children are homeschooled.

Academic knowledge or compatibility is not the only purpose of school education. School education is a powerful instrument to introduce children to fundamental values and concepts such as democracy, equality, tolerance, diversity, and human rights and to guide them to be righteous and responsible citizens of a democratic society. In light of these facts, the approach that home education can be an alternative to mainstream school education appears rather unconvincing.

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152 Pierce v. Society of Sisters, 268 U.S. 510 (1925) at 535.

153 Benyam Dawit Mezmur, "Based Solely on Their Date of Birth? Rethinking Age Discrimination Against Children Under the Convention on the Rights of the Child," *Harvard Human Rights Journal* 36, no. 2 (2023): 261.

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Biotechnology and Intellectual Property: The Limits of Animal Patentability in the European Union

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Abstract: The study considers the possibility of patenting animal breeds as objects of intellectual property, taking into account the legislation and law enforcement practices of the European Union. It presents a retrospective analysis and detailed interpretation of the conventional and directive provisions related to the patent protection of animal breeds, and characterizes the differences between the latter and the microbiological process. It was observed that the position of the European Patent Office on this issue was not always unanimous, which was manifested in the contradictory interpretation of the relevant, not perfectly formulated, legislative norms. It was analyzed under what conditions the current position of the EU manifests itself in the fact that an animal breed, as a product of an exclusively biological process, cannot be subject to patent protection. In addition, the concepts of "biological" and "technical processes" were interpreted as additional criteria for patentability concerning living organisms. Attention was also paid to the ethical component of biotechnological inventions and the still problematic aspects of animal breeding as possible results of biotechnological activity were emphasized.

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1. Introduction

The breed of animals is a specific object of intellectual property law. The legislation of the European Union (hereinafter referred to as EU) pays little attention to its protection. Patenting is an important aspect of the legal protection of animal breeds as an object of intellectual property because it is thanks to it that it is possible to implement an effective mechanism of legal protection of property and personal non-property rights of their owners.

It is relevant to consider the issue of patent protection of animal breeds in the EU in the context of the EU's unified policy in the field of intellectual property, which provides for the formation of a unified harmonized system of protection of intellectual property rights within this organization. The European Patent Convention of October 5, 1973 (also known as the Convention on the Grant of European Patents, hereinafter referred to as EPC)[1] forms the legal basis of the internal policy of the EU in the field of patent protection of the different objects of intellectual property rights, including animal breeds. Although the EU as a subject of international relations is not its signatory, all EU member states are parties to this convention, which is also the legal basis for issuing European patents. The next core legal document in this area is Directive 98/44/EC on the legal protection of biotechnological inventions (hereinafter referred to as the Directive),[2] adopted by the European Parliament and the Council of the European Union on July 6, 1998. It is already directly part of the legal framework of the EU, as it was adopted by its structural bodies. When considering the issue of patenting animal breeds as an object of intellectual property rights in the EU, it is necessary to focus on these acts, since any EU Directive must be transposed to the legislation of member states, and European patents are issued precisely on the basis of the Convention.

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1 Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973 as revised by the Act revising Article 63 EPC of 17 December 1991 and the Act revising the EPC of 29 November 2000. The new text of the Convention adopted by the Administrative Council of the European Patent Organisation by decision of 28 June 2001 (see: OJ EPO 2001, Special edition No. 4, p. 55) has become an integral part of the Revision Act of 29 November 2000 under Article 3(2), second sentence, of that Act.

2 Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions (O.J.E.C. L213, 30 July 1998), 13–21 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV), accessed June 21, 2024, https://eur-lex.europa.eu/eli/dir/1998/44/oj.

The purpose of the study is to determine the regulatory and legal provisions and practical principles of patent protection of animal breeds as an object of intellectual property law within the EU as well as the demarcation of concepts related to animal breeds in the context of their patent protection. It is also aimed at revealing the main criteria that either prevent or enable patent protection.

The goal of the article will be achieved through the following: an analysis of the legal and practical criteria that determine the patentability of animal breeds in the EU; determination of the evolution of the position of the EU's regulatory and law enforcement authorities regarding the patenting of animal breeds; examination of the criteria that distinguish an animal breed from other patentable objects similar to an animal breed.

In addition to the introduction, the paper consists of a literature review and methodology, results and discussion, conclusions, and bibliographic references.

2. Literature Review

It is worth pointing out that the number of studies in the area of the patenting of animal breeds as an object of intellectual property law is small. Those researchers who have touched on this issue revealed only certain aspects of it and, for the most part, have done that through the prism of patent protection of genetically modified animals. Moreover, the vast majority of existing scientific works in this field were written by representatives of the American legal school.

