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Culpa in Contrahendo: A Testimony to the Changing Methodologies in Private International Law

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Abstract: The concept of *culpa in contrahendo* traditionally encompasses cases of disloyal conduct by the parties during the negotiation stage of a contract. It applies to a broad range of factual scenarios. Furthermore, the legal nature of *culpa in contrahendo* has long been the subject of debate, with some legal systems favouring its classification as a contractual matter and others as a delict. In the realm of private international law, these issues present significant challenges in terms of legal characterization as aptly demonstrated by the well-known case of *Tacconi v. Wagner* (2002), in which the Court of Justice of the European Union (CJEU) delineated the application of Articles 5(1) and 5(3) of the Brussels Convention (now Articles 7(1) and 7(2) of the Brussels I bis Regulation). The CJEU favored a tort-based qualification for claims arising from the breach of pre-contractual duties, but only insofar as they were not grounded in "obligations freely assumed by one party towards another." Despite the stance taken by the CJEU – which reflects the traditional conflict-of-laws approach, strictly distinguishing torts from contracts – the EU legislator, in Article 12 of the Rome II Regulation (2007), adopted a solution that can be

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described as an "accessory connection." According to this provision, the law applicable to a non-contractual obligation arising from dealings prior to the conclusion of a contract – regardless of whether the contract was ultimately concluded – is the law that applies to the contract or that would have applied to it had it been entered into. Only in exceptional cases will the applicable law be determined by connecting factors traditionally associated with torts, such as the place of damage (Article 12(2)). Thus, regardless of the delictual nature of *culpa in contrahendo*, such obligations are governed by the law applicable to the contract, even in instances where the contract never materialized. The article explores various approaches to the conflict-of-law characterization of pre-contractual liability and contrasts them with the pragmatic method of identifying the spatial "center of gravity" of the relevant legal relationship. Additionally, the article examines how the "accessory connection" operates under Article 12 of the Rome II Regulation with respect to pre-contractual liability, highlighting its advantages. It argues that while the adopted solution does not entirely dispense with traditional conflict-of-laws characterization, it significantly diminishes its practical application, as the *lex contractus* will invariably apply. Consequently, the EU legislator favors an independent localization of the legal relationship based on pragmatic criteria – specifically, an accessory reference to the law applicable to the contract.

1. Introduction

The concept of the *culpa in contrahendo* (fault in negotiating) is often traced back to the XIX-century German scholar Rudolf von Ihering. In his 1861 article,[1] von Ihering advocated that the party, whose culpable actions during negotiations caused the invalidity of the contract or prevented its perfection, should be liable for the harm resulting therefrom.[2] Since then, it has spread

1 Rudolf von Ihering, "Culpa in contrahendo oder Schadenersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen," *Jahrbücher für die Dogmatik des Heutigen Römischen und Deutschen Privatrechts* 4 (1861).

2 For a recollection of von Ihering's original ideas see: Friedrich Kessler and Edith Fine, "Culpa in contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study,"

to many corners of the world, raising considerable interest among comparative[3] and private international law lawyers in particular.[4] Even more, since Ihering's original idea, the concept of pre-contractual liability has immensely grown in scope covering a wide variety of factual situations. Looking from

Harvard Law Review 77, no. 3 (1964): 401; Dieter Medicus, "Zur Entdeckungsgeschichte der 'culpa in contrahendo'," in *Festschrift für Max Kaser zum 80. Geburtstag* (Vienna: Böhlau, 1986), 169.

[3] Among some of the more important works in English, see e.g. John Cartwright and Martijn Hesselink, *Precontractual Liability in European Private Law* (Cambridge: Cambridge University Press, 2008); Kessler and Fine, "Culpa in contrahendo, Bargaining in Good Faith," 401; Jan von Hein, "Culpa in contrahendo," in *The Max Planck Encyclopedia of European Private Law,* 2 vols., eds. Jürgen Basedow, Klaus J. Hopt, and Reinhard Zimmermann (Oxford: Oxford University Press, 2012), 430; Paula Giliker, "A Role for Tort in Pre-contractual Negotiations? An Examination of English, French, and Canadian Law," *International & Comparative Law Quarterly* 52, no. 4 (2003): 969; Paula Giliker, *Pre-Contractual Liability in English and French Law* (The Hague: Kluwer Law International, 2002); Sylviane Colombo, "The Present Differences between the Civil Law and Common Law Worlds with Regard to Culpa in Contrahendo," *Tilburg Foreign Law Review* 2 (1992): 341; Ewoud H. Hondius, ed., *Precontractual Liability: Reports to the XIIIth International Congress of Comparative Law, Montreal, Canada, 18–24 August 1990* (Deventer: Kluwer Law and Taxation, 1991); Steven A. Mirmina, "A Comparative Survey of Culpa in Contrahendo, Focusing on its origins in Roman, German, and French Law as Well as Its Application in American Law," *Connecticut Journal of International Law* 8 (1992): 77; Gunther Kuhne, "Reliance, Promissory Estoppel and Culpa in Contrahendo: A Comparative Analysis," *Tel-Aviv University Studies in Law* 10, (1990): 279; E. Allan Farnsworth, "Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations," *Columbia Law Review* 87, no. 2 (1987): 217. In Polish doctrine of comparative law, see: Agnieszka Machnicka, *Przedkontraktowe porozumienia – umowa o negocjacje i list intencyjny. Studium prawnoporównawcze* (Warsaw: Wolters Kluwer, 2007); Dominik Michoński, "Contractual or Delictual? On the Character of Pre-contractual Liability in Selected European Legal Systems," *Comparative Law Review* 20, no. 2 (2015): 151; Maria–Anna Zachariasiewicz, "Culpa in contrahendo," in *System Prawa Handlowego*, vol. 9, *Międzynarodowe prawo handlowe*, ed. Wojciech Popiołek (Warsaw: C.H. Beck, 2013), 336; Maria–Anna Zachariasiewicz, "Zasada dobrej wiary jako kryterium oceny zachowania stron w toku negocjacji w ujęciu prawnoporównawczym: ('culpa in contrahendo')," in *Rozprawy prawnicze: księga pamiątkowa profesora Maksymiliana Pazdana*, eds. Leszek Ogiegło, Wojciech Popiołek, and Maciej Szpunar (Kraków: Zakamycze, 2005), 1501.

[4] For some of the more recent works see: Dário Moura Vicente, "Culpa in contrahendo and the Brussels Ibis Regulation," in *Research Handbook on the Brussels Ibis Regulation*, ed. Peter Mankowski (Cheltenham: Edward Elgar Publishing, 2020), 311; Najib Hage-Chahine, "Culpa in Contrahendo in European Private International Law: Another Look at Article 12 of the Rome II Regulation," *Northwestern Journal of International Law & Business* 32, no. 3 (2011); Vésela Andreeva Andreeva, "La culpa in contrahendo y el Reglamento 1215/2012: más preguntas que respuestas," *Revista electrónica de estudios internacionales (REEI)*, no. 44 (2022),

a broad comparative perspective, disloyal conduct of a party during contractual negotiations, which results in damage to the other party – whether followed by the contract's conclusion or not – can be anything: a breach of a pre-contractual agreement, a violation of the implied quasi-contractual duty to negotiate in good faith, a breach of a statutory obligation treated as a delict, a *sui generis* source of liability, or even a type of unjust enrichment leading to restitution obligations. As we will come to see, the only common feature of all instances usually classified under the heading of the pre-contractual liability is that the contested conduct of a party "arises out of the dealings prior to the conclusion of the contract" – to borrow the wording of Article 12 of the Rome II Regulation.[5] The pre-contractual liability became a "common bag" for a variety of obligations and standards, as long as they are reasonably linked to a prospective, or an already concluded, contract.

Irrespective of its international career, *culpa in contrahendo* remains a somewhat elusive, if not obscure, concept, both in how it is conceptualized and in what factual situations it covers. This remains true until this day despite the fact that intense scholarly studies investigated the nature and scope of the *culpa in contrahendo*, courts – albeit to various degrees (depending on the jurisdiction) – have embraced it,[6] and legislators enacted specific

https://dialnet.unirioja.es/servlet/articulo?codigo=8783260; Ivo Bach, in *Rome II Regulation: Pocket Commentary*, ed. Peter Huber (Köln: Otto Schmidt, 2011), 311; Luboš Tichý, in *Rome II Regulation*, eds. Ulrich Magnus and Peter Mankowski (Köln: Otto Schmidt, 2019), 408. In the Polish doctrine, see: Łukasz Żarnowiec, "Culpa in contrahendo," in *System Prawa Prywatnego*, vol. 20B, *Prawo prywatne międzynarodowe*, ed. Maksymilian Pazdan (Warsaw: C.H. Beck, 2014), 850; Maria-Anna Zachariasiewicz, in *Prawo prywatne międzynarodowe. Komentarz*, ed. Maksymilian Pazdan (Warsaw: C.H. Beck, 2018); Maria-Anna Zachariasiewicz, "Kwalifikacja 'culpa in contrahendo' w prawie prywatnym międzynarodowym," *Problemy Prawa Prywatnego Międzynarodowego* 3, (2008): 35; Łukasz Żarnowiec, "Prawo właściwe dla odpowiedzialności z tytułu culpa in contrahendo na podstawie przepisów rozporządzenia Parlamentu Europejskiej i Rady (WE)–Rzym II," *Europejski Przegląd Sądowy*, no. 2 (2010).

5 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) O.J. L 199/40.

6 Some of the often discussed cases include decisions of: German Bundesgerichtshof (BGH) of 20 June 1952, 6 BGHZ 330; German Reichsgericht (RG) of 7 December 1911, RGZ 78, 239; French Cour de Cassation of 20 March 1972 in case Etablissements Vilber-Lourmat v. Sté des Etablissements Albert et Robert Gerteis; French Cour de Cassation of 6 January 1998 in case Sandoz v. Poleval, JCP 1998 II 10066. Also in Poland, courts seem more and more confident to award damages on the basis of the *culpa in contrahendo*. See e.g. some recent decisions: of Court of Appeals in Szczecin of 10 June 2021, I AGa 97/20 (a volleyball sport

legal provisions[7] to provide for the liability arising therefrom. The concept was even included in the uniform model law codifications of the turn

club justifiably expected conclusion of the sponsoring contract and financing from a shipyard, and so made investments in personnel and equipment aiming at sportive excellence on the basis of that expectation; the court found that the shipyard may be liable for the damage incurred therefrom under the principle the *culpa in contrahendo*); of the District Court in Warsaw of 18 October 2022, XVI GC 788/19 (the plaintiff purported to seek a grant from EU funds which required that a promise of financing is obtained from the bank; the plaintiff negotiated a loan contract with the bank; eventually the bank did not issue a promise of the loan; although the bank knew much earlier that its own financial analyst had a negative opinion on the project, it carried on negotiations attempting also to induce the plaintiff to buy other products offered by the bank; the plaintiff was successful in recovering from the bank the costs incurred during negotiations, including in particular the costs of the plaintiff's advisor and costs of preparing the grant application).

7 In Germany, the legislator embraced *culpa in contrahendo* at the occasion of the reform of the law obligations in 2002. See §§ 280(1), 311(2) and 241(2) of the Bürgerliches Gesetzbuch (BGB). For a brief presentation of these rules see e.g. Jan von Hein, in Basedow, Hopt, and Zimmermann, *The Max Planck Encyclopedia*, 430; Vicente, "Culpa in contrahendo," 311. More recently, in the 2016 reform, the French legislator included specific rules to its Code Civil, providing for obligation to conduct negotiations in good faith and a right to seek damages by the injured party (Article 1104 and 1112). Analogical rules on *culpa in contrahendo* can also be found in the Civil Codes of Italy (Article 1337), Greece (Article 197), and Portugal (Article 227(1)). The Polish legislator introduced specific rules devoted to precontractual liability by amending the 1964 Civil Code on 14 February 2003 (Journal of Laws 2003, No. 49, item 408; hereafter: "KC"). Two rules modelled after PECL and UNIDROIT Principles were enacted. First, according to Article 72 §2 KC a party who commenced or conducted negotiations in breach of the rules of fair dealing, in particular with no intention to conclude a contract, is obliged to compensate for the damage which the other party suffered because it expected that the contract will be concluded. Second, under Article 72^1 KC the confidential information passed during negotiations is protected and the injured party is offered the right to seek damages or restitution of improperly obtained benefits. For the literature about Polish law in that respect, see especially: Przemysław Sobolewski, "Culpa in contrahendo w polskim prawie cywilnym," *Studia Iuridica*, no. 56 (2013): 37; Wojciech J. Kocot, "Culpa in Contrahendo as the General Ground for Precontractual Liability in Polish Civil Code," *OER Osteuropa Recht* 67, no. 2 (2021): 202; Maria-Anna Zachariasiewicz, "Culpa in contrahendo in Polish Law," in *Tort Law in Poland: Germany and Europe*, eds. Bettina Heiderhoff and Grzegorz Żmij (Munich: Sellier European Law Publisher, 2009); Marcin Krajewski, "Culpa in contrahendo," in *System Prawa Prywatnego*, vol. 5, *Prawo zobowiązań – część ogólna*, ed. Ewa Łętowska (Warsaw: C.H. Beck, 2006), 709 et seq.; Wojciech J. Kocot, *Odpowiedzialność przedkontraktowa* (Warsaw: C.H. Beck, 2013).

of the XXI century, such as the Principles of European Contract Law,[8] the UNIDROIT Principles of International Commercial Contracts,[9] and the Draft Common Frame of Reference.[10]

One should think that the theoretical difficulties surrounding the *culpa in contrahendo* could diminish its role in practice. Far from that. As the commercial relationships develop, the relevance of the pre-contractual liability grows. The complex nature of modern business dealings – especially in an international context – which manifests in a large number of involved parties, and the variety of interconnected contractual arrangements, render the negotiations longer and increase their cost. It thus raises risks associated thereto. The knowledge and information shared at the occasion of the negotiations are increasingly important. Consider in particular the role of the various types of third-party advisors (such as e.g. auditors, technical consultants, lawyers, or tax advisors) assisting parties in any major business transaction.

The final point in setting the stage for our discourse touches upon the limits of permissible interference of the courts with the freedom of contracting. The basic rule is – and must be – as reminded not only by common law courts[11] and many scholars on the continent,[12] but also by uniform

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8 Article 2:301 (negotiations contrary to good faith) and 2:302 (breach of confidentiality) [in the 2002 version of the Principles]. The Principles are available e.g. at: https://www.trans-lex.org/400200/_/pecl/.

9 Article 2.1.15 (negotiations in bad faith) and 2.1.16 (duty of confidentiality) [in 2016 version of the Principles]. The UNIDROIT Principles are available at the website of the International Institute for the Unification of Private Law, accessed November 6, 2024, https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/.

10 Article-II.3:301(3) (liability for breaking off negotiations) and article II.-3:302 (dealing with confidential information).

11 See the much cited decision of the House of Lords in Walford v. Miles [1992] 2 AC 128, 138 ("the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties (...). Each party to the negotiations is entitled (...) to threaten to withdraw from further negotiations or to withdraw in fact (...)"). Cf. E. Allan Farnsworth, "Duties of Good Faith and Fair Dealing under the Unidroit Principles, Relevant International Conventions, and National Laws," *Tulane Journal of International and Comparative Law* 3 (1995): 51; Giliker, "A Role for Tort," 978; William Tetley, "Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering," *Journal of Maritime Law and Commerce* 35, no. 4 (2004): points V–VII.

12 See, e.g.: Jan van Dunné, in Hondius, *Precontractual Liability*, 223; Martin Hesselink, in Cartwright and Hesselink, *Precontractual Liability in European Private Law*, 46; M. Fontaine, *Concluding Report*, in *Formation of Contracts and Precontractual Liability* (Paris:

rules laid down in PECL[13] and UNIDROIT Principles,[14] that each party is free to walk away from the negotiations, which have not produced a satisfactory draft of the intended contract. Consequently, in principle, each party must bear the risks associated with the negotiations and cover its costs. This rule competes, however, with a conviction that a party who created legitimate expectations of another that the contract will be concluded or that it will produce certain effects, should not be permitted to disrupt this trust without a justified cause and should make good for the damage caused.[15] Still, the latter should constitute an exception triggering liability only where fairness so demands. As a consequence, the belief that the limits on party freedom are set in advance by the rules of law competes with the conviction that legal regulations aim not so much at limiting freedom, but rather at protecting it from abuses.

The present article unfolds in three parts. First, we briefly show how the differences at the substantive law level cause difficulties in understanding the nature and scope of the precontractual liability. We then attempt to summarize various approaches to the characterization of the *culpa in contrahendo* in private international law. In the third part, we discuss and evaluate the approach taken by Article 12 of the Rome II Regulation. We argue, in particular, that the solution adopted by the EU legislators largely dispenses with the necessity to diligently carry out the conflict-of-law characterization, thereby altering the traditional methodology of private international law. Finally, we attempt to make some conclusions.

ICC Publishing, 1993), 344. In Polish literature: Marcin Krajewski, in *System*, 716; Ewa Wójtowicz, *Zawieranie umów między przedsiębiorcami* (Warsaw: Wolters Kluwer Polska, 2010), 148; Maria-Anna Zachariasiewicz, "Z rozważań nad naturą prawną culpa in contrahendo," in *Rozprawy z prawa prywatnego, prawa o notariacie i prawa europejskiego: ofiarowane Panu Rejentowi Romualdowi Sztykowi*, eds. Edward Drozd, Aleksander Oleszko, and Maksymilian Pazdan (Kluczbork: Klucz-DruK, 2007), 348.

13 Article 2:301(1): "A party is free to negotiate and is not liable for failure to reach an agreement."

14 Article 2.1.15(1) of the UNIDROIT Principles contains the exact same wording as Article 2:301(1) of PECL.

15 See, e.g.: Opinion of AG Geelhoed in case C-334/00 *Tacconi*, ECR 2000, I-7359, para. 55.

2. Difficulties in Conceptualizing the *Culpa in Contrahendo*

The first difficulty in conceptualizing pre-contractual liability arises from the fact that it is associated with a wide variety of factual patterns. Here, we will only deal with the most important types of circumstances.

The model scenario is described in Article 2.1.15 of the UNIDROIT Principles and Article 2:301 of PECL, namely breaking off negotiations in bad faith and thus causing harm to another, with the bad faith existing, in particular, where a party entered or continued negotiations with no real intention to reach agreement.[16] The basic assumption here is that certain wrongdoing – a behavior violating good faith and rules of fair dealing in business – or, possibly, even malice, may be attributed to the party, who breaks off negotiations.

A different situation is portrayed by Article 2.1.16 of the UNIDROIT Principles and 2:302 PECL. Here, the essence of the wrongdoing of a party lies in disclosing information given by the other party as confidential during negotiations or using such information for the party's purposes.

Next, the concept of pre-contractual negotiations covers also instances of providing the other party with false or misleading information, or, conversely – not providing required or otherwise crucial information, at the time of contracting. Such misrepresentation can either cause invalidity of the contract and a loss associated therewith (which was the setting originally contemplated by R. von Ihering) or, conversely, not affect the validity, but leave the other party with an unwanted and unprofitable contract, thus resulting in a loss.

Finally, we can talk about the *culpa in contrahendo* in situations where a party manipulates the rules of the contract formation. One example in this group of situations is when the offeror unjustifiably revokes an irrevocable offer, which results in a contract not being concluded and loss on the part of the other party who relied on the offer. This scenario may only occur under laws that oblige the offeror not to revoke an irrevocable offer, but do permit to treat such revocation as effective (and grant a *culpa in contrahendo* remedy).[17]

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16 Article 2.1.15(3) UNIDROIT Principles; Article 2:301(3) PECL.

17 This seems to be the case e.g. under French law. Conversely, under Polish law, an attempt to revoke an irrevocable offer is ineffective, with a result that the contract is concluded even

Second, an equally important fact underlying difficulties on a comparative law level is the different treatment afforded to pre-contractual wrongdoings in various legal systems. Traditionally, a distinction is made between legal systems in which liability for wrongful conduct during negotiations is based on a contractual basis, because the parties are deemed to be bound by duties of conduct that are contractual in nature[18] (Germany) and those that treat the *culpa in contrahendo* as essentially delictual (France,[19] Belgium, Poland,[20] Venezuela, Argentina, Quebec). The latter group of legal systems rejects the possibility of the existence of a special relationship between the partners at the negotiation stage, and thus provide a plaintiff only with a relief in tort. In many legal systems (Italy,[21] Spain, Portugal, Greece, Switzerland, Austria, the Netherlands,[22] and Japan), on the other hand, the liability for breach of good faith can be in contract or in tort, depending on the circumstances. Necessarily, the above picture is somewhat simplified for the present purposes. One should remember that often the different legal bases compete against each other within the same legal systems, as underlined by concepts such as the implied contract to negotiate in good faith, the idea of abuse of rights, the need to protect reliance, or the principle of good faith.

Different national treatment of the *culpa in contrahendo* depends foremost on the nature and function attributed to the delictual liability within a particular legal system.[23] The nature and function of tort law thus determine limits of when and what may the plaintiff recover on that basis. The search for other bases takes place in those legal systems where the tort

after the attempted revocation (provided that the acceptance is dispatched before the lapse of the period of validity of the offer in question).

18 See, e.g.: Vicente, "Culpa in contrahendo," 311.

19 See, e.g.: Opinion of AG Geelhoed in *Tacconi*, para. 61; Vicente, "Culpa in contrahendo," 313.

20 A view that liability for *culpa in contrahendo* has its basis in delict seems well established in Poland. See, e.g.: Żarnowiec, in Pazdan, *System*, vol. 20A, 850; Zbigniew Radwański and Adam Olejniczak, *Zobowiązania – część ogólna* (C.H. Beck, 2005), 132; Zachariasiewicz, "Culpa in contrahendo in Polish Law," 135; Sobolewski, "Culpa in contrahendo," 28.

21 Opinion of AG Geelhoed in *Tacconi*, para. 59.

22 Dutch law is specific in that it identifies three stages of negotiation. As the negotiations advance, breaking them off creates liability for the costs incurred by the other party (at the 2nd stage) or precludes the possibility to terminate negotiations entirely (3rd stage). See: Opinion of AG Geelhoed in *Tacconi*, para. 62.

23 Giliker, "A Role for Tort," 975.

law either does not cover cases of *culpa in contrahendo*, or, due to its shortcomings, does not constitute an adequate remedy and fails to protect the violated interests of the parties. The French (as well as Polish) model of a general and broadly defined tort formula, with precisely defined prerequisites for liability and a wide concept of damage (which includes purely economic loss), contrasts with the framework of tort liability in common law systems and German law. In the common law systems, the place of the general tort formula is occupied by specific types of torts. The case-by-case approach is accompanied by a reluctance to generalize and a belief that not all losses (especially pure economic loss) deserve compensation. Moreover, the recovery for losses, which would be characterized as *culpa in contrahendo* on the continent, in common law is often replaced by restitution for unjust enrichment.[24] A general duty of good faith that must be observed in negotiations is, nevertheless, rejected. In Germany, on the other hand, the weaknesses of tort law have led to affording the *culpa in contrahendo* a contractual nature.[25] Tort law protects – in principle – only certain goods and interests, such as life, health, liberty, or property (§ 823(1) BGB). The purely pecuniary damages are unavailable (*reiner Vermögensschaden*).[26] The preference for a contractual basis was further determined by the greater ease of establishing the liability of the wrongdoer. This includes a more favorable statute of limitations for the injured party and the burden of proof: the injured party only proves the violation of a specific pre-contractual obligation, while the burden of exculpation rests on the shoulders of the wrongdoer. The introduction of the *culpa in contrahendo* specific rules (§§ 280(1), 311(2) and 241(2)) in BGB in the 2002 reform of the law obligations has not changed that. The contractual characterization of the precontractual liability has, however, contributed to blurring the boundary between the pre-contractual and contractual stages and to equating negotiating duties with a contractual obligation, with similar remedies being available for their breach.

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24 von Hein, in Basedow, Hopt, and Zimmermann, *The Max Planck Encyclopedia*, 431.

25 See, e.g.: Gerhard Hohloch, "Culpa in contrahendo w prawie prywatnym międzynarodowym,"*Problemy Prawne Handlu Zagranicznego* 19/20, (2000): 15; von Hein, in Basedow, Hopt, and Zimmermann, *The Max Planck Encyclopedia*, 430.

26 von Hein, in Basedow, Hopt, and Zimmermann, *The Max Planck Encyclopedia*, 430.

As a last point in this section, one might remind that specific rules on the precontractual liability were included in the uniform rules of contract law, i.e. in the UNIDROIT Principles and PECL. This confirms a close relationship of the concept with the law of contracts, although should not – in our view – be treated as a confirmation of the contractual nature of the *culpa in contrahendo.*[27]

3. Characterization Criteria

Given the above-mentioned differences and complications, the problem at the private international law level was always how to characterize – as a contract, a delict, or otherwise – the instances of pre-contractual liability. The scholars have advocated and the courts have employed several criteria when dealing with instances of precontractual liability.

The most important (and most easily identifiable[28]) factor[29] – as laid out in the famous *Tacconi* judgment – is the source of the pre-contractual obligation, the breach of which causes loss to another party to negotiations. *Tacconi* was a case decided by the CJEU in 2002,[30] where the plaintiff (Tacconi) asked the Italian court to find that defendant (HWS) had unjustifiably refused to carry on the sale of a molding plant and hence had breached the duty to act in good faith. Tacconi requested the court to order HWS to pay compensation for the loss sustained. The Italian court had doubts whether such action to establish pre-contractual liability falls within the matters relating to tort, delict, or quasi-delict and thus is covered by Article 5(3) of the Brussels Convention[31] [now Article 7(2) of the Brussels I bis Regulation], or whether it should be classified as a "matter relating to a contract" and thus be covered by Article 5(1) of the Brussels Convention [now Article 7(1) of

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27 We would not go as far as to say that this evidences "affinity to German legal conceptions," as one author suggested (von Hein, in Basedow, Hopt, and Zimmermann, *The Max Planck Encyclopedia*, 432).

28 Which renders characterization process foreseeable for the parties. See: Hage-Chahine, "Culpa in Contrahendo," 480.

29 Simone Egeler, *Konsensprobleme im internationalen Schuldvertragsrecht* (St. Gallen: Dike-Verl 1994), 228; Zachariasiewicz, "Kwalifikacja," 42.

30 CJEU Judgment of 17 September 2002, Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS), Case C-334/00, ECLI:EU:C:2002:499..

31 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ L299, 31 December 1972), 32.

the Brussels I bis Regulation]. The European Court ruled that if such action is not based on the breach of an "obligation freely assumed by one party towards another," but on the breach of the rules of law, which require parties to negotiate in good faith, then it must necessarily fall within the ambit of "matters relating to tort, delict or quasi-delict." Conversely, it results from the *Tacconi* judgment, that if a party has freely assumed obligations towards another on the occasion of negotiations, then the liability for their breach should be viewed as contractual.[32] The notion of the "obligation freely assumed" was central also in other (not relating to *culpa in contrahendo*) cases, in which the European Court was faced with a necessity to distinguish between actions falling under Article 7(1) or 7(2) of the Brussels regime on one hand,[33] or Article 7(1) and other provisions of Brussels I on the other.[34] It should be noted, however, that *Tacconi* was met with much criticism in the doctrine. Some argued, inter alia, that whether the duties such as those relied on by the plaintiff in *Tacconi* are freely assumed by the parties or not, should be immaterial for the characterization of the claim as contractual or non-contractual.[35] Nevertheless, it is clear that *Tacconi*, albeit decided under the Brussels Convention, constitutes a point of reference for the interpretation of Rome II and Rome I regulations.

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32 Hage-Chahine, "Culpa in Contrahendo," 467 and the literature cited therein supporting this reading of *Tacconi*.

33 CJEU Judgment of 17 June 1992, Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des Surfaces SA, Case C-26/91, ECLI:EU:C:1992:268 (action to establish liability brought by a sub-buyer of goods against the manufacturer does not fall within Article 5(1) of the Brussels Convention because there is no "obligation freely assumed"); CJEU Judgment of 13 March 2014, Marc Brogsitter v. Fabrication de Montres Normandes EURL and Karsten Fräßdorf, Case C-548/12, ECLI:EU:C:2014:148 (the action alleging unfair competition concerns "matters relating to a contract" for the purposes of the Brussels regime, if the conduct complained of may be considered a breach of the terms of the contract).

34 CJEU Judgment of 11 November 2020, Ellmes Property Services Limited v. SP, Case C-433/19, ECLI:EU:C:2020:900 (action brought by a co-owner against another co-owner); CJEU Judgment of 13 March 2013, Česká spořitelna, a.s. v. Gerald Feichter, Case C-419/11, ECLI:EU:C:2013:165 (claims under a promissory note fall within Article 5(1) of the Brussels Convention).

35 Vicente, "Culpa in contrahendo," 322; Dário Moura Vicente, "Precontractual Liability in Private International Law: A Portuguese Perspective," *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 67, no. 4 (2003): 710.

The decisive characterization criterion here is thus the source of obligation. Contractual obligations result from acts of free will – they are "freely assumed" in the parlance of the CJEU – while delictual duties arise by operation of law, which imposes universal obligations for any party undertaking certain conduct. We ask whether there has been a violation of a positive duty of loyalty to the other partner, which is specific and more far-reaching than the general duty not to harm others, or whether there has been a violation of only a general prohibition against abusing negotiating freedom for one's interests or with the intent to harm another.

Albeit under the Brussels I bis Regulation and – by extension – also under Rome I and II Regulations – the decisive criterion is the source of obligation, one should also briefly mention other possible approaches.[36] One option is to rely on the basis for liability alleged by the plaintiff. If the plaintiff relies on the fault (bad faith understood in a subjective sense) of the wrongdoer, the action should be characterized as a delict. Conversely, if the liability is to be imposed even without the wrongdoer's culpability, the action is in contract.[37] Next, the characterization of the precontractual liability may depend on the phase of negotiations.[38] The more advanced they are, the more likely it is that the question of the liability for pre-contractual conduct is subsumed by the law applicable to the contract. That is particularly the case if the contract is eventually concluded, even if the action in question refers to occurrences preceding the contract. Furthermore, whether the action should be treated as delictual or contractual may depend on the remedy sought by the plaintiff.[39] If the action is related to the validity of the contract or seeks expectation damages (positive contractual interest), it should be characterized as contractual. If the plaintiff seeks reliance damage it is treated as tortious.

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36 See in more detail: Zachariasiewicz, "Kwalifikacja," 41.

37 Cf. Vicente, "Precontractual Liability," 712.

38 This approach seems favored in the Netherlands, where courts (see in particular judgment of the Hoge Raad of 18 June 1962 *Plas v. Valburg*, Nederlandse Jurisprudentie 1983, 723) distinguish between three phases of the negotiations, with the third justifying even a contractual remedy for expectation damages. See: Opinion of AG Geelhoed in *Tacconi*, para. 62.

39 This seems characteristic for at least some of the Anglo-American authors. See, e.g.: John O'Brien, *Conflict of Laws*, 2 ed. (London: Cavendish, 1999), 348; Eugene F. Scoles et al., *Conflict of Laws* (St. Paul: West Publishing Company, 1992).

Further, one more possible approach is to assess how close the links are between the alleged precontractual wrongdoing and the negotiated contract.[40] If the precontractual obligation is functionally related to the contract, it should be governed by the law applicable to the contract in question. This approach seems to favor the wide understanding of contractual matters and thus the contractual characterization.[41] As will be explained below – although not *per se* as a contractual attribution – the closeness of the links with the contract does play a supportive role under Article 12 of the Rome II Regulation.

Finally, according to some authors,[42] the characterization phase should be abandoned altogether, given that it is too complicated and does not lead to unequivocal results. The many characterization criteria make it possible to juggle them at will. Thus, it was suggested that one should dispense with the characterization and independently search for a natural "center of gravity" of the given relationship. If the pre-contractual liability is, functionally, closely related to a contract, the best option is to extend the application of *lex contractus* to the pre-contractual phase.

To be sure, in cases where the wrongdoing occurring prior to the contract is not sufficiently closely related to the contract, the starting point in a search for the "center of gravity" of the relationship may as well be the place of damage. That place then serves as a central factor in determining the applicable law, although the question remains: to which legal system does the preponderance of spatial connections point? One recent example

40 Cf. Andrew Dickinson, in Jürgen Basedow et al., *Encyclopedia of Private International Law*, vol. 1 (Cheltenham: Edward Elgar Publishing, 2017), 1565.

41 See: Peter Mankowski, "Die Qualifikation der culpa in contrahendo – Nagelprobe für den Vertragsbegriff des europäischen IZPR und IPR," *IPRax: Praxis des Internationalen Privat-und Verfahrensrechts*, no. 2 (2003): 128; Hohloch, "Culpa in contrahendo," 23; Michał Wojewoda, *Zakres prawa właściwego dla zobowiązań umownych. Nowa regulacja kolizyjna w konwencji rzymskiej z 1980 r.* (Warsaw: Wolters Kluwer, 2007), 213; Max Planck Institute for Foreign Private and Private International Law, "Comments on the European Commission's Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and Its Modernization," *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 68, no. 1 (2004): 94.

42 Egeler, *Konsensprobleme im internationalen Schuldvertragsrecht*, 231; Katrin Patrzek, *Die vertragsakzessorische Anknüpfung im Internationalen Privatrecht: dargestellt anhand des Deliktsrechts, der Geschäftsführung ohne Auftrag, des Bereicherungsrechts und der culpa in contrahendo* (München: VVF, 1992), 158.

of such an analysis is the decision of the English High Court in Jaffe & Anor Greybull Capital LLP & Ors.[43] In that case, the misrepresentation by a third party that induced the claimant to conclude a contract with the defendant was treated as delict for the purposes of Article 4 of Rome II. The applicability of Article 12 of Rome II appeared to have been contemplated by the Court but eventually rejected. In terms of determining the applicable law, the Court concluded:

> [299] Overall (...) the preferable analysis is that the applicable law is German Law. There are many immediate factors linking the case to Germany both in terms of direction, causation and ultimate feeling of the loss. (...)
>
> [300] In terms of direct damage, damage occurred when those misrepresentations took effect in the minds of those attending the meeting in Germany and were subsequently relied upon. The alleged key decisions were said to have been taken at the November meeting of Wirecard's Management Board; and this seems to have taken place in Germany. The direct links to Germany are simply much stronger than any links to this jurisdiction.

4. Article 12 of Rome II Regulation

Rome II Regulation contains a specific conflict-of-law rule regarding *culpa in contrahendo* in Article 12.[44] The fact that the concept was included in the Rome II and not in the Rome I Regulation (albeit with criticism from some, in particular German, authors[45]) shows that a delictual characterization of the pre-contractual liability eventually prevailed. Rome II follows *Tacconi* in that regard.[46] Moreover, Rome I expressly excludes from its scope "obligations arising out of dealings prior to the conclusion of a contract"

43 [2024] EWHC 2534 (Comm).

44 On the history behind the adoption of Article 12, see in particular: Hage-Chahine, "Culpa in Contrahendo," 459.

45 See, e.g.: Peter Mankowski, "Der Vorschlag für die Rom-I–Verordnung," *IPRax: Praxis des Internationalen Privat-und Verfahrensrechts* 26, no. 2 (2006): 101; Martin Schmidt-Kessel, "Zur culpa in contrahendo im Gemeinschaftsprivatrecht: Urteilsanmerkung zu EuGH, Urteil vom 17. September 2002-C-334/00," *Zeitschrift für europäisches Privatrecht* 12, no. 4 (2004): 1018.

46 See, e.g.: Hage-Chahine, "Culpa in Contrahendo," 468; von Hein, in Basedow, Hopt, and Zimmermann, *The Max Planck Encyclopedia*, 432; Żarnowiec, in Pazdan, *System*, vol. 20A, 851.

(Article 1(2)(i)), given that they are covered by Article 12 of Rome II (recital 10 to Rome I Regulation).[47] Nevertheless, as we will discuss below, Article 12 of the Rome II Regulation expresses a close affinity to contract via the connecting factor that it uses.

4.1. The Scope of Article 12

As made clear by Recital 30 to Rome II Regulation, the concept of the *culpa in contrahendo* under Article 12 should be treated as autonomous and so should not be interpreted according to the national law of any particular state. This autonomous approach to characterization comes as no surprise after *Tacconi*, where the European Court ruled that the term "matters relating to tort, delict or quasi-delict" – for purposes of the Brussels regime – should be interpreted independently.[48] Article 12 defines *culpa in contrahendo* as pertaining to "non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not." The definition seems fairly inclusive,[49] albeit somewhat vague[50]. However, four factors assist in determining its scope.

First, the wording of Article 12 makes clear that it only pertains to non-contractual obligations. In light of *Tacconi,* this is a visible indication that whenever the plaintiff, seeking damages for pre-contractual wrongdoing, relies on a "freely assumed obligation" – a pre-contractual agreement, a pre-negotiation agreement (taking forms of heads of agreement, memoranda of understanding, terms sheet, etc.), an agreement on confidentiality, or even a letter of intent (if it contains binding legal obligations) – the action should be viewed as in contract and thus falls outside Article 12

47 We agree, however, that Article 1(2)(i) Rome I excludes precontractual liability only insofar as it falls within the scope of Article 12 of Rome II. See a persuasive analysis by Hage-Chahine, "Culpa in Contrahendo," 469–73.

48 *Tacconi*, para. 19. See also: CJEU Judgment of 9 December 2021, HRVATSKE ŠUME d.o.o., Zagreb v. BP Europa SE, Case C-242/20, ECLI:EU:C:2021:985, para. 40.

49 Richard Plender and Michael Wilderspin, *The European Private International Law of Obligations* (London: Sweet & Maxwell, 2009), 734. A different view underlines, however, that the concept of *culpa in contrahendo* under Article 12 is narrower than the notion of a pre-contractual liability – Hage-Chahine, "Culpa in Contrahendo," 458.

50 Vicente ("Culpa in contrahendo," 314), for example, argues that Rome II Regulation "has not overcome the lack of a uniform notion of culpa in contrahendo in the European Union".

of Rome II (with the effect that the law applicable must be determined under Rome I Regulation).[51]

Second, the wording of Article 12 dispels doubts that its application does not depend on whether "the contract was actually concluded or not."[52] The liability for pre-contractual misconduct such as providing false information during negotiations or misuse of confidential information, given on that occasion, thus falls within Article 12, even if there is a binding contract between the parties governed by its own applicable law determined in accordance with Rome I Regulation.[53] Likewise, the application of Article 12 does not depend on whether the contract is valid or not.[54]

Third, some light on the coverage of Article 12 is shed by Recital 30. The recital mentions two specific types of pre-contractual wrongdoings, which are covered by Article 12, namely, the violation of the duty of disclosure and the breakdown of contractual negotiations. These examples should not be treated as in any way restrictive. We support the view,[55] that Article 12 covers all liability claims, which are based on: (a) conduct that affects the formation of the contract under negotiation, including misrepresentation[56] and causing damage to another (whether resulting in the invalidity of the contract or merely affecting its terms substantially), or (b) breach of pre-contractual duties, which does not affect the contract but cause damage to the other party (which includes unjustifiably breaking off negotiations, violating confidentiality or failure to disclose information), provided that these wrongdoings are not violations of the "freely assumed

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51 The law applicable to such precontractual agreements must be determined independently of the law applicable to the contract that is negotiated, although often the same law will in practice be applied by virtue of the conflict rules of Rome I. See: Hage-Chahine, "Culpa in Contrahendo," 485–9; Żarnowiec, in Pazdan, *System*, vol. 20A, 853.

52 See, e.g.: Plender and Wilderspin, *The European Private International Law*, 731. Contra Dickinson (in Basedow et al., Encyclopedia, 1, 1571), who holds that if the contract was actually concluded, the non-contractual obligations arising out of the pre-contractual dealings are governed by Rome I.

53 A different view holds, however, that precontractual information duties should be governed by the law applicable to the contract, as determined under Rome I Regulation. See on this: Żarnowiec, in Pazdan, *System*, vol. 20A, 853.

54 Żarnowiec, "Prawo właściwe dla odpowiedzialności," 24.