Robert Kambic, for example, attempted to answer the question of whether genetically modified animals should be patentable, taking the US case law into account. The researcher eventually concluded that recognizing genetically modified animals as patentable by the United States Patent and Trademark Office is the right decision.[3] Rebecca Dresser, researching the legal and ethical aspects of animal patenting, considered both its positive and negative aspects. She also focused on genetically modified animals as potentially patentable subjects and noted that despite the societal benefits

[3] Robert B. Kambic, "Hindering The Progress Of Science: The Use Of The Patent System To Regulate Research On Genetically Altered Animals," *Fordham Urban Law Journal* 16, no. 3 (1988): 444, accessed June 21, 2024, https://ir.lawnet.fordham.edu/ulj/vol16/iss3/3/.

of new life forms, the arguments against patenting were overwhelming.[4] Elizabeth Jozwiak emphasized the need for patent protection of transgenic animals, as this brings many advantages in the field of pharmaceuticals, agriculture, and medicine.[5] David L. Meeker, focusing on the patenting of animal genetics and processes, based on DNA-changes in the pork industry, highlighted the need to improve the procedure for protecting intellectual property rights in this area, in particular through patents.[6] Max F. Rothschild and Lawrence R. Schaeffer researched the patenting of genetic innovations in animal breeding as well. They also directed their attention specifically to the genetic modifications of animals and how various advances in genetic engineering can be patented. However, mainly the American market was taken into account.[7] The extensive work of Michelangelo Temmerman concerned the rights of animal breeders, including through the lens of patent protection. This author concentrated on patenting animals and other living organisms, considering the aspect of bioethics. He stated that in the European Union, as well as in Canada, animal breeds are excluded from patentable objects,[8] but the legal nature of such an exclusion and the existing practice on this matter were not investigated.

European authors also touched on the issue of patenting in animal breeding, emphasizing the need to protect technical inventions in this field.[9]

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4 Rebecca S. Dresser, "Ethical and Legal Issues in Patenting New Animal Life," *Jurimetrics* 28, no. 4 (1988): 399–435, accessed June 21, 2024, https://www.researchgate.net/publication/11698480_Ethical_and_legal_issues_in_patenting_new_animal_life.

5 Elizabeth T. Jozwiak, "Worms, Mice, Cows and Pigs: The Importance of Animal Patents in Developing Countries," *Northwestern Journal of International Law & Business* 14, no. 3 (1994): 620–41, accessed June 21, 2024, https://scholarlycommons.law.northwestern.edu/njilb/vol14/iss3/32/.

6 David L. Meeker, "Patenting Animal Genetics and DNA-Based Processes: Implications for the Pork Industry," *The Professional Animal Scientist* 11, no. 1 (1996): 35–40, accessed June 21, 2024, https://www.sciencedirect.com/science/article/pii/S1080744615325481.

7 Lawrence R. Schaeffer, "Dairy Cattle Test Day Models: A Case Study," in *Intellectual Property Rights in Animal Breeding and Genetics*, eds. Max F. Rothschild and Scott Newman (Oxford, U.K.: CABI Publishing, 2002), 233–46.

8 Michelangelo Temmerman, "Animal Breeders' Rights?" (Working Paper No 2011/24, Swiss national centre of competence in research, May 2011), 1–26, June 21, 2024, http://surl.li/ddfknv.

9 Morten Tvedt, "Patent Protection in the Field of Animal Breeding," *Acta Agriculturae Scandinavica* 57, no. 3 (2007): 105–20, https://doi.org/10.1080/09064700701878554.

Individual authors investigated genetic techniques in livestock breeding, pointing out the significant increase in the techniques applied in genetic industries, which causes the establishment of an agricultural bioeconomy.[10]

Therefore, all authors highlighted the need to introduce patent protection in the field of biotechnology, however, they did not disclose the issue of patent protection of the animal breed as one of the possible results of the development of the genetic industry. That is why this aspect should be studied in detail.

3. Methodology

Achieving the stated goal of the research required an analysis of EU regulations (Convention, Directive) that relate to patent protection of intellectual property rights, including animal breeds, laws of individual EU member states in this area, decisions of the European Patent Office regarding patent applications on animal breeds and other similar objects, as well as other law enforcement acts of this body (in particular, decisions of the Boards of Appeal). It is normative legal acts and acts of application of legal norms that form the basis of the empirical material that is crucial for this study.

The general philosophical method of dialectics was aimed at a holistic understanding of the normative principles of regulation of patent protection of animal breeds as objects of intellectual property law. This method enabled the authors to apply the main rules of materialist dialectics, in particular in the part related to the accumulation of multi-sectoral legal norms in the field of animal breeding and biotechnology. The concretization of the general content of the special legal regulation regarding the breeding of animals was provided by the logical method of defining the concept through the identification of its essential features.

Logical methods of analysis and synthesis were repeatedly used throughout the study. In particular, doctrinal approaches to defining the basic categories of the conceptual apparatus, EU legislative acts, judicial practice in the field of patenting of biotechnology objects, animal breeds, and plant varieties were analyzed. With the help of the synthesis, the general

[10] David Gibbs et al., "Genetic Techniques for Livestock Breeding: Restructuring Institutional Relationships in Agriculture," *Geoforum* 40, no. 6 (2009): 1041–9, accessed June 21, 2024, https://www.sciencedirect.com/science/article/abs/pii/S0016718509000992.

state of regulatory support for the patenting of animal breeds was assessed, and distinctive points in some aspects of this policy were singled out.

The historical-legal special method made it possible to study the background of the modern mechanism of legal regulation of patenting of animal breeds in the EU, in particular, to focus on the evolution of the views of the legislative and law-enforcement bodies of the EU regarding this issue. The formal-legal method became the basis for clarification of the content of legal norms that mediate relations regarding the breeding of animals as an object of intellectual property law. The hermeneutic method was used in the interpretation of different legal sources, and their connection with each other.

The comparative legal method was aimed at characterizing the patent protection of animal breeds both at the EU level and at the level of neighboring member states, as well as comparing the approaches of the EPO to the interpretation of normative provisions in the field of the possibility of patenting animal breeds at different stages. The analogy method helped to apply similar provisions that refer to the patenting of plant varieties to animal breeds as well.

The tasks formulated at the beginning of the research paper determined the choice of the aforementioned methods, which eventually helped to achieve the set tasks.

4. Legal Regulation of the Issue and Its Evolution

At first glance, EU legal regulation in the field of patenting of animal breeds looks quite unambiguous. EPC in its Article 53(b) excludes from patent protection plant and animal varieties or essentially biological processes for the production of plants or animals, with the caveat that this provision does not apply to microbiological processes or their products.[11] The Directive in its Article 4 (part 1) also provides that animal breeds, as well as essentially biological processes for the production of plants or animals, cannot be patented, adding in part 3 of this Article that inventions relating to a microbiological or some technical process or a product obtained using such

[11] EPC Article 53 amended by the Act revising the European Patent Convention of 29 November 2000.

processes may nevertheless be patented.[12] Part 2 of Article 2 indicates that a process of plant or animal production is essentially biological if it consists entirely of natural phenomena such as cross-breeding or selection.[13] An interpretation of Article 3 (part 1) of the Directive, namely: "(…) inventions which are new, which involve an inventive step and which are susceptible of industrial application shall be patentable even if they concern a product consisting of or containing biological material or a process using which biological material is produced, processed or used"[14] allows us to state that a certain invention that meets all the criteria for patentability (novelty, inventive step, and industrial applicability) can relate to an animal, but not be limited to it. In this case, it can be patented even if it concerns a product that includes biological material or a process by which this biological material is produced or used. The analysis of the provisions mentioned above makes it clear that the Directive does not consider the breed of animals separately as a possible object of patenting. Even if the patent concerns an animal breed, it should not be limited to it (a caveat that a patent can protect inventions related to animals, if the technical possibility of such an invention is not limited to a certain type of animal is provided by the Article 4 (part 2)).[15] That is, even if a new breed of animal was bred in the process of genetic modification, it cannot be patented, although genetic modification itself is a biotechnological process (it means that this process can be patented, but not the animal as such); for example, a dog breeder cannot apply for patent protection for a new breed.

The norm that can be interpreted in favor of patent protection of animal breeds is Part 2 of Article 3 of the Directive, which states that biological material isolated from the natural environment or produced by a technical process can be the subject of an invention, even if it previously occurred in nature.[16] These provisions, provided they are interpreted in favor of the patentability of the animal breed itself, still provide scope for a wide interpretation and can be easily used to justify the expediency and legality of patenting a given object. The main condition is the meeting of

12 Directive 98/44/EC.
13 Ibid.
14 Ibid.
15 Ibid.
16 Ibid.

patentability criteria, the involvement of the microbiological, i.e. technical, stage in the creation of the animal breed, as well as the non-limitation of the patent exclusively to the animal breed itself. Even the new breed of dogs, mentioned in the example above, can satisfy these conditions.