55 Hage-Chahine, "Culpa in Contrahendo," 494–6.

56 Cf. Dickinson, in Basedow et al., *Encyclopedia*, 1, para. 1571; Plender and Wilderspin, *The European Private International Law*, 733–4.

obligations." Article 12 does not, on the other hand, cover questions as to whether a valid contract has been formed,[57] including questions as to what constitutes misrepresentation and how it affects the contract[58] (which all fall within Rome I).

Fourth, recital 30 makes clear that Article 12 only covers non-contractual obligations "presenting a direct link" with the dealings prior to the conclusion of a contract.[59] Delicts, which are not sufficiently closely related to pre-contractual dealings (such as e.g. instances of a personal injury of a party to the negotiations), are thus not covered. They will fall within the general rule of Article 4 of the Rome II Regulation. The necessity to delimit the scopes of Articles 12 and 4 thus exists.[60] Consequently, if misrepresentation is made outside contractual negotiations, it might be more appropriate to apply Article 4 instead of Article 12.[61] Furthermore, it is doubtful whether Article 12 should apply to claims by a contracting party against a third party (e.g. an advisor), even if the claim alleges misrepresentation, which has induced the claimant to enter into the contract.[62] Tension at the characterization level, moreover, can be seen between Articles 12 and Article 10 (which deals with the law applicable to unjust enrichment). If the claim is for restitution of certain benefits received by the other party during negotiations but is not based on any illegal or culpable wrongdoing, it might be said to fall within the ambit of the latter provision[63]. As we will argue later, however, this is usually of little practical significance, since the putative *lex contractus* will govern such a claim in any event.

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57 Dickinson, in Basedow et al., *Encyclopedia*, 1, para. 1571.

58 Plender and Wilderspin, *The European Private International Law*, 735.

59 Vicente, "Culpa in contrahendo," 314; Dickinson, in Basedow et al., *Encyclopedia*, 1, para. 1571; Żarnowiec, in Pazdan, *System*, vol. 20A, 852.

60 More on this e.g. Bach, in Huber, *Rome II Regulation*, 313.

61 Albert V. Dicey, Lawrence A. Collins, and John H.C. Morris, *Dicey, Morris and Collins on the Conflict of Laws* (London: Sweet & Maxwell, 2012), §35–093.

62 To that effect: ibid., §35–093; Andrew Dickinson, *The Rome II Regulation: The Law Applicable to Non-contractual Obligations*, vol. 1 (Oxford University Press, USA, 2010), para. 12.08. This view seems supported (although not unequivocally) also by two English cases: *The Republic of Angola v. Perfectbit Ltd* [2018] EWHC 965 (Comm); *Jaffe & Anor Greybull Capital LLP & Ors* [2024] EWHC 2534 (Comm).

63 See: Dickinson, *The Rome II Regulation*, 1, 525; Dicey, Collins, and Morris, *Conflict of Laws*, §35–093.

4.2. The Law Applicable under Article 12

Article 12(1) of Rome II Regulation provides that the law applicable to a non-contractual obligation arising out of pre-contractual dealings "shall be the law that applies to the contract or that would have been applicable to it had it been entered into." Therefore, although the EU legislator chooses delictual characterization by including the relevant conflict rule in the Rome II Regulation, it subjects the *culpa in contrahendo* to the law applicable to the negotiated contract, which is to be determined according to conflict rules adopted in the Rome I Regulation[64]. In that regard, Rome II departs from *Tacconi* since it predominantly turns to the *lex contractus* instead of relying on the delictual connecting factors – such as the place of the harmful event – which are relevant under Article 7(2) of the Brussels I Regulation, deemed applicable by the European Court to cases of pre-contractual liability (absent "obligations freely assumed"). The solution adopted in Article 12(1) is often referred to as a principle of an accessory connection[65] or a "union" between the two laws.[66] A few brief comments should be made here concerning how this rule operates, before we move to expand on its merits.

First, it is worth underlying that by the very wording of Article 12(1), the *lex contractus* of the negotiated contract applies "regardless of whether the contract was actually concluded or not." If the contract was not finalized, e.g. because the negotiations were prematurely terminated, it will be the law that would putatively (hypothetically) apply to the contract.

Second, it is controversial whether such putative *lex contractus* might be determined under Article 3 of Rome I Regulation, i.e. on the basis of the choice of law that would have been part of the negotiated contract had it

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64 Nevertheless, if the parties have exercised their freedom under Article 14 of Rome II Regulation and submitted the non-contractual obligations arising out of dealings prior to the contract's conclusion to the law of their choice, this shall take precedence over *lex contractus* applied via Article 12(1). This seems an unlikely scenario in practice, however.

65 See, e.g.: von Hein, in Basedow, Hopt, and Zimmermann, *The Max Planck Encyclopedia*, 433; Bach, in Huber, *Rome II Regulation*, 319; Vicente, "Culpa in contrahendo," 323; Thomas Graziano, in Basedow et al., *Encyclopedia*, 1, 1712. The "accessory connection" as a conflict-of-laws solution for *culpa in contrahendo* was probably first proposed by Pierre Bourel, *Les conflits de lois en matiére d'obligations extracontractuelles* (Paris: LGDJ, 1961), 149.

66 Sylvain Bollée, "A la croisée des règlements Rome I et Rome II: la rupture des négociations contractuelles," *Recueil Dalloz*, no. 31 (2008): 2161.

been concluded. Some argue that this can never be the case, mainly because it would unfairly surprise the party who did not agree to the choice proposed by the other party.[67] Others take a more moderate position that the chosen law cannot be applied if there is a disagreement between the parties on this issue.[68] In our view, the very idea behind applying the putative law under Article 12 is that it is the law, which would hypothetically apply. As one author put it, "the court may evaluate the prospects" for an agreement on the applicable law.[69] In most cases, this should not come as a surprise to the parties that the law which they planned to apply for their contract by virtue of their own choice, will also cover any precontractual liability claims. Moreover, it should be remembered that the choice of law clause is treated as legally independent from the main contract.[70] Thus, even misrepresentation which affects the main contract does not necessarily affect the choice of law clause. If prerequisites for misrepresentation and their consequences concerning the contract might be governed by the *lex contractus* then there is nothing that prevents the application of that law under Article 12(1) to the action for damages caused by misrepresentation. We agree, however, that if the choice-of-law was a point of disagreement between the parties, then it cannot be used for purposes of Article 12(1) and so the *lex contractus* must be determined under Article 4 of the Rome I Regulation.[71]

Third, in the absence of the choice of law in the contract (or a putative contract), the pre-contractual liability under Article 12(1) will be governed by the law indicated on the basis of the objective connecting factors contained in Article 4 of Rome I Regulation.[72]

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67 Hage-Chahine, "Culpa in Contrahendo," 505–6, who believes that "the applicable law to the putative contract should always be determined on the basis of Article 4 of the Rome I Regulation."

68 Plender and Wilderspin, *The European Private International Law*, 736–7.

69 Bach, in Huber, *Rome II Regulation*, 320.

70 See, e.g.: Article 7 of the Principles on Choice of Law in International Commercial Contracts, The Hague 2015; Peter Nygh, *Autonomy in International Contracts* (Oxford: Oxford University Press, 1999), 86.

71 Similarly Żarnowiec, in Pazdan, *System*, vol. 20A, 854; Zachariasiewicz, in Pazdan, *Komentarz*, 968.

72 Unless the contract would have fallen within some of the specific rules of Article 5 (carriage), 6 (consumers), 7 (insurance) or 8 (employment), of Rome I Regulation.

If, on the other hand, "the law applicable cannot be determined on the basis of paragraph 1," Article 12(2) comes into play with its traditional, delictual connecting factors, analogous to those contained in Article 4 (with a chief role for the place of damage). What remains controversial is the exact circumstances that trigger the application of Article 12(2). In our view, situations where the law applicable on the basis of paragraph 1 (i.e., in accordance with Rome I) "cannot be determined" will be extremely rare.[73] After all, Rome I contains a cascade of connecting factors helpful in determining the *lex contractus*, including the escape clause in Article 4(3) and a subsidiary clause in Article 4(4), providing for the application of the law of the country with which the contract is most closely connected. Nevertheless, an example of a situation when it might prove problematic to establish that law is that of breaking off negotiations at a very early stage,[74] when it is still unclear what type of contract the parties envisaged, where it will be performed, or possibly even which exact companies from an international group will be parties to the contract.

4.3. Merits of the Accessory Connection

In our view, the principle of the accessory connection enshrined in Article 12(1) and constituting the leading conflict rule for *culpa in contrahendo* under Rome II presents several advantages.[75]

First, applying the same law to the negotiated contract and to the liability for pre-contractual wrongdoings that occurred during its negotiations, helps to overcome difficulties – apparent at the comparative law level – in characterizing the instances of the *culpa in contrahendo* as contractual or delictual. In this way, Article 12 of Rome II may be said to depart from the traditional, European-style conflict-of-law characterization process,[76] for it is no longer important whether the pre-contractual liability is viewed as a violation of the statutory duty (to negotiate in good faith, etc.) or as a breach of a contractual or quasi-contractual obligation resulting from the mere fact of entering the social relationship of negotiations. The EU

[73] Similarly Bach, in Huber, *Rome II Regulation*, 321 and the literature cited therein.

[74] Hage-Chahine, "Culpa in Contrahendo," 506.

[75] The "accessory connection" had its opponents too, even before Rome II was adopted. See e.g. Hohloch, "Culpa in contrahendo," 25.

[76] See: Hage-Chahine, "Culpa in Contrahendo," 461.

legislator thus opts for a pragmatic approach, whereby the functional link between the various instances of the pre-contractual wrongdoings and the negotiated contract overrides the necessity to clearly distinguish between a delictual and a contractual relationship. The characterization becomes an intellectual effort with little practical consequences. *Lex contractus* applies in any event.

Moreover, it should be noted that Article 10(1) of Rome II essentially also employs the accessory connection to determine the law applicable to unjust enrichment (by subjecting unjust enrichment claims concerning relationship arising out of a contract, that is closely connected with that unjust enrichment, to the law applicable to that contract).[77] Where no contract was formed yet (or the contract is deemed invalid) the law applicable to unjust enrichment under Article 10 would be that of the putative *lex contractus*.[78] Thus, the question of characterization of the claim for payment of the benefits improperly obtained by the other party at the pre-contractual stage – whether as restitution of unjust enrichment falling within the scope of Article 10 or as compensation for pre-contractual wrongdoings properly classified under Article 12 – loses its significance. The law applicable to the negotiated (or concluded and later found invalid) contract applies in any case.

To be sure, Article 12 does not dispense with the need for diligent characterization entirely. It remains important to distinguish, on the one hand, precontractual liability falling within its scope from liability for breaches of obligations freely assumed under precontractual agreements (subject to their own *lex contractus*), and on the other – from regular torts falling under Article 4 of Rome II.

As a side note, one might also observe that the characterization of the claim is still crucial under the Brussels I Regulation, given that it does not contain a specific rule concerning *culpa in contrahendo*. Under the *Tacconi* interpretation of the Brussels regime, the pre-contractual liability

77 See, e.g.: Marek Świerczyński and Łukasz Żarnowiec, in Pazdan, *Komentarz*, 950.

78 Application of Article 10(1) is not precluded by the fact that the contract, in connection with which, the payments were made, did not eventually come into life or is to be deemed invalid. See: Świerczyński and Żarnowiec, in Pazdan, *Komentarz*, 951; Stefan Leible and Matthias Lehmann, "Die neue EG-Verordnung über das auf außervertragliche Schuldverhältnisse anzuwendende Recht ('Rom II')," *Recht der internationalen Wirtschaft*, no. 10 (2007): 732.

can either be contractual (and thus fall within Article 7(1)), or delictual, if its source cannot be found in an "obligation freely assumed," but results merely from statutory duty, e.g. to negotiate in good faith (and thus fall within Article 7(2)). Since the two rules use diverging connecting factors, the application of those rules can provide jurisdictional competence to different courts.

Second, relying on *lex contractus* of the negotiated agreement helps to achieve harmony in dealing with questions concerning the existence (forming the consensus), validity, and effectiveness (e.g. how does the misrepresentation affect the contract), which are governed by *lex contractus* (as determined under Rome I) and those relating to the liability for damage caused by pre-contractual wrongdoings, which are subject to the law determined under Article 12 of the Rome II Regulation,[79] given that the latter is in principle (as long as Article 12(1) plays its role) the same law as the former.[80] The solution precludes difficult-to-reconcile outcomes, which could occur if, for example, the law applicable to the contract deemed the contract valid, while the law applicable to the *culpa in contrahendo* treated certain false representations as a ground for invalidating the contract, and held the defendant liable for misrepresentation.[81]

Third, the pre-contractual dealings in a situation where the contract was eventually concluded may potentially entitle the injured party to benefit both from contractual and delictual claims. This could be the case, e.g. if a party was given misleading information in a breach of statutory obligations to negotiate loyally and in good faith where, at the same time, such misleading information was transformed into a contractual term. The claimant could then benefit from a choice between concurrent claims. The position of different legal systems concerning the question of treatment of concurrent claims may, however, vary. Here again, applying

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79 On the dividing line between the *lex contractus* proper and the law governing the *culpa in contrahendo* (whether determined under Article 12(1) as *lex contractus* or Article 12(2) as *lex loci delicti commissi*), see: Bach, in Huber, *Rome II Regulation*, 314–5.

80 Plender and Wilderspin, *The European Private International Law*, 735; Goetz Schulze, in *Rome Regulations: Commentary on the European Rules of the Conflict of Laws*, ed. G.-P. Calliess (Alphen aan den Rijn: Wolters Kluwer Law & Business, 2011), 210; Żarnowiec, in Pazdan, *System*, vol. 20A, 855.

81 See a closer analysis of various patterns: Hage-Chahine, "Culpa in Contrahendo," 507 et seq.

the same law via the accessory principle to contractual and delictual claims helps to avoid friction between the two legal systems.[82]

Fourth, allowing the *lex contractus* to govern the *culpa in contrahendo* avoids difficulties with delictual connecting factors, which are often recognized as problematic and not warranting sufficient predictability in pre-contractual liability situations. Nevertheless, it is worth pointing out that when determining jurisdiction, it might still be necessary to apply delictual connecting factors, given that pre-contractual liability will often fall within Article 7(2) of the Brussels I bis Regulation.

Last but not least, placing the rule dealing with non-contractual obligations in the Rome II Regulation confirms the basic understanding that pre-contractual wrongdoing, which constitutes a violation of the rules of law (and not a freely assumed obligation) is delictual in nature. Still, the principle of accessory connection is not about simple subordination of the *culpa of contrahendo* to the law applicable to the contract, just because they are functionally related to the contract or arise at the final stage of negotiations. The pre-contractual relationship remains independent. Its nature remains intact. Yet, it is its direct link with the negotiated contract that raises in prominence above the outcome of the delictual characterization. Therefore, the principle of accessory connection does not promote the creation of a "third regime" ("third way") of liability. It recognizes a strong connection with the law applicable to the contemplated contract, nonetheless not rejecting the delictual nature of the *culpa in contrahendo*. All to ensure harmonization in dealing with pre-contractual and contractual obligations. It is truly a Judgment of Solomon.

Although we maintain the view that the creators of the Rome II Regulation have opted for the best solution when it comes to dealing with *culpa in contrahendo* in the private international law, the accessory principle too has its downsides. One is the risk of a tendency to blur in practice the boundaries between the pre-contractual phase and the contract, given that the court is not obliged to precisely distinguish between them for the purposes

[82] Graziano, in Basedow et al., *Encyclopedia*, 1, 1712. On the issue of concurrent claims in private International law see, in a Polish doctrine: Maksymilian Pazdan, "Zbieg odpowiedzialności cywilnej *ex contractu* i *ex delicto* w prawie prywatnym międzynarodowym," in *Rozprawy z prawa cywilnego. Księga pamiątkowa ku czci Witolda Czachórskiego*, eds. Jan Błeszyński and Jerzy Rajski (Warsaw: Państwowe Wydawnictwo Naukowe, 1985), 283 et seq.

of private international law. The other is a gradual expansion of the concept of pre-contractual liability in the domestic laws of various countries, as well as straining its delictual nature. Over time, it becomes a collective category for various positive obligations characteristic for the law of contracts as well as the prohibited types of conduct distinguishing the law of torts. This, however, comes as a natural cost of adopting the accessory connection. It must be accepted as a pragmatic solution to a difficult conflict-of-law problem. The paradox occurs: Article 12 constitutes a remedy to the occurring problems of characterization but at the same time it strengthens the mentioned tendencies.

5. Concluding Remarks: A Testimony to the Changing Methodologies in Private International Law

Despite the position taken by the CJEU in the *Tacconi* judgment, which appears to reflect the classic conflict-of-laws approach, strictly distinguishing torts from contracts, the EU legislator adopted a pragmatic solution in Article 12 of the Rome II Regulation, in the form of an "accessory connection." The rule is that the law applicable to pre-contractual liability – regardless of whether the contract was concluded – is, in principle, that of the putative *lex contractus*, i.e., the law that applies to the contract or that would have applied to it had it been concluded. Thus, regardless of the essentially delictual characterization of *culpa in contrahendo*, such matters are subject to the law applicable to the contract, even in cases where the contract never came into existence.

The adoption of the accessory principle in Article 12(1) of the Rome II Regulation represents, it is submitted, a departure from the traditional private international law paradigm. By subjecting the delictual relationship of *culpa in contrahendo* to the law applicable to the contract, the EU legislator may not have entirely eliminated the need for conflict-of-laws characterization but has diminished its role in practice. A functional link between liability for breach of pre-contractual duties and the contract becomes paramount, outweighing dogmatic classifications. This shift in priorities represents, it is argued, a lasting testimony to changing methodologies in European private international law.

In this context, it is important also to emphasize that the application of either Article 12(1) (which leads to the application of *lex contractus*) or

Article 12(2) (which involves the use of classic delictual connecting factors) does not depend on the inherent nature of the legal relationship in question (whether it constitutes a delict or a contract). Instead, the determination hinges on the appropriateness of the connecting factor in the context of conflict-of-law analysis.

The pursuit of compromise, along with simple and pragmatic solutions, is a logical approach in the formulation of the common, uniform private international law of the European Union. Likewise, it is both justified and consistent with contemporary developments in the field of conflict-of-laws to adopt rules that offer adequate flexibility. Granting a reasonable degree of discretion to the court enables it to consider the unique circumstances of each case.

It is also important to highlight the legislator's careful attention to the influence – albeit indirect – on the process of harmonizing the substantive laws of the Member States, despite the fact that this is not, strictly speaking, its primary mandate. The legislator's responsibility lies solely in seeking "fair" conflict-of-laws solutions, which involve determining the law most closely connected to the legal relationship in question – the law that naturally governs that relationship. By applying the same substantive law to the functionally related, although distinct (contractual or delictual) consequences arising from the same facts, friction can be avoided, thereby supporting justified and equitable decisions at the substantive law level. The rapprochement between conflict-of-laws justice and substantive justice appears to be an appropriate response to the demands of modern cross-border transactions.

Last but not least, it is interesting to observe how the objectives, such as honesty, transparency, and rationality, are safeguarded through instruments developed within the fields of contract law and tort law within the same legal system.

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Judicial Independence in Croatia Under European Scrutiny: Analysis of the Ruling Hann-Invest and Others (Or How to Save Judges from Other Judges)

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Abstract: This contribution analyses the first case presented to the Court of Justice of the EU that questions the independence of the judiciary in Croatia. The case has several unique aspects. First, it addresses threats to judicial independence from within the judiciary itself, which is unusual, as most cases typically involve external pressures from the executive or legislative branches. Second, while the judicial practice under scrutiny was deemed contrary to EU law, interestingly the Court explained to Croatian authorities how they could rectify the situation. Third, the Advocate General's Conclusions largely diverge from the Court's ruling. While this is not so uncommon, it proves that this was not an easy case. Last, the case challenges and ultimately deems unjust a judicial practice that persists in Croatia as a remnant of the country's communist past and which draws inspiration from an era when judges were subject to a strict judicial hierarchy to the detriment of their own autonomous opinion. The paper delves into the specifics of the Croatian case. It compares the legal reasoning of the Advocate General and that the Court of Justice, illustrating their differing approaches. The contribution explores other arguments that were not raised in the Conclusions that, interestingly, were included in the Court's judgment. The Court ruled

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that Croatia's practice – where a registrar judge, not involved in the case, could override a decision made by the court handling the case, and where an extended section of the court could also force the judges handling the case to give up their legal reasoning before they could even rule on the case – was incompatible with Article 19 TEU.

1. Introduction

In 2016, the Council of Europe's Commission for Democracy through Law (commonly known as the Venice Commission) outlined in its "Rule of Law Checklist" that the rule of law demands a legal system where laws are clear and predictable.[1] This system must ensure that individuals are treated with dignity, equality, and rationality by decision-makers, and that decisions comply with established laws.[2] Furthermore, people should have the opportunity to challenge these decisions in front of independent and impartial courts through fair procedures. In this checklist, the Venice Commission identified key standards that should guide the evaluation of State actions, which include legality, legal certainty, the prevention of power abuse, equality before the law, non-discrimination, access to justice (which encompasses judicial independence, impartiality, and the autonomy of prosecution services and the legal profession), and the right to a fair trial (which includes access to courts, the presumption of innocence, and the effectiveness of judicial decisions).[3]

A fundamental precondition for upholding the rule of law is ensuring judicial independence. Without this, any external interference in judges' impartial duties could undermine the very fabric of the rule of law. Judicial independence is not a privilege afforded to judges for their own benefit but is a crucial principle that serves as the cornerstone of any democratic state. It is a necessary precondition for the rule of law and a critical guarantee for fair trials. Decisions that undermine judicial independence, especially when disguised, are unacceptable: "Judicial independence is a pre-requisite

1 Council of Europe, Commission Democracy through Law: Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, March 11–12, 2016), 17.
2 Ibid., 12.
3 Ibid., 13.

to the rule of law and a fundamental guarantee of a fair trial. Judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens."[4] Judicial independence is not a privilege or right for the judges themselves, but rather a fundamental necessity for the rule of law and for those who seek and expect justice.[5]

When assessing the independence and impartiality of a tribunal, factors like the method of appointment of its members, their terms of office, safeguards against external pressure, and the overall appearance of independence are all crucial. These elements collectively determine whether a tribunal can be seen as truly independent.[6] Judicial independence extends beyond simply being free from political influence by the executive or legislative branches. It also includes the protection of judges from undue interference from within the judiciary itself. Courts should be independent from legislative bodies, except where they are required to apply laws passed by them. The core issue of judicial independence revolves around ensuring there are no organic ties that could compromise the judiciary's independence from other branches of government. Additionally, the absence of adequate safeguards may not only erode this independence but can also create the perception of bias.[7]

It is crucial that both the judiciary as an institution and individual judges exercise their professional duties without any external influences or even internal pressures. The ability of the judiciary to act impartially and independently is essential for ensuring that justice is done based on law,

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4 Consultative Council of European Judges, Opinion no. 1 on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges, Strasbourg, November 23, 2001, CCJE (2001) OP N°1, p. 3.

5 Council of Europe, Commission Democracy through Law: Opinion no. 789 / 2014: *Amicus Curiae* Brief for the Constitutional Court of Moldova on Certain Provisions of the Law on Professional Integrity Testing, CDL-AD(2014)039, adopted December 15, 2014, p. 4.

6 Council of Europe, Commission Democracy through Law: Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on Legal Safeguards of the Independence of the Judiciary From the Executive Power of the Netherlands, CDL-AD(2023)029, adopted October 11, 2023, p. 4.

7 Council of Europe, Commission Democracy through Law: Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, Opinion no. 550/2009, CDL-AD(2010)003, adopted March 16, 2010, p. 8.

thereby preventing any misuse of power. Public trust in the judiciary's ability to operate independently is vital for maintaining the rule of law.[8]

Judges must be able to make decisions without being subject to any form of undue influence, whether from external authorities or internal pressures within the judiciary itself. Judicial independence must be safeguarded both in its "external" components (free from outside influence) and its "internal" components (free from internal pressures or conflicts of interest).[9] An independent judiciary must also be accountable, but this accountability should not infringe upon its independence. Judicial independence should never be used as an excuse to prevent accountability, but accountability measures must be carefully designed to avoid undue pressure on the judiciary. The Venice Commission also reminds us that judges are not mere civil servants because they perform a unique constitutional function. Given this, it is essential to protect the special status of judges and the principles that underpin judicial independence to preserve the integrity of the judiciary.[10]

The "Rule of Law Checklist" of the Council of Europe is one of the most important documents in Europe for discussing the rule of law and judicial independence because it provides a comprehensive framework for assessing the legal and institutional standards that underpin democracy and justice in member states. The "Checklist" offers a set of benchmarks that countries can use to measure their adherence to fundamental democratic values. It emphasizes the essential role of an independent judiciary in maintaining the rule of law, ensuring fair trials, and protecting citizens' rights, making it a crucial reference for both legal experts and policymakers across Europe.

The European Commission, drawing inspiration from the Council of Europe, offered its own definition of the rule of law in its July 2019

8 Council of Europe, Commission Democracy through Law: Opinion on Constitutional Arrangements and Separation of Powers and the Independence of the Judiciary and Law Enforcement of Malta, Opinion no. 940/2018, CDL-AD(2018)028, adopted November 29, 2018, p. 7.

9 Rule of Law Checklist, p. 39.

10 Council of Europe, Commission Democracy through Law: Ukraine – Joint Follow-up Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe to the Joint Opinion on the Draft Amendments to the Law "On the Judiciary and the Status of Judges" and Certain Laws on the Activities of the Supreme Court and Judicial Authorities (CDL-AD(2020)022), adopted by the Venice Commission at its 136th session, October 9, 2023, p. 8.

Communications on strengthening the rule of law within the EU. According to this definition, the rule of law refers to a system where all public authorities act within the boundaries set by law, respecting democratic values and fundamental rights, and are subject to oversight by independent and impartial courts.[11]

Judicial independence is also a fundamental requirement, deriving from the principle of effective judicial protection outlined in Article 19 of the TEU and the right to an effective remedy before the courts, as stated in Article 47 of the Charter of Fundamental Rights of the EU. It ensures fairness, predictability, and certainty within the legal system. The Court of Justice of the EU defines judicial independence as

> (…) presuppos(ing), in particular, that the body concerned exercises its judicial functions wholly autonomously without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.[12]

Both the Council of Europe and the European Union recognize justice as a core element of the rule of law. For both organizations, an effective justice system is defined by its independence, quality, and efficiency, which are essential to upholding the rule of law and the values on which the EU is based.

Until recently, the issue of judicial independence had not been raised at the EU level against Croatia. This stands in contrast to the fact that the European Commission's Judicial Scoreboard has consistently shown Croatia's population confidence in its judicial system to be among the lowest in Europe. No other country fares worse. Interestingly, countries such as Hungary, Romania, and Malta – who have been brought before the Court of Justice of the European Union (CJEU) over judicial independence issues – have a better public perception of their judicial systems. Croatian citizens

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11 European Commission, Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Strengthening the rule of law within the Union. A blueprint for action, COM/2019/343 final, July 17, 2019.

12 CJEU Judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses v. Tribunal de Contas, Case C-64/16, ECLI:EU:C:2018:117, para. 2.

cite government and political interference as the primary reason for their perceived lack of judicial independence. In Croatia, 60% of respondents share this view. Furthermore, 47% perceive that the judicial status does not guarantee independence, this figure being – together with Poland – the highest in the EU.[13]

Against this backdrop, in 2021, three cases were referred to the CJEU concerning potential violations of judicial independence in Croatia. These cases were consolidated into a single procedure which dealt with the rejection of requests by the Croatian Financial Agency for reimbursement in insolvency procedures and the initiation of judicial administration. The affaire at stake joined cases C-554/21 (*Financijska agencija v. Hann-Invest d.o.o.*), C-622/21 (*Financijska agencija v. Mineral-Sekuline d.o.o.*), and C-727/21 (*Financijska agencija v. Udruga KHL Medveščak Zagreb*). Advocate General Mr. Priit Pikamäe presented his Conclusions on October 26, 2023 and the judgment was issued by the Grand Chamber on July 11, 2024.[14] The referring national court questioned whether certain procedural mechanisms might violate EU law, particularly Article 19 TEU. The contested mechanism aims to ensure consistency in case law by empowering a "registrar judge," who has not participated in the case, to reject, amend, or even escalate a decision to a larger court panel without direct involvement with the case. It also allows an extended section of the same court to force the judges who have heard the case to change the sense of the resolution they deem appropriate for the specific case before the resolution is issued.

This ruling is noteworthy not only because it marks the first time the CJEU addressed judicial independence in Croatia, but also because it is the first one where the Court considered internal threats to judicial independence rather than interference by the government. Another notable aspect is that the CJEU rejected the Advocate General's opinion, which had initially suggested that the case should be dismissed. Actually, the Advocate General attempted twice to avoid a ruling against Croatia. First, by suggesting the case should be inadmissible, and second, by arguing that Croatian

13 European Commission, Judicial Scoreboard, June 11, 2024, p. 46.

14 CJEU Judgment of 11 July 2024, Financijska agencija v. Hann-Invest d.o.o., Mineral-Sekuline d.o.o., and Udruga KHL Medveščak Zagreb, Joined Cases C 554/21, C 622/21, and C 727/21, ECLI:EU:C:2024:594.

judicial rules did not conflict with EU law. The CJEU finally found this practice incompatible with EU law but offered constructive guidance to Croatia on how to reform its judicial system.[15]

2. Jurisdiction

There are two aspects that are essentially the two sides of the same coin: first, it is the CJEU's responsibility to assess the circumstances in which a national judge refers a case to ensure the Court's jurisdiction and the admissibility of the request for a preliminary ruling. Second, the CJEU can only interpret EU law within the scope of the competences it has been assigned.

Regarding the jurisdiction of the Court of Justice, the Advocate General argues that the Court is competent on the issue of interpreting Article 19(1) TEU (composition and functions of the Court), but it is not competent to interpret Article 47 of the Charter of Fundamental Rights (effective judicial protection and the right to a fair trial), despite both provisions being cited by the Croatian court in its request for a preliminary ruling. Article 19 TEU applies to any national body tasked with issues concerning EU law, meaning national judges act as EU judges when dealing with matters related to EU law. Therefore, the Court has jurisdiction in this regard. Conversely, according to Article 51 of the EU Charter, the Charter only applies to member states when they are implementing EU law. Since the Croatian court did not invoke any EU provisions relevant to the case, the Advocate General concluded that the CJEU could not address Article 47 of the Charter in this instance (paras. 24–26 of the Opinion).

It's important to note that the Court of Justice concurs with this view. It first declares its lack of jurisdiction to interpret Article 47 of the Charter because the Croatian court did not indicate that the cases at hand involved the application of any EU legal norm at the national level (paras. 32–33 of the Judgment). It then declares its jurisdiction over Article 19 TEU, as this provision requires member states to establish a system of remedies ensuring effective judicial protection within EU law. Since the Croatian court

[15] A preliminary yet very accurate comment on this judgment can be found in: Nika Bačić Selanec and Davor Petrić, "Reshaping National Judiciaries under Article 19(1) TEU: The Grand Chamber's Decision in Hann-Invest," *EU Law Live. The Week*, no. 35 (2024), accessed April 25, 2025, https://eulawlive.com/op-ed-reshaping-national-judiciaries-under-article-191-teu-the-grand-chambers-decision-in-hann-invest.

forms part of the national judicial system, the Court confirmed its jurisdiction over the three cases (paras. 34–38 of the Judgment).

It may cause surprise that the Court considers itself competent to rule on the application of Article 19 TEU but not on Article 47 of the Charter. The reason lies in the universal application of Article 19 TEU as all judicial bodies in member states may eventually be required to address matters related to EU law. Every national judge is, in effect, an EU judge. Ensuring that national remedies guarantee effective judicial control within EU law is a fundamental requirement. However, Article 51 of the Charter restricts its application to situations where EU law is being implemented, and the Croatian court did not indicate that the disputes involved the interpretation or application of EU law (para. 32 of the Judgment). This is why the Court of Justice found it was not competent to interpret the Charter.

3. Admissibility

A significant point of divergence between the Conclusions and the Judgment concerns the admissibility of the case. While the Advocate General suggested inadmissibility, the Court took the opposite stance and addressed the merits.

The Advocate General suggests that rigor in assessing admissibility is the only limit to reviewing preliminary ruling requests that might be "contrary to the spirit and purpose" of the preliminary reference procedure (para. 30). The Conclusions argue that there must be a clear link between the case and the EU law provisions whose interpretation is requested. The Advocate General elaborates on the "necessity" of a preliminary ruling (para. 31), explaining that this necessity may be direct – when the national court needs to apply EU law to resolve the case – or indirect – when the ruling helps clarify procedural provisions of EU law essential to the national court's decision. He argues that although insolvency procedures have some substantive connection to EU law, the link here is insufficient to meet the necessity criteria. Furthermore, the requests do not demonstrate that the Croatian court must apply Article 19 TUE in resolving the substance of the case (para. 33). The Advocate General adds that the national court does not appear to seek clarification on the substance of the cases but on procedural matters (para. 34). He concludes that the procedural issues raised do not reflect a necessary connection to EU law (para. 35).

The Advocate General notes that judicial independence within the scope of EU law is not different from judicial independence in domestic matters. However, he stresses that this observation does not relieve the Court of the obligation to assess whether EU law is applicable to the case at hand in Croatia (para. 40). According to the Conclusions, an overly broad interpretation of Article 19 TUE could lead to the Court assuming jurisdiction over any judicial matter in a member state, even if the case is not related to EU law, potentially undermining national judicial autonomy. The Advocate General raises the legitimate question of whether Article 19 TUE grants the Court the authority to intervene in any matter affecting the judicial system of a member state, even if the case is unrelated to EU law. If so, it could lead to a form of general competence for the Court, potentially undermining national sovereignty over judicial organization.

Regarding the Court's reasoning on admissibility, the Grand Chamber states that the purpose of a preliminary ruling is not to provide advisory opinions on hypothetical or general matters but to resolve concrete disputes. Thus, a preliminary ruling must be necessary for the national court to issue its judgment (paras. 39–40). The Court finds that the Croatian High Commercial Court in the first two cases (C-554/21 and C-622/21) is confronted with the instructions of the registrar judge, and in the third case (C-727/21), with the obligation to resolve in accordance with the legal position adopted by the expanded commercial section of the court. These instructions and positions affect prior judgments and will not be considered final unless they are followed. Since the Croatian court is seeking clarification on whether these interventions violate Article 19 TUE, which mandates judicial independence in matters related to EU law, the Court declares all three preliminary ruling requests admissible (para. 41).

While the Advocate General sought to differentiate when a ruling is necessary to resolve a case and when it is not, the Court simply declares the requests admissible, arguing that the Croatian High Commercial Court is confronted with binding instructions and legal positions that affect its judgments. The Court does not elaborate on the connection to EU law nor cites any EU provision of secondary law. Instead, it reasons that the involvement of the registrar judge and the expanded section of the court

justifies the need to clarify whether these interventions align with Article 19 TEU (para. 42).

Thus, the Court of Justice seems to assert a near-general competence to review the compatibility of member state judicial norms and practices with the TEU, even without demonstrating a clear connection to EU law or its areas of application. Moreover, it appears that the national court does not need to make any real effort to explain the connection between the case and EU law. In essence, the fact that a national judge is also an EU judge seems to grant the CJEU a broad authority to address any issue related to the judicial system of a member state.

4. Merits

Although the Advocate General held the view that the joined cases should not have been admitted, he still examined the substance of the issues raised, aiming for thoroughness in his role of assisting the CJEU.

In essence, the preliminary questions suggest that the referring court has doubts about whether a national mechanism, which includes both national legislation and practices aimed at ensuring the coherence of jurisprudence, is compatible with Article 19(2) TEU. The mechanism involves a judicial decision at second instance being sent to the parties for the conclusion of the case only if a registry judge (who is not part of the judicial panel that issued the decision) approves its content, and if an extended section meeting of that court has the authority to adopt legally binding positions for all the chambers or judges of that court.

The Advocate General organizes his analysis into two main parts: one relating to the requirement for legal certainty, and another to the respect for the right to effective judicial protection. The second part is further divided into three subsections: judicial independence, the right of defense, and access to a tribunal established by law. While the Court of Justice does not follow this structure in its Judgment, it addresses almost all of these issues in one way or another, albeit sometimes only in passing.

4.1. Legal Certainty

The Advocate General offers a detailed analysis of legal certainty, a fundamental EU principle ensuring predictability in legal relationships. He argues that legal norms must be clear, precise, and consistently applied so

individuals can understand their rights and obligations (para. 50 of the Conclusions). Additionally, the Advocate General ties this principle to the Court of Justice's role in maintaining consistent case law to ensure legal certainty across the EU (para. 51 of the Conclusions).The Advocate General contends that a national mechanism ensuring consistent case law is not incompatible with EU law, provided it does not undermine judicial independence or obstruct national courts from referring questions to the Court (para. 52 of the Conclusions). He supports the Croatian procedural mechanism, suggesting second-instance courts should ensure consistency in their case law, promoting horizontal coherence and legal certainty (para. 54 of the Conclusions).

In contrast, the Court of Justice briefly references legal certainty, treating it as a given and emphasizing that national measures to prevent judicial divergence must comply with the requirements of Article 19(2) TEU (para. 48 of the Judgment).

4.2. Effective Judicial Protection

The Advocate General's discussion of effective judicial protection begins by emphasizing the EU's foundational values, particularly the rule of law as enshrined in Article 19 TEU. He asserts that member states must ensure their judicial systems respect the principle of effective judicial protection in line with EU law. States may reform their judicial systems to enhance the protection of the rule of law but cannot diminish it (para. 56 of the Conclusions). Judicial independence is crucial, and any measures undermining it must be avoided. The Advocate General further ties the principle of effective judicial protection to Articles 6 and 13 of the European Convention on Human Rights (ECHR), ensuring the right to a fair trial and access to an effective remedy. He references both Article 47 of the Charter and Article 19 TEU, arguing that member states must establish legal systems that guarantee effective judicial protection in EU law areas (para. 57 of the Conclusions). While he acknowledges the relevance of Article 47 of the Charter, his earlier position that the Court was not competent to interpret this provision creates some confusion when he emphasizes its importance in this context.

The Advocate General's reasoning draws from early jurisprudence, where the Court recognized fundamental rights as part of EU law's general principles, based on the constitutional traditions of member states and

international human rights conventions[16] (para. 58 of the Conclusions). Effective judicial protection is one of these principles, which includes judicial independence and access to an independent judge. However, when discussing Article 47 of the Charter, the Advocate General shifts focus away from the constitutional traditions and the ECHR, which could have been more central to the analysis in this case.

The Court of Justice generally follows the Advocate General's reasoning, recognizing judicial independence and access to an independent judge as essential for effective judicial protection. However, the Court adopts a broader approach, referencing Article 47 of the Charter and its own case law, while also integrating the ECHR into its interpretation. The Court notes that Article 47 corresponds to Article 6(1) of the ECHR and frequently refers to the ECHR, but does not base its reasoning solely on Article 47 (para. 46 of the Judgment).

While the Court refers to the ECHR, it only cites two relevant Judgments of the European Court of Human Rights (ECtHR): *Parlov-Tkalčić v. Croatia*,[17] regarding judicial independence, and *Coëme and Others v. Belgium*,[18] which discusses the requirement that a tribunal be "established by law" (paras. 54 and 57 of the Judgment). The Court's reliance on these two cases is a missed opportunity to incorporate a wider range of ECtHR case law on judicial independence, such as *Baka v. Hungary*, *Grzęda v. Poland*, or *Guðmundur Andri Ástráðsson v. Iceland and Others*,[19] which could have enriched the Court's reasoning.

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16 See on this: Manfred A. Dauses, "La Protection des Droits Fondamentaux dans l'Ordre Juridique Communautaire," *Revue Trimestrielle de Droit Européen*, no. 3 (1984): 401–24; José C. Moitinho de Almeida, "La Protección de los Derechos Fundamentales en la Jurisprudencia del TJCE," in *El Derecho Comunitario Europeo y su Aplicación Judicial*, eds. Gil C. Rodríguez Iglesias and Diego J. Liñán Nogueras (Madrid: Cívitas, 1993), 97–131.