Concerning these provisions, patents related to animal breeding were issued, especially methods of selecting animals before and after crossing. Examples include a method for identifying cows with mastitis by bulk genotyping of tank milk (EP2597159A1),[17] as well as DNA markers for meat tenderness (EP1358356A1).[18]

In these patents there is no requirement for the animal breeds themselves. However, depending on the wording of the formula, according to opponents of the issuance of such patents, such patents can be used to control further breeding if the animals in subsequent generations have the genetic characteristics described in the patent. Thus, this type of patent can interfere with traditional animal breeding and be used, for example, to prevent or prohibit farmers from further breeding of animals, in particular, dairy cows (which were discussed in the patents mentioned above).[19]

Interpretation of Article 53(b) of the EPC was repeatedly carried out by the Boards of Appeal (hereinafter referred to as BoA) of the European Patent Office (hereinafter referred to as EPO; the highest judicial body whose task is the uniform application of the provisions of the EPC) in the process of law enforcement. In the T19/90 case, it was held that the exception to patentability under Article 53(b) applies to certain categories of animals but not to animals as such.[20] Obviously, in this context, we are talking about the exclusion from patentability of animal breeds created using an exclusively biological process. However, the EPC and Directive mention animal breeds in general as one of the exclusion options. This was done to

17 Michael Georges, Gregoire Blard, and Wouter Coppieters, "Method for Identifying Cows with Mastitis by Bulk Genotyping of Tank Milk," EU Patent, EP2597159A1, November 28, 2011, accessed June 21, 2024, https://patents.google.com/patent/EP2597159A1/en.

18 William John Barendse, "DNA Markers for Meat Tenderness," EU Patent, EP1358356A1, February 8, 2002, accessed June 21, 2024, https://patents.google.com/patent/EP1358356A1/en.

19 Christoph Then and Ruth Tippe, "European Patents on Plants and Animals – Is the Patent Industry Taking Control of Our Food?," No Patents on Seeds!, 2014, accessed June 21, 2024, https://www.no-patents-on-seeds.org/en/node/285.

20 Decision of Technical Board of Appeal of the European Patent Office 3.3.2 dated 3 October 1990 – T 19/90 (OJ EPO 1990), 476.

emphasize that even a certain modification of an animal, which leads to the creation of a new species, does not make it patentable.

However, the interpretation by the BoA was not unanimous. This was confirmed by two resonant and identical decisions issued in the cases of "Tomatoes II"[21] and "Broccoli II,"[22] which related to the patentability of biological products due to the description of the procedure for obtaining this product (a claim for the product by the process). Here the BoA provided the following interpretation of Article 53(b) of the EPC: "Essentially biological processes for the production of plants or animals" are subject to exclusion from patentability, but not plants and animals obtained with the help of these processes,[23] which enabled breeders to submit applications for obtaining a patent for an animal breed, which in the sense of the BoA is considered a patent for a product (even if it is made with the help of a biological process), and not for this biological process itself. This interpretation allowed the patenting of new breeds of animals, created even by crossbreeding and selection, since the object of patenting is not this process, but the product. In addition, the decision states that a product that is the result of a biological process can be patented under the following conditions:

(1) the declared animal meets other basic patentability requirements, such as novelty (Article 54 of the EPC), inventive step (Article 56 of the EPC), or industrial application (Article 57 of the EPC);[24]
(2) the application contains appropriate language to sufficiently define the claimed product, which in certain situations can be achieved by formulating a product-by-process claim, and;
(3) the patent does not claim a plant variety as such, which is also excluded by Article 53(b).[25]

21 Decision of the Enlarged Board of Appeal of the European Patent Office dated 25 March 2015 – G 2/12 (OJ EPO 2016), A27.
22 Ibid., A28.
23 Ibid.
24 Convention on the Grant of European Patents (European Patent Convention).
25 Decision of the Enlarged Board of Appeal of the European Patent Office dated 25 March 2015 – G 2/12 & G 2/13 (OJ EPO 2016).

This decision refers to varieties of plants, however, by analogy of law, we can apply similar provisions to breeds of animals. Consequently, the last (third) condition indicates that the patentable product should not have the name "breed of animals."