17 ECtHR Judgment of 22 December 2009, Parlov-Tkalčić v. Croatia, application no. 24810/06, hudoc.int.

18 ECtHR Judgment of 22 June 2000, Coëme and Others v. Belgium, applications nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, hudoc.int.

19 ECtHR Judgment of 23 June 2016, Baka v. Hungary, application no. 20261/12, hudoc.int; ECtHR Judgment of 15 March 2022, Grzęda v. Poland, application no. 43572/18, hudoc.int; ECtHR Judgment of 1 December 2020, Guðmundur Andri Ástráðsson v. Iceland, application no. 26374/18, hudoc.int.

The Court does not extensively engage with the vast body of ECtHR case law on judicial independence, despite the relevance of many key decisions, which could have provided additional depth to the judgment. The limited reference to ECtHR jurisprudence in the judgment may be seen as a missed chance to further align the EU's interpretation of judicial protection with established international human rights standards.

In short, the Advocate General provides a thorough exploration of legal certainty and effective judicial protection, emphasizing their importance in ensuring predictability and upholding the rule of law in the EU. He discusses the role of the Court in maintaining consistent case law and ensuring that national mechanisms align with EU law, while maintaining judicial independence. Although the Court of Justice adopts a similar approach, its judgment is more concise, referencing both Article 47 of the Charter and the ECHR. However, the Court limits its engagement with ECtHR case law, missing the opportunity to draw on the full body of relevant judgments that could have further informed its analysis of judicial independence in the EU context.

4.2.1. Judicial Independence

The Advocate General raises an important question regarding judicial independence: whether the involvement of the registrar and the judges' section in Croatia undermines the independence of the judicial panel. His answer is negative. While his conclusion might be debated, the Advocate General provides a comprehensive explanation of judicial independence. He explains that judicial independence is essential to the judicial function, directly linked to the right to effective judicial protection and the right to a fair trial – both fundamental rights necessary to uphold the EU's rule of law, as enshrined in Article 2 TEU. Judicial independence includes two key aspects: external and internal. External independence ensures that judges act without external pressures, particularly from the executive and legislative branches. Internal independence relates to impartiality, ensuring that judges remain neutral and are not influenced by the parties involved in the case. To safeguard these principles, the Advocate General argues that certain rules are necessary, such as those governing the composition of the judiciary, the length of judicial mandates, and grounds for recusal. These rules are vital to maintaining both the legitimacy of the court and public confidence in the judiciary. Furthermore, the appearance of judicial independence is as

critical as its substance, and any internal pressures within the judicial system must also be considered.

In this particular case, the Advocate General evaluates whether the Croatian mechanism for ensuring consistent case law, which involves the registrar and the judges' extended section, threatens judicial independence. He relies on ECtHR's case-law to argue that judicial independence must guard against both external and internal pressures. While he acknowledges that the registrar's involvement could be seen as disruptive, he justifies it as part of the mechanism to maintain legal consistency, stating that it does not undermine judicial independence as long as it is appropriately implemented. The Advocate General also highlights the tension between ensuring uniformity in judicial decisions and safeguarding judicial independence. However, he concludes that the Croatian system system, which includes broad participation and still allows the judicial panel to make the final decision, does not violate judicial independence. The process may appear intrusive, but it does not infringe on the domestic court's ability to make its final decision (paras. 61–63 of the Conclusions).

The Court of Justice largely follows the Advocate General's reasoning here but further emphasizes that judicial independence is indispensable for effective judicial protection and a fair trial. It reiterates the need to safeguard both external and internal judicial independence, asserting that strict rules governing judicial composition are crucial for maintaining impartiality and preventing undue influence. The Court underscores that threats to judicial independence, whether internal or external, must be prevented to ensure the integrity of the judicial system within the EU (paras. 55–59 of the Judgment).

4.2.2. The Right to Defense

The Advocate General discusses the right to defense as a central component of effective judicial protection within the Croatian judicial framework. He references again the Charter and, particularly Article 47, as well as Article 6 of the ECHR, which protects the right to a fair trial. For its part, the Commission raises concerns about the Croatian procedure, particularly that section meetings are not public, parties cannot present their arguments during these meetings, and judges may participate without having reviewed the case submissions (para. 73 of the Conclusions). In response, the Advocate General asserts that the right to defense includes the right to be heard. He

acknowledges that while the Croatian process might seem opaque, the deliberation phase does not violate the right to defense. He clarifies that no resolution is made until after the deliberation, allowing judges to discuss abstract legal principles. He views deliberation positively as it provides an opportunity for judges to reflect on the case and applicable legal norms, even if some issues were not raised by the parties themselves, provided it respects the adversarial process (paras. 76–78 of the Conclusions).

When the Court of Justice issued its Judgment, it incorporated the right to defense within the broader framework of judicial fairness, rather than addressing it as a separate issue. The Court included the right to defense within its general emphasis on the requirement for an effective trial (paras. 55–59 of the Judgment).

4.2.3. Access to a Court Established by Law

The Advocate General discusses the meaning of "a court established by law," an essential principle for ensuring the rule of law. He draws on established ECHR case law to argue that a court must be pre-established by law and governed by legislation, preventing arbitrary decisions by the executive. This principle ensures that courts operate within a legal framework set by the legislature, ensuring transparency and predictability in the judicial system.

The Advocate General explains that the issue in this case is not the existence of the Croatian Commercial Court, but the mechanism it uses for decision-making. He discusses whether the involvement of the registrar and the judicial section in this process affects the requirement that the court be established by law. He concludes that the Croatian rules governing the deliberation phase meet this requirement, as they are based on legal provisions that ensure the legitimacy of the process. Although the Advocate General focuses primarily on the registrar's role, he briefly mentions the participation of the expanded judicial section. He argues that the registrar's intervention in ensuring consistency in case law does not violate the requirement for a court established by law. However, he provides a more limited analysis of the expanded section's involvement, suggesting it does not raise significant concerns under this principle (para. 79 of the Conclusions).

The Court of Justice's judgment expands on this issue, emphasizing that the requirement of a court established by law refers not only to the legal foundation of the court but also to its composition and the transparency

of the decision-making process. It agrees with the Advocate General that the court must issue its judgment in accordance with a transparent procedure that guarantees fairness and the right to an effective trial. The Court stresses that the formation of the judicial body responsible for the decision must be clearly defined, and that any undue external influence, including from judges not directly involved in the case, violates the principle of judicial independence. The Court concludes that the registrar's role, as well as the expanded section's participation, could infringe the requirement for a court established by law, as both involve individuals who may not be fully familiar with the case or the facts, potentially influencing the final outcome without the parties having had a chance to present their case (paras. 55–59 of the Judgment).

5. Autonomous Arguments Invoked by the CJEU

After the previous analysis of the applicable principles, the CJEU presents its own autonomous legal reasoning, departing from the structure of the Advocate General's Conclusions (para. 60 of the Judgment).

The Court evaluates the role of the registrar judge in the main proceedings, noting that neither Croatian procedural regulations nor the Law on the Judiciary grant this judge the authority to control the content of judicial rulings. However, in practice, the role of the registrar judge exceeds his administrative function, as he can block the registration of decisions, thus preventing their finalization and notification to the parties. This allows the judge to send the case back to the judicial formation for reconsideration and even urge a meeting to establish a binding legal position. The Court concludes that this constitutes undue interference, as the registrar's intervention lacks a proper legal foundation, is not based on clear and objective parameters, and affects the final resolution (paras. 61–69 of the Judgment).

Next, the CJEU addresses the role of the expanded section of the court. It acknowledges that Croatian law allows the intervention of a section meeting in cases of interpretative disagreements between sections, panels, or judges. This meeting, which can be called by the registrar judge, has the power to issue a binding legal position for the entire section or court. Although it does not resolve the case definitively, the position adopted can influence the final content of the ruling (paras. 70–74 of the Judgment). The Court observes that the intervention of the expanded section does

not meet sufficiently objective parameters and lacks transparency, as the parties are unaware of the meeting's convocation and cannot participate. Therefore, this intervention is also incompatible with the right to effective judicial protection (paras. 75–79 of the Judgment).

Finally, the CJEU introduces a new argument, which seems to serve as a "safety valve" for the Croatian judicial system. The Court outlines the conditions under which the intervention of the judge's or the expanded section's intervention could be compatible with Article 19 TEU. These conditions include that the matter has not yet been submitted for deliberation by the relevant formation, the criteria for such a referral is clearly defined in the applicable law, and the referral should not deprive the interested parties of the opportunity to participate in the procedure before the expanded formation. These conditions would ensure that a procedure aimed at avoiding or correcting conflicting jurisprudence does not contravene Article 19 TEU and guarantees the legal certainty inherent in the rule of law. The CJEU notes that this additional point was not raised by the parties but is nonetheless included as a constructive suggestion to Croatian authorities on how they might amend their judicial system to comply with EU law (para. 80 of the Judgment). Thus, the CJEU appears to provide a "constructive" solution, explaining how Croatian judicial regulations could be reformed to align with the EU's expectations on judicial independence.

6. Consequences of the Judgment for the Croatian Legal System

Croatia successfully adhered to EU standards at the time of its accession meeting the criteria for an efficient and independent judicial system. However, over a decade later, the Croatian judiciary is far from being considered a model of excellence by either the European Commission or Croatian public opinion.[20] In fact, Chapter 23 of the acquis, which addresses the judiciary and fundamental rights – an essential condition for Croatia's EU membership – was one of the most challenging and contentious areas for the country's candidacy.

[20] Mateja Čehulić and Dario Čepo, "Hiding behind Digitalization: Judiciary Reform Strategies," in *¿La Europa de los valores? El declive del Estado de Derecho en la UE*, ed. Susana Sanz-Caballero (Navarra: Aranzadi, 2023), 371–92.

The reforms implemented during negotiations with the EU had a positive impact on the judicial system, accelerating the fight against corruption and improving the protection of fundamental rights, ultimately enabling Croatia to join the Union. That said, the results fell short of expectations.[21] In Croatia, as in other Eastern European member states, many reforms initiated after meeting the EU's criteria were not fully implemented due to changes in government or shifting political priorities.[22] Some reforms were even reversed later, either through amendments to existing policies or a conscious decision to abandon them.[23]

Consequently, the Croatian judicial system retains practices inherited from the past, some of which persist either due to inertia or unconscious repetition. These outdated practices and norms reflect an earlier era, more akin to the control expected in a communist judicial system than in a democracy.[24] In Croatia, there is not only a serious perception of interference from other state powers in the judicial process, but also a significant concern about corruption within the judiciary itself.[25] In many cases, judges simultaneously hold other professional or honorary positions – such as being members of chambers of commerce, football club presidents, or real estate agents. These additional roles, often doubling their income, make it

21 Tina Đaković, *Policy Insight: Partial Reforms and Incomplete Europeanisation – Croatia's Experience in Conducting Reforms in the Context of the Chapter 23 Negotiations with the EU* (Skopje: European Policy Institute), https://epi.org.mk/wp-content/uploads/Policy-Insight-_Partial-Reforms-and-Incomplete-Europeanisation_Croatia%E2%80%99s-Experience-in-Conducting-Reforms-in-the-Context-of-.pdf.

22 Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality* (The Hague: Kluwer Law International, 2008); Dimitry Kochenov and Petra Bard, "Rule of Law Crisis in the New Member States of the EU: The Pitfalls of Overemphasising Enforcement," *Reconnect Working Paper*, no. 1 (2018), https://ssrn.com/abstract=3221240.

23 Andrea Cassani and Luca Tomini, "Reversing Regimes and Concepts: From Democratization to Autocratization," *European Political Science* 19, no. 3 (2020): 272–87; Elyse Wakelin, "EU Conditionality: An Effective Means for Policy Reform?," November 2013, accessed April 25, 2025, https://www.e-ir.info/pdf/43900.

24 Josip Jambrač, "Croatian Post-Socialist Transition or Transformation: Lost in Translation," *Croatian and Comparative Public Administration* 20, no. 4 (2020): 649–76, https://doi.org/10.31297/hkju.20.4.3.

25 Nika Bačić Selanec, Iris Goldner Lang, and Davor Petrić, "Rule of Law in the EU and the State of Croatian Judiciary," in *Crisis Era European Integration: Economic, Political and Social Lessons from Croatia*, eds. Jakša Puljiz and Hrvoje Butković (London: Routledge, 2024), 77–96.

easy for judges to become entangled in clientelism, cronyism, nepotism, or influence peddling.

The fact that the Croatian Constitution declares the rule of law as the supreme value is insufficient to ensure its effectiveness. What truly matters is its implementation in everyday life. Surveys show a low level of trust in the judiciary and profound dissatisfaction with its functioning, which points to an "internal" crisis of trust in the judicial system, compounded by an "external" crisis and latent tensions within and around the Croatian judiciary. In addition to factors related to the functioning of the judiciary, external influences – such as a disorganized legal system and an overburdened court system – contribute to a negative balance. These unfavorable impressions lead to a loss of confidence in the judicial system, reducing its authority and, consequently, the capacity to implement and protect rights. This situation could lead to legal uncertainty, which is disastrous for any society.[26]

Against this backdrop of dissatisfaction with the Croatian judiciary – both due to external pressures on judges and the internal permeability to corrupt or unethical practices – the first case on judicial independence was presented to the CJEU. However, instead of addressing the previously mentioned issues, this case questions an internal procedural practice aimed at correcting divergences in case-law within the same court.[27] The case does not address issues such as the appointment of judges, a politicized judicial council, executive interference in the judiciary, judges holding multiple jobs or receiving extra salaries, nepotism, or judicial misconduct, some of which have been central to other EU member states' cases. The case is nevertheless significant for the rule of law because it concerns a procedural practice – largely oral rather than written – that contradicts the logical idea that the judicial formation responsible for a case should be the only one to issue the final resolution of that case. No one else, not even from the same

26 Jakša Barbić, "Administration of Justice and the Rule of Law in the Republic of Croatia," *Croatian Academy of Legal Sciences Yearbook* 13, no. 1 (2022): 161–72.

27 Alessandro Schmidt, "When the Threat Comes from Home: the Grand Chamber's Review of the Croatian Judicial Uniformity Mechanism under Article 19 (1) TEU in Hann-Invest," BlogDUE, November 5, 2024, accessed April 25, 2025, https://www.aisdue.eu/alessandro-schmidt-when-the-threat-comes-from-home-the-grand-chambers-review-of-the-croatian-judicial-uniformity-mechanism-under-article-19-1-teu-in-hann-invest/.

court, should be able to force a change in the outcome of a decision after the judges have deliberated.[28]

Although this may seem like a minor issue compared to more severe violations of judicial independence that have been brought before the CJEU in recent years, the Court nonetheless declares that the powers granted to the registration judge and the expanded section meeting to alter the decision after deliberation constitute an anomaly. Such practices undermine transparency and involve undue interference by judges who have not examined the case in the final resolution to be notified to the parties. Nevertheless, the CJEU offers a constructive approach, outlining how this procedural mechanism could be compatible with EU law if certain conditions are met. These include ensuring that the case has not yet been submitted for deliberation by the relevant formation, that the criteria for referral are clearly defined in applicable law, and that the parties still have the opportunity to participate in proceedings before the expanded court formation.[29]

Equally intriguing is the fact that the Croatian Constitutional Court had previously validated the constitutionality of this mechanism, deeming it unnecessary to refer the matter to the CJEU for an opinion on its compatibility with EU law, even when the Hann-Invest case was pending before the CJEU. What appears to be a benign and well-intentioned Croatian mechanism designed to prevent contradictions in case law actually reflects outdated collectivist practices from the communist era, when there was total vertical judicial submission to higher-ranking judges. The current apparent lack of interference from other state powers contrasts with a judicial system that is hierarchically organized, where lower-ranking judges are reduced to bureaucrats without free opinion, following the directives of superior judges, often aligned with government interests.[30] Thus, there

[28] Nika Bačić Selanec and Davor Petrić, "New Frontiers for Article 19(1) TEU: A Comment on Joined Cases C-554/21, C-622/21 and C-727/21 Hann-Invest," *Croatian Yearbook of European Law & Policy* 20, (2024): 127–54.

[29] Marc de Werd, "Uninvited Oversight: Judges Watching Judges – The ECJ Hann-Invest Case," Amsterdam Centre on the Legal Professions and Access to Justice, July 16, 2024, accessed April 25, 2025, https://aclpa.uva.nl/en/content/news/2024/07/blog-marc-de-werd.html?cb.

[30] Nika Bačić Selanec and Davor Petrić, "Internal Judicial Independence in the EU and Ghosts from the Socialist Past: Why the Court of Justice Should Not Follow AG Pikamäe in Hann Invest," *Croatian Yearbook of European Law & Policy* 20, (2024): 155–79.

is nothing innocent or benevolent about this mechanism of unifying case law, which still survives in Croatia and other former communist countries, such as Hungary, while countries like Estonia, Lithuania and Latvia have moved past it.[31]

In democracy, the way to challenge an unsatisfactory judicial decision is through an appeal before a higher court that reconsiders the case and hears the parties. The solution is not to have judges who have not examined the case overturn the decision made by those who have, under the pretext of unifying case law. As established in the "Rule of Law Checklist":

> The possibility of appealing judgments to a higher court is a common element in judicial systems and must be the only way of review of judges when applying the law. Judges should not be subject to supervision by their colleague-judges, and a fortiori to any executive hierarchical power, exercised for example by civil servants. Such supervision would contravene their individual independence and consequently violate the Rule of Law. The guarantee can be understood as having two aspects. One relates to the court as a whole. The other relates to the individual judge or judicial panel dealing with the case. It is not enough if only the court (or the judicial branch) competent for a certain case is determined in advance.[32]

Or, as expressed by the ECtHR, there might be potential interference with the decision-making of judges originating from within the judiciary. Internal judicial independence requires that judges be free from directives or pressures from fellow judges. Also, from those who have administrative responsibilities in a court, such as, for example, the president of the court[33] (or registration judges, for the same reason). And not only internal independence is important since the absence of sufficient guarantees against

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31 Ibid., 163. Different but, at the same time, similar concerns arise in Romania – and also in Hungary – from the discretional power that the presidents of courts have in the allocation of cases (Petra M. Gyöngyi, "Judicial Reforms in Hungary and Romania. The Challenging Implementation of EU Rule of Law Standards" [PhD diss., Erasmus University Rotterdam, 2019], 158, 179).

32 Council of Europe Commission for Democracy through Law (Venice Commission), Report on the Independence of the Judicial System. Part I: The Independence of Judges, CDL-AD(2010)004, Study No. 494/2008, March 16, 2014.

33 ECtHR Judgment of 22 December 2009, Parlov-Tkalčić v. Croatia, application no. 24810/06, para. 86, hudoc.int.

internal pressures might also amount to a breach of the right to an independent judge.[34]

There are further questions raised by Croatian scholars, such as whether this registrar or expanded section judges act as "sheriffs," whether they believe the judges who have examined the case do not know the law, whether the system marginalizes disobedient judges, or what the implications are of the fact that much of this mechanism is unwritten and therefore poorly regulated.[35] It is worth noting that the Advocate General responsible for the Hann-Invest case was Estonian, and one might speculate whether this fact influenced the leniency of his opinion on the questioned mechanism, despite its criticism in the Judgment. Many Central and Eastern European countries lived under similar mechanisms of jurisprudential unification during the communist era, and there may be an unconscious empathy or understanding toward such practices in countries where similar systems existed.

7. Conclusions

While member states have discretion in organizing their judicial systems, they must comply with EU law requirements. The deficiencies in the Croatian judicial system are well known, as reflected year after year in the European Commission's Justice Scoreboard. These deficiencies appear to trace back to the time when Croatia was part of the former Yugoslavia, as critical data and opinions about the Croatian judiciary date back to the same period when the country joined the EU. However, until the summer of 2024, no case had been brought before the CJEU questioning the Croatian judicial system or its independence (no referrals, annulment actions, or infringement procedures). Therefore, there was no formal judicial evidence at the European level regarding these deficiencies.

Curiously, the first case that reached the CJEU, although related to judicial independence, does not concern any law that blatantly ignores the rule of law and the standards set out in Article 19 TEU. Instead, it addresses a procedural practice that, although with the seemingly noble aim of

[34] ECtHR Judgment of 6 October 2011, Agrokompleks v. Ukraine, application no. 23465/03, para. 137, hudoc.int.

[35] Council of Europe Commission for Democracy through Law (Venice Commission), Report on the Independence of the Judicial System. Part I: The Independence of Judges, CDL-AD(2010)004, Study No. 494/2008, March 16, 2014, pp. 3–5, 8–10.

avoiding contradictory jurisprudence within the same court, imposes an external judicial criterion on judges who have already considered the case. Judges who have not heard the case should not be able to influence the final decision.

The fact that Croatia may not have been condemned is reflected in the Conclusions of the Advocate General, who suggested that the case be inadmissible, or if it were examined, the procedural practice could be deemed compatible with Article 19 TFEU. The ruling also took the Croatian Constitutional Court by surprise, as this national Court had ruled in 2022 that the mechanism was constitutional and did not warrant a referral to the CJEU to assess its compatibility with EU law.

However, the CJEU is not obliged to follow the reasoning of the Advocate General or accept a national Constitutional Court's opinion on the compatibility of a national provision with EU law. The ruling raises two significant questions. First, whether the CJEU's competence to review the judicial organization of EU member states is unlimited, granting it the broad authority to demand changes in the judicial systems of all 27 EU countries. Second, whether the CJEU, through its rulings, creates law. In this case, beyond merely pointing out the incompatibility of national legislation with EU law, the Court actively offered solutions on how to adapt the Croatian system to meet EU standards.

The ruling underscores the need to protect judges not only from external pressures but also from themselves. Internal pressures, such as the intervention of judges who have not considered the case, can undermine judicial independence. While the goal may be the unification of jurisprudence, this practice reflects a remnant of the judicial system from the former Yugoslavia era, in which the judicial elite could correct the decisions of other judges. This case is expected to prompt legislative reform that aligns Croatia's judicial system with EU rule of law standards. It will also serve as a warning to other EU member states that retain judicial mechanisms inherited from the Iron Curtain era.

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Virtual Conciliation and Mediation Hearings: A Systematic Review

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Abstract: This article aims to conduct a systematic review on virtual conciliation and mediation hearings to identify their strengths, weaknesses, and areas for concern. The study employs a systematic review methodology, allowing for the identification, selection, analysis, and synthesis of relevant academic works. The research is directly linked to digital judicial governance, examining its dimensions in terms of accessibility, resources, structure, and judicial performance. By reviewing and analyzing the scientific studies available on Scopus, Web of Science, HeinOnline and Google Scholar databases, this study identifies recurring analytical dimensions and provides a framework that can serve as a basis for future research, contributing to the advancement of this area of knowledge.

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1. Introduction

Society has become increasingly interconnected through technological advancements, albeit at varying levels.[1] The so-called *homo digitalis* interacts on social networks, engages in commerce, communicates with others,[2] pursues education, and accesses public services in digital environments. In this context, the judicial system has undergone a process of progressive digitalization, particularly since the early 21st century.[3] This shift aims to adapt to evolving social dynamics, capitalize on technological opportunities, and enhance judicial efficiency.[4]

Several studies emphasize that the dematerialization of justice[5] was significantly accelerated by the COVID-19 pandemic, which required social distancing and led to the closure of physical court facilities. As a result, judicial systems worldwide were compelled to adopt digital mechanisms to sustain operations.[6] Although electronic case management systems were

1 Beatriz F. de Moraes, Fabrício C. Lunardi, and Pedro Correia, "Digital Access to Judicial Services in the Brazilian Amazon: Barriers and Potential," *Social Sciences* 13, no. 2 (2024): 1–17; António M. Oliveira et al., "An Overview of the Portuguese Electronic Jurisdictional Administrative Procedure," *Laws* 12, no. 5 (2023): 1–24.

2 Luiz O.R. de Freitas, Fabrício C. Lunardi, and Pedro M.A.R. Correia, "Liberdade de Expressão na Era Digital: Novos Intermediários e Censura por Atores Privados," *Revista de Investigações Constitucionais* 11, no. 2 (2024): 1–22.

3 Oliveira et al., "An Overview of the Portuguese Electronic Jurisdictional Administrative Procedure."

4 Rafael L. de Costa, "Audiências Virtuais e sua Influência na Governança Judicial" (MA diss., Escola Nacional de Formação e Aperfeiçoamento de Magistrados, 2023); Pedro M.A.R. Correia et al., "User-Centric Approach: Investigating Satisfaction with Portuguese Justice Services," *Revista Brasileira de Políticas Públicas* 14, no. 2 (2024): 439–63.

5 Costa, "Audiências Virtuais e sua Influência na Governança Judicial."

6 Oliveira et al., "An Overview of the Portuguese Electronic Jurisdictional Administrative Procedure"; Chinemelum Arinze-Umobi and Ifeanyi T. Okonkwo, "Alternative Dispute Resolution Practice in Nigeria and the Effect of Covid-19 Pandemic," *International Journal of Law and Clinical Legal Education* 2, no. 1 (2021): 82–5; Christopher D.R. Cameron, "Virtually the Same? Videoconference Arbitrations and Some Myths and Ethics about Conducting Them," *ABA Journal of Labor & Employment* 3, no. 1 (2021): 479–94; Livia L.O. Borba, Fabrício C. Lunardi, and Tomas A. Guimaraes, "Judge's Managerial Competences: A Case Study in a High-Performance Court," *Revista Direito GV* 20 (2024): 1–23; Jaime Lindsey, "Open Justice, Participation and Materiality: Virtual Hearings and the Court of Protection," in *Covid-19, Law and Human Rights: Essex Dialogues*, eds. Carla Ferstman and Andrew Fagan (Colchester: University of Essex, 2020), 257–60.

already in place in several countries prior to the pandemic,[7] the crisis catalyzed the expansion of virtual hearings and remote trial sessions, allowing for the near-complete virtualization of judicial procedures and eliminating the need for physical attendance to access justice.[8]

Similarly, multiple jurisdictions reported the adoption of virtual conciliation and mediation hearings, with some even establishing dedicated online mediation and conciliation centers.[9] Virtual conciliation and mediation hearings can be defined as procedural or pre-procedural sessions held on a videoconferencing platform, in which the parties seek to resolve conflicts consensually, led by a third facilitator, called a conciliator or mediator. While this transition offers numerous benefits in terms of judicial governance, particularly in enhancing accessibility, resource optimization, and structural efficiency,[10] it also raises critical concerns. Scholars have questioned whether virtual hearings may compromise procedural integrity, particularly regarding confidentiality and data security, the quality of communication between participants, the duration of proceedings, inappropriate conduct by participants, the adequacy of virtual formats for handling complex disputes, digital exclusion, the absence of clear regulations ensuring due process, and the need for standardized procedural guidelines.[11]

Thus, while judicial digitalization presents notable advantages, it also introduces challenges and opportunities that require critical examination. From an accessibility perspective, Digital Justice extends judicial services

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7 J.C. Costa, "A Virtualização do Acesso à Justiça" (Undergraduate diss., Centro Universitário do Planalto Central Apparecido dos Santos, 2021); Lindsey, "Open Justice, Participation and Materiality"; John D. Gregory, "Current Practices of Online Dispute Resolution: The Canadian Experience," *E-Commerce and ODR: Current Status and Prospects in the Region* 16, no. 1 (2012): 1–12.

8 Oliveira et al., "An Overview of the Portuguese Electronic Jurisdictional Administrative Procedure."

9 Costa, "Audiências Virtuais e sua Influência na Governança Judicial."

10 Jose G. de Araujo Filho et al., "Access to Justice and Digital Inclusion in the Amazon: Geographic Vulnerability and Riverside Communities," *Virtual Economics* 7, no. 2 (2024): 31–49; Moraes, Lunardi, and Correia, "Digital Access to Judicial Services"; Oliveira et al., "An Overview of the Portuguese Electronic Jurisdictional Administrative Procedure."

11 Cameron, "Virtually the Same?"; Paulo C. Dias and Heitor M. de Oliveira, "As Sessões de Conciliação de Mediação Virtuais: Um Breve Ensaio sobre a Ampliação do Acesso à Justiça," *Revista Direito UNIFACS – Debate Virtual* 269, no. 1 (2022): 1–15; Tala Zein, "Virtual Hearings in Arbitration," *Journal of Legal Studies* 2022, no. 13 (2023): 2–10.

to geographically remote regions, eliminating the need for travel. However, there remains significant concern about digital exclusion, which may arise due to limited electricity access, lack of electronic devices, digital illiteracy, or insufficient awareness of legal rights.[12]

This research aims to conduct a systematic review on virtual conciliation and mediation hearings to identify their strengths, weaknesses, and areas for concern. To achieve this, the study employs a systematic review with meta-synthesis, enabling the identification of recurring themes and analytical frameworks in existing research. This methodological approach ensures transparency, rigor, and reproducibility, strengthening the reliability and applicability of findings.

2. Research Methods and Techniques

A systematic review is a research methodology that follows rigorous protocols to synthesize and critically analyze a large volume of academic studies, ensuring high reliability and reproducibility.[13] Among systematic review methodologies, meta-synthesis – also referred to as meta-ethnography or meta-analysis – is particularly useful for synthesizing qualitative studies on a given subject. This approach allows researchers to identify key themes, concepts, and theoretical frameworks, thereby generating new or refined insights into the studied phenomenon.[14]

For this study, we employed a systematic review with meta-synthesis, which involved the identification, selection, analysis, and synthesis of scholarly articles focused on virtual conciliation and mediation hearings. The adoption of this methodology was intended to enhance the transparency and rigor of the systematic review, ensuring the reliability and applicability of the results. The review process was organized into four distinct phases: (1) identification, (2) screening, (3) inclusion, and (4) exclusion.

Subsequently, the analysis of the selected texts was carried out in-depth, comprising the following stages: (1) defining the issue to be addressed in the review, (2) selecting bibliographic databases for consultation

12 Araujo Filho et al., "Access to Justice and Digital Inclusion in the Amazon"; Moraes, Lunardi, and Correia, "Digital Access to Judicial Services."

13 Maria C.B. Galvão and Ivan L.M. Ricarte, "Revisão Sistemática da Literatura: Conceituação, Produção e Publicação," *Logeion: Filosofia da Informação* 6, no. 1 (2019): 57–73.

14 Ibid.

and material collection, (3) developing advanced search strategies, and (4) selecting texts and organizing the gathered information.

In the first stage, the subject of the systematic review – virtual conciliation and mediation hearings – was defined, along with its key analytical dimensions. This step was critical in formulating the central research question, which guided the study.

In the second stage, considering that this is a relatively recent topic, with limited prior research focusing on it as a primary subject, the search strategy prioritized academic publications that emerged after the onset of the COVID-19 pandemic. The search has been conducted using Scopus, Web of Science, HeinOnline and Google Scholar databases, the last one chosen for its broad coverage and accessibility for emerging topics.[15]

In the third stage, a structured search strategy was implemented to locate relevant studies in Portuguese and English.

In the Scopus database, the combinations of terms and expressions occurred as follows, with the results shown below, in Portuguese and English: (1) <*Audiências* AND *virtuais* AND *conciliação* AND *mediação*> with zero results; (2) <*Audiências* AND *virtuais* AND *conciliação*> with 1 result; (3) <*Audiências* AND *virtuais* AND *mediação*> with zero results; (4) <Virtual AND hearing AND mediation AND conciliation> with 2 results; (5) <Virtual AND hearing AND conciliation> with 4 results, composed of the 2 previous ones and 2 new ones; (6) <Virtual AND hearing AND mediation> with 13 results.

Regarding the Web of Science database, adopting the same methodology for research in Portuguese and English, no studies were found in Portuguese. In English, the results were as follows: (1) <virtual AND hearing AND mediation AND conciliation> with 3 results; (2) <virtual AND hearing AND conciliation> with 8 results; (3) <virtual AND hearing AND mediation> with 16 results.

In the HeinOnline database, performing searches in Portuguese, the results are as follows: (1) <*Audiências virtuais de conciliação e mediação*> (without quotation marks) – 5 results; (2) <*Audiências virtuais de conciliação*> (without quotation marks) – 5 results, the same articles as the previous combination; (3) <*Audiências virtuais de mediação*> (without

15 Ibid.

quotation marks) – 9 results, composed of the 4 previous articles and 5 new ones. In turn, using terms and expressions in English, the search presented: (1) <AND "virtual hearing" mediation conciliation> with 40 results; (2) <AND "virtual hearing" conciliation> with 50 results; (3) <AND "virtual hearing" mediation> with 139 results.

In Google Scholar, the following search queries were used in Portuguese, along with their respective results: (1) <*"Audiências virtuais de conciliação e mediação"*> with 7,240 results; (2) <*"Audiências virtuais de conciliação"*> with 12,800 results; (3) <*"Audiências virtuais de mediação"*> with 23,200 results; (4) <*"Audiências virtuais de conciliação e mediação"*> with 2 results; (5) <*"Audiências virtuais de conciliação"*> with 21 results, and (6) <*"Audiências virtuais de mediação"*> with 3 results. After applying a time filter to include only studies published between 2020 and 2024, searches were conducted using both Portuguese and English terms, yielding the following results: (1) <*Audiências virtuais de conciliação e mediação*> (without quotation marks) – 3,420 results; (2) <*Audiências virtuais de conciliação*> (without quotation marks) – 5,700 results; (3) <*Audiências virtuais de mediação*> (without quotation marks) – 15.300 results; (4) <*"Audiências virtuais de conciliação e mediação"*> (in quotes) – 2 results; (5) <*"Audiências virtuais de conciliação"*> (in quotes) – 20 results; (6) <*"Audiências virtuais de mediação"*> (in quotes) – 1 result; (7) <Virtual Hearing mediation conciliation> (without quotation marks) – 3,260 results; (8) <Virtual Hearing conciliation> (without quotation marks) – 14,400 results ; (9) <Virtual Hearing mediation> (without quotation marks) – 17,500 results.

Since this study aims to assess the state of the art on virtual conciliation and mediation hearings and identify dimensions of analysis, it was necessary to select the most relevant studies using Google Scholar's "Sort by relevance" filter. Regarding Brazilian studies, when search terms were enclosed in quotation marks, only two studies published before 2020 were found – one focused on <*Audiências virtuais de conciliação*> and the other on <*Audiências virtuais de mediação*>. By contrast, several English-language studies published before 2020 had already examined this topic as their primary research focus, underscoring their significance in the field. Following this initial survey, a targeted review of abstracts, introductions, and concluding remarks was conducted across the retrieved studies to refine the selection. In the HeinOnline database, the articles were also sorted according to their

degree of relevance (number of citations by other studies), and the most relevant ones were analyzed.

In the fourth stage, the most relevant works for the systematic review were identified and categorized in Table 1 below, which classifies them by title, author, year, country and research approach (theoretical, empirical, or mixed-method).

Table. Categorization of articles on virtual conciliation and mediation hearings

Title	Author, year	Country	Approach
"Análise crítica quanto à virtualização das audiências de conciliação e de mediação no âmbito do Poder Judiciário e os seus reflexos na garantia dos direitos de personalidade" [Critical Analysis of the Virtualization of Conciliation and Mediation Hearings in the Judiciary and Its Reflections on the Guarantee of the Personality Rights]	Gregório & Teixeira, 2024	Brazil	Theoretical
"Access to Justice during COVID-19: Challenges and Issues Created by a Virus"	Middha & Paliwal, 2023	India	Theoretical
"Arbitration Chambers and Technology: Witness Tampering and Perceived Effectiveness in Video-conferenced Dispute Resolution Proceedings"	Ferreira et al., 2023	UK	Mixed-method
"Audiências de conciliação e mediação por videoconferência no Estado de São Paulo: Benefícios e desvantagens segundo relatos empíricos dos conciliadores e mediadores judiciais" [Conciliation and Mediation Hearings via Videoconference in the State of São Paulo: Benefits and Disadvantages According to Empirical Reports from Judicial Conciliators and Mediators]	Oliveira & Dias, 2022	Brazil	Mixed-method
Advocacy for Online Proceedings: Features of the Digital World and Their Role in How Communication is Shaped in Remote International Arbitration	Gómez-Moreno, 2024	Colombia	Theoretical
Virtual Courtrooms: Technical and Jurisprudential Challenges and Solutions – Lessons Learned by the Land and Environment Court of New South Wales	Dixon, 2023	Australia	Theoretical

Title	Author, year	Country	Approach
"O acesso à justiça durante pandemia de COVID-19: Uma análise dos atos normativos expedidos pelo CNJ e TJTO no contexto das audiências de conciliação" [Access to Justice During the Covid-19 Pandemic: An Analysis of the Normative Acts Issued by the CNJ and TJTO in the Context of Conciliation Hearings]	Costa & Costa, 2022	Brazil	Mixed-method
"As alterações do processo civil diante da pandemia da Covid-19: uma análise dos impactos nas audiências de conciliação e de instrução e julgamento" [Changes in the Civil Process Facing the Covid-19 Pandemic: An Analysis of the Impacts on Conciliation Hearings and Instruction with Judgment]	Alves, 2022	Brazil	Mixed-method
Mediation and Conciliation as a Tool to Reduce the Delay in the Resolution of Disputes: An Analysis in the Light of the Principle of Access to Justice	Melo et al., 2020	Brazil	Theoretical
"Covid-19 in Australia: Impacts on Separated Families, Family Law Professionals, and Family Courts"	Smyth et al., 2020	Australia	Theoretical
"The Extrajudicial Virtual Conciliation in Law: Reflections on Ethics"	Arboleda Lopez et al., 2018	Colombia	Theoretical
"Política Autocompositiva: câmaras privadas no cenário nacional" [Self-Composition Policy: Private Chambers in the National Scenario]	Moura & Dufloth, 2024	Brazil	Mixed-method
"The Evolution and Effectiveness of Online Dispute Resolution (ODR) Platforms: A Comprehensive Analysis of ADR in the Digital Age"	Goyal & Goyal, 2023	India	Theoretical
"Post-Pandemic FINRA Arbitration: To Zoom or Not to Zoom?"	Gross, 2023	USA	Empirical
"A Model for Post-Pandemic Remote Arbitration?"	Iannarone, 2023	USA	Mixed-method
"Reform of Civil Procedure in Italy: The Purpose of Lawmakers"	Kaur, 2023	Italy	Theoretical
"Forced Remote Arbitration"	Horton, 2022	USA	Mixed-method
"Arbitration in the Age of COVID: Examining Arbitration's Move Online"	Schmitz, 2021	USA	Theoretical
"Mediation: Its Future Perspective in India"	Ayush, 2021	India	Theoretical

Title	Author, year	Country	Approach
"Observing Online Courts: Lessons from the Pandemic"	Thornburg, 2020	USA	Mixed-method
"A Mediação Digital de Conflitos como Política Judiciária de Acesso à Justiça no Brasil" [Digital Conflict Mediation as a Judicial Policy for Access to Justice in Brazil]	Spengler & Pinho, 2018	Brazil	Theoretical
"Pensando convergências entre a meta 9 do CNJ e o ODS 16 da Agenda 2030: um estudo sobre a tecnologia a serviço da consensualidade no acesso à Justiça" [Thinking about Convergences between CNJ Goal 9 and SDG 16 of the 2030 Agenda: A Study on Technology Serving Consensual Access to Justice]	Ramos, 2023	Brazil	Mixed-method
"Efetividade das audiências de mediação e conciliação online" [Effectiveness of Online Mediation and Conciliation Hearings]	Bessa & Nascimento, 2023	Brazil	Theoretical
"A Mediação como Contribuição para o Desafogamento do Judiciário – ODR no Contexto da Realização das Audiências" [Mediation as a Contribution to Alleviating the Judiciary – ODR in the Context of Conducting Hearings]	Silva, Silva & Sales, 2023	Brazil	Theoretical
"Aplicação da mediação de conflitos no ambiente virtual: desafios e possibilidades" [Application of Conflict Mediation in the Virtual Environment: Challenges and Possibilities]	Vitale, Soares & Machado, 2023	Brazil	Theoretical
"The Impact of Digital Technologies on Alternative Dispute Resolution"	Bhushan, 2023	Brazil	Theoretical
"Effectiveness of Mediation and Conciliation in Extrajudicial Services as an Effective Means in Resolution of Disputes"	Sá et al., 2023	Brazil	Mixed-method
"Online Mediation: Prospects and Challenges in India"	Mishra, 2023	India	Theoretical
"An Analysis of Online Dispute Resolution in India with Special Emphasis on the Impact of COVID-19: Opportunities and Obstacles"	Sharad & Misrab, 2023	India	Mixed-method
"Virtual Hearings in Arbitration"	Zein, 2023	Lebanon	Theoretical

Title	Author, year	Country	Approach
"As sessões de conciliação de mediação virtuais: um breve ensaio sobre a ampliação do acesso à justiça" [Virtual Conciliation and Mediation Sessions: A Brief Essay on Expanding Access to Justice]	Dias & Oliveira, 2022	Brazil	Theoretical
"A conciliação como método de solução de conflitos: desafios enfrentados para sua efetivação no período de pandemia do COVID-19" [Conciliation as a Conflict Resolution Method: Challenges Faced in Its Implementation During the COVID-19 Pandemic]	Abreu & Junior, 2022	Brazil	Mixed-method
"Aplicabilidade da mediação e da conciliação no metaverso: uma análise à luz da advocacia 5.0" [Applicability of Mediation and Conciliation in the Metaverse: An Analysis in Light of Advocacy 5.0]	Mello, 2022	Brazil	Theoretical
"Judiciário e Pandemia da COVID-19: uma análise à luz das atividades de conciliação e dos dados estatísticos referentes ao Tribunal de Justiça do Rio Grande do Norte" [The Judiciary and the COVID-19 Pandemic: An Analysis in Light of Conciliation Activities and Statistical Data from the Rio Grande do Norte Court of Justice]	Bezerra, Neris & Bezerra Júnior, 2022	Brazil	Mixed-method
A audiência telepresencial e a segurança jurídica no processo do trabalho [Telepresence Hearings and Legal Certainty in Labor Proceedings]	da Silva, 2022	Brazil	Theoretical
"Virtually the Same? Videoconference Arbitrations and Some Myths and Ethics About Conducting Them"	Cameron, 2022	USA	Theoretical
"Virtual Hearing Platform: The Use of Technology to Ensure Access to Justice"	Chatterjee, 2022	India	Theoretical
"Inovações Tecnológicas em audiências de conciliação: a utilização da videoconferência no âmbito do TJAP" [Technological Innovations in Conciliation Hearings: The Use of Videoconferencing within the TJAP]	Cavalcante & Abrantes, 2021	Brazil	Mixed-method
"O Paradoxo das Novas Tecnologias e as Audiências Virtuais de Conciliação dos Juizados Especiais Cíveis" [The Paradox of New Technologies and Virtual Conciliation Hearings in the Special Civil Courts]	Mól & Rodrigues, 2021	Brazil	Theoretical

Title	Author, year	Country	Approach
"A Tecnologia Como Ferramenta de Acesso à Justiça: Conciliação Online e sua Aplicabilidade no Campo Jurídico" [Technology as a Tool for Access to Justice: Online Conciliation and Its Applicability in the Legal Field]	de Azevedo Sanches et al., 2021	Brazil	Theoretical
"A virtualização do acesso à justiça: uma visão sobre o impacto das audiências de conciliação por videoconferência durante a pandemia da COVID-19 no âmbito do Tribunal de Justiça do Distrito Federal e dos Territórios" [The Virtualization of Access to Justice: A View on the Impact of Videoconference Conciliation Hearings During the COVID-19 Pandemic within the Court of Justice of the Federal District and Territories]	Costa, 2021	Brazil	Theoretical
"Mediação e Pandemia: os meios tecnológicos como ferramenta da mediação em tempos de pandemia" [Mediation and the Pandemic: Technological Means as a Tool for Mediation in Times of Crisis]	Amaral, 2021	Brazil	Theoretical
"As adaptações do Processo Civil diante da Pandemia de COVID-19: uma análise dos impactos nos processos de famílias e nas audiências de instrução e julgamento" [Adaptations to Civil Procedure in the Face of the COVID-19 Pandemic: An Analysis of the Impacts on Family Proceedings and Trial Hearings]	Alves, 2021	Brazil	Theoretical
"The 'Gants Principles' for Online Dispute Resolution: Realizing the Chief Justice's vision for Courts in the Cloud"	Koh, 2021	USA	Theoretical
"Mediation: The New Normal?"	Alexander, 2021	Singapore	Theoretical
"Arbitral Proceedings Configuration and COVID-19 Pandemic; Evaluation of Success and Shortcomings – Europe, USA and Canada"	Bello & Adeosun, 2021	Nigeria	Mixed-method
"Alternative Dispute Resolution Practice in Nigeria and the Effect of COVID-19 Pandemic"	Arinze-Umobi & Okonkwo, 2021	Nigeria	Theoretical
"Audiência Telepresencial e Devido Processo Constitucional" [Telepresence Hearing and Constitutional Due Process]	Soares & Alves, 2020	Brazil	Theoretical

Title	Author, year	Country	Approach
"O Uso de Meios Eletrônicos pelo Direito Processual Brasileiro Durante a Pandemia da COVID-19" [The Use of Electronic Means in Brazilian Procedural Law during the COVID-19 Pandemic]	Farias, 2020	Brazil	Theoretical
"Audiências Online em Tempo de Pandemia de Covid-19 no âmbito do TJ-CE" [Online Hearings During the COVID-19 Pandemic Within the TJ-CE]	Martins & Holanda, 2020	Brazil	Mixed-method
"A possibilidade da continuidade de audiências de conciliação judicial telepresencial no período pós-pandemia" [The Possibility of Continuing Remote Judicial Conciliation Hearings in the Post-Pandemic Period]	de Paula & Nascimento, 2020	Brazil	Theoretical
"Mediação e conciliação on-line, vulnerabilidade cibernética e destaques do ato normativo nº 1/2020 do NUPEMEC/SP" [Online Mediation and Conciliation, Cyber Vulnerability, and Highlights of NUPEMEC/SP Normative Act No. 1/2020]	Tartuce & Brandão, 2020	Brazil	Theoretical
"Virtual Arbitration: The Impact of Covid-19"	Bateson, 2020	India	Theoretical
"The Global Impact of the Covid-19 Pandemic on Commercial Dispute Resolution in the First Seven Months"	Rooney, 2020	Hong-Kong	Theoretical
"Open Justice, Participation and Materiality: Virtual Hearings and the Court of Protection"	Lindsey, 2020	UK	Theoretical
"Mediation Mediums: The Benefits and Burdens of Online Alternative Dispute Resolution in Australia"	Kluss, 2020	Australia	Theoretical
"Courts, Mediation and COVID-19"	Sourdin & Zeleznikow, 2020	Australia	Theoretical
"Impact of COVID-19 on Arbitration Proceedings; Online Dispute Resolution a Way Forward"	Shawani & Tiwari, 2020	India	Theoretical
"Building Trust Online: The Realities of Telepresence for Mediators Engaged in Online Dispute Resolution"	Exon & Lee, 2019	USA	Mixed-method
"Current Practices of Online Dispute Resolution: The Canadian Experience"	Gregory, 2012	Canada	Theoretical

Source: Prepared by the authors based on research data.

In summary, the eligibility criteria for the selected papers are as follows:

(1) Inclusion criteria:
   - Studies primarily focused on virtual conciliation and mediation hearings.
   - In the Scopus and Web of Science databases: all articles published in Portuguese and English.
   - In the HeinOnline database: articles in Portuguese and English, ranked among the most relevant in the database.
   - In the Google Scholar database: articles in Portuguese, published between 2020 and 2024, ranked among the most relevant in the database; articles in English, ranked among the most relevant in the database.

(2) Exclusion criteria:
   - Works in which virtual conciliation and mediation hearings were addressed only as a secondary topic.
   - The selection process ended once further reading no longer revealed new dimensions of the subject.

After selecting the studies on virtual conciliation and mediation hearings, we conducted a full reading of their content to (1) analyze the relationships and distinctions within the topic, and (2) identify their strengths, weaknesses, and areas for concern. This research does not aim to exhaust the discussion on the subject, but rather to establish a solid foundation for future studies.

3. Analysis and Discussion of Results

The research findings indicate a substantial body of scientific literature on virtual conciliation and mediation hearings. However, before the COVID-19 pandemic, this topic was relatively uncommon as a primary focus of study. In most cases, virtual conciliation and mediation hearings were addressed only peripherally within broader research themes, particularly in studies on the digitalization of the judiciary or alternative dispute resolution methods.

With the onset of the COVID-19 pandemic, research on virtual conciliation and mediation hearings expanded significantly, with the subject becoming a primary focus of investigation. This shift coincided with the

widespread adoption of virtual hearings, driven by the need for social distancing as a public health measure.

The 60 papers identified were analyzed and categorized according to their respective thematic fields (as detailed in the table in the Appendix). Of these, 55 examined the issue – at least indirectly – from the perspective of access to justice for digitally excluded populations (Gregório & Teixeira, 2024; Moura & Dufloth, 2024; Middha & Paliwal, 2023; Dixon, 2023; Gross, 2023; Iannarone, 2023; Kaur, 2023; Ramos, 2023; Bessa & Nascimento, 2023; Silva, Silva & Sales, 2023; Vitale, Soares & Machado, 2023; Bhushan, 2023; Goyal & Goyal, 2023; Sá et al., 2023; Mishra, 2023; Sharad & Misrab, 2023; Zein, 2023; Costa & Costa, 2022; Alves, 2022; Horton, 2022; Oliveira & Dias, 2022; Dias & Oliveira, 2022; Mello, 2022; Bezerra, Neris & Bezerra Júnior, 2022; Silva, 2022; ; Cameron, 2022; Chatteriee, 2022; Schmitz, 2021; Ayush, 2021; Cavalcante & Abrantes, 2021; Mól & Rodrigues, 2021; de Azevedo Sanches, Silva, Bugalho & Cardoso, 2021; Costa, 2021; Alves, 2021; Koh, 2021; Bello & Adeosun, 2021; Arinze-Umobi & Okonkwo, 2021; Melo et al., 2020; Smyth et al., 2020; Thornburg, 2020; Soares & Alves, 2020; Farias, 2020; Martins & Holanda, 2020; Paula & Nascimento, 2020; Tartuce & Brandão, 2020; Bateson, 2020; Rooney, 2020; Lindsey, 2020; Klus, 2020; Sourdin & Zeleznikow, 2020; Shawani & Tiwari, 2020; Exon & Lee, 2019; Arboleda Lopez et al., 2018; Spengler & Pinho, 2018; Gregov, 2012). These studies consistently emphasize the need to advance digital inclusion through public policy.

Digital exclusion is also analyzed through an intersectional approach, as "several factors may be at play simultaneously."[16] For example: "rural populations face exceptional geographical and physical barriers to connecting online"; "at the same time, additional factors like cultural expectations might make it even more difficult for rural women to connect"; "or the lack of relevant skills might create yet another barrier for older persons living in rural areas."[17] To aid in the analysis and categorization of results, the term "digitally excluded" is understood as referring to "those who do not have access to the internet and other digital media and/or who lack the ability

16 United Nations, "Digital Exclusion," accessed October 1, 2024, https://www.un.org/techenvoy/sites/www.un.org.techenvoy/files/general/Definition_Digital-Inclusion.pdf.

17 Ibid.

or knowledge to use them, even with assistive technology."[18] However, the reviewed papers also use synonymous terms such as "vulnerable populations" and "people without internet access" to account for the diverse national contexts that contribute to digital exclusion.

Additionally, a set of articles examines the technical aspects of virtual hearings and Online Dispute Resolution (ODR), proposing regulatory improvements or enhancements to support the continued use of these mechanisms in the post-pandemic period.[19]

Through the analysis of all the reviewed scientific papers, we also sought to identify, evaluate, and establish connections between the perceived advantages and criticisms of virtual conciliation and mediation hearings.

(1) Positive aspects: (i) improved communication flow; (ii) greater convenience (saving time for all parties involved); (iii) reduced costs for conciliators, mediators, and litigants, primarily by minimizing travel and meal expenses, as well as cost reductions for courts; (iv) increased participation and lower absenteeism in hearings; (v) enhanced procedural efficiency; (vi) improved accessibility for individuals with disabilities.
(2) Negative aspects: (i) potential risks to maintaining the confidentiality and secrecy of proceedings (due to the inability to control who is present in the physical space where virtual participants are located); (ii) inconsistent communication quality between participants (particularly when internet connectivity is unstable); (iii) technical difficulties (connectivity issues and internet reliability – resources and infrastructure); (iv) longer hearing durations (virtual sessions tend to last longer than in-person hearings); (v) digital exclusion resulting from a lack of

18 Conselho Nacional de Justiça, "Recomendação n. 101/2021, do CNJ: Recomenda aos tribunais brasileiros a adoção de medidas específicas para o fim de garantir o acesso à Justiça aos excluídos digitais," Brasil, 2021, accessed March 10, 2025, https://atos.cnj.jus.br/atos/detalhar/4036.

19 Unnaty Goyal and Aaryushi Goyal, "The Evolution and Effectiveness of Online Dispute Resolution (ODR) Platforms: A Comprehensive Analysis of ADR in the Digital Age," *Indian Journal of Integrated Research in Law* 3, no. 5 (2023): 1–26; Raphaella Abreu and Pedro Arruda Junior, "A Conciliação como Método de Solução de Conflitos," in *Anais do V Congreso Latinoamericano y Caribeño de Ciencias Sociales* (Montevideo: FLACSO Uruguay, 2022), 486–501; Nadja M. Alexander, "Mediation: The New Normal?," *Law and Covid-19* 1, no. 1 (2021): 245–54; Letícia R. Amaral, "Mediação e Pandemia" (Undergraduate diss., Pontifícia Universidade Católica de Goiás, 2021).

digital literacy, insufficient information, or limited access to electronic devices and/or the internet; (vi) absence of adequate procedural regulations to safeguard due process.

(3) Neutral aspects/Points of consideration: (i) participant safety (particularly in family law cases, where individuals remain in a familiar and secure environment); (ii) inappropriate behavior from participants (failure to observe the formality and decorum typically required in court proceedings); (iii) resistance to technological changes and the adoption of virtual platforms by legal professionals; (iv) limitations in handling more complex cases.

The survey indicated that, despite the numerous studies conducted on the subject, the majority relied on bibliographic reviews rather than empirical investigation. It was also observed that most of these studies adopted theoretical or legal-normative approaches, primarily seeking to determine whether virtual conciliation and mediation hearings should continue as the preferred method for conducting these proceedings.

4. Conclusion

Based on the systematic review on virtual conciliation and mediation hearings, this study provides a comprehensive overview of the current state of knowledge in this field. To ensure scientific rigor, this study employed a systematic review methodology with meta-synthesis.

The selection and analysis of the most relevant articles revealed that this topic has gained significant prominence since the onset of the COVID-19 pandemic, primarily due to the necessity of maintaining essential judicial services worldwide, particularly consensual conflict resolution sessions. From the perspective of judicial governance, technology played a pivotal role in sustaining these services, with videoconferencing emerging as the primary solution for conducting conciliation and mediation hearings.

However, while this shift initially served as an emergency response to the social distancing measures imposed by the pandemic, determining the most appropriate modality for such hearings beyond the pandemic period – whether virtual, face-to-face, or hybrid – now requires thorough research. Moreover, if virtual or hybrid hearings are to remain a viable option, it is imperative to establish best practices, evaluate both their advantages and

shortcomings, and address critical concerns to enhance the effectiveness of the adopted model.

In this regard, this study has mapped the current state of virtual mediation and conciliation hearings. A detailed analysis of the reviewed studies underscores recurring concerns, particularly regarding the digitally excluded and the technical challenges inherent to virtual hearings. Additionally, this study highlights the relationship between the virtualization of judicial proceedings, technological advancements, and their impact on access to justice, judicial resources, and court performance.

Based on the literature analysis, this article has also highlighted the positive and negative aspects of virtual hearings, as well as the technological, procedural, and accessibility challenges that need to be addressed. These observations provide a foundation for further research on the topic.

While these theoretical approaches are valuable, particularly for critically analyzing the various issues surrounding virtual hearings, the findings suggest a significant need for further empirical research, incorporating both qualitative and quantitative methodologies within the specific contexts of different countries and regions.

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The Consul and the Hungarian Diaspora: Legal Background and Practical Considerations

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Abstract: The study reviews the legislation governing the relationship between the consul and the Hungarian diaspora. In doing so, we have referred to the historical background, when the consul, who basically had other tasks, was given official tasks already after the Compromise of 1867. We then saw how the Vienna Consular Convention of 1963 established a new and uniform catalogue of tasks for consuls, which, because of its acceptance, gradually became a basic standard. Hungary ratified this treaty in 1987, and initially consuls did indeed exercise their administrative and other – cultural, scientific and economic – duties as provided for in Article 5 of the VCC. Later, however, after 2010, the administrative tasks of the consuls became primary, while the other tasks, including general liaison with the diaspora, were taken over by other levels of the emerging national diaspora policy institutions. All this means that although the consul will continue to be in contact with Hungarian communities abroad and their members, and this relationship will be fundamentally shaped by the legal framework, the consul will no longer participate in this role primarily as a diplomat, but as a public administration professional.

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1. Introduction

When you read about diplomatic missions, there are two staff members who are most often mentioned: the ambassador and the consul. One of them – by ancient customs and, in more recent times, by international treaties – represents the sending state, while the other tries to sort out the ins and outs of the sending state's citizens. The tasks of the consul are listed at length in the 1963 Vienna Consular Convention, yet little is said about the relationship between these tasks, their content and how they have changed. This paper will review the duties of the consul, based on the Hungarian legislation, while also focusing on the changes in the role of the consul and the relationship between the duties.

2. History

2.1. The Consul's Past Status and Duties

Although many people associate the title with ancient Rome, the predecessors of today's consuls date back to the Middle Ages, around a thousand years ago. Their main task was to settle commercial disputes, because commercial "traffic should be dealt with more freely and more quickly."[1] In these cases, because of the movement of persons and goods, there was a frequent element of foreign law and, therefore, of conflict of laws. Consuls should, therefore, initially be looked to as experts in the practice of what later became known as private international law, who at one time acted for merchants in "all commercial, shipping and civil litigation."[2] They were primarily adjudicators, but their work also, arguably, involved the development of law, which made trade in the Mediterranean regions of Europe smoother. The consuls first appeared in the central and western Mediterranean and then, during the crusades of the 11th and 13th centuries, in the Levant in the East. Here, in the border areas between Christian and Muslim religions and legal systems, they played an even greater role in securing trade flows, as their decisions had to bridge the marked differences in legal systems. The legal institution itself – the commercial judge – also appeared in other trading

1 Dezső Márkus, *Magyar Jogi Lexikon*, vol. 5 (Budapest: Pallas, 1899), 647.
2 Ibid.

towns, for example, many Hanseatic towns had an official (usually called alderman) with similar responsibilities.[3]

The powers of consuls have increased considerably over time. "In addition to commercial matters, they were later entrusted with the handling of civil and even criminal cases. Then they also exercised police power and administrative authority and finally acted as representatives and protectors of the interests of the colony in all respects."[4] In other words, consuls were already in the 13th century increasingly transformed from judges into leaders of commercial colonies in the eastern Mediterranean basin. These colonies were included as a separate point (caput) in later international treaties, and thus the capitulation system later became synonymous with consular jurisdiction.

From the 16th century onwards, more and more countries began to "nationalize" the administration of justice, and as part of this process, elected consuls were replaced by state officials.[5] At the same time, the former diplomatic functions of consuls (such as fostering good relations between states) were transferred to diplomatic missions in a kind of profiling, while the tasks of trade promotion became more important.

Hungary was then already part of the Habsburg Empire, but it was primarily interested in domestic trade, so the decisions of successive Austrian emperors (who were kings of Hungary at the same time), Charles VI and Maria Theresa, to stimulate international trade, including the opening of consulates, did not directly affect it. From a Hungarian point of view, the operation of consulates became interesting after the Austro-Hungarian Compromise of 1867. Although the consulates were also subject to a common (Austro-Hungarian) foreign minister under the terms of the 1867 Reconciliation Act,[6] the most important consular functions and powers –

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3 In fact, according to earlier scientific research, in some major trading cities, such as Byzantium, Hungarian merchants had a consul-like superior in the 11th–12th centuries. See: Márkus, *Magyar Jogi Lexikon*, 647.

4 Ibid.

5 See also: Paweł Czubik, "Sovereignty in International Law," in *International Law from a Central European Perspective*, ed. Anikó Raisz (Budapest: CEA Publishing, 2022), 95–116.

6 Article 8 of Act No. 12 of 1867. In Central Europe, we prefer to use the term of "Compromise" in scientific studies referring that two equal parties consensually made an agreement. But if we see the terminology used in the English-speaking countries, the Compromise made between Austrians and Hungarians could also be labelled as a "reconciliation" because, by this

the enforcement of national trade interests and consular jurisdiction – were left to the Hungarian government and the individual ministries concerned to exercise their own room for maneuver under Hungarian law.[7] In the Hungarian foreign affairs network established after the dismemberment of the Austro-Hungarian Monarchy at the end of 1918, the primary task of the Hungarian consulates became the representation of Hungarian commercial interests.[8] Although the official functions of the consuls had already appeared in the second half of the 19th century,[9] they became significant only in the second half of the 20th century, when at the same time a larger number of Hungarians and former Hungarian citizens left the Carpathian Basin, in many cases opening up legal situations (movable, immovable property, inheritance, gifts, personal status matters, etc.).These could only be partially dealt with by legislative or administrative decisions, and more and more often the declarations of the persons concerned were required, which were of course most easily obtained by the Hungarian consul abroad, who was also visited by members of the Hungarian community concerned for other matters (birth certificates, passports, citizenship, visas).

As can be seen from the above, the consul is an old institution dating back to the Middle Ages, which primarily performed commercial judicial and administrative functions. Towards the end of the Middle Ages, consuls began to evolve from elected to state officials, but their functions remained largely unchanged until the early 20th century: they adjudicated and dealt with trade policy. In Hungary, interest in this legal institution grew after the Compromise of 1867. Despite the public perception that until 1918 they were seen as the representative of Austrian interests,[10] Hungarian legislation gave them more and more responsibilities and also granted them a certain degree of leeway in Hungarian trade policy.[11] Within the Hungar-

process, a large number of indigenous minority (the Hungarians) of the Habsburg Empire was put into their previous legal state back.

7 Cf. Section IX of Act No. 20 of 1878, and Section IX of Act No. 31 of 1891.

8 Article 6, People Act [Néptörvény] No. 5. of 1918 (on another name: Foreign Affairs Act 1918).

9 Cf. Endre Domaniczky, "New Challenges in Consular Work: Changes in the Legal Framework and the Opportunities Provided by EU Membership from a Hungarian Perspective" (book chapter, Central European Academy's Publishing, forthcoming).

10 Cf. Jenő Cholnoky, *Utazásaim, élményeim, kalandjaim* (Budapest: Pantheon, 1942), 246–7.

11 Cf. Endre Domaniczky, *Előszó, Határterületeken II* (Budapest: MFI, 2024), 12–3.

ian foreign affairs network established by the Foreign Affairs Act of 1918, commercial policy remained the primary and almost sole task of the consuls, while at the same time they had to perform an increasing number of official duties in the ever-growing Hungarian diaspora. Although the origins of these official tasks date back to the period of dualism, their importance only increased after World War II, when, on the one hand, large numbers of Hungarians or former Hungarian citizens emigrated from the Carpathian Basin and, on the other hand, the worldwide development of the Hungarian diplomatic and consular network began, which enabled the consuls to become involved in the life of local Hungarian communities in more and more places. To see where and what tasks they had to perform, we need to sketch the history of the emergence of the Hungarian diaspora.

2.2. The Emergence and Characteristics of the Hungarian Diaspora

2.2.1. The Hungarian Diaspora in a Nutshell

Throughout the turbulent centuries of Hungarian history, Hungarian communities have been established beyond the Hungarian borders on several occasions. The most notable of these communities were the Moldavian Csángós, who settled on the eastern side of the Carpathians from the 12th century onwards, and some of their villages still exist in what is now Romania. Although initially settled by the Hungarian king, they later arrived of their own accord. The two important characteristics of a diaspora: (1) cross-border, (2) long-standing ethnic community would, therefore, stop at this point, and even the migratory nature of the migration can be discerned. However, it does not stand still in the case of Hungarian emigrants after the fall of the War of Independence in 1711, and the defeat of the Hungarian War of Independence in 1849, as these communities were created by political necessity, the end of which led those who could, to move back to Hungary.

In the cases above, it would, therefore, be more appropriate to speak of early forms (predecessors), while the formation of the Hungarian diaspora should be placed in the second half of the 19th century. This is the beginning of the wave of emigration from Central and Eastern Europe, which lasted for several decades and included hundreds of thousands of emigrants from Hungary. As a Hungarian foreign affairs report put it in 1946: "Before the First World War, the main route of Hungarian emigration through

Western Europe led almost exclusively to North America, and even in the period between the two wars only South America attracted a larger number of emigrants."[12] However, the second half of the 19th century also saw the first initiatives of the Hungarian diaspora in Western European countries and Oceania.[13]

The next important moment in the development of the concept emerged after the collapse of the Austro-Hungarian Monarchy.[14] The dismemberment of historical Hungary brought significant Hungarian communities under foreign rule. Although after 1918 they were considered as cross-border communities, these people did not go anywhere. In their case, therefore, there was no intention to migrate, they had, in fact, been transformed from a state-forming nation into indigenous minorities of other countries – but the exact terms were not yet known at the time.

In any case, the Hungarian diaspora concept was split in 1918:[15] into (1) Hungarians living in the Carpathian Basin who had previously lived inside the borders of Hungary ("Hungarians living beyond the borders"), and (2) those who settled and formed permanent communities outside the Carpathian Basin ("Hungarian diaspora").[16] Between 1918 and 1989, Hungary concentrated mainly on the former, mainly due to the scarcity of resources and the limited room for maneuver on its own on the field of foreign affairs.

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12 Quoted in Endre Domaniczky, *Ausztrália magyar szemmel a fegyencteleptől a jogállamig* (Kecskemét: Fakultás, 2018), 315. The original report is available in the Hungarian National Archives (MNL XIX-j-1-k ADM 1945–1963 [Australia] bundle 5j).

13 For Australia and New Zealand, see in detail: Endre Domaniczky, "Trianon menekültjei Ausztráliában és Új-Zélandon," in *Határterületeken*, ed. Endre Domaniczky (Budapest: MFI, 2021), 389–413.

14 For the legal history of this period, see: Lóránt Csink and László Trócsányi, eds., *Comparative Constitutionalism in Central Europe. Analysis on Certain Central and Eastern European Countries* (Miskolc: CEA Publishing, 2022), and especially: István Szabó, "The Legacy of the Habsburg Empire in the Constitutional Traditions of Successor States," in *Comparative Constitutionalism in Central Europe*, 21–36.

15 See also: Dániel Gazsó, "Egy definíció a diaszpórakutatás margójára," *Kisebbségkutatás* 24, no. 2 (2015): 7–33.

16 The conceptual split can be illustrated by the situation of Hungarians in Romania. Within the pre-1918 borders of Romania – especially in Bucharest – there was already a significant Hungarian community before 1918. They were still members of the Hungarian diaspora in Romania, while those living in the newly annexed territories (those who remained in the Carpathian Basin) were considered Hungarians living beyond the borders.

The existence of diasporas in this period came to the fore mainly at historic turning points, such as after the Second World War or in 1956, when masses of Hungarians were once again leaving the Carpathian Basin in search of a new life, and countries with an existing Hungarian community seemed more advantageous for settlement. Although for a while after 1956 there was no talk of a diaspora, from the 1960s until 1989 there was continuous emigration, mainly to countries with an established Hungarian community. Although there was a general emigration back to Hungary, which became independent in 1989, the assimilation effect was more significant, reaching all communities of the Hungarian diaspora by the end of the 20th century. Second- and third-generation Hungarians are naturally more strongly connected to the new homeland, and belonging to the Hungarian nation has become rather a cultural (or culinary) experience.

The transformation of the diaspora – with the biggest waves of newcomers and first-generation migrants disappearing in all communities – has itself required a different approach. On the one hand, from the academic side, which since the 1980s has taken a growing interest in the past and customs of this community.[17] On the other hand, the Hungarian government, which in 1990 for the first time in a long time was able to express its interest in this other community of Hungarians living outside the Carpathian Basin. This long-awaited openness was already expressed in an early speech of Prime Minister József Antall,[18] but the development of long-term solutions (institutional framework and support policy), the implementation of Hungarian citizenship for all Hungarian citizens[19] (which eventually abolished

17 For examples of studies of the largest diaspora of Hungarian communities in North America, see: Julianna Puskás, *Kivándorló magyarok az Egyesült Államokban (1880–1940)* (Budapest: Akadémiai Kiadó, 1982); Ferenc Bakó, *Magyarok Kanadában* (Budapest: Gondolat, 1988); Zoltán Fejős, *A chicagói magyarok két nemzedéke 1890–1940* (Teleki Foundation, 1992).

18 "In the legal sense, on the basis of Hungarian common law, I wish to be the Prime Minister of all Hungarian citizens, as the head of government of this country of ten million people – in spirit and in feeling, of fifteen million Hungarians" (József Antall, 1990). For the background, see: Endre Marinovich, *1315 nap – Antall József naplója* (Budapest: Éghajlat Könyvkiadó, 2003), 100–1.

19 The basic idea of this was formulated in 2003 by the internationally renowned Hungarian law scholar, Ferenc Mádl (1931–2011), in his capacity as President of the Republic. See: A köztársasági elnök állásfoglalása a kettős állampolgárság könnyített megszerzéséről, A Köztársasági Elnöki Hivatal Évkönyve [A statement of the President of the Republic of Hungary on the facilitated acquisition of dual citizenship], 2003 (KEH, 2004), 324–7.

the concept of Hungarian expatriates), were not implemented until 2010. Since 2018, it has, in fact, become clear that the Hungarian diaspora has ceased to exist as an independent political factor or concept, because its members have become part of the Hungarian nation – despite the fact that they have remained in the country and have not moved back home.

2.2.2. Changes in the Tasks of the Hungarian Consul Related to the Diaspora (From the Beginning until 1989)

In the above, we have reviewed the characteristics of the diaspora, while pointing out that the Hungarian diaspora has become part of the Hungarian nation again – in legal terms – after about one hundred and fifty years. This did not happen in the literal sense of the word, with the return of descendants, but by means of the law. The legislator faced up to the vicissitudes of Hungarian history[20] and made it possible for everyone to become a member of the Hungarian nation again, on the basis of his or her own decision. In this work, the Hungarian consuls played a key role in relation to the Hungarian diaspora, and in 2010 they were assigned the task not only because they were skilled in administration, but also because they traditionally had the closest links with the Hungarian diaspora.

Where does this relationship date from and is there a legal basis for it? Perhaps it is most correct to say that the consul's diaspora responsibilities are roughly contemporaneous with the Hungarian diaspora, dating back to the second half of the 19th century. The tasks were partly generated by the large numbers of Hungarian expatriates who emigrated, leaving open, interrelated legal issues in both places: the new and the old homeland (for example, the birth of a child, which could change the succession order, or a will, which could affect Hungarian relations). On the other hand, the consul's duties in relation to citizens living abroad were a consequence of the need to build a rule of law in Hungary because the administrative powers regarding the Hungarian expats had to be delegated in the legal rules and the consul seemed to be ideal to be the main recipient of these responsibilities. It was self-evident, especially in the wake of the travel boom of the early 20th century, that citizens abroad should not be disadvantaged simply because they could not travel home. This is why, initially, they wanted to ensure passport renewal (which was also important for the maintenance

[20] The Fundamental Law of Hungary, National Creed.

of citizenship) and birth registration. It was also clear that the local consul had the greatest expertise in obtaining and handling the necessary documents for such official acts. A law on consular translation fees had already been enacted in 1901 (Act 26 of 1901). Although the main functions of the consul at that time were still related to trade (and in some countries to the administration of justice), their official powers had already appeared at the end of the 19th century and were maintained after 1918. Although the events of 1918–1920 led to several waves of emigration from Hungary (and from the Carpathian Basin), this did not lead to a significant increase in the number of tasks, mainly due to the rudimentary nature of the Hungarian consular network.

Significant changes in this area occurred after World War II. On the one hand, the diaspora experienced a significant increase in numbers in three major waves (those who left in 1944–1945, those who left between 1945–1951 and those who left in 1956). The Hungarian state, therefore, had to take over administrative tasks, so that the consuls continued to deal with inheritances, birth registrations, passports and citizenship. From the second half of the 1960s onwards, as the number of expatriates began to gradually travel back to visit the old country, the importance of visas began to increase. The administrative tasks of consuls, thus, began to increase after 1945, and consular services began to reach more and more people, especially as the consular network grew.

On the other hand, the Hungarian state from the very beginning regarded those who left after 1944 as a security issue. It wanted to know – especially in the larger Hungarian communities – what organizations were plotting against the existing Hungarian system. From the very beginning, consuls were assigned (or instructed) to keep an eye on Hungarian organizations in the local communities, to prepare "mood reports" of sorts, since they were the ones in closest contact with Hungarian emigrants at the foreign missions. Anyway, they handled their cases and could gather information without attracting attention. Their tasks did not necessarily stop at information gathering, as they also took further action against certain individuals based on their reports.

So, after 1945, not only did the administrative burden of the consul increase, but a new task was added: reporting on the diaspora. This could, of course, be exercised in two directions: on the basis of party interests and

instructions, but also in the classical sense, to assess the composition of the diaspora and to find out about its needs. Based on the Australian-related materials in the Hungarian foreign ministry's archives that I have reviewed, it can also be said that while political requirements dominated in the beginning, consular reports became more and more professional from the late 1970s onwards, with political tasks being increasingly taken over by the political departments of embassies. There was also an internal profiling process which, at least in Australia and New Zealand, saw the administrative functions of consuls re-dominate before the change of regime. This is not due to ideological changes, but primarily to professional reasons. On the one hand, the increasingly free travel habits of Hungarian citizens, which in the second half of the 1980s led to a number of people visiting foreign countries that was almost equal to the country's population at the time.[21] The tasks of providing consular protection for them (replenishing passports, representing people in distress, repatriation loans and insurance) simply filled the available capacity. On the other hand, the Vienna Convention on Consular Relations,[22] ratified in the late 1980s, reinforced this professional approach by listing the tasks of consuls, most of which were official tasks. The status of the consul and his or her duties and powers were, thus, in fact protected internationally before 1989.

3. The Legislation in Force

The ratification of the 1963 Vienna Consular Convention – which Hungarian officials had been pushing for since the mid-1980s – was important primarily because of its basic nature. Because of its broad international acceptance, the Convention provided a solid reference point in the consular system, which had previously been based mainly on customary law, and thus had a stabilizing effect on international relations. This – the return to the international system – was also symbolized by the reappearance of the honorary consuls in Hungarian law, which – at the dawn of the regime change – was of symbolic importance.[23] The real significance of the Vienna Consular Convention, however, can be seen – looking back – in the fact that

21 See: Domaniczky, "New Challenges in Consular Work."
22 Inacted into the Hungarian law by Decree-Law No. 13 of 1987.
23 For more information, see: Domaniczky, "New Challenges in Consular Work."

it provided the basis for the development of a completely new conception of the consular role.

3.1. The Consul's Duties in the Vienna Conventions

Consular functions are listed in detail in Article 5 of the Vienna Consular Convention (hereinafter: VCC). At first reading, it is striking that the section consists of a single long list of thirteen items, but below we will only touch on the points of particular relevance for relations with the diaspora.[24]

On closer examination, the text of the VCC can be divided into three major parts with regard to consular functions:

(1) general terms of reference;
(2) specific terms of reference;
(3) general authorization to update consular tasks.

The general terms of reference aim to define the scope of consular competence. To this end, Article 5(a) to (c):

- states that the consul's basic duty is to protect the interests of natural and legal persons belonging to the sending state (consular protection);
- states that the consul may be active in other areas of cooperation in addition to his or her advocacy duties, in particular "promoting the development of commercial, economic, cultural and scientific relations";
- has a fundamental right to freedom of information and disclosure (right to report) in relation to all these activities.

The specific terms of reference contain new types of duties and powers for consuls (which were new at the time of the adoption of the Vienna Consular Convention (1963), but have now (2024) become commonplace. These include, for example, the preparation of passports (Article 5(d) of the VCC), the issuing of visas (Article 5(d) of the VCC), the administration of citizenship[25] (Article 5(d) of the VCC) and applications for birth/marriage/divorce/death registration (Article 5(f) of the VCC), the performance of

[24] For a detailed analysis, see: ibid.

[25] Passport matters implicitly include the handling of citizenship applications, as a passport can only be issued to a citizen by default. Therefore, Article 5(d) of the Vienna Consular Convention (VCC), in fact, also applies to this type of case, but in case of doubt, Article 5(f) of the VCC could also be invoked, since in the registration procedures, the nationality of the applicant must also be examined as a prerequisite. As a last resort, reference could also

notarial duties (Article 5(f) of the VCC). These tasks enable the consul to establish close contacts with members of the diaspora, since they are clearly the person authorized to deal with such matters at the diplomatic mission under the VCC.

In relation to the diaspora, it is also important to mention the general mandate at the end of Article 5 of the VCC. According to this, consular functions include

> performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.[26]

Although the provision was originally included in the list to allow for any extension of consular tasks and adaptation of the text of the Convention to modern times, in the Hungarian context it allows for flexibility in the tasks of the consul in relation to the diaspora to change according to needs.

Given the structure of the legislation, let's look at how this section helps the consul to carry out his or her duties in relation to the diaspora. The three points of the general terms of reference place consular functions not only on a firm (normative) basis, but on a new basis. In fact, Article 5(a) of the VCC states that the primary task of the consul is to ensure the protection of consular interests: to assist, within the limits provided by law, the nationals of the sending State. In addition, however, says Article 5(b) of the VCC, the consul may also be active in other areas of relations between the two countries (the sending and the receiving states), in particular in the field of "development of commercial, economic, cultural and scientific relations."[27] In fact, this section opens up another channel for the consul towards the local Hungarian community, since he or she can refer to it not only in the case of need, in connection with a legal matter, but also proactively, looking ahead, to seek contact with the diaspora. The VCC gives him/her a completely free

be made to the general authorization (Article 5(m) of VCC), which covers all administrative matters not prohibited by the law of the host State or not opposed by the host State.

26 Article 5(m) of VCC.

27 Article 5(b) of VCC.

hand: in addition to an individual – who does not even have to be a citizen of the sending state (!) – he/she can contact groups, such as associations or communities without legal personality (traditionally many of these exist in the diaspora!). You can also link them with each other or even with the home country, individuals, groups or institutions. But it is also possible to establish closer links within the host country, between members of minority and majority societies. There is no legal limitation, only the laws and will of the receiving state and the decision of the superiors within the Hungarian organizational system, primarily the local leader, the ambassador or the head of the consular department at home.

Article 5(a) and (b) of the VCC, therefore, gives the consul a free hand in maintaining and building relations with the diaspora. The third point of the general terms of reference also provides for a blank sheet of paper and the right to fill it in as the consul sees fit. However, this right to report is also a duty, which most consuls are not aware of. Under the VCC, the consul would have the right and the duty to investigate the diaspora in depth, if his/her skills and experience allow him or her to do so. In practice, however, this possibility is limited to a summary of a few sentences in the annual embassy reports on consular work. This is particularly thought-provoking because consular reports, which at one time (in the early 20th century) were mainly about commercial opportunities in the receiving country, were even published in newspapers. Later, they became secret, but their professional character – for example, at the Hungarian missions in the English-speaking countries – remained until the change of regime. The recent centralization and personalization of international relations can, of course, partly explain this hollowing out: the importance of top managers and their entourages has increased in a unipolar world (aided by the new wave of the communications revolution), rather than local endpoints. What used to be acquired locally, through years of slow work, can now be achieved through a short video conference between headquarters.