Since then, more than 5,000 patent applications for the breed have been submitted to the EPO, and 3,800 patents have been issued, 120 of which were related to normal selection processes. This state of affairs caused heated discussions and criticism from the public. More than 40 written claims have been submitted on this issue, including from public and governmental institutions (e.g. Austrian Patent Office, Danish Government, EU Commission), plant breeders' associations (e.g. German Plant Breeders' Association, Euroseeds), NGOs, and experts in the field of law.[26]

In response to such an outcry, on July 1, 2017, the BoA supplemented Implementing Regulations to the Convention on the Grant of European Patents by Rule 28(2). It expressed a position already contrary to the previous precedent practice, namely: according to Article 53(b), European patents are not granted in respect of plants or animals exclusively obtained by means of an essentially biological process.[27] The higher legal force of this provision is indicated by Article 164(2) of the EPC, according to which, in case of inconsistency between two opposite standards of the EPO, the norms of the EPC (or additions to the EPC) prevail.[28]

Interestingly, the BoA also noted that "the interpretation given to this legal provision can never be taken as set in stone, as its meaning may change or evolve over time." With this statement, the BoA recognizes the variability of the presented legal positions and indicates the possibility of future evolution of the legislation on this issue.[29]

In its decision G 3/19 "Pepper" of May 14, 2020, the BoA, referring already to the Implementing Regulation and its new rule 28(2), stated that

[26] Kline Moore and Robert Frederickson, "Strong Roots: Comparative Analysis of Patent Protection for Plants and Animals," IPWatchdog, August 5, 2020, accessed June 21, 2024, https://ipwatchdog.com/2020/08/05/strong-roots-comparative-analysis-patent-protection-animals-plants/id=123649/.

[27] Amended by a decision of the Administrative Council CA/D 6/17 of 29 June 2017 (OJ EPO 2017, A56), which entered into force on July 1, 2017.

[28] Convention on the Grant of European Patents (European Patent Convention).

[29] Decision of the Administrative Council of 29 June 2017 amending Rules 27 and 28 of the Implementing Regulations to the European Patent Convention, CA/D 6/17 (OJ EPO 2017, A56).

European patents will no longer be granted to plants and animals if they are obtained exclusively by mean of an essentially biological process (such as breeding or crossing). However, this new dynamic interpretation is not retroactive to patents or patent applications issued or filed before the effective date of rule 28(2) (7 January 2017). Such patents or applications are still subject to the previous, more applicant-friendly interpretation.[30] It means that, for example, a new dog breed, obtained by conventional crossing and subsequent selection, cannot be patented under any circumstances.

It is worth emphasizing that this decision did not apply to microorganisms and cells, as well as plants and animals obtained by microbiological processes (for example, gene transfer), since the EPC, as well as the Directive, do not exclude the latter from patentability. Thus, they are patentable, provided that the invention is not limited to an animal breed itself and that there are no ethical exceptions to its patenting.[31] An example worth mentioning here is the genetically modified oncomouse, created by researchers at Harvard Medical School in the early 1980s by introducing an oncogene into the animal's body, which provoked the growth of tumors. This was done for further cancer research. This patent was considered from the beginning to be granted to an animal produced by a microbiological process,[32] but the position on the justification of its grant has long been ambiguous. In the case T 19/90, the BoA emphasized that since the tumor is a product of a microbiological process, the exceptions outlined in Article 53(b) do not apply to it when assessing patentability, however, the presence of genetic manipulations, namely the introduction of an activated oncogene, gives grounds for applying Article 53(a) – exclusion from patentability in case the invention is in conflict with the principles of morality.[33]

The final opinion regarding the patenting of the oncomouse was expressed by the EPO in 2004. The EPO decided that the oncomouse does not

30 Opinion of the Enlarged Board of Appeal dated 14 May 2020 – G 3/19 (OJ EPO 2020, A119).

31 "Patentability of Plants and Animals at the European Patent Office – the Decision G 3/19 'Pepper,'" Kailuweit & Uhlemann, June 13, 2020, accessed June 21, 2024, https://ku-patent.de/en/ekk-patentability-of-plants-and-animals-at-the-european-patent-office-the-decision-g-3-19-pepper/.

32 Decision of Technical Board of Appeal of the European Patent Office dated 3 October 1990 – T 19/90 (OJ EPO 1990).

33 Ibid.

fall under the prohibition of Article 53(b), since it is not an animal breed, but the result of genetic manipulation.[34] There is no breeding and selection involved in obtaining it. Thus, genetic modification of biological material enables its patent protection, however, it is not the animal as such or its new breed that is subject to protection, but rather the genetically modified organism as one of the manifestations of the microbiological process, that is fully correlated with the provisions of the EPC and the Directive, which allow the patenting of such objects.