3.2. The Consul's Duties under the National Consular Laws

We have seen that at the level of international conventions, the consul has been given a stable framework and broad powers to engage with the diaspora. Given the international standard of the VCC, it is not an exaggeration to say that the consul has become the primary contact point between the

mainland and the diaspora. But how far does the domestic legislation take this into account? In what areas does the Hungarian law rely on the work of the consul?

Although provisions on certain elements of consular work can be found at the top of the Hungarian legal hierarchy, in the Fundamental Law,[28] the key elements of the regulation are contained in laws, and within them in the so-called sectoral laws. From a consular point of view, the laws that regulate the basic areas of consular protection and the fields of consular administrative work are considered to regulated by sectoral laws. These are the areas covered by the specific terms of reference of the VCC. These include, *inter alia*, the laws governing citizenship, visas, residence, consular notarial services, and probate proceedings. To turn the argument around: at the statutory level, as expanded by subordinate regulations and "bundles of regulations," the only rules are those that ensure the consul's protective and official functions. The primary reason for this is that the Consular Protection Act (Act XLVI of 2001), which contains the basic regulations on consular work, also approaches the essence of consular work from this (consular protection) perspective. The Consular Protection Act, which was adopted relatively late, about a decade after the change of regime, focused primarily on the country's accession to the EU and its compliance with EU law – as the reader is reminded of in the final provisions.[29] In 2001, the legislator's aim was to codify the rules of consular protection in a way that would be as flexible as possible and easily adaptable to the sometimes very different local circumstances, while covering, among other areas, the issues that were then covered by EU law: the basic rules on the EU temporary passport (ETD) and consular protection in the Member States.[30]

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28 Cf. Article XXVII of the Fundamental Law, which stipulates the right of Hungarian citizens to consular protection (although the explanatory notes to the draft Fundamental Law allows for a broader interpretation, which, in this case, may mean the provision of diplomatic protection). For diplomatic protection, see: József Hargitai, *Nemzetközi jog a gyakorlatban* (Budapest: Magyar Közlöny, 2008), 198–206.

29 Article 24 of Act XLVI of 2001.

30 The legislator had two EU documents in particular in mind as models: (1) Decision 95/553/EC of 19 December 1995 on the protection of citizens of the European Union by diplomatic missions and consular posts, and (2) Decision 96/409/CFSP establishing a European temporary travel document.

The detailed rules were mainly laid down in an implementing regulation,[31] which could be more easily amended in-house.

The backbone of consular legislation is, thus, built on, elaborated and detailed from the outset, through various legal (laws and regulations) and non-legal (normative instructions) protective tasks. However, in the field of liaison and networking, which is another of the consul's main tasks, the basic legislation remains in the VCC (Article 5(b) and (c) of the VCC). This makes the rules on consular work "one-sided" and cumbersome – but only in appearance. However, since the VCC was incorporated into the Hungarian legal system by the Hungarian Act No. 17 of 1987, it is more appropriate to regard this regulation not as a shortcoming, but as an advantage. Thanks to the VCC and the absence of detailed Hungarian legislation, the consul can continue to act freely in relation to the diaspora in accordance with the interests of the state. At least, he or she has the possibility to do so, as provided for in all legislation, and the actual scope of his/her powers is determined – beyond the consul's own decision – only by the decisions of his/her superiors (which may be verbal or in writing, in the form of so-called consular instructions). Although the legal framework is, as we have seen, sufficiently flexible to allow the consul to take the initiative in relation to the diaspora, the state has only made use of the possibilities offered by this for about two decades (1987–2010), and then only in relation to certain relations. The explanation for this is simple: the VCC was only promulgated in Hungary in the autumn of 1987,[32] so it could only be referred to as a law from that time. The closing date is linked to a change of government, as the new government that took office in 2010 made it clear that it wanted to bring the period of regime change since 1989 to a close by making new constitution and law.

3.3. Are There Any Differences between the International and Hungarian Regulations Regarding the Consul's Responsibility for the Diaspora?

In the process of drafting the new constitution, an answer had to be found to the question – implicit in the title – whether there is a difference between international and Hungarian legislation in this area. The new constitution,

31 See: 17/2001 (XI.15.) Foreign Minister's Regulation.

32 September 15, 1987.

the Fundamental Law of 2011, speaks of a united Hungarian nation and declares its responsibility towards Hungarians living beyond its borders.[33] The Fundamental Law, while stating Hungary's responsibility for the diaspora in general,[34] also lists the areas of responsibility, thereby identifying concrete measures affecting both individuals and groups. Hungary (1) "facilitates the survival and development of their communities," (2) "supports their efforts to preserve their Hungarian identity," (3) supports "the effective use of their individual and collective rights," (4) supports "the establishment of their community self-governments," (5) supports "their prosperity in their native lands," and (6) "promotes their cooperation with each other and with Hungary."

Point D of the Fundamental Law, therefore, focuses on two things: (1) it abolishes the previous ethnic and historical and legal borders within the Hungarian diaspora, and creates a non-discriminatory concept, the "one single Hungarian nation." Henceforth, "the category of Hungarian beyond the border will be a definition of current residence, not a concept used to distinguish between Hungarian citizens and non-Hungarian citizen ethnic Hungarians."[35] (2) Building on the above point, Hungary will develop and implement an entirely new national policy, including both public and private elements. This will no longer require measures radically different from those taken domestically, as the new national policy will be reflected in all measures affecting Hungarians, with respect to the concept of a unified Hungarian nation. Thus, there is no need to exploit the potential of consular contacts, because local needs and opinions are also channeled into decisions at the highest level in Budapest through the newly established contact forums.[36]

It took longer to build up the institutional framework provided for in the Constitution, but the foundations were laid by 2014. Knowing the

33 Fundamental Law, point D.

34 "Hungary (...) bears responsibility for the fate of Hungarians living beyond its borders (...)" (Fundamental Law, point D.)

35 Bálint Ablonczy, *Az Alkotmány nyomában. Beszélgetések Szájer Józseffel és Gulyás Gergellyel* (Budapest: Elektromédia, 2011), 115.

36 For example, the Diaspora Council, which was established in 2011. See also: the founding declaration of the Hungarian Diaspora Council 2011 (www.kulhonimagyarok.hu, accessed December 28, 2024).

main features of the Hungarian legislation, it is now possible to say clearly whether and how it differs from international solutions. In light of the most relevant international examples and the practice in Central and Eastern Europe,[37] the Hungarian system differs in two important respects. On the one hand, it ensures full citizenship rights for all those who acquire Hungarian citizenship (in this area, it eliminates the differences between those living inside and outside the border and between certain groups of people living beyond the border by extending the law, which is a consequence of Hungarian tradition),[38] and on the other hand, it dissolves and extends the concept of nation, which was previously limited to the territory of the state, by creating the concept of a single Hungarian nation. The Hungarian nation has, thus, become a world nation in the public law sense, of which the diaspora is now also a part, based on an individual decision. The Hungarian solution has, thus, made maximum use of the room for maneuver provided by international law[39] and has resolved a situation that arose as a result of historical vicissitudes. From this point of view, although it is based on international examples, it is a completely unique solution that guarantees the full enjoyment of rights.

4. The Consul and the Hungarian Diaspora

The relationship between the consul and the Hungarian diaspora is easier to understand in the light of Hungarian diaspora policy after 2011. After 2011, the consul has changed from being a contact person of high status in terms of diaspora policy to one of the experts dealing with expatriates. As required by Hungarian law, his/her primary task is to ensure consular protection of interests and to deal with official matters. Despite the above-mentioned room for maneuver provided by the VCC, his/her role in the field of

[37] For a detailed description of international practice, see: Eszter Kovács, "Klasszikus és kelet-európai diaszpórapolitikák," *Regio* 26, no. 3 (2018): 155–234.

[38] On this, see the speeches of Zsolt Semjén and Zsolt Németh, Members of Parliament, in connection with the 2010 amendment to the Citizenship Act (May 20, 2010, speeches of Zsolt Semjén and Zsolt Németh in connection with the T/29 bill (www.parlament.hu, accessed December 28, 2024). See also: Zsolt Körtvélyesi, "Az 'egységes magyar nemzet' és az állampolgárság," *Fundamentum* 15, no. 2 (2011): 49–55.

[39] In connection with the 2010 amendment of the Citizenship Act 1993, the speakers also explained in detail how international examples and solutions were used in the drafting of the Hungarian bill.

diaspora policy is limited primarily to attending events organized by Hungarians abroad and organizing or coordinating certain meetings. Its reporting rights are also limited to these tasks. To give you an overview of the current legislation, let's look at the most important tasks.

4.1. Statutory Tasks

The basic rules of consular work are laid down in the Consular Protection Act (Act XLVI of 2001). As we have seen above, it sets out in detail the rules of consular protection laid down in the Constitution (Fundamental Law) (and in line with European legislation). On the other hand, it contains the rules in areas which are not specifically regulated by law (e.g. notarial duties of the consul, over-certification, transport of corpses). The detailed rules of the Consular Protection Act are laid down in the implementing regulation.[40] A comparison between the Act and the Regulation reveals the depth of the tasks related to consular protection (for example, what is meant by information, what to do in the event of evacuation, or what and how long a citizen whose personal freedom is restricted can be assisted). The Act is also accompanied by a Regulation on consular fees.[41]

Although there are some areas where consular law overlaps with consular sectoral laws ,[42] while the most common consular tasks are regulated by separate laws and related regulations.

The most common official tasks (so-called classic consular duties) are:

- the administration of citizenship applications (Citizenship Act 1993/ Act No. LV of 1993),
- passport applications (Act on Travelling Abroad 1998/Act No. XII of 1998),
- birth/marriage/death registrations and related matters (e.g. paternity acknowledgements, name changes),
- applications for identity cards,

40 See: 17/2001 (XI.15.) Foreign Minister's Regulation.

41 See: 5/2010 (XII.31.) Foreign Minister's Regulation.

42 A typical example is passport management, where the rules for ETD are covered by the Consular Protection Act and the rules for temporary passports are covered by the Law on Traveling Abroad 1998. The situation is similar for the tasks of consular notaries, where the specific rules are contained in the Consular Act, but the Notaries Act 1991 is always applicable as background legislation.

– address matters,
– issuing and re-issuance of certificates,
– consular protection issues,
– legal aid matters.

A frequent but separate category for regulatory[43] purposes is the administration of visas and residence.

Finally, it is worth noting that there are other consular tasks, the scope of which may vary from region to region (either in terms of content or type). These include, for example, tasks related to the issuance of police clearance certificates, consular loans and consular certificates.

4.2. The Role of Consular Instructions

Consular work is a teamwork based on hierarchy. This also means that individual decisions play a relatively small role in resolving issues not covered by legislation. When legislation is consulted, the rules are usually filled in by so-called consular instructions. There are two types of these non-legislative norms: (1) explanatory and (2) normative instructions. The former is intended to explain the application of a legal provision or to lay down the rules of procedure in the event of legal gaps. A normative instruction may be addressed to one or more persons (for example, all the consuls in one, more or each region). It may contain either an active action ("issue...!") or an abstention ("do not issue...!"), either for an individual or for a group. The important elements of a consular instruction are the case number (to which it may refer), the name of the addressee, the name and other particulars of the person concerned, the normative instruction, the time limit and the name, capacity and signature of the issuer. The role of consular instructions in Hungarian practice started to decrease after 2010, but is still significant. They are mainly used in the field of classic consular and visa matters, but they are also excellent for regulating relations with the diaspora of a given country or region – where, as we have seen, only the framework of consular work is defined by law (see above).

[43] In these cases, not only national, but also EU legislation is of particular importance.

4.3. The Content of the Consular Report and the Importance of the Consular Role

While the consular instructions usually impose an obligation on the consul, a report prepared by the consul and submitted to the Headquarters in Budapest is called a consular report. There are several types of consular report. Currently, one consular report is required annually and forms part of the annual ambassadorial report. The compulsory elements of this annual consular report are: (1) a presentation of the Hungarian community in the receiving country, (2) a description of the consular activities in the period under review, and (3) a presentation of trends (what changes are expected in consular administration). As we have seen above, this mandatory report has now become largely formalized and is mainly for use within the Ministry of Foreign Affairs, as the now well-established Hungarian diaspora policy institutions are able to obtain and synthesize much more data than the consul directly and through several channels.[44] The other type of consular report is the *ad hoc* consular report, which is either produced on the basis of a request from the Centre, expressed in the form of a consular instruction, or on the basis of the consul's own decision. Its subject matters are usually significant events from a consular aspect of view (e.g. a rapid increase in the number of temporary passport applicants) or a major change in the diaspora (e.g. the start of a new wave of immigration). Although the importance of the *ad hoc* consular reports has also declined in recent years, their purpose and role has remained unchanged: to inform the management of the Ministry of Foreign Affairs and to facilitate the strategic planning work of the Ministry.

Although the content of consular reports is largely determined by custom, the consul has a relatively wide margin of maneuver in this area. In the case of mandatory reports, the ambassadorial requirement can adversely affect the content and length of the report, whereas, in *ad hoc* consular reports, the consul can, if he or she is proactive in his or her role, explore or

[44] However, prior to the establishment of the diaspora policy system in 2014, consular reports often reached the highest political levels, for example when dealing with a priority issue and a particularly sensitive region. One such example from the author's own practice is his 2011–2013 reports on the interest of Hungarians in Australia and New Zealand in acquiring dual citizenship. The data collected in connection with these reports have been used to produce a book on the Hungarian diaspora in Australia (in English and Hungarian). Endre Domaniczky, *Australia through Hungarian Eyes: From Penal Settlement to a Multicultural Commonwealth* (Budapest: Fakultás, 2020), 554.

analyze several issues of local relevance. Primarily in relation to the composition of the diaspora, although since 2014 there has often been a dedicated diaspora policy liaison diplomat in the outposts with a larger Hungarian community who is also primarily responsible for the preparation of diaspora reports. However, even in addition to a national diaspora report, *ad hoc* consular reports may still have a reason to exist, as the consular aspects of data related to the composition of the diaspora can be most easily assessed primarily in a general consular report.

5. What Does the Future Hold?

After reviewing the legislation governing the consul's diaspora responsibilities, it is worth briefly considering the changes that are expected in the future. The future changes will not only affect the tasks of the consul, because the infrastructure itself (the consular network as a whole) is also changing. Naturally, the Hungarian diaspora itself will also change, which will also have an impact on the consul's diaspora-related tasks.

5.1. Changes in the Role and Status of Consuls

The changes affecting the consul are mainly in two areas: the role of the consul and his or her legal status. The role of the consul, as defined by the 1961 and 1963 Vienna Conventions, can be understood as the person who defends the interests of the nationals of the sending state in the receiving state.[45] In addition, he or she may also be concerned with the development of commercial, economic, cultural and scientific relations. Although the Vienna Convention generally includes this among the duties of the consul, there is no obstacle to a state employing separate diplomats for each category of duties, whether consuls or other specialized diplomats.

In Hungarian practice, between 1989 and 2014, the former model was used, and after 2014 the latter. Today, the consul is primarily responsible for administrative tasks, scientific tasks are performed by scientific attachés, cultural tasks by cultural attachés, and economic tasks by foreign economic attachés. In some posts with a large Hungarian community, the consul's

[45] Vienna Convention of 1961, Article 3, point 1(b) and Vienna Convention of 1963, Article 5(a)–(b) (enacted in Hungary by Decree No. 22 of 1965 and Decree No. 11 of 1987, respectively).

diaspora-related tasks are carried out by diplomats specialized in diaspora policy. In other words, in the current model, the consul is increasingly identified as an administrative official from whom most of the professional matters requiring diplomatic[46] negotiations have been detached. Although profiling could also be seen as a political decision, it is in fact more a question of a worldwide trend spreading to Hungary, which entails a change in the legal status of the consul.

To explain this, it is necessary to go back to the time when the Vienna Conventions were drawn up. In the early 1960s, the definition of consular functions was new and forward-looking, and had a significant impact on the definition of consular functions at a national level. In the meantime, already from the late 1960s, there was an explosion in travel patterns. International tourism grew even larger following the fall of the Iron Curtain and the unification of Europe, which led to the development of consular networks in each country and the formalization of consular procedures. The formalization of procedures in this area meant that consular matters increasingly lost their diplomatic character and became more administrative. The more cases had to be dealt with, the simpler and faster they were dealt with, and this work increasingly required administrative specialists rather than diplomats, who were the masters of form. The advent of the internet and the possibility of electronic administration accelerated these changes. After 2010, the Hungarian consular network started to catch up with these changes at an accelerated pace and, by the end of the 2010s, the back-office institutions and information platforms for electronic administration had been set up. The Hungarian changes were also stimulated by the waves of emigration following EU accession, as many citizens moved to different parts of the world, leaving many open cases in Hungary, which only the consul could help them to deal with.

The transformation of the consul into an administrative specialist was, therefore, primarily driven by the needs of citizens on the Hungarian side. In the future, therefore, the administrative tasks of consuls will be further increased and simplified. The aim is to help them deal with as many cases

[46] The profile-cleansed consul also had some cases that required diplomatic consultations, such as the acceptance of certain documents in the case of reciprocity or legal aid cases that also required continuous consultations.

as possible in as simple a way as possible, preferably in a single meeting with the client. This does not require diplomatic qualifications or cultural, scientific or economic expertise, and these tasks, which were previously carried out by the consul, have been taken over by specialized diplomats or specialized consuls.

5.2. The Size of the Consular Network and the Evolution of Consular Tasks

The consul has, thus, gradually – over the past decade – evolved from a diplomat to an administrative worker, doing essentially the same job abroad as his or her colleagues in domestic client centers (at government offices or document offices). Consular offices have also been transformed through various developments, from being a department of the embassy to being *de facto* document offices abroad. This is partly due to the strengthening of the consular network, which Hungary has sought to make available to expatriates in more places than in the past.[47]

The Hungarian legislation on consuls has essentially reinforced these changes: the consul has been given all the powers necessary to deal with official matters as quickly as possible. However, the legal changes did not become radical, did not infringe or override the tasks defined in the Vienna Consular Convention, but only improved those that were necessary for the work of the administration.

Therefore, the consul remained in contact with the Hungarian communities of the receiving state, but primarily as a contact person for the Hungarian citizens living in the diaspora. All other liaison tasks were transferred to the appropriate levels of the different institutions of diaspora policy, and to the relevant specialized diplomats and consuls.

The question may arise as to whether this process has come to an end, or whether it is a completed change or a temporary one, which may one day return to its starting point. At present, the changes seem to be moving towards further profiling, with more types of cases, and a more electronic and simplified administration. In other words, the administrative nature of consular work will continue to grow, and, along the way, consuls may be given more and more administrative tasks. These include, for example,

[47] On the changes in the size of the consular network, see: Domaniczky, "New Challenges in Consular Work."

tasks related to the preparation of national elections, most of which have been assigned to consuls for practical reasons (and are likely to remain with them in the long term).[48] Whether the former status and tasks of the consul will return can be partly answered in the affirmative. Some tasks, which are now mainly carried out by specialized diplomats and specialized consuls, may return to the consuls, especially in the smaller missions. But the change of status (from consul to bureaucrat) will remain as long as so many citizens move outside national borders.

5.3. Changes in the Hungarian Diaspora

Finally, there are some important changes affecting the Hungarian diaspora. We have seen that the number of Hungarians abroad peaked in the mid-1960s. At that time, even those who had emigrated from Hungary before the First World War were still alive. Thereafter, over the past 60 years, assimilation (in the second and third generations growing up) has caused significant losses. In the post-1989 period, when freedom of movement became a fundamental constitutional right in Hungary, the number of emigrants increased for the first time after accession to the European Union. This was partly due to the ease of movement within the EU and partly to the economic crisis unfolding in the Central European region. The emigration rate peaked in the first half of 2010, before rising again after 2020. The scale of emigration after 1989 is comparable to that of the 1956 wave, but – and this is also a significant change – it is much more concentrated in terms of area than before. Whereas in the 20th century the main destinations were America and certain countries of Western Europe, Hungary, which has become an EU Member State, has had new favorite destinations, mainly other EU Member States (and the United Kingdom). As a result, the main purpose of emigration has also changed: whereas in the past it was often permanent, nowadays it is more of a temporary settlement until a new life is established. And, as the majority of emigrants move within the European Union, it is easier for them to return – even for a few years – to Hungary, where they

[48] For details, see: Endre Domaniczky, "Voting at the Missions Abroad. The Current Hungarian Regulations, with Special Regard to the Duties of the Consuls" (article, Central European Academy's Publishing, forthcoming).

will again have new administrative issues that they may later wish to resolve with consular assistance, again from abroad.

In other words, the changes in the diaspora are also working towards strengthening the administrative role of the consul. Hungarians living abroad today no longer need a diplomat who understands the diaspora and its composition, but a specialist in administrative matters who can assist them to solve their cases.

6. Summary

In the above, I have reviewed the legislation governing the relationship between the consul and the Hungarian diaspora. In doing so, I have referred to the historical background, when the consul, who basically had other tasks, was given official tasks already after the Compromise of 1867. We then saw how the Vienna Consular Convention of 1963 established a new and uniform catalogue of tasks for consuls, which, because of its acceptance, gradually became a basic standard. Hungary ratified this treaty in 1987, and initially consuls did indeed exercise their administrative and other – cultural, scientific, and economic – duties as provided for in Article 5 of the VCC. Later, however, after 2010, the administrative tasks of the consuls became primary, while the other tasks, including general liaison with the diaspora, were taken over by other levels of the emerging national diaspora policy institutions. However, the consul did not only transform from a diplomat into a bureaucrat as a result of the new diaspora policy based on the concept of a unified Hungarian nation. He or she was pushed in this direction by the change in people's travel habits, which produced a significant increase in business in a short time. In the Hungarian context, this was compounded by changes affecting the Hungarian diaspora: most new emigrants – who have the strongest ties to the motherland – often prefer temporary residence to long-term settlement, and the change in travel patterns has also led to more frequent temporary or permanent return to Hungary. All this has the effect of further strengthening the administrative tasks of the consul, which indicates that although the scope of consular tasks may change several times in the future, the transformation of the consul from a diplomat to an administrative specialist can be considered a completed change in the long term – as long as the willingness to engage in mass migration remains high. This means that, while the consul

will remain in contact with the Hungarian communities abroad and their members, and this contact will be shaped largely by the legal framework, the consul will no longer be primarily a diplomat in this role, but an administrative professional.

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The "Russian Law" in Georgia: Human Rights, Legal Certainty, and the Passions of the Georgian Lawmakers

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Abstract: The article examines Georgia's Law "On Transparency of Foreign Influence" (the "Russian Law"), analyzing its implications for fundamental rights and democratic governance within Georgia's post-Soviet context. Through comparative analysis of the United States' Foreign Agents Registration Act (FARA) and the Russian Federation's Foreign Agents Laws (RFAL), the research demonstrates how Georgia's legislation substantively aligns with the Russian rather than the American act, despite claims by its proponents. The study reveals how the Georgian legislation creates substantial barriers to civil society operations through mandatory registration requirements, intrusive monitoring mechanisms, and punitive financial sanctions. Drawing upon the European Court of Human Rights jurisprudence and the Venice Commission's opinions, the analysis shows that while the law ostensibly pursues transparency

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objectives, its practical effect significantly impedes democratic development and Euro-Atlantic integration aspirations, potentially constituting a regression in Georgia's post-Soviet democratic trajectory. The findings contribute to discourse on legal mechanisms for civil society regulation in emerging democracies, offering critical insights into how transparency frameworks can become instruments of institutional control. This investigation holds particular significance for understanding contemporary challenges to democratic consolidation in post-Soviet states and the complex interplay between legal frameworks and political transformation processes.

1. Introduction

Tolstoy said: "All happy families are alike, each unhappy family is unhappy in its own way."[1] The same can be applied to nation-states – happy nations are typically democratic regimes based on the rule of law. In contrast, the history, social systems, and daily realities of hybrid democracies, authoritarian, and totalitarian countries are built and nourished by distinctly different tragedies. After regaining independence, Georgia's post-Soviet period persisted for a very long time, largely due to the fragility of hybrid democracy and the deviation of democratic processes from the rule of law. The democratic deterioration in Georgia stems from intensifying political antagonism manifested through several key mechanisms: electoral system distortions,[2] progressive media polarization, politically motivated judicial proceedings against opposition figures,[3] and growing anti-Western rhetoric despite formal Euro-Atlantic commitments. This polarization reflects not ideological differences but rather elite power struggles, establishing a governance pattern where successive administrations systematically undermine institutional progress. Such dynamics have significantly impeded Georgia's

1 Leo Tolstoy, *Anna Karenina*, trans. Rosamund Bartlett (Oxford: Oxford University Press, 2016), 3.

2 "ISFED on Changes to Election Code: GD Uses Legislative Process to Maintain Power at All Costs," Civil Georgia, December 20, 2024, accessed April 2, 2025, https://civil.ge/archives/647009.

3 Parliamentary Assembly of the Council of Europe, Doc. 13588 (September 5, 2014), paras. 91–5.

European integration prospects, as evidenced by its exclusion from EU candidate status consideration alongside Ukraine and Moldova in 2022.[4]

An initiative against civil society was first presented in the Georgian Parliament in 2017 in the form of a legislative proposal; however, at that time, this initiative was only listened to.[5] In 2023, Georgia's ruling political party – "Georgian Dream" – escalated its authoritarian tactics against civil society and free media[6] and initiated a draft law "On Transparency of Foreign Influence," which sparked significant public protest.[7] The draft law, at first glance, aimed to regulate a seemingly simple matter and should not have caused intense agitation and protest, especially since its targets were NGOs and media companies, whose interests' protection would not be a sensitive issue for the average voter. The initiators referenced the Foreign Agents Registration Act (FARA), which served as the model for the Georgian version, while the opposition, NGOs, and media companies pointed to similarities between the Georgian law and the Russian Federation's "Foreign Agents Laws" (RFAL), particularly regarding their target groups, scope, and regulation. Consequently, the draft law was dubbed the "Agents Law" or "Russian Law" by the public and continues to be known as such.[8]

Following mass protests after the first reading vote,[9] the Georgian Parliament discontinued the legislative procedure to prevent the draft from

4 Orcun Caliskan, "Democratic Backsliding in Georgia and the Role of the Rivalry between the Georgian Dream and the United National Movement," *Journal of Liberty and International Affairs* 9, no. 2 (2023): 392.

5 "Parliament Deliberates on Initiative to Restrict Foreign-Funded NGOs," netgazeti.ge, May 11, 2017, accessed April 2, 2025, https://netgazeti.ge/news/193187.

6 Salome Minesashvili and Erekle Gozalishvili, "The Politics of Euroscepticism in Georgia and Its Resonance in Society," *Georgian Institute of Politics Policy Memo*, no. 82 (2025): 4, accessed May 16, 2025, https://gip.ge/publication-post/the-politics-of-euroscepticism-in-georgia-and-its-resonance-in-society/.

7 "International Reactions to Reintroduction of Draft Law on Foreign Agents," Civil Georgia, April 17, 2024, accessed January 17, 2025, https://civil.ge/archives/589823.

8 See: Rayhan Demytrie and Emily Atkinson, "Georgia Approves Controversial 'Foreign Agent' Law, Sparking More Protests," BBC, May 14, 2024, accessed January 17, 2025, https://www.bbc.com/news/world-europe-69007465.

9 Rayhan Demytrie and Emily Atkinson, "Georgia Passes the 'Law on Agents', the Internal Crisis Escalates," BBC News, May 14, 2024, accessed April 3, 2025, https://www.osw.waw.pl/en/publikacje/analyses/2024-05-15/georgia-passes-law-agents-internal-crisis-escalates.

becoming law.[10] Despite the parliamentary majority's public promise, one year later, in 2024, the draft law was re-registered with minor changes, replacing the word "agent" with "foreign influence representative," though the essential content remained unchanged.[11] The Venice Commission critically assessed the draft law, directly urging Georgian authorities to withdraw it and reject the adoption of such a harmful normative act.[12] The second wave of mass protests against the draft law proved ineffective, and parliamentary majority approved it (without participation of opposition), then enacted it despite the Georgian President Salome Zurabishvili's veto.[13]

Beyond political consequences, the "Russian Law" carries severe legal implications in Georgia, directly affecting fundamental human rights and freedoms. The article analyses the main directions of the content of Georgia's law "On Transparency of Foreign Influence." It comparatively examines both FARA and RFAL to identify the legal characteristics of American and Russian Federation acts and their contextual influence on the "Russian Law" in Georgia. The paper reviews the "Russian Law" in the light of freedom of association and expression, as well as the right to privacy, and the legal dimension of stigmatization risk created by the law; it particularly emphasizes the context of legal certainty as one of the principal components of the rule of law and democratic state.

2. The "Russian Law" in Georgia

According to the explanatory note of the Law of Georgia "On Transparency of Foreign Influence," the law's objective is to ensure transparency of foreign influence. It establishes the legal definition of organizations advancing foreign power interests,[14] regulates the matter of their registration

10 Paul Kirby, "Georgia Drops 'Foreign Agents' Law after Protests," BBC News, March 9, 2023, accessed January 17, 2025, https://www.bbc.com/news/world-europe-64899041.

11 "BREAKING: GD Reintroduces the Draft Law on Foreign Agents," Civil Georgia, April 3, 2024, accessed January 17, 2025, https://civil.ge/archives/589747.

12 See: Venice Commission, Urgent Opinion on the Law on Transparency of Foreign Influence CDL-PI(2024)013, Strasbourg, May 21, 2024.

13 Felix Light, "Georgian Parliament Votes to Override Presidential Veto of 'Foreign Agent' Bill," Reuters, May 29, 2024, accessed January 17, 2025, https://www.reuters.com/world/europe/georgian-parliament-votes-override-presidential-veto-foreign-agent-bill-2024-05-28/.

14 Explanatory Note on Law of Georgia "On Transparency of Foreign Influence", par. "ა.ა.ა", accessed April 3, 2025 https://info.parliament.ge/#law-drafting/28355.

and monitoring, and stipulates sanctions in cases of non-compliance with the requirements prescribed by law. The act defines the legal concept of an organization advancing foreign power interests in Article 2, encompassing four primary categories: (1) non-entrepreneurial legal entities, (2) broadcasters, (3) print media owners, and (4) online media operators, where more than 20% of their non-commercial revenue originates from foreign sources. The law further elaborates on the definition of revenue and its acquisition criteria, while regulating the identification of foreign-sourced revenue in a manner that encompasses both direct and indirect funding scenarios. Notably, a foreign power includes foreign government entities, non-Georgian citizens, legal entities not established under Georgian law, and organizations based on foreign or international law.[15]

An organization meeting the statutorily prescribed criteria for entities advancing foreign power interests must be officially recorded in the registry as an organization advancing foreign power interests based on its own declaration. The organization must also submit a financial declaration disclosing not only the origin of funds, but also the purpose and amount of expended financial resources. The Ministry of Justice of Georgia is obligated to examine the submitted application within 30 working days and may request special categories of personal data and confidential information which, upon the Ministry's request, should be immediately provided. Furthermore, the Ministry of Justice is empowered to conduct monitoring of organizations advancing foreign power interests, initiated by a decision from an authorized representative or a written statement from any person. The authorized official can obtain personal data, special categories of personal data, and confidential information, which must be provided immediately. Monitoring occurs every six months.[16]

For the effective enforcement of the law, the Ministry of justice of Georgia issued an order establishing procedure for identifying, registering, and supervising entities advancing foreign interests. The order creates a multi-layered legal mechanism encompassing both self-declaration and

[15] Law N4194-XIVმს-Xმპ of Georgia "On Transparency of Foreign Influence," May 28, 2024, Articles 1, 2(1–4), 3, 4, 8, 9.

[16] Ibid., Articles 4(1)(3), 5(4), 8(1)(4).

state monitoring elements.[17] The process includes two stages: access to the organization's website and mobile verification, and submission of a detailed financial declaration encompassing information about funding sources, intended purposes, and incurred expenditures.[18]

The monitoring system introduced by the order is an innovative development in Georgia's legal framework, incorporating both regular reporting requirements and special inspections. Simultaneously, the Minister may amend the system at any time through an individual decision-making power. The current monitoring mechanism balances interest with organizational autonomy, allowing the agency to initiate monitoring and request additional information while imposing clear restrictions including limits on monitoring frequency and a requirement for prior notice.[19] Moreover, entities refusing to self-declare as advancing foreign interests are subject to a fine of 25,000 GEL, with the additional 20,000 GEL monthly fine for continued non-compliance. Entities that refuse to provide requested information are fined 10,000 GEL, and individuals failing to submit information face a 5000 GEL fine.[20]

3. Comparative Analysis: FARA and RFAL

In the process of adopting legislation on "foreign agents" to discredit civil society, countries often refer to the United States model – FARA. For instance, amid intense criticism, Russian authorities claimed that their 2012 Law (RFAL) shared the same objectives[21] as its American counterpart. Subsequently, Hungary employed similar argumentation to defend its 2017 Law on the Transparency of Organizations Funded from Abroad.[22] Despite

17 Order №1019 of the Minister of Justice of Georgia, August 1, 2024, Articles 1(1), 2(1)(2).

18 Ibid., Articles 3, 4.

19 Ibid., Article 7(1–6).

20 Law N4194-XIVმს-Xმპ of Georgia "On Transparency of Foreign Influence," May 28, 2024, Article 9(1–2)(4).

21 Jacqueline Van De Velde, "The 'Foreign Agent Problem': An International Legal Solution to Domestic Restrictions on Non-Governmental Organizations," *Cardozo Law Review* 40, no. 2 (2019): 701.

22 Nick Robinson, "'Foreign Agents' in an Interconnected World: FARA and the Weaponization of Transparency," *Duke Law Journal* 69, no. 5 (2020): 1087, accessed May 16, 2025, https://scholarship.law.duke.edu/dlj/vol69/iss5/2/.

certain superficial similarities,[23] the Russian and U.S. laws differ substantially in both their objectives and substantive content.[24] Significantly, FARA was enacted in 1938 as a countermeasure against Nazi and Communist propaganda influence,[25] with its primary objective being to ensure transparency of foreign propaganda rather than its prohibition.[26] Under the current version of the U.S. law, a person or an entity must register as a foreign agent if it operates under the control of a foreign power and engages in political or related activities.[27] This implies that financial support represents one element in the principal-agent relationship, albeit not the decisive factor. The American legislation does not presume that an entity receiving external funding automatically qualifies as a foreign agent, which stands in clear contrast to the presumptive approach embedded in the Russian law or its derivative frameworks.[28]

As a consequence of the 2017 and 2020 amendments to Russian legislation, media entities and individuals receiving foreign funding and engaged in "political activities" are now required to register as "foreign agents,"[29] regardless of any connection between the funding and political activity.[30] This registration is mandatory, and the Russian Ministry of Justice has authority to enforce compulsory registration, unlike the United States, where no such measure exists.[31] Furthermore, in contrast to FARA, entities designated as agents in Russia are subject to additional reporting requirements and audit obligations.[32] The broad application of the RFAL, which automatically

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23 Samuel Rebo, "FARA in Focus: What Can Russia's Foreign Agent Law Tell Us About America's?," *Journal of National Security Law & Policy* 12, no. 2 (2022): 314.

24 Ibid., 314–5.

25 Yuk K. Law, "The Foreign Agents Registration Act: A New Standard for Determining Agency," *Fordham International Law Journal* 6, no. 2 (1982): 365.

26 Randall H. Johnson, "The Foreign Agents Registration Act: When Is Registration Required?," *South Carolina Law Review* 34, no. 3 (1983): 687.

27 Law, "The Foreign Agents Registration Act," 360.

28 Rebo, "FARA in Focus," 314.

29 Mercedes Malcomson, "So Whose Agents Are We? Defining (International) Human Rights in the Shadow of the 'Foreign Agents' Law in Russia," *Birkbeck Law Review* 7, no. 1 (2020): 123.

30 Rebo, "FARA in Focus," 301.

31 Ibid., 309.

32 ECtHR Judgment of 16 June 2022, Ecodefence and Others v. Russia, application nos. 9988/13 and 60 others, hudoc.int., paras. 84–87; ECtHR Judgment of 22 October 2024, Kobaliya and Others v. Russia, applications nos. 39446/16 and 106 others, hudoc.int., para. 67.

stigmatizes anyone receiving foreign finance support as an agent, poses the risk of including people who post on social media about politics or receive gifts from relatives abroad. This contrasts with FARA's regulatory approach, which requires specific control and influence over the agent.[33] Furthermore, Russian law restricts foreign agents from having contractual arrangements, supporting them financially, and participating in referendums or elections. Such restrictions are not present under FARA.[34]

Russia's implementation of its "foreign agent" law is unforeseeable and selective, whereas FARA is more consistent and predictable. Russia specifically targets NGOs, while FARA applies more broadly to lobbyists, PR companies and law firms. This leads to fundamental differences in the regulatory approach and enforcement of methodology between the two jurisdictions.[35] Russia actively employs this legislation as an instrument for suppressing dissenting voices, as evidenced by the increase in the number of closed organizations.[36] In contrast, freedom of association in the U.S. provides robust protections for civil society organizations, enabling them to function effectively as intermediaries between government and society while ensuring their engagement in political discourse and dialogue.[37]

4. Legal Barriers and Stigmatization: The Impact on Freedom of Association and Expression

Freedom of association reinforces the concept of a person as both a free and social being, whose inherent need is to engage and connect with others.[38]

33 Ivan Davydov, "Why Does Russia Need a New 'Foreign Agent' Law?," openDemocracy, December 4, 2019, accessed January 16, 2025, https://www.opendemocracy.net/en/odr/why-does-russia-need-a-new-foreign-agent-law/.

34 Rebo, "FARA in Focus," 314–5.

35 Samantha Laufer, "A Difference in Approach: Comparing the US Foreign Agents Registration Act with Other Laws Targeting Internationally Funded Civil Society," *International Journal of Not-for-Profit Law* 19, no. 1 (2017): 5.

36 Thibault Spirlet, "Top Russian Court Orders Shutdown of Human Rights Group Memorial," Politico, December 28, 2021, accessed January 1, 2025, https://www.politico.eu/article/russia-supreme-court-dissolution-memorial-international-human-rights-ngo-foreign-agents/.

37 U.S. Supreme Court, Judgment of 30 June 1958, Case NAACP v. Alabama, 357 U.S. 449, 460 (1958).

38 Carol C. Gould, *Rethinking Democracy: Freedom and Social Co-operation in Politics, Economy, and Society* (Cambridge: Cambridge University Press, 1990), 15.

The concept of freedom is fundamentally laid to the individual's liberty within the society (rather than the reverse), where diverse and often conflicting interests coexist.[39] It is important to emphasize that freedom of association carries a significant weight, not only in terms of individual self-realization, but also on the formation of a democratic and free society and state. For this reason, in the contemporary world – particularly in countries with developing democracies – civil society plays a crucial role,[40] often regarded as the "public watchdog."[41] According to the European Court of Human Rights (ECtHR), Article 11 of the European Convention on Human Rights (ECHR), in turn, provides the freedom to form associations and includes the creation of a legal entity for the purposes of collective action within the field of mutual interests.[42] Without this, Article 11 would lose its very essence.[43] In recent years, several member states of the Council of Europe (CoE) have adopted laws aimed at obstructing the free functioning of non-governmental organizations.[44] One such example is the Law "On Transparency of Foreign Influence" in Georgia, which mandates registration and monitoring of organizations receiving over 20% of their funding from abroad. While Article 1 of the law aims for transparency, as also confirmed by the explanatory note, it is not recognized as one of limiting grounds for the rights under either the ECHR (Article 11(2)) or the International Covenant on Civil and Political Rights (ICCPR) (Article 22(2)), a point that the Venice Commission has also emphasized.[45] Transparency laws are often justified by their creators as a means to reduce foreign influence on internal affairs,

39 Decision N2/2/439 of the Constitutional Court of Georgia, September 15, 2009, para. II-2.

40 Ibid.

41 See: ECtHR Judgment of 14 April 2009, Tarsasag a Szabadsagjogokert v. Hungary, application no. 37374/05, hudoc.int; ECtHR Judgment of 22 April 2013, Animal Defenders International v. the United Kingdom, application no. 48876/08, hudoc.int.