It is worth noting that none of the EU member states, at the level of their national legislation, refers to the breeds of animals as objects that can be subject to patent protection. For example, animal breeds are also not subject to patenting according to Article 3 of the National Patent Act of the Netherlands.[35] In the Section 2a of German Patent Act it is clearly stated that patents are not granted for "plant and animal varieties and essentially biological processes for the production of plants and animals and the plants and animals produced exclusively by such processes."[36] An identical provision is illustrated in Section 4 of the Patent Act of the Czech Republic.[37] However, in the Czech Republic there is a separate legal regulation and protection regarding animal breeds. Law on the legal protection of New Varieties of Plants and Breeds of Animals refers to the breed as a separate independent object of intellectual property law, the law enforcement document for which is a certificate.[38] Almost identical legal legislation regarding animal breeds developed in Bulgaria. According to the Law on the Protection of New Plant Varieties and Animal Breeds the certificate is also a law enforcement document, besides, it is issued by the patent office of

34 Decision of Technical Board of Appeal of the European Patent Office 3.3.8 dated 6 July 2004 – T 315/03 – 3.3.8 (OJ EPO 2005), 246.

35 National Patent Act 1995 of Netherlands (Kingdom Act of December 15, 1994, Containing Rules Regarding Patents, status as of June 1, 2023), WIPO Lex No. NL111, as amended.

36 Patent Act as published on 16 December 1980 (Federal Law Gazette 1981 I, p. 1), as last amended by Article 1 of the Act of 30 August 2021 (Federal Law Gazette I, p. 4074).

37 Czech Republic Patent Act No. 527 of 27 November 1990 on Inventions and Rationalization Proposals, as amended by Act No. 519/1991.

38 Act No. 132/1989 Coll. of 15 November 1989, on the Protection of New Varieties of Plants and Breeds of Animal, Czech Republic, WIPO Database of Intellectual Property, accessed June 21, 2024, https://www.wipo.int/wipolex/en/legislation/details/948.

Bulgaria,[39] from which it can be concluded that the legal protection of the animal breed in Bulgaria is similar to patent protection. It is obvious that the legislation of the EU member states does not contradict the provisions of the EPC and the Directive, which meets the requirements of the EU's unified policy in this area. But it is striking at the same time that the Czech Republic and Bulgaria are the only two countries among all EU member states where specialized legal regulation about animal breeds is established, which indicates an insufficient level of legal protection of this object within the EU.

5. Essentially Biological, Microbiological, and Technical Processes

As we can observe, the key characteristics to be analyzed when assessing the patentability of an animal breed in the sense of the EPC and Directive are "exclusively essentially biological process," "microbiological process," and "technical process."

A more extensive interpretation is contained in the Guidelines for Examination in the European Patent Office (hereinafter referred to as Guidelines) dated July 1, 1978, with changes and additions as of March 2023, where a biological process is characterized as one where there is no direct technical interference with the genome of plants or animals, as suitable parental plants or animals are simply crossed and the desired offspring are selected. The exception applies even when technical means facilitate the performance of essentially biological steps. Only plants or animals produced by a technical process that alters the genetic characteristics of such plants or animals are patentable. The term "exclusively" is used here to indicate that a plant or animal that is created by a technical process or characterized by a technical intervention in the genome was not considered unpatentable, even if in addition a non-technical method (crossing or selection) is also used (Part G, chapter II, 5.4.2.).[40] The examples of subject matter, which relate to essentially biological processes (e.g. use of a (transgenic) animal for

[39] Law on the Protection of New Plant Varieties and Animal Breeds (SG No. 84/1996, as amended up to December 23, 2022), Bulgaria, WIPO Database of Intellectual Property, accessed June 21, 2024, https://www.wipo.int/wipolex/en/legislation/details/21802.

[40] Guidelines for Examination in the European Patent Office, March 2024 edition, HTML version with amendments, accessed June 21, 2024, https://www.epo.org/en/legal/guidelines-epc.

breeding, introduction of a (transgenic) gene into the genome by crossing and selection, etc.) are also provided in these Guidelines (Part G, chapter II, 5.4.2.1).[41] The presence of a non-technical method alongside a technical process is not a reason for exclusion from patentability. But again, the use of a technical process in the development of a new breed does not turn such a breed into an invention as the object of patent law. The technical process as such can be patented. In the cases G2/07[42] and G1/08,[43] it is indicated that the processes are considered biological if they are based on the sexual crossing of entire genomes and their subsequent selection.