42 ECtHR Judgment of 10 July 1998, Sidiropoulos and Others v. Greece, application no. 26695/95, hudoc.int., para. 40.

43 ECtHR Judgment of 17 February 2004, Gorzelik and Others v. Poland [GC], application no. 44158/98, hudoc.int., para. 88.

44 Nick Robinson, *Foreign Influence Registration Laws and Civil Society: An Analysis and Responses* (International Center for NON-Profit Law, 2024), https://doi.org/10.13140/RG.2.2.20960.08966.

45 Venice Commission, Urgent Opinion on the Law on Transparency of Foreign Influence, CDL-PI(2024)013, Strasbourg, May 21, 2024, para. 59.

frequently citing national sovereignty.[46] However, national sovereignty, like transparency, is not explicitly recognized as a legitimate justification. The UN Special Rapporteur stated that national sovereignty is not considered a legitimate interest under the ICCPR and it was described as an "illegitimate justification" that fails to meet the "democratic society" standard.[47] While transparency could be legitimate for goals like national security, assuming all foreign financial support aims to strengthen political influence is difficult to justify.[48] The European Court of Justice (CJEU) also holds that transparency laws cannot justify legislation based on the presumption that any funding automatically poses a threat to the country.[49] Restrictions are permissible only for compelling and weighty reasons.[50] Therefore, even in a specific case where transparency may serve a legitimate aim, the law should not be based on vague assumptions,[51] but on actual risks to fundamental societal interests.[52]

The restriction should not be solely established by law; rather, the law must be clear and predictable to avoid absurd situations, such as when funding that is neither substantial nor linked to a specific action of an organization leads to the necessity of registering the organization as a foreign agent. In the case of Russia, the law also covered an organization to which a Norwegian hotel, where it had conducted a workshop, refunded the service fee.[53] Considering the importance of financial support for NGOs, the UN Special Rapporteur stated that freedom of association includes the

46 Maina Kiai, "Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association," UN G.A., A/HRC/23/39, April 24, 2013, 9, accessed January 16, 2025, https://documents.un.org/doc/undoc/gen/g13/133/84/pdf/g1313384.pdf.

47 Ibid., 10.

48 Venice Commission, Urgent Opinion on the Law on Transparency of Foreign Influence, CDL-PI(2024)013, Strasbourg, May 21, 2024, para. 63.

49 CJEU Judgment of 18 June 2020, Commission v. Hungary (Transparency of associations), Case C78/18, ECLI:EU:C:2020:476.

50 ECtHR Judgment of 10 July 1998, Sidiropoulos and Others v. Greece, application no. 26695/95, hudoc.int., para.40.

51 Venice Commission, Urgent Opinion on the Law on Transparency of Foreign Influence, CDL-PI(2024)013, Strasbourg, May 21, 2024, para.53.

52 CJEU Judgment of 18 June 2020, Commission v. Hungary, Case C78/18, ECLI:EU:C:2020:476, para. 91.

53 Venice Commission, Urgent Opinion on the Law on Transparency of Foreign Influence, CDL-PI(2024)013, Strasbourg, May 21, 2024, para. 30.

right to access and use both internal and external resources, including funding from abroad.[54] In *Ecodefence and Others v. Russia*, although the ECtHR concluded that restrictions on foreign funding violates Article 11,[55] it only indirectly stated that organizations had the right to receive such financial support.[56] The court noted that the label of "Foreign Agent" was so stigmatizing for certain entities that, in order to avoid negative public perceptions,[57] they refused external funding, which ultimately led to the suspension of their specific programs.[58] The court made a similar observation in the *Kobaliya and Others v. Russia* case, stating that the law of the Russian Federation strictly stigmatizes the status of "foreign agent" because it carries a negative connotation and is associated with concepts such as "traitor," "spies," or "enemies of the people."[59] Moreover, the ECtHR rejected Russia's argument, as a signatory state of the convention, that protection of human rights and the rule of law is an internal matter of the state, and that external influence constitutes a potential threat to national interests. This approach is inconsistent with the Convention's purpose as a foundation for European public order and collective security, as well as with its historic development and underlying values. The protection of human rights under the ECHR is an obligation of each signatory state.[60]

Along with restricting the freedom of association, the "Russian Law" significantly limits freedom of expression in Georgia as it creates the possibility of requesting critical information, including sensitive personal data,

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54 Maina Kiai, "Report of the Special Rapporteur," 4, accessed January 16, 2025, https://documents.un.org/doc/undoc/gen/g13/133/84/pdf/g1313384.pdf.

55 See: ECtHR Judgment of 16 June 2022, Ecodefence and Others v. Russia, application nos. 9988/13 and 60 others, hudoc.int.

56 Florian Kriener, "Ecodefence v. Russia: The ECtHR's Stance on Foreign Founding of Civil Society," EJIL:Talk!, June 21, 2022, accessed January 4, 2025, https://www.ejiltalk.org/ecodefence-v-russia-the-ecthrs-stance-on-foreign-funding-of-civil-society/.

57 Polina Malkova, "Images and Perceptions of Human Rights Defenders in Russia: An examination of Public Opinion in the Age of the 'Foreign Agent' Law," *Journal of Human Rights* 19, no. 2 (2020): 205.

58 ECtHR Judgment of 16 June 2022, Case Ecodefence and Others v. Russia, application nos. 9988/13 and 60 others, para. 126.

59 ECtHR Judgment of 22 October 2024, Case Kobaliya and Others v. Russia, application nos. 39446/16 and 106 others, hudoc.int., para.75.

60 Kriener, "Ecodefence v. Russia," accessed January 4, 2025, https://www.ejiltalk.org/ecodefence-v-russia-the-ecthrs-stance-on-foreign-funding-of-civil-society/.

upon written application,[61] as well as imposing heavy financial penalties.[62] Accordingly, the law gives the government a powerful leverage to interfere in the activities of NGOs and media organizations and suppress their independent voices.[63] The Venice Commission has noted, "the system of sanctions is too harsh" and "does not appear proportionate to the severity of the violations." As a result, it has a potential to place these organizations in a difficult financial situation and, furthermore, it can serve as a de facto basis for their dissolution.[64]

It is crucial to highlight the discriminatory nature of the law, as the differential treatment of an organization based on the source of their funding contradicts the principle of equality. For instance, the OSCE has addressed this issue, noting that entities receiving foreign financial support exceeding 20% are subject to stricter regulations than those with foreign funding below 20% which can be considered indirect discrimination.[65] Predominantly, NGOs working on sensitive issues like, human rights or anticorruption, are not prioritized by the state, and they require international support; thus, they are particularly affected by such regulation.[66]

5. Foreign Agents Law and Right to Privacy

According to Article 4(4) of Georgia's Law "On Transparency of Foreign Influence," an authorized representative of the Ministry of Justice is entitled to request special categories of personal data. While Georgia's Constitutional Court affirms that the constitution protects an individual's right to prevent the disclosure of information related to their health, finances, or

61 Law N4194-XIVმს-Xმპ of Georgia "On Transparency of Foreign Influence," May 28, 2024, Article 4(4).

62 ECtHR Judgment of 23 September 1994, Jersild v. Denmark, application no. 15890/89, hudoc.int., para. 31.

63 Venice Commission, Urgent Opinion on the Law on Transparency of Foreign Influence, CDL-PI(2024)013, Strasbourg, May 21, 2024, para. 65.

64 ECtHR Judgment of 16 June 2022, Ecodefence and Others v. Russia, application nos. 9988/13 and 60 others, hudoc.int., para. 179.

65 OSCE/ODIHR, Urgent Opinion on the Law "On Transparency of Foreign Influence" of Georgia, NGO-GEO/506/2024 [NR], May 30, 2024, para. 41.

66 Venice Commission, Urgent Opinion on the Law on Transparency of Foreign Influence, CDL-PI(2024)013, Strasbourg, May 21, 2024, para. 97.

other personal matters in official records,[67] the aforementioned law requires disclosure of information related to health and intimate life, racial or ethnic origin, political, philosophical, or religious beliefs, among others.[68] It's noteworthy that the law grants the government wide discretion to intervene in the activities of NGOs, including the examination of their documentation.[69] This not only involves the regular submission of activity reports to the Ministry of Justice, but also grants access to confidential documents,[70] such as legal consultations and strategic papers, for the purposes of inspection. Given that the reports may contain sensitive information regarding victims of human rights violations or other vulnerable groups, the potential for breaching professional confidentiality increases. For instance, journalists, doctors and lawyers may be required to disclose confidential information, thereby increasing the risk of unauthorized access to such information. As the Venice Commission has noted, the law fails to provide adequate safeguards regarding the protection and use of the acquired data.[71] This means that not only could personal data be misused, but the effective operation of human rights organizations may also be jeopardized. Such extensive interpretation and enforcement creates the risk of violating attorney-client privilege and other confidentiality guarantees.[72] Under the conditions set forth by the law, organizations that support victims of domestic violence or LGBT+ community members will be unable to ensure the safety of their beneficiaries, as they will be forced to disclose information.[73] This could severely undermine trust within these groups, potentially deterring individuals from seeking assistance altogether. In other words, the law creates a "chilling effect."

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67 Decision N2/3/406,408 of the Constitutional Court of Georgia, October 30, 2008, para. II-14.

68 Law N5669-რს of Georgia on Personal Data Protection, June 14, 2023, Article 3(ბ).

69 Françoise Daucé, "The Duality of Coercion in Russia: Cracking Down on 'Foreign Agents,'" *Demokratizatsiya: The Journal of Post-Soviet Democratization* 23, no. 1 (2015): 64.

70 Malcomson, "So Whose Agents Are We?," 129.

71 Venice Commission, Opinion on Federal Law No. 121-fz on Non-commercial Organizations ("Law on Foreign Agents"), on Federal Laws No. 18-fz and No. 147-fz and on Federal Law No. 190-fz on Making Amendments to the Criminal Code ("Law on Treason") of the Russian Federation (June 2014), June 27, 2014, para. 55.

72 Ibid.

73 Venice Commission, Urgent Opinion on the Law on Transparency of Foreign Influence, CDL-PI(2024)013, Strasbourg, May 21, 2024, para. 82.

It is remarkable that the Ministerial order regulating the administrative mechanism for implementation of the law contains unclear provisions. It does not establish any restrictions or guarantees for handling and protecting personal and confidential information, nor does it define storage periods, access rights, or security measures. For example, Article 7 enables the Ministry-authorized representative to initiate monitoring at any time and request any information from an organization.[74] Additionally, the order does not provide for judicial control over the monitoring process, increasing the chances of abuse of power.[75]

6. Legal Certainty and Challenges for the Rule of Law

It is crucial that the national legislation protects Convention-guaranteed rights from unjust interreference of the state. When the executive has unlimited power, it contradicts with the principle of the rule of law.[76] According to the Venice Commission, legislative procedure must be transparent, accountable and democratic, which implies justification of legislative proposals, public debates and, where necessary, ensuring public participation.[77] Law "On Transparency of Foreign Influence" in Georgia was adopted amid large-scale protest, with neither the local nor international organizations' recommendations for withdrawing the bill being considered.

The principle of legal certainty originates from and is a fundamental element of the rule of law[78] and combines important elements including clarity, foreseeability, legitimate expectations, etc. Law "On Transparency of Foreign Influence" violates the principle of legal certainty as the language used in the law is vague and allows broad interpretations. For instance, unlike FARA, where the "foreign agent" label is tied to a very high degree of control between the foreign entity/individual and the agent,[79] in Georgia's case, the term "foreign influence" is not defined; however it is equivalent

74 Order №1019 of the Minister of Justice of Georgia, August 1, 2024, Article 7(1).

75 Ibid., Article 7(2)(ა).

76 ECtHR Judgment of 15 November 2018, Navalnyy v. Russia, application no. 29580/12, hudoc.int., para. 115.

77 Ibid., para. 44.

78 Humberto Ávila, *Certainty in Law* (Switzerland: Springer, 2016), 1–3.

79 Venice Commission, Urgent Opinion on the Law on Transparency of Foreign Influence, CDL-PI(2024)013, Strasbourg, May 21, 2024, para. 40.

to the concept of a foreign agent and undermines the activities of NGOs.[80] This serves to damage the reputation of the NGOs in the public perception,[81] which is one of the methods of public delegitimization. Moreover, the rule of law implies that powers granted to public authorities must be specifically defined by law.[82] Empowering the Ministry of Justice with extensive powers without clear guidelines violates this principle, as the discretion for the Ministry of Justice and its authorized personnel is unclear. This is problematic not only because it allows for subjective interpretations or political manipulations but also increases the reality of such risks, considering there is no transparent enforcement mechanism that would have public trust. Additionally, any type of restrictions must comply with the rule of law and international human rights standards and should not be specifically directed against the NGOs.[83] The negative effect of the "Russian Law" is strengthened in accordance with the political regimes in the country, especially when there is no separation of powers, no independent judiciary, and the media encourages propaganda and engages in campaigns to discredit individuals with different opinions.[84]

In addition to Articles 3 and 4 of the Constitution of Georgia, which protect the principles of the democratic and legal state, Article 78 is significant as it expresses the country's aspiration to European and Euro-Atlantic structures and obligates all constitutional bodies to take all measures within the scope of their competencies for Georgia's full integration into the EU and NATO. According to the Constitutional Court of Georgia, "among the main directions of foreign policy, it can be said that integration into European and Euro-Atlantic structures is the most important direction, as taking all measures to achieve it is elevated to the rank of a constitutional obligation."[85] Given these circumstances, it is noteworthy that the

80 Ibid., paras. 71–72.

81 Council of Europe Commissioner for Human Rights, Third Party Intervention by the Council of Europe Commissioner for Human Rights, CommDH (2017)22, 2017, para. 33.

82 Venice Commission, Urgent Opinion on the Law on Transparency of Foreign Influence, CDL-PI(2024)013, Strasbourg, May 21, 2024, para. 57.

83 OSCE/ODIHR, Urgent Opinion on the Law "On Transparency of Foreign Influence" of Georgia, NGO-GEO/506/2024 [NR], May 30, 2024, paras. 13–26.

84 Maxim Krupskiy, "Russian 'Foreign Agents' Scenario: From the Weaponization of Transparency to Public Discrimination," *Kennan Cable*, no. 92 (2024): 3.

85 Conclusion N3/1/1797 of the Constitutional Court of Georgia, October 16, 2023, para. 59.

so-called "Transparency Law" creates significant obstacles to Georgia's Euro-Atlantic integration as, according to the EU's statement, this law goes against EU core principles and values and moves Georgia away from the European path;[86] in turn, NATO considered it a step backward on the path of NATO-Georgia relations.[87]

President of Georgia Salome Zourabishvili, some members of the parliament of Georgia, and NGOs submitted a constitutional complaint to declare the adopted act unconstitutional and void, as it is the "Russian Law" that moves the country away from the European Union and brings it closer to Russia; plaintiffs also requested suspension of the operation of the law until the final judgment of the court.[88] Important *amicus curiae* briefs have been submitted to the Constitutional Court of Georgia by legal scholars who critically analyze the constitutionality of the disputed legislation.[89] The Constitutional Court of Georgia did not share the position of the President of Georgia and other plaintiffs, however two judges dissented.[90]

7. Conclusion

The adoption of the "Russian Law" in Georgia further strained an already unstable political situation. The process transcended ordinary legislative activity and took on a real character, which the Georgian Parliament was trying to avoid, attempting instead to present the act as a routine product of ongoing legislative work. For this very reason, the initiators ideologically linked the Law "On Transparency of Foreign Influence" to FARA, aiming to enhance the reputation and credibility of the "Russian Law" by drawing an

86 Alessio Dell'Anna, "Georgia's EU Hopes Fade as Parliament Approves 'Russian Law' on Foreign Agents," euronews, May 28, 2024, accessed June 1, 2024, https://www.euronews.com/my-europe/2024/05/28/georgia-eu-hopes-fade-as-parliament-set-to-approve-russian-law-on-foreign-agents.

87 "NATO PA: The Law on Foreign Agents Must Now Be Withdrawn," Civil Georgia, May 26, 2024, accessed June 1, 2024, https://civil.ge/archives/609414.

88 Recording Notice N3/3/1828,1829,1834,1837 of the Constitutional Court of Georgia, October 4, 2024.

89 Amicus Curiae Brief, Reference No. AC1828, 1829, 1834, Authors: Fernanda Nicola and Günter Frankenberg, August 28, 2024; Amicus Curiae Brief, Reference No. AC1828, 1829, Authors: Albrecht Weber and Wolfgang Babeck, August 2, 2024.

90 Dissenting Opinion of Judges Giorgi Kverenchkhiladze and Teimuraz Tugushi on Recording Notice N3/3/1828, 1829, 1834, 1837 of the Constitutional Court of Georgia, October 4, 2024.

analogy with an act from a democratic and developed state. Both in terms of content and form, the law "On Transparency of Foreign Influence" of Georgia significantly differs from the FARA and directly shows similarities with the RFAL. The "Russian Law" in Georgia does not affect political actors or lobbyists, but NGOs and media companies, aiming to create an image of the public enemy. Moreover, it refers to "foreign power" not as the Russian Federation, which occupied part of Georgia's territory, or terrorist organizations, but rather strategic partners, and authoritative international organizations.

The law stigmatizes people and organizations, creating an artificial sense of alienation. The use of terms like "foreign power," "foreign influence," and similar terminology contradicts human rights and the rule of law. The disintegration of community, separating and antagonizing its members, cannot lead to any fair outcome. In any case, the existence of such a goal deprives the law of its purpose and removes its substance from its main idea. Furthermore, giving broad discretion to the executive branch and equipping it with a greater ability to restrict human rights makes the legal act unpredictable and leaves individuals completely unprotected. This violates legal certainty and consequently the rule of law, of which it is an essential component.

The "Russian Law" violates the right to privacy by granting the state authority to access personal, professional, and commercial secrets of both individuals and legal entities, without any judicial supervision. Moreover, non-compliance with executive demands automatically triggers legal liability and leaves no room for preventive and subsequent effective means of rights protection. Additionally, the large fines imposed as sanctions are not only disproportionate, but carry such a heavy financial burden that their application would result in organizational liquidation. If financial transparency were the law's genuine aim, it could be achieved much more simply through a single amendment to the Tax Code, requiring beneficiaries of foreign funding to complete additional financial declarations and indicate such funding. The existence of this alternative renders the means provided by the law disproportionate to achieving any legitimate aim.

Modern states and societies coexist and influence each other, regardless of their political regimes. Logically, their formula for happiness should be similar, encompassing, alongside economic and social welfare,

a well-functioning system of human rights and the rule of law. Conversely, so-called unhappy states, alluding to Tolstoy, must share an individual fate, as the causes of their failure or unhappiness may vary. However, when one adopts and implements the legislation – one cause of this unhappiness – from another country, one discovers an unfortunate reality: the resulting unhappiness resembles that of the state from which the specific rule was borrowed. The "Russian Law" is not merely a nickname; it may become a grave prospect of an inevitable future for Georgia, one that has already been "successfully" implemented and fulfilled by the Russian Federation and its imitating undemocratic regimes.

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Establishment of the Authority for Anti-Money Laundering. Why Does the European Union Need to Institutionalize Anti-Money Laundering?

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authority,
direct supervision,
obliged institutions

Abstract: The Regulation of the European Parliament and of the Council of 31 May 2024 establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism (AMLA) is an important step in combating money laundering and the financing of terrorism. This article outlines why this initiative was deemed necessary and what the objectives and powers of the new Authority will be. The primary method used during the research was the formal-dogmatic method through an analysis of the provisions regulating AML. The new Authority's goals and functions were verified using legal acts, reports and studies from European Union bodies. On the basis of these, conclusions are presented on the purposefulness of the AMLA's establishment, its scope of tasks and how it is expected to function. Some of the proposed assumptions – especially regarding the effectiveness of the direct supervision the AMLA is to perform – were subject to critical analysis. The research results show that, to increase the effectiveness of overall AML policy in the European Union, the new Authority must cooperate successfully with both EU and national authorities – primarily the Financial Intelligence Units of Member States.

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1. Introduction

Anti-Money Laundering (AML) is a series of legal regulations aimed at limiting the laundering of illegally obtained money and the financing of terrorism, both of which pose a serious threat to the integrity of the economy and financial system. Since the adoption of Council Directive 91/308/EEC of 10 June 1991, European Economic Community institutions have sought to implement a zero-tolerance approach to illicit financial resources and to combat money laundering and the financing of terrorism effectively. Nevertheless, the value of suspicious financial transactions still remains unacceptably high. According to the estimates provided by Europol in 2017, such transactions amounted to between 0.7 and 1.28% of the annual gross domestic product of all European Union Member States.[1]

A number of specific regulations to effectively mitigate the risk of money laundering have been adopted over the past 30 years. Key among these has been a package of legislative proposals, presented on July 20, 2021, on strengthening the EU's regulations on anti-money laundering and countering the financing of terrorism. Between 2024 and 2026, three regulations and one directive, replacing or supplementing the existing regulations, are slated for adoption and implementation in Member States. One of the legal acts presented on July 20, 2021 was the Regulation establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism (AMLA). It was published in the Official Journal of the European Union on June 19, 2024.

As per the Regulation, the Authority is to be established by December 31, 2025 and achieve its full operational capability in 2026. Therefore, the aim of this research article is to outline the genesis of the establishment of the AMLA along with its powers of direct and indirect supervision. It also defines a framework for cooperation with the authorities currently responsible for AML processes within the European Union. The article draws on the European Commission's project, information published by the European Commission and the final version of the Regulation.

[1] Europol, *From Suspicion to Action. Converting Financial Intelligence into Greater Operational Impact* (Luxembourg: Publications Office of the European Union, 2017), 26, https://doi.org/10.2813/568228.

2. Summary of Previous Research

In the academic discourse, there have not yet been published the results of research relating directly to the impact of the AMLA on the potential for enhancing the effectiveness of anti-money laundering policy in the European Union. The paucity of academic thought on the matter should come as no surprise: the proposal for the AMLA's establishment was presented relatively recently and the Authority has not yet begun to function operationally. Thus, there is a certain scarcity of literature and scientific articles presenting the results of the research carried out. Nonetheless, the new supervision system, in which the AMLA will hold a key position, has been discussed in several scientific articles.

Among the already existing publications, attention should certainly be drawn to the findings of G. Pavlidis. In the article "The Birth of the New Anti-Money Laundering Authority: Harnessing the Power of EU-Wide Supervision," he pointed out that the AMLA could revolutionize the anti-money laundering and countering terrorism financing system by strengthening and centralizing the supervision. According to the conclusions presented, the Authority should be made operational as soon as possible, as this will help the EU maintain its reputation as a safe and reliable place to do business. The author did not criticize the proposed shape of the AMLA, but instead focused on the challenges it will likely face, such as funding, functional autonomy and cooperation with the supervisory authorities of Member States. In Pavlidis' opinion, the benefits of establishing the AMLA far outweigh any potential obstacles.[2]

In his article "The Single Supervisory Mechanism (SSM) and the EU Anti-Money Laundering Framework Compared: Governance, Rules, Challenges and Opportunities," G. Schiavo likewise argues in favor of creating the AMLA. According to the author, the differences in the scope and features of national supervisory authorities led to the lack of consistency and effectiveness of AML processes in the EU. At the same time, scandals involving large financial institutions have shown that Member State institutions cannot be relied upon to carry out appropriate supervision, hence

[2] Georgios Pavlidis, "The Birth of the New Anti-Money Laundering Authority: Harnessing the Power of EU-Wide Supervision," *Journal of Financial Crime* 31, no. 2 (2024): 322–33, https://doi.org/10.1108/JFC-03-2023-0059.

posing a serious threat to the functioning of the single market. Schiavo juxtaposes this failure with the prudential supervision of credit institutions by the European Central Bank since 2014.[3]

In his article "The EU Is Homing in on Dirty Money," K. Lannoo takes a far more critical tack. He emphasizes the difficulties that could arise for the single supervisory mechanism. They would be attributable to the different practices employed by each of the Member States regarding tolerance of money laundering, protection of personal data and banking secrecy. Moreover, there is already a complex structure of cooperation between national supervisory authorities. The AMLA will have to prove its added value by collecting consistent and high-quality data from the Financial Intelligence Units (FIUs), then interpreting and acting upon these data. The threat, as Lannoo sees it, is the overlap of supervisory powers, which can lead to inconsistent actions, operational inefficiencies and problems in protecting fundamental rights.[4]

The role of the AMLA in the new single supervisory system was discussed in D. Schlarb's article "Rethinking Anti-Money Laundering Supervision: The Single Supervisory Mechanism – A Model for a European Anti-Money Laundering Supervisor?." He reached a number of important conclusions. First, the centralization of anti-money laundering efforts in the EU should not go beyond what is necessary to address the shortcomings within the current system. Therefore, there is no need to establish the union AML supervision for all obliged entities. The new Authority should primarily control high-risk institutions, while indirect supervision should include monitoring the activities carried out by national supervisory authorities. Additionally, the AMLA should only be allowed to take over the direct supervision if national authorities are found to be ineffective.[5]

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3 Gianni Lo Schiavo, "The Single Supervisory Mechanism (SSM) and the EU Anti-Money Laundering Framework Compared: Governance, Rules, Challenges and Opportunities," *Journal of Banking Regulation* 23, no. 6 (2022): 91–105, https://doi.org/10.1057/s41261-021-00166-0.

4 Karel Lannoo, "The EU Is Homing in on Dirty Money," *Centre for European Policy Studies*, no. 2022–03 (2022): 1–8, accessed June 29, 2024, https://www.ceps.eu/ceps-publications/the-eu-is-homing-in-on-dirty-money.

5 Dominik D. Schlarb, "Rethinking Anti-Money Laundering Supervision: The Single Supervisory Mechanism – A Model for a European Anti-Money Laundering Supervisor?," *New Journal of European Criminal Law* 13, no. 1 (2022): 69–90, https://doi.org/10.1177/20322844221085949.

It is distinctive that research results published to date have focused on the AMLA's competences in direct supervision. At the same time, issues such as coordinating inter-FIU cooperation, performing joint analyses, imposing administrative and financial penalties, and monitoring national supervisory authorities' work are left aside. Furthermore, except for the findings of G. Pavlidis, there is a lack of research results presenting the internal structure of the Authority, which may affect its operational efficiency. The issues outlined above are the areas of research that need to be completed and are reflected in this article.

3. Method

At the conceptualization stage of the study, the fundamental research question was formulated – why the European Union has decided to appoint another authority to oversee the EU's anti-money laundering and anti-terrorism funding efforts. In the current legal status, the European Banking Authority (EBA) and the Member States' FIUs are primarily responsible for AML. Additionally, the Financial Stability, Financial Services and Capital Markets Union (FISMA), operating within the European Commission, initiates legislative works in the AML area. Therefore, it may seem that the establishment of a new body is not necessary, and it would be better to simply increase the powers of the institutions already in place. The legitimacy of the establishment and the scope of the AMLA's tasks constitute the main research problem. In accordance with the hypothesis formulated prior to the research, the appointment of the Authority will create an integrated supervision system, which will have more possibilities to combat the procedure of money laundering than the dispersed actions of the EBA and FIU.

During the research, the formal-dogmatic method was applied. This method covers clarifying the meaning and significance of AML regulations resulting from its own content. The powers and responsibilities of the AMLA were analyzed by studying directives, regulations, drafts of new legal acts and other documents published by the European Union institutions. The following legal acts were central to the research: Communication from the Commission on an Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing of 7 May 2020; Regulation of the European Parliament and of the Council establishing a European Supervisory Authority of 18 December 2019; European Parliament

Resolution on a comprehensive Union policy on preventing money laundering and terrorist financing of 10 July 2020; Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism of 20 July 2021; Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism of 31 May 2024.

The analysis of the legal acts provided an understanding of the reasons for the fundamental changes in the EU's AML policy, in which the AMLA will obviously play a crucial institutional role. It also led to the formulation of conclusions on the nature of the tasks and goals of the new Authority.

4. Background of the Establishment of AMLA

According to the latest data, the magnitude of money laundering is difficult to quantify, however it is presumed to be considerable. The United Nations Office on Drugs and Crime (UNODC) estimates that 2% to 5% of global GDP is laundered annually, equating to EUR 715 billion to EUR 1.87 trillion each year.[6] There is no doubt that the EU's regulations on AML are among the most rigorous in the world. However, consistent application of these regulations by individual Member States remains a problem. The quality and effectiveness of the national supervisory frameworks varies due to significant disparities in the resources and methods the states employ. According to the estimates, USD 750 billion in illicit funds flowed through the financial system in Europe in 2023. The finding comes from a report by Nasdaq Verafin, a Canada-based company which provides fincrime technology such as fraud detection software. It said the dirty cash was equivalent to 2.3% of Europe's GDP and included: USD 178.0 billion in drug trafficking activity; USD 82.2 billion in human trafficking activity; USD 2.7 billion in terrorist financing activity; USD 487.2 billion in "other" illicit activity, including "organized crime, fraud, corruption".[7] Only a minor share of these suspicious

6 Europol, "Money Laundering," February 28, 2025, accessed April 29, 2025, https://www.europol.europa.eu/crime-areas/economic-crime/money-laundering#:~:text=The%20United%20Nations%20Office%20on,GDP%20is%20laundered%20each%20year.

7 Paul O'Donoghue, "NEWS: $750 Billion in Dirty Cash Is Laundered through Europe per Year – Report," March 31, 2025, accessed April 29, 2025, https://www.amlintelligence.com/2025/03/news-750b-in-dirty-cash-is-laundered-through-europe-per-year/.

transactions and activities were detected, with about 2% of assets seized and only 1% ultimately confiscated, allowing criminals to invest into expanding their criminal activities and, ultimately, infiltrate the legal economy.[8]

The European Commission's 2019 evaluation of the effectiveness and efficiency of the AML processes revealed numerous weaknesses. First and foremost, many financial institutions failed to comply with the basic requirements such as risk assessments, customer due diligence and timely reporting of suspicious transactions to FIUs. National supervisory authorities have not always foreseen the shortcomings of the obliged entities and have also at times failed to require remedial actions to be taken. According to the Commission, intervention has often been delayed until repeated failures have occurred.[9]

The system's shortcomings have also been described by academics working on AML issues. According to H. Koster, the inconsistent transposition and enforcement of the IV and V AML Directive by the Member States, as a result of the freedom given by the European Commission, led to the regulatory landscape characterized by the critical lack of coordination. The approach to cross-border transactions was particularly inconsistent. The FIUs should immediately inform the relevant Member State of any issues that may affect its assessment of compliance with AML policies and procedures concerning the whole capital group. In practice, this has been done, but with long delays or to a very limited extent.[10]

In addition, the European Commission came under pressure when scandals involving financial institutions from several Member States came to light. The Danske Bank scandal was one such case. Between 2007 and 2015, the Estonian branch of the bank transferred more than USD 200 billion belonging to people who were not Estonian residents. Many of these

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8 European Commission, "Report from the Commission to the European Parliament and the Council. Asset Recovery and Confiscation: Ensuring that Crime Does Not Pay," COM/2020/217 final, June 2, 2020, 1.

9 European Commission, "Communication from the Commission to the European Parliament and the Council. Towards Better Implementation of the EU's Anti-Money Laundering and Countering the Financing of Terrorism Framework," COM/2019/360 final, July 24, 2019, 4–5.

10 Harold Koster, "Towards Better Implementation of the European Union's Anti-Money Laundering and Countering the Financing of Terrorism Framework," *Journal of Money Laundering Control* 23, no. 2 (2020): 379–86, https://doi.org/10.1108/JMLC-09-2019-0073.

transactions were *post factum* deemed suspicious as they were carried out by Russian oligarchs or criminal organizations. The abnormalities in the AML mechanisms were borne of a lack of adequate transaction-monitoring instruments and unclear criteria for the creation of databases on high-risk customers.[11] Also, the disclosure of information about Deutsche Bank resonated strongly in the public sphere. The weakness of the internal AML tools enabled Russian entities to launder up to USD 1.3 trillion. Both failures in oversight were exposed by the US Treasury Department's Financial Crimes Enforcement Network (FinCEN), not by European supervisory authorities.[12]

Responding to public criticism, on May 7, 2020 the European Commission presented an Action Plan for a comprehensive Union policy on preventing money laundering. In the document, six pillars for countering money-laundering practices were laid out: ensuring the effective implementation of the existing EU AML framework; establishing an EU single rule book on AML; bringing about EU level AML supervision; establishing a support and cooperation mechanism for FIUs; enforcing Union-level criminal law provisions and information exchange; strengthening the international dimension of the EU AML framework.[13]

The proposal of introducing the EU level AML supervision clearly indicated the need to establish an authority responsible for that area. Prior to the announcement of the Action Plan, the EBA played the leading role in preventing money laundering by means of the financial system. This was executed by, among other things, monitoring AML activities, preparing

11 Elisabetta Bjerregaard and Tom Kirchmaier, "The Danske Bank Money Laundering Scandal: A Case Study," *Social Science Research Network Electronic Journal* (2019): 12–20, https://doi.org/10.2139/ssrn.3446636.

12 Elizabeth Hearst, "Deutsche Accused of Allowing $1.3TRN to Be Laundered Despite Red Flags Being Raised by Bank's Own Internal Compliance Team – FinCEN Leaks," AML Intelligence, September 20, 2020, accessed 22 June 2024, https://www.amlintelligence.com/2020/09/deutsche-bank-suffers-worst-damage-over-massive-aml-discrepancies-in-fincen-leaks; Katherin Alfonso and Trevor Sutton, *The Meaning of the FinCEN Files*, Global Financial Integrity, June 23, 2022, accessed June 30, 2024, https://gfintegrity.org/the-meaning-of-the-fincen-files/.

13 European Commission, "Communication from the Commission on an Action Plan for a Comprehensive Union Policy on Preventing Money Laundering and Terrorist Financing" (OJ C164, 13 May 2020), 2.

risk assessments, and also requesting the national supervisory authorities to conduct inquiries. However, these tasks were only carried out towards financial services providers.[14] Nevertheless, the EBA independently pointed out the gaps in the supervision system. In early 2020, it issued a report highlighting two problems: first, the lack of cooperation between Member States and interested national and international parties, and second, the numerous shortcomings in the risk assessment process many of the obliged entities exhibited.[15]

This position was supported by the European Court of Auditors (ECA). According to Special Report no. 13/2021, the national supervisors apply different methodologies for their AML assessments by using different scales and criteria for scoring risk. In turn, the EU bodies have limited tools to ensure sufficient application of AML frameworks.[16] Both the EBA and ECA opinion emphasized the need to create a separate authority with stronger prerogatives to coordinate the activities of FIUs and other national supervisors.

5. Legislative Efforts towards the AMLA's Creation

The European Commission's proposal of 7 May 2020 started legislative works on establishing the new authority. The European Parliament, in its Resolution of 10 July 2020, welcomed the intention to set up a new EU institutional architecture to combat money laundering. The Commission was called upon to ensure that the responsibilities of the new body cover financial and non-financial obliged entities with direct supervision powers over

14 Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) (OJ L334/2, 27 December 2019).

15 European Banking Authority, "Report on Competent Authorities' Approaches to the AML/CFT Supervision on Banks," 2022, 16–9, accessed June 24, 2024, https://www.eba.europa.eu/sites/default/files/document_library/News%20and%20Press/Press%20Room/Press%20Releases/2020/EBA%20acts%20to%20improve%20AML/CFT%20supervision%20in%20Europe/Report%20on%20CA%20approaches%20to%20AML%20CFT.pdf.

16 European Court of Auditors, *Special Report: EU Efforts to Fight Money Laundering in the Banking Sector Are Fragmented and Implementation Is Insufficient* (Luxembourg: Publications Office of the European Union, 2021), 40–3.

certain obliged entities depending on their size or the risk they present, as well as ensuring that national supervisors apply the rules effectively.[17]

According to the Conclusions of the Council of the European Union, that were presented on November 5, 2020, the new body should be equipped with competencies triggered on a purely risk-sensitive basis, be able to support the national authorities, and promote the supervisory convergence of common practices. The first pillar of the activities should comprise responsibility for supervising a selected number of obliged entities that have high money-laundering risk, and which are chosen on the basis of appropriate risk criteria. However, it was emphasized that inspections should be carried out and supervisory measures and sanctions imposed with respect to the specificities of national systems and enforcement set-ups. The second pillar should allow the new AML authority to step in *ad hoc* and take over supervision from a national supervisor. Such a possibility should only be exercised in clearly defined and exceptional situations, and on the basis of objective and transparent criteria – primarily in cases where the national supervisor is unable to enforce compliance or cannot ensure adequate supervision.[18]

As a part of the legislative preparation process, the public consultation was held from May 7 to August 26, 2020. That consultation received 202 official contributions from participants, the majority of whom favored establishing the new EU authority with competences towards obliged entities – both financial and non-financial.[19] Nevertheless, even before the consultation ended, the European Commission had presented the package of legislative proposals that would overhaul the AML area. According to them, between 2024 and 2026, three regulations and one directive should be adopted and then implemented in the Member States. One of

17 European Parliament resolution of 10 July 2020 on a comprehensive Union policy on preventing money laundering and terrorist financing — the Commission's Action Plan and other recent developments (2020/2686(RSP)) (OJ C371, 15 September 2021), 5.

18 Council of the European Union, "Council Conclusions on Anti-Money Laundering and Countering the Financing of Terrorism," November 5, 2020, 9, accessed June 22, 2024, https://data.consilium.europa.eu/doc/document/ST-12608-2020-INIT/en/pdf.

19 European Commission, "Consultation on the Action Plan for a Comprehensive Union Policy on Preventing Money Laundering and Terrorist Financing," 2020, accessed June 22, 2024, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12176-Action-Plan-on-anti-money-laundering/public-consultation.

the projects presented on July 20, 2021 was the Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism.[20]

The draft of the regulation was then submitted to the European Parliament, where two bodies – The Committee on Economic and Monetary Affairs (ECON) and the Committee on Civil Liberties, Justice and Home Affairs (LIBE) – set about working on it. They proposed introducing amendments to extend the scope of direct AMLA supervision by including crypto-asset service providers and increasing the number of selected obliged entities to 40–45. Regarding indirect supervision, it was proposed that the AMLA be endowed with legally binding mediation powers and the possibility to periodically review the national supervision frameworks. Eventually, on March 28, 2023, the joint report of the two committees was voted on and, on April 17, 2023, the plenary approved the trialogue on the final content of the regulation. The Parliament and the Council reached a provisional agreement in December 2023, and the decision on the seat was taken by a joint vote on February 22, 2024.[21]

6. The AMLA's Responsibilities and Structure

On June 19, 2024, after a long waiting period, the final version of the regulatory package on anti-money laundering and countering terrorism financing was published in the Official Journal of the European Union. The legal basis enabling the creation of the AMLA is Article 114 of the Treaty on the Functioning of the European Union, which concerns the adoption of harmonization measures in the internal market.[22] The Authority is to have a legal personality in the form of a decentralized agency of the European Union. According to the schedule presented in 2021, the AMLA was to be

[20] European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010, COM (2021) 421 final, July 20, 2021.

[21] Cécile Remeur, "EU Legislation in Progress: Anti-Money-Laundering Authority (AMLA). Countering Money Laundering and the Financing of Terrorism," European Parliament, 2024, 1–8, accessed June 25, 2024, https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733645/EPRS_BRI(2022)733645_EN.pdf.