In order to determine whether the animal was obtained exclusively by biological means, it is necessary to check whether there are changes in the hereditary characteristics of the declared organism, which is the result of a technical process. The latter, in turn, should involve more than simple crossing and selection, that is, not simply serve to ensure or facilitate the implementation of essentially biological stages of the process. Thus, transgenic plants and engineered mutants are patentable (since they are not exclusively produced by biological means), while products of conventional breeding (as, for example, a new dog breed) are not. UV-induced mutations are an example of a technical process.[44]

The prohibition of Article 53(b) of the EPC in the sense of the EPO also does not fall under the method aimed at technical steps, carried out before the step of breeding and does not include the step of breeding itself. This is noted by the EPO in its written decision regarding the patent EP 1263521 (Ovasort, Great Britain), which concerns sex selection in animals.[45]

The concept of "essentially biological process" concerning plant breeding is treated in detail in decision G 3/19 and is characterized as follows: (1) the process is not microbiological; (2) sexual crossing of entire plant

41 Ibid.

42 Decision of the Enlarged Board of Appeal of the European Patent Office dated 9 December 2010 G 1/08 (OJ EPO 2012), 206.

43 Decision of the Enlarged Board of Appeal dated 9 December 2010 G 2/07 (OJ EPO 2012), 130.

44 Guidelines for Examination in the European Patent Office, March 2024 edition, HTML version with amendments, accessed June 21, 2024, https://www.epo.org/en/legal/guidelines-epc.

45 Ian Cumming, "A Method of Sorting Cells," EU Patent, EP1263521A2, March 8, 2001, accessed June 21, 2024, https://data.epo.org/publication-server/rest/v1.0/publication-dates/20021211/patents/EP1263521NWA2/document.html.

genomes and subsequent selection of plants are included in the stages of the process. Crossbreeding or selection can be enabled or improved by a "technological step" that can be created independently as a supplement to or as part of the crossbreeding or selection process. If this "technical step" introduces a new trait into the genome or modifies an existing trait in the genome of the plant, such that the introduction or modification of the trait does not result from the mixing of the genes of the plants selected for sexual crossing, then such a process is not excluded from patentability under Article 53(b) of EPC.[46] Similar requirements apply to an essentially biological process for animal breeding.[47] Therefore, in order to be patented, a new organism should be created with the help of a technical process that modifies this organism genetically.

However, in terms of interpretation of the "biological" process, the following question remains open: whether the process is considered completely biological, if it was not possible to achieve an identical result during repeated breeding. That is, if repeated breeding, even being essentially a biological process, provoked certain genetic changes in the animal (mutagenesis), and therefore the final result was not identical? Is there a difference in whether this process occurs naturally or was directed by a man and purposefully aimed at obtaining a specific result in the form of a new breed of animals?[48] Today it is clear that such a new breed of animals is unlikely to receive patent protection within the European Union. However, taking into account the previous precedent practice, it is obvious that breeders will continue to explore the limits of Article 53(b) of the EPC and seek to expand them in their favor. One of the options for how breeders can apply for patent protection of their breeds is the wording of the claim, in which the invention is not limited to the breed of animals itself, but receives protection along with, for example, the technical process that may be involved

46 Opinion of the Enlarged Board of Appeal dated 14 May 2020 – G 3/19 (OJ EPO 2020, A119).

47 Alex B. Berger and Kerstin Galler, "Regarding the Patentability Of Plants And Animals In Europe – The G 3/19 Decision ('Pepper') Of The European Patent Office," Monaq, July 28, 2020, accessed June 21, 2024, https://www.mondaq.com/germany/patent/970084/regarding-the-patentability-of-plants-and-animals-in-europe--the-g-319-decision-pepper-of-the-european-patent-office.

48 Neil Wilkof, "More on Broccoli, Tomatoes, and the Patentability of a Plant or Animal Obtained by Means of an Essentially Biological Process," The IPKat, July 28, 2017, accessed June 21, 2024, https://ipkitten.blogspot.com/2017/07/more-on-broccoli-tomatoes-and.html.

in this case. The problem is, however, that the number of such technical processes aimed at obtaining a new breed of animals can be quite limited. Therefore, the possibilities of breeders under such conditions are limited.