[22] Article 114 of the Consolidated version of the Treaty on the Functioning of the European Union (OJ C326, 26 October 2012).

established in early 2023, be operational by the end of 2025, and have full resources in 2026.[23] However, the launch date was changed and, according to the final version of the Regulation, the Commission shall be responsible for the establishment and initial operation of the Authority until December 31, 2025.[24]

In terms of finances, according to the 2021 draft, as much as 75% of the AMLA's funding was to come from fees on obliged entities. In the first full year the budget was to be EUR 45.6 million.[25] This means that the public funds to be spent on the Authority were supposed to be only a little over EUR 11 million, which should be considered a relatively low amount given the scope of its responsibilities. Nevertheless, in the final version of the Regulation of 31 May 2024, the percentage distribution of revenue is not indicated in detail. Only the sources of funding are listed. These include contribution from the Union entered in the general budget of the Union, the fees paid by the selected and non-selected obliged entities, voluntary financial contribution from the Member States, charges for publications, and for training and any other services provided by the Authority and possible Union funding in the form of contribution agreements or *ad hoc* grants.[26]

The process of choosing the seat of the AMLA was likewise drawn out. In July 2022, the Court of Justice of the European Union stated that choosing the "headquarters city" should be part of the ordinary legislative procedure. In June 2023, the Commission, the Parliament and the European Council agreed on common criteria for the choice of the seat. On September 28, 2023, the Commission announced that applications could be submitted before November 10, 2023. Proposals for the location of the AMLA headquarters were submitted by nine Member States: Belgium (Brussels), Germany (Frankfurt), Ireland (Dublin), Spain (Madrid), France (Paris),

23 European Commission, Proposal for a Regulation…, 12.

24 Article 107 of Regulation (EU) 2024/1620 of the European Parliament and of the Council of 31 May 2024 establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010 (OJ L 2024/1620, 19 June 2024).

25 European Commission, Proposal for a Regulation…, 11.

26 Article 76 of Regulation (EU) 2024/1620.

Italy (Rome), Latvia (Riga), Lithuania (Vilnius), and Austria (Vienna).[27] In the vote, Frankfurt received a majority of validly cast votes on the first round of voting and was chosen to host the new agency.[28]

The Authority will consist of two collegiate governing bodies – the Executive Board and the General Board. The Executive Board, composed of the Chair and five members, will take decisions concerning obliged entities and national supervisory authorities. Its scope of duties will include, among other things, the assessment and adoption of consolidated annual reports on the Authority's activities, direct and indirect supervision, the adoption of anti-fraud strategies, and adopting decisions on budget and organizational issues. An important prerogative is the imposition of pecuniary sanctions on obliged entities under direct supervision. Where the Executive Board finds that a selected obliged entity has, intentionally or negligently, committed a serious, repeated or systematic breach of directly applicable requirements, it shall adopt a decision imposing pecuniary sanctions. For serious, repeated or systematic breaches that have been identified in at least two Member States where a selected obliged entity operates, the sanction shall fall between EUR 500,000 and EUR 2,000,000 or 1% of the annual turnover – depending on which of these is higher. If a serious breach has been identified in only one Member State, the sanction shall run to at least EUR 100,000, but not exceed EUR 1,000,000 or 0.5% of the entity's annual turnover.[29]

In turn, the General Board, which is to be composed of the representatives of the Member States, will sit in one of two alternative compositions – either in a supervisory or in an FIU composition. The first will consist of the heads of the public authorities responsible for AML supervision, while the second will involve the heads of the Member States' FIUs. The General Board shall adopt the opinions, recommendations, guidelines and

27 European Commission, "Selection of the Seat of the Anti-Money Laundering/Countering the Financing of Terrorism Authority (AMLA)," February 22, 2024, accessed June 24, 2024, https://commission.europa.eu/law/selection-seat-anti-money-launderingcountering-financing-terrorism-authority-amla_en.

28 European Parliament, "Frankfurt Will Be the Home of the EU Anti-Money Laundering Authority," accessed June 29, 2024, https://www.europarl.europa.eu/news/en/press-room/20240219IPR17818/frankfurt-will-be-the-home-of-the-eu-anti-money-laundering-authority.

29 Article 22 of Regulation (EU) 2024/1620.

decisions, vote on the draft regulatory technical standards and provide its opinion on any draft decision prepared by the Executive Board in relation to selected obliged entities.[30]

Among the AMLA's powers, the most widely commented upon are its direct supervisory and investigative powers over selected obliged entities from the financial sector operating in several Member States and classified by those states in the highest risk category. In the regulation's project stage, the European Commission analyzed several variants concerning the Authority's powers in two main areas – supervision and improving the quality of operations, and cooperation between national supervisors. Eventually, in the case of supervision, it was decided on direct powers over selected financial institutions. In this context, the criteria used to select the entities are crucial. It was agreed that in the first selection process, forty entities would fall under the Authority's remit. The AMLA shall commence the first selection process by July 1, 2027 and conclude the selection within six months of the date of commencement. Subsequently, the selection process is to be carried out every three years after the date of commencement of the first selection and will be concluded within six months for each selection process. The list of the selected obliged entities shall be published by the Authority without undue delay upon completion of the selection process. The Authority shall start direct supervision of the selected obliged entities six months after publication of the list. The direct supervision will last for three years – i.e. until the next six-month period passes since the publication of the next list of financial institutions subject to action in the next "supervisory cycle." A joint supervisory team shall be established for the supervision of each selected obliged entity. Each team will be composed of staff from the Authority and from the financial supervisors responsible for supervision of the selected obliged entity at the national level.[31]

Joint supervisory team duties will include performing the supervisory reviews and assessments, coordinating on-site inspections and preparing supervisory measures, participating in the preparation of draft decisions, liaising with financial supervisors where that is necessary to exercise

30 Articles 57–60 of Regulation (EU) 2024/1620.
31 Articles 14–16 of Regulation (EU) 2024/1620.

supervisory tasks in a Member State where a selected obliged entity functions.[32] There are no limitations in the Commission's draft so that the previously monitored financial institution is not included in the next supervisory cycle. This means, in practice, that if a given entity is not selected in the following cycle, the AMLA will have approximately two and a half years to verify its anti-money laundering mechanisms. As a result, the supervision will be more of a remedial than a permanent nature, with the main aim of reducing operational risk.

On the other hand, the AMLA's tasks regarding national supervisors will focus on monitoring and coordinating their activities. In popular opinion, they have not always been keen to use the full set of control tools available to them. The supervisory practices are, therefore, to be converged by developing a supervisory methodology in line with a risk-based approach. It will incorporate harmonized quantitative benchmarks, primarily by the preparation of the common approaches for classifying the risk profile.[33] In addition, the national financial supervisory authorities will be obliged to notify the AMLA in cases of a significant deterioration in AML compliance standards by the credit or financial institutions. In extreme situations, if the financial supervisor fails to comply with and implement the AMLA's recommendations concerning a given credit or financial institution, direct supervisory competences over the institution in question could be transferred to the AMLA.[34]

Improving cooperation between national FIUs is also of paramount importance. The new Authority shall coordinate the FIUs' joint analyses and provide them with necessary tools and operational support as well as the appropriate technical coordination, including IT support and artificial intelligence tools. The new EU body will also assume responsibility for maintaining the AML database, which was previously managed by the EBA, and the secured channel of communication for FIUs. It will also be authorized to issue guidelines and technical standards, organize training, and carry out trend and risk analysis.[35] In this form, the AMLA, when fully

32 Article 16 of Regulation (EU) 2024/1620.
33 Article 8 of Regulation (EU) 2024/1620.
34 Article 32 of Regulation (EU) 2024/1620.
35 Articles 40–41 of Regulation (EU) 2024/1620.

operational, will become the center of an integrated system consisting of the Authority itself and the national authorities overseeing the AML area.

7. Research Results

Although the AMLA has not yet begun to function operationally, doubts have arisen as to its functioning and powers. The first concerns changes that have been made to the original organizational plans. Per the 2021 resolution's draft, it was planned to hire 250 employees in the institution with the budget of EUR 45.6 million. According to more recent information, the AMLA's budget will come in nearly nine times higher, at EUR 400 million, while 430 employees will be taken on.[36] This shows how difficult it is to estimate the volume of resources needed to effectively combat money laundering. Once up and operating, the AMLA could need still more resources, given the breadth of cases subject to analysis. This makes the controversial issue of how the AMLA is to be funded all the more pressing. If, as it was announced, up to 75% of the budget comes from fees on obliged entities, will a conflict of interest not arise? In comparison, the EBA, which delegates only 13 of its approximately 200 employees to deal with AML/CFT issues, has an annual budget of EUR 50 million – 40% of which comes from the EU budget and 60% from national supervisors.[37] In the case of the AMLA, the proposed mechanism might raise ethical doubts. After all, the fees will be collected from institutions that will later be the subject of audits by the Authority. Additionally, the entities under direct supervision would, in a way, finance the AMLA twice – once through taxes paid, part of which goes to

[36] European Commission, "Questions and Answers: The New EU Anti-Money Laundering Authority," April 24, 2024, accessed June 24, 2024, https://finance.ec.europa.eu/document/download/61cf5a0d-0e5d-43e2-876a-8e68e45c7f1f_en?filename=240424-anti-money-laundering-faqs_en_0.pdf; Stephen Rae, "Europe's New AML Authority (AMLA) Will Need 500 Staff – Double Original Estimate – and Budget of at Least €400M," AML Intelligence, February 1, 2023, accessed June 26, 2024, https://www.amlintelligence.com/2023/02/exclusive-europes-new-aml-authority-amla-will-need-500-staff-double-original-estimate-and-budget-of-at-least-e400m-pa/.

[37] Sarah Lambert-Porter and E. Kyle Zipf, "The EU is Overhauling Its AML/CTF Framework and May Be Looking to Leverage or Facilitate the Work of PPPs," Ropes & Gray LLP, September 9, 2021, accessed June 24, 2024, https://www.ropesgray.com/en/insights/alerts/2021/09/the-eu-is-overhauling-its-aml-ctf-framework-and-may-be-looking-to-leverage.

the EU budget as Member State contributions, and again by additional fees paid because of the status of an obliged entity.

The second source of doubt concerns, as laid down in the draft from July 20, 2021, two goals for the Authority's establishment – the coordination of activities of FIUs and other supervisors in the Member States, first, and the direct supervision over high-risk cross-border financial entities. Meanwhile, at the stage of works in the European Parliament and the Council of the European Union, the body's responsibilities included analyzing crypto-asset service providers, overseeing AML/CFT supervisors of the non-financial sector, including self-regulatory bodies, and coordinating and supporting FIUs.[38] The question of whether to grant the AMLA the competence to enforce economic sanctions related to the war in Ukraine was also entertained.[39] All this suggests that further areas of oversight could well be added to the AMLA's remit, particularly in the event of a Union-wide problem more or less related to financial markets. That, in turn, could chip away the quality of its work in the core areas which the AMLA was set up to begin with. This prompts the question of whether a body that is to employ only 430 people should be empowered to conduct such multifaceted operations? There is some concern that the AMLA would be forced to significantly expand its organizational structures in order to carry out not only its core tasks, but also others, thereby ballooning its bureaucracy. Otherwise, a catalogue of priority cases is likely to be created, and that solution might not fully properly affect the overall supervisory processes.[40] Thus, it is likely that the organizational and bureaucratic complications that befell the EBA would be repeated. The EBA, too, was initially given broad AML authority, only to discover that the creation of a new, independent body would be needed to take over some of its workload.

38 Article 12 of Regulation (EU) 2024/1620.

39 Stephen Rae, "EU's New AML Authority (AMLA) May Also Be Tasked with Enforcing Russia Sanctions in Proposal Being Considered by Commission," AML Intelligence, July 4, 2022, accessed June 26, 2024, https://www.amlintelligence.com/2022/07/news-eus-new-aml-authority-amla-may-also-be-tasked-with-enforcing-russia-sanctions-in-proposal-being-considered-by-commission/.

40 Sebastian Diessner, "More Questions than Answers? The EU's New Anti-Money Laundering Authority," The London School of Economics and Political Science, September 22, 2022, accessed July 10, 2024, https://blogs.lse.ac.uk/europpblog/2022/09/22/more-questions-than-answers-the-eus-new-anti-money-laundering-authority/.

The large scope of discretion and arbitrariness of the decisions also raises concerns, especially in the case of the tasks performed by the Member States' public institutions so far. The Regulation provides for a procedure, according to which the AMLA indicates the application of specific measures, if breaches of AML regulations have occurred, but the national supervisor has not reacted adequately. In those cases, the Authority should request the local supervisor to take specific measures to remedy the situation, including requesting the local supervisor to issue financial sanctions or other coercive measures.[41] The launch of such a mechanism might be questioned by national FIUs and result in disputes between the institutions. After all, it is difficult to imagine a Financial Intelligence Unit, with years of experience and operational expertise, accepting without objection an AMLA's opinion that it is unable to introduce appropriate corrective measures independently. Such a situation may result in the deterioration of the institutional cooperation's quality, which, as it was repeatedly emphasized during the drafting of the new legislation, is of a key importance to the overall AML processes.

There are also doubts about putting specific entities – financial institutions that function in a significant number of Member States and have the highest risk profile in several of them – under direct supervision. Credit institutions and financial institutions, and groups of credit institutions and financial institutions, shall qualify as selected obliged entities. Pursuant to the decision on the maximum number, the selected obliged entities shall be those obliged entities which are operating in the highest number of Member States whether through establishments or under the freedom to provide services.[42] One should also bear in mind that according to the assumptions, only 40 financial institutions will be qualified for direct supervision across the European Union. However, where more than 40 entities will be identified, the Authority may, in consultation with the supervisory authorities, agree on limiting the selection to a specific different number of entities or groups that is greater than 40. Whether this number is eventually reduced or increased, direct supervision of only 40 institutions – albeit the biggest financial institutions that generate the highest risk – is very modest given

41 Articles 19–20 of Regulation (EU) 2024/1620.

42 Article 13 of Regulation (EU) 2024/1620.

the market's size. To put these numbers in perspective, consider that in 2020 5441 banks alone were operating in the Member States.[43]

Moreover, that some institutions will be supervised by the new Authority does not necessarily mean that the application of the AML procedures by the entire sector will actually improve. Knowing the list of the entities selected for the direct supervision, the criminals might turn to other banks to launder money, even though those institutions were not of the highest risk on the date of selection. The question emerges if these are not facade actions aimed only at creating a conviction that a more efficient monitoring and control framework would have introduced? In a dark scenario, the direct supervision might reduce the FIUs' effectiveness as they may "loosen" their own control mechanisms given the presence of a union authority. Here, direct supervision could be counterproductive – the AMLA would not improve AML processes as the procedure would still be carried out using the accounts in other financial institutions.

With regard to putting the particular entities under direct supervision, one further issue is of note. As pointed out in the Regulation, the institutions whose residual risk profile has been classified as high shall qualify as selected obliged entities.[44] This could cause investors to become leery, which could affect the entity's competitive position and financial performance. The institution has not properly managed its AML risk, leading the EU authority to put it under direct supervision, the rationale would go. In extreme cases, such a message would fall into the lap of competition, which could deploy the information to warn of the dangers of carrying out financial operations with the entity given its money-laundering risk profile. In practice, it will be very difficult for an entity to limit the reputational damage and explain to investors and clients that it has been put under direct supervision by the AMLA because it performs cross-border activities or falls within the criteria adopted at the union level in the harmonized risk assessment methodology.

43 Francisco Saravia, "Banking in Europe: EBF Facts & Figures 2021 – 2020 Banking Statistics," European Banking Federation, 4, accessed July 10, 2024, https://www.ebf.eu/wp-content/uploads/2021/12/Banking-in-Europe-EBF-Facts-and-Figures-2021.pdf?lang=en.

44 Articles 12–13 of Regulation (EU) 2024/1620.

8. Conclusions

The remarks presented in the foregoing section were intended only to present the problematic aspects potentially facing the AMLA – not to question the important reasons it is being created. It is not a given that all of those risks will be reflected in the practice of the AML processes. Referring to the hypothesis formulated prior to the research, the AMLA has the potential to increase the efficiency of anti-money laundering measures in the European Union – if cooperation with national FIUs is harmonious. However, direct supervision, primarily the AMLA's prerogative, will not be able to fully eliminate the proven weaknesses of the current system. The new Authority's resources are simply too sparse and the number of entities under its direct supervision too few. Therefore, the powers in the areas of performing joint analyses, coordinating activities of national supervisors and issuing unified technical standards might be of a greater significance for strengthening the AML effectiveness than the direct supervision, which receives more attention in the public sphere.

The Regulation should not, however, be seen as an evolutionary regulatory reform. The establishment of the AMLA is a radical change to the rules of the functioning of the process in the European Union, proving the earlier failures in countering money laundering. It is a proof that the most optimal system of the AML area monitoring and supervision was sought. The financial system is only as resilient as its weakest links. These weakest links were the lack of coordination between national FIUs and the dispersion of responsibilities. This caused that adopted methods were costly and ineffective.

It seems symptomatic that only a few years after both the IV and V AML Directives were published, the established pattern of institutional relationships is being completely remodeled as a consequence of endowing the new authority with some of the EBA's and FIUs' powers. As the data shows, previous attempts to minimize money laundering have not achieved adequate results. In 2017, suspicious financial transactions amounted to a maximum of 1.28% of the GDP of the European Union member states, while in 2023 it was already 2.3%. The AMLA's establishment has the effect of adding a supranational actor to the EU enforcement AML landscape.

On the other hand, implementation challenges will require careful attention. The establishment of the AMLA is not part of the deregulatory

measures, which, as intended, are supposed to strengthen the competitiveness of the European Union economy. On the contrary, it represents another step in strengthening regulation. Companies will have to adapt their frameworks, engage proactively with the AMLA, and consider direct supervision. It remains an open question as to how the new regulations will affect the emergence of management and production innovations, and whether the increasing reporting requirements will not impede European business growth.

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State as an Heir: Balancing Public and Private Interests in Georgia and Europe. Part II: Dilemma of the State as Legal Successor

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Abstract: As previously stated in Part I, Article 1343 of the Civil Code of Georgia establishes the state as a "sixth-degree" heir, signifying that the state possesses a legitimate public interest in acquiring heirless property. Considering the state as a heir in the same capacity as individuals would conflict with the private interests of those individuals, particularly when they might have a legitimate claim to the heirless property. It is vital to circumscribe the state's involvement to the minimum necessary in order to fulfil its public interest. The Part II of the article is dedicated to an examination of the dilemma faced by the state in its capacity as legal successor, posing the question of whether it should assume the role of "sixth degree" heir or defender of the public order.

1. Dilemma of the State as Legal Successor: "Sixth Degree" Heir or Defender of the Public Order?

1.1. Unusual Defender of the Public Interest

In inheritance law, public order plays a vital role in ensuring fair civil turnover. When public order is violated, it impacts not only private interests, but also public interests, as the good protected by public order holds significant societal value. The violation of this order undermines the foundation of

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society's existence. This is why the scenario where private property is found without an owner and is absorbed by the state is in conflict with the concept of private ownership.[1]

The circle of authorized entities to receive heirless property, as outlined in Article 1343 of the Civil Code, is broad and the title of the article does not fully encompass the list. It includes not only the state, but also institutions for the elderly, disabled, medical, educational, and other social protection, in cases where the testator was under their care, as well as entrepreneurial societies and cooperatives.

According to Article 1492 of the Civil Code, when heirless property is transferred to the state, the state is liable for the testator's debts with the corresponding portion of the heirless property, just as an heir would be. This raises the matter of whether this obligation extends to other authorized recipients listed in Article 1343. Heirless property does not obligate institutions providing support, or subjects of entrepreneurial-legal relations, to pay the testator's debts.[2] However, this does not exclude the possibility that the property could be used to satisfy creditors' debts if the recipient of the heirless property does not protect their right to the estate.

Heirs can be:

(1) At the time of inheritance by law – persons who were alive at the time of the testator's death, as well as the testator's children born alive after his death.
(2) In the case of inheritance by will – persons who were alive at the time of the testator's death, as well as those conceived during his lifetime and born afterward, regardless of whether they are his children or not, as well as legal entities.[3]

According to the broad interpretation of Article 1307 of the Civil Code, the state can acquire the status of a testamentary heir. However, under

1 Angelique Devaux, "The European Regulations on Succession of July 2012: A Path Towards the End of the Succession Conflicts of Law in Europe, or Not," *The International Lawyer* 47, no. 2 (2013): 248, https://www.jstor.org/stable/43923949.

2 See: Roman Shengelia and Ekaterine Shengelia, *Family and Inheritance Law (Theory and Practice)* (Tbilisi: "Meridiani", 2019), 407; Kenneth Reid, Marius Waal, and Reinhard Zimmermann, *Comparative Succession Law*, vol. 2, *Intestate Succession* (Oxford: Oxford University Press, 2015), 32.

3 See: Roman Shengelia, "The Necessity of Improving the Mechanism for Protecting the Interests of Subjects of Inheritance Law Relations," *Life and Law* 1–2, no. 57–58 (2022): 95.

Article 1343, legal inheritance is as natural a phenomenon for the state as it is for an individual.

The state can be a testamentary heir and, in this role, it assumes rights and obligations to the same extent as an individual would, since the state's status as a testamentary heir is determined by the testator's will. However, this scenario differs from the case where the right to inherit does not stem from the testator's will, but from the presumption of the state being a legal heir.

Through a systematic interpretation of inheritance rules, the state has the right to challenge the heirs of the testator based on claims that inheriting individuals typically present against each other.[4] Although this view is generalized, it does not exclude the state's authority to act against private interests, including overcoming the unlawful private interests of individuals to uphold the public interest.[5]

In a case considered by the Supreme Court of Georgia, the author of a private complaint was unable to demonstrate any legal interest in annulling a decision. Although the complainant was a co-owner of immovable property, the declaration of the other co-owner's death did not constitute a violation of the complainant's co-ownership rights. Even if the deceased co-owner's death had been confirmed by the court, inheritance proceedings would have been initiated for the deceased's share, with the heirs being invited to claim it. If no heirs were found, the heirless property would pass to the state. Since the complainant was neither a legal nor a testamentary heir of the deceased, their complaint was dismissed.[6]

1.2. Constitutional Lawsuits: Beginning of the Chaos

The matter of whether the state is a "sixth-degree" legal heir or a guarantor of public order is vital to the two constitutional lawsuits filed by

4 See: Besarion Zoidze, "Formalism in Georgian Law – Primarily According to the Practice of the Constitutional Court," *Journal of Public Law*, no. 1 (2023): 59–93; Besarion Zoidze, "The Interaction between Private and Public Law (Primarily in The Context of The Theory of Interests)," *Private Law Re*view, no. 5 (2023): 17.

5 Does the transfer of heirless property to the state restrict the constitutional right to property? For more information, see: Giorgi Khubua, "Superpositive Constitution (?): On the Issue of the Legal Nature of 'Constitution and Law'," *Journal of Public Law*, no. 2 (2023): 6–7.

6 Decision of the Supreme Court of Georgia in Case №as-634–595–2010, July 5, 2010.

Giorgi Khorguashvili and Giorgi Arsenidze against the Parliament of Georgia. These cases bring into focus the constitutional compatibility of certain provisions of the Civil Code of Georgia, particularly Articles 1336 and 1343, which regulate inheritance and the transfer of heirless property to the state.

In the case of Giorgi Khorguashvili against the Parliament of Georgia (Constitutional claim No. 1395, 2019), Khorguashvili challenges the constitutionality of specific provisions in Articles 1336 and 1343 of the Civil Code.[7] The main issues include:

(1) The constitutionality of the phrase in Article 1343(1) that transfers heirless property to institutions for the elderly, disabled, medical, educational, and other social protection if the testator was under their care. Khorguashvili argues this provision contradicts constitutional principles, especially regarding personal property rights (Article 11 of the Constitution of Georgia).
(2) The constitutionality of transferring heirless property to the state under Article 1343(1) when there are no legal heirs, or when all heirs have been deprived of inheritance rights. Khorguashvili claims this provision infringes on individual property rights (Article 19 of the Constitution).

However, the Constitutional Court did not accept the part of the claim challenging the state's right to inherit in the absence of heirs. This decision left open the issue of whether the state's involvement in inheritance is consistent with the constitutional right to private property and inheritance.

In Giorgi Arsenidze's case (2023), the plaintiff argues that certain blood relatives, who are not recognized as heirs under the Civil Code, should be allowed to inherit in the absence of direct heirs (fifth-degree heirs). Arsenidze contends that the legal framework does not adequately address the interests of those who have cared for the testator, particularly in cases where the state might inherit property in such situations.[8]

The Civil Code does not establish a "sixth-degree" heir in cases where the direct heirs are absent. Currently, the system recognizes up to fifth-degree heirs, beyond which the state is deemed the heir if no other relatives or

[7] Constitutional Court of Georgia № 2/10/1395 in the Case "Giorgi Khorguashvili vs. the Parliament of Georgia".

[8] Constitutional Claim №1796 "Giorgi Arsenidze vs. the Parliament of Georgia".

designated parties can inherit. Both plaintiffs argue that this legal vacuum unfairly excludes individuals who may have close ties with the deceased, such as those who provided care or support during their life.[9]

The legal framework in the Civil Code leaves the state as the fallback heir in cases of intestacy, but it does not extend inheritance rights to individuals beyond the five degrees specified. In their constitutional claims, both Khorguashvili and Arsenidze argue that, in the absence of heirs, the property should be transferred to relatives who were close to the testator but testator, meet the technical requirements of the existing degrees. These lawsuits highlight a gap in the legal provisions concerning inheritance, which might limit the recognition of non-immediate family members as legal heirs.

The state, in the context of Article 1343 of the Civil Code, assumes the role of inheritor when no legal or testamentary heirs exist, or when all heirs are either non-existent, have renounced their inheritance rights, or have been disqualified from inheritance. The state's role as a legal heir is based on the principle that heirless property should not remain ownerless and must be managed for public benefit, especially when there are no direct heirs.

However, the lawsuits question whether this principle fully aligns with the constitutional right to property and whether it respects the broader social and familial connections individuals may have with the testator. Specifically, if a person has been a primary caregiver or has a close personal relationship with the deceased, should they not be considered a rightful heir in the absence of immediate family members? These lawsuits suggest a re-evaluation of how property is transferred to the state, possibly advocating for broader recognition of those outside the established degrees of inheritance.

The constitutional lawsuits challenge whether the current framework for heirless estate, particularly the transfer of property to the state, violates the constitutional rights of individuals to inherit property. In this context, public order is an essential consideration. The state's role as a guarantor of public order may justify its claim to heirless property, ensuring that it is not left without ownership and is used for public or societal benefits.

[9] Cf. Louise I. Shelley, "Privatization and Crime: The Post-Soviet Experience," *Journal of Contemporary Criminal Justice* 11, no. 4 (1995): 244–56, https://doi.org/10.1177/104398629501100405.

However, the plaintiffs argue that public order should not override individual rights in cases where the testator's property can be inherited by other relatives or individuals who were close to the deceased.

The Constitutional Court of Georgia will ultimately need to assess whether the current legal provisions respect the balance between public order and individual property rights, and whether the exclusion of a "sixth-degree" heir creates an unjust legal gap. The outcome of these cases could set important precedents for the rights of individuals in situations where heirless estate inheritance is in question.[10]

The matter of whether the state is a "sixth-degree" legal heir or a defender of public order revolves around the application and interpretation of Articles 1336 and 1343 of the Civil Code.[11] While the state currently acts as the fallback heir in the absence of other claimants, the constitutional lawsuits filed by Khorguashvili and Arsenidze suggest that the Civil Code may be in need of reform. These cases underscore the tension between protecting individual property rights and maintaining societal order through the state's role in inheriting property, especially when other legal heirs are absent or disqualified. The Constitutional Court's eventual ruling could clarify whether the state's interest in heirless property should be prioritized or if individuals with close personal ties to the deceased should be recognized as legitimate heirs.

1.3. Getting Stronger and More Powerful

The state, as an heir, possesses characteristics typical of natural persons in inheritance law is a complex one. There are several aspects to consider, particularly regarding the state's role in the inheritance process and the distinction between public interests and private property rights. Below, I will address several key points raised in the scenario you have outlined.

In inheritance law, the state typically assumes the role of an heir only when there are no legal heirs or when all heirs renounce their inheritance

[10] Cf. Mariusz Załucki, "Impact of the EU Succession Regulation on Statutory Inheritance," *Comparative Law Review, Nicolaus Copernicus University*, no. 23 (2017): 223–5, http://dx.doi.org/10.2139/ssrn.3122632.

[11] Cf. Rosa M. Garcia-Teruel, "Excluding Forced Heirs Due to a Lack of Personal Relationship with the Deceased in Spain in a Comparative Perspective," *Review of European and Comparative Law* 47, no. 4 (2021): 7–26. https://doi.org/10.31743/recl.12717.

rights, as outlined in Article 1343 of the Civil Code of Georgia. The state's role here is generally seen as one of "necessity" rather than one of personal interest, as it steps in to ensure that property does not remain ownerless.[12] ECtHR noted that

> norm is "foreseeable" when it affords a measure of protection against arbitrary interferences by the public authorities. Any interference with the peaceful enjoyment of possessions must, therefore, be accompanied by procedural guarantees affording to the individual or entity concerned a reasonable opportunity of presenting their case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by that provision. In ascertaining whether that condition has been satisfied, a comprehensive view must be taken of the applicable judicial and administrative procedures.[13]

While a natural person inherits to fulfil personal or familial interests, the state's involvement is more procedural, seeking to maintain public order and legal continuity. This distinction shapes the nature of the state's rights and obligations as an heir, setting it apart from private heirs.

> [A]ny interference by a public authority with the peaceful enjoyment of possessions can only be justified if it serves a legitimate public (or general) interest. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to decide what is 'in the public interest'. Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures interfering with the peaceful enjoyment of possessions.[14]

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12 Cf. European Union Committee, *The EU's Regulation on Succession, 6th Report of Session* (London: The Stationery Office Limited, 2010), 11; European Commission, *Summary of Replies to the Public Consultation on Crossborder Inheritance Tax Obstacles within the EU and Possible Solutions* (Brussels, 2010), 6.

13 Cited ECtHR Judgment of 13 October 2020, Agro-Pacht KFT v. Hungary, application no. 31185/14, para. 34 in Douglas Maxwell, *The Human Right to Property – A Practical Approach to Article 1 of Protocol No.1 to the ECHR* (Oxford: Bloomsbury Publishing, 2022), 189.

14 Cited ECtHR Judgment of 13 December 2016, Béláné Nagy v. Hungary, application no. 53080/13, para. 113, and ECtHR Judgment of 30 June 2005, Jahn and Others v. Germany, applications nos. 46720/99, 72203/01 and 72552/01, para. 91 in Maxwell, *The Human Right to Property*, 201.

One of the most important aspects to highlight is that, while the state can be an heir, it is not meant to "fight for the right" or "contest" the estate as a natural person might. In other words, the state's involvement is generally seen as an "inevitable necessity" rather than an active pursuit of property. It assumes inheritance only when it is necessary to prevent the property from being without an owner.

If the state were to be viewed as having the same rights and obligations as a natural person heir, it could lead to situations where public interests might be subordinated to private interests, potentially causing a conflict of interests. For this reason, many legal scholars argue that the state's role should be limited to the bare minimum necessary to ensure that property is transferred appropriately without entering into the competitive nature of inheritance.

The matter of whether the state should have the same rights and obligations as a natural person is a key issue. Equalizing the state's rights with those of a private heir could create imbalances, particularly because the state has a larger role in public order, and its actions can influence broader societal structures.

For example, Re Maldonado's case is a notable decision of the English Court of Appeal concerning the inheritance of property located in the United Kingdom, which belonged to a Spanish national who died without heirs. Under English conflict of laws principles, the distribution of a deceased person's estate is generally governed by the law of their domicile at the time of death. However, the question of title to specific property is typically determined by the law of the jurisdiction where the property is situated. In this case, Spanish law dictated that, in the absence of heirs, the estate would pass to the Spanish state as the "ultimate heir." In contrast, English law provides that such property would pass to the Crown as *bona vacantia* – that is, as ownerless property. The Court of Appeal concluded that the Spanish state's right to inherit under Spanish intestacy law meant that the property never became ownerless. Accordingly, the English doctrine of *bona vacantia* did not apply and the Spanish state was entitled to the property.

> It would be more fitting to say that the decision of the Court of Appeal administers a well-deserved punishment to those legal systems whose interpreters did not study with sufficient care and attention the legal literature

> of the civil law countries during the nineteenth century. All the pandectist textbooks of the 19th century deal at length with the question of the "legal nature" of the right of the fisc or State to take the assets of an intestate leaving no known relatives.[15]

If the state were to act as an heir with the same rights as a natural person, it could undermine the idea that inheritance is a private matter that should be governed by individual rights. In some instances, the state's claim to property could be seen as too invasive, especially if it actively "fights" for the inheritance against other potential heirs, thus affecting the balance of power in inheritance disputes.

> Right of succession between children and parents, and between grandchildren and grandparents, was so closely related to family life that it came within the sphere of Article 8. It has thus considered that matters of intestate succession – and voluntary dispositions – between near relatives prove to be intimately connected with family life. Family life does not include only social, moral or cultural relations, for example in the sphere of children's education; it also comprises interests of a material kind, as is shown by, amongst other things, the obligations in respect of maintenance and the position occupied in the domestic legal systems of the majority of the Contracting States by the institution of the reserved portion of an estate.[16]

When it comes to actual possession of property, the key principle is that an heir is considered to have received the estate when they file a claim with a notary or begin managing the property. In this case, the state's role in claiming property as heirless might be seen as an administrative action to ensure that property does not remain unowned.

However, if the state is claiming property as heirless, it should do so with awareness of other potential claims. For instance, if there are other heirs or claimants, the state should not simply claim ownership without fully considering the interests of those who may already possess the property

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15 E.J. Cohn, "The Moral of Maldonado's Case," *The Modern Law Review* 17, no. 4 (1954): 381. Cited Decision of The Supreme Court of Judicature Court of Appeal – *Re Maldonado, deceased The State of Spain v. The Solicitor for the Affairs of her Majesty's Treasury*, [1953] EWCA Civ J1130–1.

16 ECtHR Judgment of 13 June 1979, Case Marckx v. Belgium, application no. 6833/74, hudoc.int, 23–4, paras. 51–52.

or have legal rights to it. This is especially relevant in situations where the property may be actively possessed by another heir.[17]

In cases where an heir has missed the deadline for claiming inheritance, and the estate is disputed, the state's involvement becomes more complex. If the state has already claimed ownership of the property, the court may have to decide whether the state's claim is legitimate or whether another heir, having missed the deadline, should be allowed to take over the inheritance.[18]

In these cases, the state should not be seen as a "rival" to the owner, but rather as a neutral party that steps in to preserve public order. However, if the estate has already been transferred to the state, it may be appropriate for the state to defend its interest in the property, just as any other legal heir would defend their claim.

The state's obligations as an heir specifically, regarding its responsibilities toward the estate are not as expansive as those of natural persons. For example, the state is not responsible for the testator's debts in the same way that a natural heir might be, unless explicitly stated by the law. As an heir, the state's main obligation is to preserve the property and maintain its legal status, ensuring that it is not left as heirless estate or lost to the public.

The involvement of state authorities in legal proceedings regarding heirless property often falls to institutions like the Ministry of Economy and Sustainable Development, which is responsible for managing state property. The state, acting through this institution, can step into legal disputes over inheritance, but its role remains that of a caretaker rather than a rival to other heirs. In the case where other heirs claim ownership of property, the state's participation should be seen in terms of procedural necessity rather than as an adversarial interest.[19]

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17 See: Mark Beuker, "Combining Legal and Economic Theory. An Interdisciplinary Approach to Dutch and Polish Family Provisions in Succession Law," *Review of European and Comparative Law* 47, no. 4 (2021): 49–65, https://doi.org/10.31743/recl.12840.

18 Cf. Mihail Danov and Paul Beaumont, "Measuring the Effectiveness of the EU Civil Justice Framework: Theoretical and Methodological Challenges," *Yearbook of Private International Law*, no. 17 (2016): 151–3, https://doi.org/10.9785/9783504385163-008.

19 The Council of the Notariats of the European Union, *Recommendations about the Monitoring and Evaluating of the Succession Regulation EU 650/2012*, 2023; European University Institute (EUI) Florence/European Private Law Forum Deutsches Notarinstitut (DNotI)

The Law of Georgia "On Relations Arising from the Occupancy of Dwellings" clarifies how property used in residential tenancy can be treated in cases of heirless estate inheritance. The court can recognize the property as heirless, transferring ownership based on the specific nature of the property and regulations in force at the time. This law emphasizes the importance of considering the context of actual possession and use when determining the rightful heir, especially in cases where the property has been used as a residence.

The state, as an heir under Georgian inheritance law, does not possess the same rights and obligations as natural persons. It acts primarily to prevent property from becoming ownerless and to maintain public order. While the state's claim to inheritance is necessary in certain circumstances, its role is much more procedural and passive compared to natural heirs, who inherit to fulfil personal or familial interests. The state's involvement in inheritance should be seen as an administrative necessity rather than an active pursuit of property, and its role should be limited to the interest of ensuring legal order, not to compete with natural heirs. The courts and other authorities must be mindful of the balance between protecting the state's rights and respecting the property rights of individual heirs.

The Supreme Court of Georgia's explanation regarding Article 1473 of the Civil Code highlights the legislator's intent to ensure fairness and equality in the distribution of inheritance among heirs, particularly when it comes to dividing a parent's estate. This principle of equalization of shares is crucial for maintaining fairness in inheritance law. The Court distinguishes between property given as a gift and property allocated as an advance share of the estate, emphasizing that these two types of property transfers are subject to different legal norms.

This distinction is important because, in the case of an advance allocation, the parent's intent is to distribute the estate beforehand, while a gift is a voluntary transfer of property with no elements attached.[20] The Court's

Würzburg, *Real Property Law and Procedure in the European Union General Report (Final Version)*, 2005, 49–50.

[20] Hanna Witczak, "The Legal Status of Minor Testator's Parents Deprived of Parental Authority in Intestate Succession. Some Remarks on the Solutions in Polish, Russian, and Italian Law," *Review of European and Comparative Law* 47, no. 4 (2021): 107–10, https://doi.org/10.31743/recl.12937.

interpretation underscores that inheritance law is designed to honour the parent's intent, ensuring that heirs are treated equally unless specified otherwise by the parent. Also

> the good governance principle should not, as a general rule, prevent the authorities from correcting occasional mistakes, even those resulting from their own negligence. However, the need to correct an old "wrong" should not disproportionately interfere with a new right which has been acquired by an individual relying on the legitimacy of the public authority's action in good faith.[21]

1.4. Role of the National Agency of State Property of Georgia and Recent Practice - The Shadow Behind Statistics

However, the state's involvement in inheritance relations introduces complexity.[22] Unlike individuals, the state's role as an heir is not primarily driven by the testator's will (as in testamentary inheritance). Instead, the state assumes its inheritance role based on legal principles and the need to uphold public order. This makes the state's position as an heir distinct from natural persons. The state's role can sometimes be seen as an advocate for public interests and property rights, ensuring that inheritance is handled according to the law and preventing unfair distribution.[23] As we mentioned, the National Agency of State Property of Georgia is responsible for determining the existence of uninherited property. This determination is based on submitted applications or letters from citizens and various administrative

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21 Cited ECtHR Judgment of 12 June 2018, Beinarovič v. Lithuania, application no. 70520/10, para. 140 in Maxwell, *The Human Right to Property*, 320.

22 Cf. Katherine Verdery, "The Property Regime of Socialism," *Conservation & Society* 2, no. 1 (2004): 190–1, https://www.jstor.org/stable/26396571; François Trémosa, *The State of Implementation of the EU Succession Regulation's Provisions on its Scope, Applicable Law, Freedom of Choice, and Parallelism between the Law and the Courts, Policy Department for Citizens' Rights and Constitutional Affairs of the European Parliament* (Toulouse, 2017), 1–4.

23 See: Tatjana Evas and Wouter Van Ballegooij, *Common Minimum Standards of Civil Procedure, European Added Value Assessment Accompanying the European Parliament's Legislative Own-initiative Report* (European Parliamentary Research Service, European Union, 2019), 20–1; Maria Mousmouti, Haris Meidanis, and Jos Uitdehaag, *Civil Enforcement in the EU: a Comparative Overview, Comparative Report* (Centre for European Constitutional Law, International Union of Judical Officers, 2021), 38; European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law Relating to Access to Justice* (Luxembourg: Publications Office of the European Union, 2016), 25.

bodies, in accordance with the relevant legislation. Furthermore, it is to be noted that over the past five years (2020–2025), the Agency has been conducting administrative proceedings on the recognition of estate owned by 22 individuals as heirless, of which only three estate items were registered as state property.[24]

It is to be noted that the decisions made by the National Agency for State Property concerning the recognition of real estate as uninherited, according to the information available to the Agency, have not been subject to judicial appeal.