6. Bioethics and Morality

Another important aspect that must be taken into account when considering the possibility of patenting an animal breed or at least an animal created with the help of microbiological or technical processes, is the issue of bioethics and morality. Article 53(a) EPC prohibits the patenting of inventions whose commercial use would be contrary to "public order" or morality.[49] In the case of the already mentioned oncomouse, the EPO ruled that the benefits of the oncomouse for further cancer research significantly outweighed moral concerns about the suffering caused to the animal.[50] However, by itself, the EPC does not clarify the meaning of the concepts of ethics and morality in the context of patenting. Moreover, it is rather difficult to identify the general criteria of the latter for states with different religious and cultural traditions.[51] Therefore, these points should be considered individually in each specific case, since the issue of bioethics in biotechnology and breeding is quite sensitive. It is impossible to ask an animal whether it has suffered from any human interference with its body, nor to measure the intensity of such suffering or any possible discomfort. In general, it should not be allowed for commercial benefits to become the only guide in matters of innovation and biotechnology.

7. Conclusion

The analysis of EU legal acts in the field of patenting of objects of intellectual property law, in particular animal breeds, as well as law enforcement practice on this issue, allows us to conclude that the provisions expressed in the EPC and the Directive are not completely unambiguous. On the one hand, animal breeds are excluded from the objects of patent protection, as

49 Convention on the Grant of European Patents (European Patent Convention).

50 "Bioethics and Patent Law: The Case of the Oncomouse," WIPO Magazine, no. 3 (2006), accessed June 21, 2024, https://www.wipo.int/wipo_magazine/en/2006/03/article_0006.html.

51 Andrii Olefir, "To the Problem of Legal Protection of Biotechnology," *A Scientist's View. Series: Theory and Practice of Intellectual Property*, no. 1 (2015): 81, accessed June 21, 2024, http://nbuv.gov.ua/UJRN/Tpiv_2015_1_10.

well as essentially biological processes for producing animals. By default, within the meaning of the EPC and the Directive, all new breeds of animals can be created with the help of such essential biological processes as breeding and selection. It is allowed to patent objects that only relate to the breed of animals, are not excluded by it and, of course, have all the necessary criteria for patentability. On the other hand, certain provisions can be interpreted in favor of patenting animal breeds or, at least, be considered contradictory. For example, the rule that biological material isolated from the natural environment or produced by a technical process can be the subject of an invention, even if it previously occurred in nature, made it possible to issue patents in the field of animal breeding (although not for the animal breed itself).

An important stage in the formation of precedent practice regarding the patenting of animal breeds was the adoption of the "Tomatoes II" and "Broccoli II" decisions, in which the BoA subjected Article 53(b) to an interpretation according to which essentially biological processes for the production of animals, but not animals created with the help of these processes, were considered unpatentable. It certainly became a resonant statement and required an adequate response from the EPO, which resulted in the consolidation of the provision according to which European patents are not granted in respect of plants or animals obtained exclusively by means of an essentially biological process. In the future, BoA decisions were already based on this norm. The adjective "exclusively" is extremely important, which is used to outline the fact that, provided that a certain technical component or microbiological process is involved, the animal may be subject to patent protection.

When considering the prospects for patenting animal breeds, it is worth taking into account and distinguishing the following categories: "microbiological process," "essentially biological process," and "technical process." A microbiological process is an independent patentable object, as are animals obtained as a result of its application (for example, the oncomouse). However, such animals are still not a new breed. The biological process is characterized by the absence of direct technical intervention in the animal's genome, suitable chosen parent animals are simply crossed and selected. Finally, the technical process must exceed simple crossing and selection, and not only serve to ensure or facilitate the implementation of the biological

stages of the process, but also introduce a new trait into the genome or modify an existing trait in the genome (an example of a technical process is UV-induced mutations).

We found out that an animal breed as such cannot be an object of patenting if its derivation does not require the involvement of microbiological or technical processes. The application of the latter in relation to an animal involves its genetic modification, and in such a case the modified animal may be subject to patenting as a product (invention in general). The breeding of a new breed of animals concerns exclusively biological processes, such as crossing and selection. Still, the question of what to do with one-time or subsequent repeated breeding, in the process of which unforeseen genetic changes took place, which led to the appearance of a completely new breed of animals, remains unsolved. That is, although the process was supposed to be exclusively biological, significant changes at the microbiological level were involved. We hope that an answer to this question will soon be found by law enforcement agencies or a direct answer will be given at the level of the law, in particular at the EU level.

The practical significance of unambiguous regulatory wording and uniform enforcement is to prevent the issuance of patents for animal breeds in some cases and the refusal to issue them in other cases, as was the case until 2017. In addition, the same legal position on patenting at the EU level will lead to identical legal regulation of this issue by its member states, which generally corresponds to the principles that govern the functioning of the EU. Reforming the EU legislation in this area in the direction of the unification of legal regulation would contribute to the elimination of disagreements and ambiguous wording.

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