The state's multifaceted role can be viewed as that of a "sixth- degree" legal heir. This means that while the state can inherit property under specific conditions, its role is more procedural and aligned with maintaining public order and fairness, rather than fulfilling the personal intentions of a testator.[25] The state's rights and obligations in inheritance law,[26] therefore, need to be carefully regulated to strike a balance between protecting individual rights and ensuring public interests are maintained.

1.5. Finding Solutions Between Private and Public Interests

The state's rights over property and inheritance can have significant economic repercussions, particularly in relation to the economic freedoms of private owners. Economic freedom is considered a fundamental component of prosperity, as it enables individuals to possess, utilize, and transfer property without restriction, thereby stimulating entrepreneurship, investment, and overall economic growth. However, when the state asserts broad control over property rights, it introduces uncertainty into the market, as private owners and heirs may fear potential state intervention in their property disputes. Of particular concern is the state's power to claim inheritance rights over private estates, especially in cases where there are no immediate heirs. This authority has the capacity to establish an environment in which

[24] The following information has been officially provided by the National Agency of State Property of Georgia, no. 14/9032, 19/02/2025.

[25] Cf. Irakli Leonidze, "The Problem of Inheriting a Land Plot in the Household According to Georgian Judicial Practice," *Justice and Law* 4, no. 76 (2022): 107–40.

[26] Cf. Alfonso-Luis C. Caravaca, "Article 20 – Universal Application," in *The EU Succession Regulation*, eds. Alfonso-Luis C. Caravaca, Angelo Davì, and Heinz-Peter Mansel (Cambridge: Cambridge University Press, 2016), 291.

property is no longer exclusively within the domain of private individuals. Such uncertainty has the potential to dissuade investment, impede property transactions, and disrupt market dynamics that depend on clear, predictable ownership rights.[27] The possibility that the state might assert its claim to inheritance could potentially result in individuals exercising caution when exercising their property rights, due to the long-term stability of ownership becoming uncertain. The state's capacity to appropriate property without shouldering comparable economic risks to those of private individuals has the potential to exacerbate existing inequalities. It is evident that private owners act in their own economic self-interest, thereby benefiting both themselves and the broader economy. In contrast, the state's intervention is often characterized by a lack of comparable economic motivation. This is due to the fact that the state does not face the same personal or financial loss when appropriating property. In such cases, the economic agency of private individuals is undermined, as the state's claim to property often supersedes private ownership rights.[28]

Thus, understanding the state's position as an heir within the Civil Code requires an in-depth consideration of its dual role: as both an enforcer of inheritance law (defending the interests of rightful heirs and the public order) and as a participant in the inheritance process (fulfilling its role as a legal heir in cases of heirless estate succession). The regulation of the state's rights and obligations in inheritance law remains an important task to ensure fairness and equity in the system.

In order to consider mediation as an effective means of protecting the rights of heirless household owners, it is essential that the legislator develop a strategy for selecting the most appropriate environment for mediation and legal resolution of complex social relations.[29] Following this, the formation of large-scale, targeted working groups according to municipalities should be initiated, where heirless households are still unregistered

27 Cf. Ekaterine Shengelia and Irakli Leonidze, "Notary Electronic Registry and Data Security," *Journal of Personal Data Protection Law*, no. 1 (2024): 41.

28 Cf. Devaux, "The European Regulations on Succession of July 2012," 249.

29 Cf. Natia Chitashvili, "Strengthening the Legal Guarantees of Mediation Confidentiality with Contractual Mechanisms," *Journal of Law*, no. 2 (2023): 110.

and there is a dispute between the parties or the threat of a disputable relationship.[30]

While the state must retain the authority to act in cases where there is no owner or legitimate claimants to property, this power must be exercised cautiously and transparently, with due regard for the private interests involved. The state's involvement should be limited to the minimum necessary to preserve public order and ensure that property does not remain ownerless. One potential safeguard is to ensure that individuals with close personal or economic ties to the deceased, such as those who have cared for the testator or contributed significantly to their well-being, are given stronger recognition in inheritance laws. By expanding the definition of who may be considered an heir, the legal system can more accurately reflect the diversity of private interests that may be involved in inheritance matters. Furthermore, the principle of state rights should be subject to increased judicial scrutiny. It is incumbent upon the courts to ensure that the state's claims to property do not undermine individual property rights or economic freedom.[31] This objective can be accomplished by means of a more rigorous examination of state claims in the context of inheritance disputes. In order to ensure that the state's role is always justified and proportionate to the public interest, this examination is necessary.[32]

2. Conclusion

When the state's authority over property and inheritance is essential for maintaining order in certain situations, its unconditional rights pose a risk to private owners' interests and economic freedom. The state's broad jurisdiction in property claims can undermine the legitimate rights of private individuals, potentially stifling the economic vitality that private property ownership fosters. To mitigate these risks, it is crucial to ensure that state intervention remains limited, transparent, and consistent with broader

30 Irakli Leonidze and Giorgi Chikviladze, "The Importance of Eliminating the Legal Gap of Title to a Household and the Role of the Constitutional Court," *Journal of Constitutional Law*, no. 2 (2022): 91–2.

31 Cf. Reid, Waal, and Zimmermann, *Comparative Succession Law*, 30.

32 Irakli Leonidze, "State as an Heir: Balancing Public and Private Interests in Georgia and Europe. Part I: Comparative Overview, *Review of European and Comparative Law* 60, no. 1 (2025): 248, https://doi.org/10.31743/recl.18175.

societal values. By striking a balance between preserving public order and safeguarding private rights, legal systems can better protect economic freedom while fulfilling the state's essential role as a legal successor in cases of heirless property.

Article 1343 of the Civil Code of Georgia establishes the state as a "sixth-degree" legal heir, meaning the state holds a legitimate public interest in acquiring heirless property. However, considering the state as a full-fledged heir in the same capacity as private individuals' conflicts with the private interests of individuals, especially when those individuals might have a legitimate claim to the property. Therefore, it is crucial to limit the state's involvement to the extent necessary to fulfil its public interest in ensuring the proper management and disposition of property that otherwise remains without an heir.

The state's multifaceted role as a legal heir reflects its dual function: it acts as both a defender of public order and an opponent of private interests in some cases. Through the systematic interpretation of the Civil Code and relevant judicial practices, it becomes evident that the state's role as a "sixth-degree" heir needs a nuanced understanding. The regulation of its rights and obligations as an heir is of significant importance in inheritance law, and this dual nature-acting both for and against the interests of private citizens should be carefully balanced.

In testamentary inheritance, the state assumes rights and obligations similar to those of natural persons, because the state's involvement arises from the will of the testator. However, in legal inheritance, the state's role is less robust and is instead a consequence of the absence of other heirs. Given that the state's status as an heir in legal inheritance is not determined by the testator's intentions, but by the lack of other legal heirs, it is essential to define what specific rights and obligations the state assumes in such cases. This will ensure clarity and consistency in inheritance law.

It is, therefore, necessary to improve Article 1343 of the Civil Code to directly define the state's status as a special legal heir, delineating its rights and obligations clearly. By doing so, the law would prevent excessive state intervention in inheritance relations, preserving the balance between protecting public interests and safeguarding private ownership rights. Furthermore, it might be prudent to consider jointly regulating the state's status as both a legal and testamentary heir, ensuring a cohesive approach to

inheritance law that respects the distinctions between these two forms of inheritance.

Unconditional rights of the state can lead to the restriction of private owners' interests and economic freedom, because the state has more power and opportunities to fight for property and inheritance rights than individuals.

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A Framework for Conditional Sunset Clauses

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Abstract: Sunset clauses are a legislative method ensuring that a law expires at a certain time. This legislative tool can be further divided into conditional and unconditional sunset clauses. While unconditional sunset clauses are well-known and without much controversy – the duration of a law in such a case is usually dependent on a specific date – conditional sunset clauses are more complex and less debated. This article develops a structured framework of conditional sunset clauses that distinguishes these clauses primarily by a measure of legal certainty. The article divides conditional sunset clauses into three distinct categories: formal, semi-formal, and non-formal sunset clauses. With examples of their use across jurisdictions, it shows their differences – formal sunset clauses are based on public authority and are an official source of law (they are typically also published in an official statute book or public register), while semi-formal ones are also based on public authority, but any transparently published information is sufficient for their classification. Non-formal sunset clauses may be linked to actors other than the public authority and the reference to them may be non-public; however, the key question regarding these sunset clauses is whether they can be considered legal. This study highlights the challenges in applying conditional sunset clauses, their impact on the predictability of law, the separation of powers and the democratic rule of law as a whole. This framework

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enables legislators, judges and especially legal scholars to effectively classify these sunset clauses and to contrast them with their local legal orders, constitutions and laws.

1. Introduction

Sunset clauses are a specific type of legislative technique that ensures that a law will cease to have an effect at a specified time.[1] Traditionally, this time is tied to a specific date, but more rarely it can be tied to another circumstance.[2] The potential uses of sunset clauses in legislation are varied, ranging from temporary or experimental legislation by design[3] to emergency legislation.[4]

The division of sunset clauses into unconditional, i.e. tied to a specific moment (date), and conditional, i.e. tied to another situation, is not fully explored. We can also note some confusion of terms in the above-mentioned definition of a sunset clause; in fact, some authors tie a sunset clause only to a specific date, not a specific moment.[5] This nuance is crucial, if only because sunset clauses tied to situations other than a specific date do exist in many jurisdictions, as I will describe later in this article. Of course, this

1 Frank Fagan and Fırat Bilgel, "Sunsets and Federal Lawmaking: Evidence from the 110th Congress," *International Review of Law and Economics* 41 (2015): 1–16; Helen Xanthaki, *Drafting Legislation: The Art and Technology of Rules for Regulation* (Oxford: Hart Publishing, 2014), 188–9.

2 Ittai Bar-Siman-Tov, "Temporary Legislation, Better Regulation, and Experimentalist Governance: An Empirical Study," *Regulation & Governance* 12, no. 2 (2018): 192–219.

3 Tom Ginsburg, Jonathan S. Masur, and Richard H. McAdams, "Libertarian Paternalism, Path Dependence, and Temporary Law," *University of Chicago Law Review* 81, no. 1 (2013): 325 et seq.

4 There is controversy over whether and to what extent sunset clauses are part of emergency legislation. Only S. Ranchordás is in favor of separating sunset clauses and emergency legislation, while other authors tend to argue that emergency legislation also contains sunset clauses and is not a "special" category. Sofia Ranchordás, *Constitutional Sunsets and Experimental Legislation: A Comparative Perspective* (Cheltenham: Edward Elgar Publishing, 2015), 35 et seq.; Sean Molloy, "Approach with Caution: Sunset Clauses as Safeguards of Democracy?," *European Journal of Law Reform* 23, no. 2 (2021): 147–66; Antonios Kouroutakis, "The Virtues of Sunset Clauses in Relation to Constitutional Authority," *Statute Law Review* 41, no. 1 (2020): 16–31; Jakub Dienstbier, *Teorie mimořádného vládnutí* (Prague: Wolters Kluwer, 2024), 175 et seq.

5 Sofia Ranchordás, "Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies," *Minnesota Journal of International Law* 25, no. 1 (2016): 33.

is not the only way to subdivide sunset clauses; there are other subdivisions devoted to, for example, ex post review of sunset clauses in statutes.[6]

Tying the effectiveness of a statute to a specific point in time potentially creates a wide range of situations that vary in their interference with legal certainty. It is legal certainty that I aim to use to confront the concept of conditional sunset clauses in this article. To do so, I draw on a series of previous papers by various authors across the globe. We do not traditionally associate substantial interference with legal certainty with unconditional sunset clauses. On the contrary, an awareness of the temporariness of the law may lead to reassurance to legal actors in advance of the limits of the legislation in question.[7]

In this Article, I conclude that conditional sunset clauses can be divided in terms of legal certainty into formal sunset clauses, semi-formal sunset clauses, and non-formal sunset clauses.

As much as the constitutionality of conditional sunset clauses may vary substantially across jurisdictions, this division may assist legal academics in determining which conditional sunset clauses are or may be used in a given jurisdiction, or, conversely, that the use of certain clauses from the typology would certainly be unconstitutional. The division may also serve future reference for legislators, judges, and other legal practitioners in creating, classifying, and assessing conditional sunset clauses in particular jurisdictions.

2. Unconditional and Conditional Sunset Clauses

At the outset, I think it appropriate to detail the initial distinction between unconditional and conditional sunset clauses. Unconditional sunset clauses will not be dealt with too exhaustively in this article, as their function is much more established, better studied by the legal academy, and their use is also much less controversial given their widespread use.

Other examples of distinction can be found in literature. One is the seemingly more elegant distinction between time-based vs. event-based

6 Brian Baugus, Feler Bose, and Jeffry Jacob, "Get in Line: Do Part-Time Legislatures Use Sunset Laws to Keep Executive Agencies in Check," *Regulation & Governance* 15, no. 1 (2021): 185–99.

7 Ranchordás, *Constitutional Sunsets*, 78 et seq.; Michal Říha, "Dočasnost zákona jako hodnota chtěná a nechtěná," *Acta Universitatis Carolinae Iuridica* 66, no. 1 (2020): 76.

sunset clauses.[8] However, this distinction is more characteristic of private law or contract law.

In the field of public law, sunset clauses are more likely to be divided into conditional and unconditional.[9] However, this distinction by A. Kouroutakis can be perceived in several ways, which is why I consider it necessary to elaborate on this distinction.

I find the distinction between conditional and unconditional sunset clauses as dependent on whether it is possible to determine from the terms of the sunset clause exactly on which date the law will cease to have effect. Thus, an unconditional sunset clause may be best described as a situation where it sets a time limit linked to the promulgation of the law, if it is a legal order or legal culture where the promulgation of the law is quite clearly determined, e.g. ("This Act shall cease to have effect 3 years after its promulgation"). Similarly, it is a matter of setting a specific date, e.g. "1 January 2025," or a specific date in another way, e.g. "Tuesday next after the first Monday in November."[10] Within the limits of the old Latin principles of Roman law, it is essentially an expression of the principle *dies certus an, certus quando*.[11]

I consider all other sunset clauses, tied more typically to a less certain moment, to be conditional sunset clauses. The purpose of this division, essentially by simple negation, is to remove unconditional sunset clauses relatively easily, which will allow me to work further only with the conditional ones covered in this paper.

Conditional sunset clauses are a very varied set, consisting of very predictable situations with almost no impact on the predictability of the law to situations quite on the borderline of arbitrariness. An example is the sunset

8 Jill Fisch and Steven Davidoff Solomon, "The Problem of Sunsets Symposium: Institutional Investor Activism in the 21st Century: Responses to a Changing Landscape," *Boston University Law Review* 99, no. 3 (2019): 1057–94; Charlie Xiao-chuan Weng and Arena Jingjing Hu, "Every Sunset Is an Opportunity to Reset: An Analysis of Dual-Class Share Regulations and Sunset Clauses," *Journal of Corporate Law Studies* 22, no. 1 (2022): 571–603.

9 Kouroutakis, "The Virtues of Sunset Clauses," 21.

10 This is a loose paraphrase referring to the Election Day determination in the election of the President of the United States of America. See: Title 3, sec. 21 of the Act on Presidential Elections and Vacancies of 4 October 1961 of the United States Code, as amended.

11 See in greater depth "Condition and Time Term – Max-EuP 2012," accessed January 7, 2025, https://max-eup2012.mpipriv.de/index.php/Condition_and_Time_Term.

clause linked to the end of the current parliamentary term. This is a real example; it refers to the legislation in Israel, as described by Bar-Siman-Tov: 32.35 % of all sunset clauses in the Israeli legislation are conditional sunset clauses. The regulation also includes, for example, a sunset clause linked to the tax period.[12]

The end of the current parliamentary term cannot be a condition for an unconditional sunset clause, since in principle one cannot be absolutely certain when the election period will end. Although not every legislature necessarily knows the concept of early elections; even so, one cannot rule out a situation where constitutional reform occurs and early elections are newly possible.[13] This example, however, may serve as an example of the most predictable conditional clauses. In many cases, the application of an unconditional sunset clause would serve a very similar purpose, but tying it to the end of the term is more flexible and, in many ways, similarly predictable.

A contrasting hypothetical example might be a sunset clause that is tied purely to the public interest. That is, a law whose sunset clause provides that "this Act shall cease to have effect when it becomes apparent that it is no longer in the public interest." This case is wholly hypothetical and would of course raise more legal problems than simply interfering with the legal certainty of the addressees of the law. This hypothetical example illustrates the absolute legal uncertainty – it is not clear who will interpret the public interest in relation to this law and who will declare the existence of this fact and, thus, invalidate the law itself. This is an example of the absolute extreme in terms of potential interference with legal certainty.

The initial distinction of conditional sunset clauses illustrated by the two extreme situations can now be divided into groups on the criterion of legal certainty.

3. Briefly on the Principle of Legal Certainty

Before the actual division, the principle of legal certainty itself deserves a few words. It is a well-known legal concept, associated with the possibility

12 Bar-Siman-Tov, "Temporary Legislation," 192–219.

13 Edward Morgan-Jones and Mathew Loveless, "Early Election Calling and Satisfaction with Democracy," *Government and Opposition* 58, no. 3 (2023): 598–622.

of law being identifiable,[14] achievable, and predictable.[15] It is closely associated[16] with Ion Fuller's definition of the legal system as *inter alia* clear, consistent, and relatively rigid.[17]

Central to this article is the consideration of legal certainty from a highly formal standpoint. A wholly formal source that is formally well identifiable, accessible, and predictable is the statute book or its equivalent under each individual constitutional system. From this wholly formal source are derived sources that are at the level of the statute book, i.e. other collections of regulations of both state institutions and local governments, including public registers.

4. Distinction According to the Impact on Legal Certainty

4.1. Formal Conditional Sunset Clause

It is difficult to give an example of an entirely formal conditional clause, as each legal system has a different obligation to publish information in a statute book or similar register. Likewise, in some jurisdictions, some authorities may publish in the statute book whatever they see fit.[18] This procedure can then formalize many different kinds of notices, even if they take the form of *ad hoc* communications. For instance, the adoption of another law may still be an example, i.e., "the law will cease to have effect upon the adoption of the Banking Act." This law presupposes the adoption of a law with the same name, assuming that such a law does not already exist in the legal system. An analogous hypothetical example may be other notices that are

14 Robert Alexy, "Legal Certainty and Correctness," *Ratio Juris* 28, no. 4 (2015): 443.

15 Patricia Popelier, "Five Paradoxes on Legal Certainty and the Lawmaker," *Legisprudence* 2, no. 1 (2008): 48.

16 Patricia Popelier, "Legal Certainty and Principles of Proper Law Making," *European Journal of Law Reform* 2, no. 3 (2000): 325.

17 Lon Luvois Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1973), 262.

18 Cf. Polish Article 10 sec. 3 of the Act on publishing normative acts of 20 July 2000, Journal of Laws 2019, No. 1461, as amended or cf. Czech Article 4(f) of the Act on the Collection of Laws and International Treaties and on the Production of Legal Regulations Announced in the Collection of Laws and International Treaties of 5 June 2016, Journal of Laws 2016, No. 222, as amended.

published in the law books of some states, e.g., notices of the negotiation of an international treaty.[19]

In the field of communications other than in the statute book, this may also include, for example, the official collection of the central bank under the condition that it is maintained by the central bank. This seemingly complex construction may have an in-depth justification, e.g. when the effectiveness of a law is linked to high interest rates, whereby the law will cease to be effective once the interest rates are reduced to or below a certain level.[20]

I consider clauses that derive their formality from an official source that is governed by the legal principle *ignorantia juris non excusat* as "formal sunset clauses." This is the first category of the triad outlined in the introduction.

4.2. Semi-Formal Conditional Sunset Clauses

The second category is the semi-formal conditional sunset clauses. These clauses are activated by a situation that is not formalized in any official collection but, nevertheless, they (1) refer to immediately publicly available sources or (2) originate from public authority. An example of a sunset clause linked to such a publicly available source emanating from public authority can typically be statistical data.[21] An example is the monthly unemployment figure for the national economy. Similarly, it may be a simple resolution of a public authority that is not formally published, but is publicly available. It is conceivable that the unemployment data could be published periodically (e.g. monthly) in an official collection – in which case it would be a formal sunset clause, not a semi-formal sunset clause.

The immediate public availability of the source deserves further clarification. It is not just a situation where we know that the information is

[19] Cf. e.g. in Slovakia see Article 20 sec. 11 of the Act on the creation of legal regulations and on the Collection of Laws of the Slovak Republic and on the amendment and supplementation of certain acts of 18 November 2014, Journal of Laws 2015, No. 400, as amended.

[20] For a more thorough description of the current roles of central banks cf. Charles A.E. Goodhart, "The Changing Role of Central Banks," *Financial History Review* 18, no. 2 (2011): 135–54.

[21] See in greater depth on open data of public sector: Marijn Janssen, Yannis Charalabidis, and Anneke Zuiderwijk, "Benefits, Adoption Barriers and Myths of Open Data and Open Government," *Information Systems Management* 29, no. 4 (2012): 258–68.

somehow available (e.g. at the request of an individual). In that case, the condition of partial formality is not met. It must be information that is made publicly available without request to all, typically information available by accessing a website. A problem in the typology may arise if the sunset clause were tied to a specific (oral) act of a public official, typically the president or prime minister. Here, of course, it depends on the specific constitutional (statutory) implementation and the particular constitutional or other custom in the jurisdiction. Criterion (2) is met without much difficulty in policy statements, but the question is whether they can be said to be immediately publicly available sources. Again, I think it depends on the particular implementation.

A mere oral statement made "behind closed doors" would not satisfy the immediate public availability test. There is little chance of such information reaching the addressees of the law and there would be substantial confusion as to whether the clause was triggered at all. However, the possibility of announcing the act by television, radio and print will satisfy this condition. It is certainly possible to talk about individual nuances – e.g. publication only on radio or only on television – but this information will, in any case, be immediately taken up organically in the media world, and the information will, therefore, be at least partially formally delivered to the addressees. An example of the use of such a sunset clause can be found in anti-terrorism legislation, whereby once the political power knows that the danger has passed, it immediately refrains from appreciably restricting the rights of citizens because of the terrorist threat.[22]

The boundary between governmental power and the private sphere can certainly vary from jurisdiction to jurisdiction and may also not be entirely fixed. However, partial formality is ensured precisely by reference to governmental power as a manifestation of the law's legitimacy. Blurred edges may be evident, for example, in the case of forth-branch

[22] The sunset clause in anti-terrorism legislation has become increasingly important over time. Cf. Nicola McGarrity, Rishi Gulati, and George Williams, "Sunset Clauses in Australian Anti-Terror Laws," *Adelaide Law Review* 33, no. 2 (2012): 307; John Ip, "Sunset Clauses and Counterterrorism Legislation," *Public Law* 74, (2012), https://dx.doi.org/10.2139/ssrn.1853945.

institutions,[23] independent administrative authorities and state-owned companies. Local or professional self-governments or public media may similarly be on the edge.

4.3. Non-Formal Conditional Sunset Clauses

The third and final category is non-formal sunset clauses. These clauses may be based on publicly available sources, but their origin does not come from public authority. Conversely, they may originate from public authority, but may not be publicly available. Of course, there is also a third option, namely non-public information not tied to public authority.

An example of the first modality of non-formal sunset clauses might be tying the clause to the price of a commodity on a publicly traded exchange. The usefulness of such a clause is visible, for example, in the context of the recent energy crisis in Europe, where the price of 1 MWh was essentially an informal metric of many state interventions and public support, tied precisely to temporary legislation.[24] The idea of a law being tied to the price of a commodity is undoubtedly controversial. Such a regulation would most likely have an impact on the sovereignty of the people, on the principle of legality, and on legal certainty.

A clause linked to the fullness of gas reserves in connection with the gas crisis caused by the aggression of Russian troops in Ukraine leads to very similar controversies. The mechanism of linking the law to the fullness of gas storage facilities could, for example, lead to the end of the imposed restrictions on factories requiring substantial quantities of gas when there is sufficient gas in storage facilities.[25] This example assumes that gas storage facilities are not owned or held by the governmental authorities.

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[23] These can take different forms or have different content, cf. Michael Pal, "Electoral Management Bodies as a Fourth Branch of Government," *Review of Constitutional Studies* 21, no. 1 (2016): 85–114.

[24] See in greater depth about energy crisis in Europe: Eva M. Urbano, Konstantinos Kampouropoulos, and Luis Romeral, "Energy Crisis in Europe: The European Union's Objectives and Countries' Policy Trends-New Transition Paths?," *Energies* 16, no. 16 (2023): 5957, https://doi.org/10.3390/en16165957.

[25] On the impact of the Russian invasion, see: James Henderson, "The Impact of the Russia-Ukraine War on Global Gas Markets," *Current Sustainable/Renewable Energy Reports* 11, no. 1 (2024): 1–9.

Various internal decisions and internal events may be examples of the second, non-formal sunset clauses tied to public power, but not available to the public. This does not necessarily mean that the information must be confidential; it is sufficient if its attainment is solely on request. Examples include being tied to the number of civil servants (if the information is not publicly available without further information), or the number of requests made under the law (if there are too few, the law ceases to apply because it is not useful).

The argument for these clauses may be that the sunset clause is primarily directed inward to the public power, and thus the public power itself is best able to know when the law ceases to be effective. The counterargument, however, may be the damage that such uncertainty may cause – indeed, the legitimate expectations of the addressees of the law may lead them, without knowing that the moment of sunset has occurred, to continue to act (e.g. to apply) as if the law had never ceased to be effective.

As can be seen from these varied examples, it is very difficult to determine which of the above-mentioned sunset clauses would be more inadmissible or threatened with unconstitutionality for a given legal order. The law's reference to private entities can be a very inorganic turn in existing standard-setting and, in the case of non-public information, similar controversies arise.

5. Who Is the Trigger?

Conditional sunset clauses bring with them another difficulty – that is, the problem of who or what triggers the sunset clause. This element is also central to the assessment of legal certainty in the area of conditional sunset clauses. Let me now illustrate the predictability of the triggering authority again on a spectrum.

Let us return to the example of the end-of-term sunset clause – as I said above, this is a conditional sunset clause, but it can take many forms. An example of a formal conditional sunset clause would be a situation where the end of a term is somehow formalized in a public collection. It is possible to imagine several situations where this could be the case.

The first possibility is that the end of an electoral term is a clearly legally determinable unit of time that cannot be challenged in any way, e.g. by the

institution of early elections. In such a situation, a mere reference to a statutory provision would suffice.

However, let us imagine a more complex, second situation where, in a particular jurisdiction, the electoral period would be linked to the moment of publication of the election results in the statute book. Nevertheless, this kind of enforceability must be outlined in a specific statutory or constitutional provision. At that point, the moment of announcement of the results would merge with the moment of the sunset. It would then be up to the specific body announcing the results of the elections in the Collection of Laws; here many different bodies can be imagined, ranging from the highest actors of government to ministries and offices. This scenario also retains the sunset clause as it stands, i.e., linked to the end of the electoral term.[26]

The third situation then entails a situation where the end of the electoral term is not indisputably fixed, but its exact moment is subject to dispute. Such an example may be the end of an electoral period linked to the next election, but it may already be disputed whether the moment of the triggering of the electoral clause is the opening of the election, the closing of the polling stations, the counting and announcement of the results, or another moment altogether. It also follows that there may be a chain of vague legal concepts, one being the term of office, the other being the commencement of the election, etc. At such a time, it would be necessary to amend the sunset clause itself. The optimal approach is to choose an exact, formalized moment and link it to the sunset clause.

6. Conclusion

Conditional sunset clauses are one of the tools that legislators or legislative bodies can use to flexibly determine the end of a piece of legislation. This flexibility is, however, paid for by an interference with the legal certainty of the addressees of the law. In this article, I have classified the issue of legal unpredictability in sunset clauses into three isolated categories, fully formal

[26] Of course, an additional problem may arise here as well, consisting of the competition between the two authorities entitled to trigger the sunset clause. If the two authorities disagree as to whether or not a situation warranting triggering the sunset clause has occurred, there may be substantial uncertainty as to the effectiveness of the standard. The optimal solution is to resolve this issue in the sunset clause itself, i.e., that only one authority is authorized to trigger it.

sunset clauses, semi-formal sunset clauses, and non-formal sunset clauses. In the paper, I also pointed out that the essence of the formality of a sunset clause is not just the wording of the clause, but also the definition of the actor or actors who trigger the sunset. In particular, this article contributes to clarifying the basic typology of conditional sunset clauses, an area that has not been fully considered by legal scholarship to date. This distinction may be useful not only to legal actors, but especially in comparative studies in legal scholarship, where the limits of abstractness or contingency are difficult to determine.

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Actio Directa as an Element of the Polish and European System of Protection of Victims of Traffic Accidents

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Abstract: Liability insurance involves a direct claim by the injured party against the insurer (*actio directa*). In the case of compulsory motor insurance, it is guaranteed not only by the Polish Civil Code, but also by EU directives (currently Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles and the enforcement of the obligation to insure against such liability). Doubtful issues related to the application of this power have repeatedly been the subject of rulings by Polish courts and statements by the doctrine. The purpose of the article is to present the nature of the *actio directa* and selected problems related to the application of this entitlement in practice, in particular by presenting the jurisprudence of Polish courts and the CJEU. At the same time, the article highlights the issues arising in the situation of the application of national civil liability provisions and harmonized provisions on compulsory motor vehicle insurance to this entitlement. One of the important problems is the difficulty in drawing clear boundaries between national, non-harmonized regulation, and European Union law. The research methodology used includes: analysis of the legal provisions, the caselaw of the Polish courts and CJEU as well as the views of the doctrine.

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1. *Actio Directa* in Polish Law and the Motor Insurance Directive (2009/103/EC)

Although the provisions concerning the insurance contract generally remain the subject of Polish national regulation and the contract is regulated in the Polish Civil Code,[1] in the case of motor vehicle liability insurance, the Polish legal regulation contained additionally in the special law on compulsory insurance[2] must also take into account Directive 2009/103/EC of the European Parliament and of the Council.[3]

Compulsory third-party motor vehicle liability insurance has been the subject of many court disputes over the years, as well as doubts regarding the correct interpretation and application of the provisions devoted to it, which have been resolved by the Supreme Court in many of its judgments. Polish courts have also repeatedly referred questions to the Court of Justice of the European Union for preliminary rulings in order to clarify doubts regarding the interpretation of EU motor insurance provisions. Among the controversial issues with which the Polish courts were confronted was the problem of adjusting the minimum guarantees (minimum amounts of cover) in order to achieve the appropriate level resulting from Directive 84/5[4] and the correctness of Poland's use of the transitional periods for achieving these minimum amounts.[5] Another issue requiring interpretation by the CJEU was the understanding of the concept of "use of the vehicle," which is crucial for compulsory motor vehicle owners' insurance.[6]

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1 Law of 23 April 1964 Civil Code (consolidated text: Journal of Laws of 2024, item 1061, as amended) – Civil Code.

2 Law of 22 May 2003 on compulsory insurance, the Insurance Guarantee Fund and the Polish Motor Insurers' Office (consolidated text: Journal of Laws of 2023, item 2500, as amended) – Law on Compulsory Insurance.

3 Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles and the enforcement of the obligation to insure against such liability (codified version) (OJ L263, 7 October 2009), 11 – the Motor Vehicles Directive.

4 Second Council Directive of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ L8, 11 January 1984), 17.

5 CJEU Judgment of 21 December 2021, A.K. v. Skarb Państwa, Case C-428/20, ECLI:EU:C:2021:1043.

6 CJEU Order of 29 October 2021, HG and TC v. Insurance Guarantee Fund, Case C-688/20, ECLI:EU:C:2021:897.

The case law of the Court of Justice issued as a result of the preliminary questions from the Polish courts also concerned the interpretation of Article 18 of Directive 2009/103, which regulates direct right of action, requiring Member States to ensure that the victim of an accident caused by an insured vehicle has a direct claim against the insurance company protecting the perpetrator of the accident with respect to civil liability.

This construction is known in Polish law as *actio directa* and is regulated both in the Civil Code (for all liability insurance) and in the Law on compulsory insurance (for compulsory liability insurance). The idea of a direct claim by the injured party against the insurer of the entity responsible for the damage is also widely known in Europe. In countries such as Sweden it was introduced as early as 1927 and in Norway in 1930. It is particularly common in the case of compulsory insurance.[7]

According to Article 822 § 4 of the Civil Code, a person entitled to compensation in connection with an event covered by a civil liability insurance contract may pursue a claim directly against the insurer. On the other hand, pursuant to Article 19(1) of the Law on Compulsory Insurance, an injured party in relation to an event covered by a compulsory liability insurance contract may pursue a claim directly against the insurance company; the insurance company shall immediately notify the insured of the claim. Further provisions of the Law provide for the possibility for the injured party to pursue a claim directly from the Insurance Guarantee Fund in certain cases (Article 19(2) of the Law on Compulsory Insurance) and from the Polish Motor Insurers' Office (Article 19(3) of the Law on Compulsory Insurance).

While the introduction in the Law of a specific regulation concerning the assertion of claims to the Insurance Guarantee Fund and the Polish Motor Insurers' Office is justified, the repetition of a regulation allowing

7 Olavi-Juri Luik and Janno Lahe, "Granting Direct Claim Rights in Voluntary Liability Insurance to the Aggrieved Person in Estonian Insurance Practice: Via Insurance Contract Vs Claim Assignment" (Conference paper, The 9th International Scientific Conference of the Faculty of Law of the University of Latvia, 2024), 196–206, https://doi.org/10.22364/iscflul.9.2.17; Bernard Tettamanti, Hubert Bär, and Jean-Claude Werz, "Compulsory Liability Insurance in a Changing Legal Environment – An Insurance and Reinsurance Perspective," in *Compulsory Liability Insurance from a European Perspective*, eds. Attila Fenyves et al. (Berlin: De Gruyter, 2016), 347.

the assertion of a claim against an insurance company is an unnecessary statutory *superfluum*.[8]

As indicated earlier, the claim is also directly provided for in the Motor insurance Directive. In addition, the importance of this claim is highlighted in the recitals of the Directive. According to recital 30,

> [t]he right to invoke the insurance contract and to claim against the insurance undertaking directly is of great importance for the protection of victims of motor vehicle accidents. In order to facilitate an efficient and speedy settlement of claims and to avoid as far as possible costly legal proceedings, a right of direct action against the insurance undertaking covering the person responsible against civil liability should be provided for victims of any motor vehicle accident.

2. Legal Nature of *Actio Directa* in Polish Law

The nature of *actio directa* is variously defined. In Polish law, the position has been formed that it is a specific entitlement which cannot be regarded as either a tort claim or a contractual claim. Although both Polish laws use the term "claim," it is, strictly speaking, a subjective right consisting of the right to demand performance from which claims flow.[9]

This position is also shared by the Polish Supreme Court (Sąd Najwyższy), holding that it is an independent substantive subjective right to which the injured party is entitled vis-à-vis the creditor in the event of the occurrence of an event covered by the insurance contract, containing both elements of a claim against the perpetrator of the damage and a claim to which the policyholder is entitled under the concluded contract of civil liability insurance.[10] The injured party's entitlement to the insurer arises only if the insured is liable for damages under separate legislation, either

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8 Marcin Krajewski, *Ubezpieczenie odpowiedzialności cywilnej według kodeksu cywilnego* (Warsaw: Wolters Kluwer Polska, 2011), 365–9; Dorota Maśniak, *Komentarz do ustawy: Ubezpieczenia obowiązkowe, Ubezpieczeniowy Fundusz Gwarancyjny, Polskie Biuro Ubezpieczycieli Komunikacyjnych* (Warsaw: C.H. Beck, 2021), 1010, Legalis.

9 Aleksander Raczyński, *Sytuacja prawna poszkodowanego w ubezpieczeniu odpowiedzialności cywilnej* (Warsaw: C.H. Beck, 2010), 135–7; Eugeniusz Kowalewski, *Ubezpieczenie odpowiedzialności cywilnej: Funkcje i przemiany* (Toruń: Uniwersytet Mikołaja Kopernika, 1981), 128.

10 Judgment of the Supreme Court of 21 April 2023, II CSKP 1907/22, unreported.

contractual or tortious in nature, and the amount of damages depends on the amount of damages that the perpetrator of the damage is obliged to pay.

In the case of a compulsory motor insurance contract, the injured party may also claim compensation from the insurance company if the driver of the vehicle that caused the damage might not have been compensated himself. In accordance with Article 43 of the Law on Compulsory Insurance, the insurance company may seek reimbursement of compensation paid from the driver of a motor vehicle if the driver caused damage intentionally, while under the influence of alcohol or in the state of intoxication or after using narcotic drugs, psychotropic substances or substitute substances within the meaning of the provisions on counteracting drug addiction; took possession of a vehicle as a result of committing an offence; did not have the required authorization to drive a motor vehicle, with the exception of cases in which it was necessary to save human life or property or in the pursuit of a person immediately after committing an offence; fled from the scene of the event.

The introduction of the above-mentioned recourse (called "atypical recourse") against the wrongdoer constitutes a sanction against the driver of the vehicle and has a repressive and preventive function.[11] Above all, however, atypical recourse in compulsory insurance (including motor insurance) allows compensation to be paid to the injured party because of the need to protect his interest when the perpetrator of the damage does not deserve protection.[12]

Despite the fact that the direct claim is an own subjective right of the claimant, it is linked to two other legal relationships: to the legal relationship of insurance between the insurer and the policyholder and to the legal relationship of damages linking the injured party to the insured. In the case of the first link, the literature speaks of the accessory nature of the own

[11] Dorota Maśniak, "Komentarz do niektórych przepisów ustawy o ubezpieczeniach obowiązkowych, Ubezpieczeniowym Funduszu Gwarancyjnym i Polskim Biurze Ubezpieczycieli Komunikacyjnych," in *Kontrakty na rynku ubezpieczeń. Komentarz do przepisów i warunków ubezpieczenia*, eds. Jakub Nawracała and Dorota Maśniak (Warsaw: Wolters Kluwer Polska, 2020), art. 43, Nt I.2, LEX/el.

[12] Marcin Orlicki, *Ubezpieczenia obowiązkowe* (Warsaw: Wolters Kluwer, 2011), 411; Jacek Pokrzywniak, "Kilka uwag o regresie nietypowym w ubezpieczeniu OC posiadaczy pojazdów mechanicznych," in *Aktualne problemy ubezpieczeń komunikacyjnych*, ed. Andrzej Koch (Warsaw: C.H. Beck, 2008), 56–7.

right, while in the context of the second link it speaks of the accessory nature of the insurer's liability. However, since the *actio directa* is self-contained and is its own subjective right – from its inception it exists and is exercised independently of the insured's claim against the insurer.[13]

It is recognized that, in the case of *actio directa*, for the determination of the relationship between the insurer and the injured party, the provisions of insurance and the provisions of civil law (the Polish Civil Code) on liability for damages must be taken into account. Despite the fact that the injured party has two claims, they cannot obtain two damages. Claims against the injury case and the insurer exist until one of them is completely satisfied. The injured party may, at his or her option, direct his or her claim against the insured, or the insurer, or both entities at the same time (liability *in solidum*).[14]

3. Person Entitled to a Direct Claim

The Law on Compulsory Insurance provides that the possibility of pursuing claims directly against the insurance company is available to "the injured party in connection with an event covered by the compulsory liability insurance contract" (Article 19(1) of the Law). The Civil Code, on the other hand, refers to "the person entitled to compensation in connection with an event covered by a civil liability insurance contract" (Article 822 § 4 of the Civil Code). The regulation of the direct claim in the Civil Code refers to an earlier paragraph of the same article, which explains the essence of liability insurance as insurance in which the insurer undertakes to pay compensation for damage caused to third parties for whom the insurer or the insured is liable.

Despite these differences in the wording of the above-cited regulations, it can be assumed that the terms used are equivalent.[15] The wording used

[13] Aleksander Raczyński, in *Kodeks cywilny. Tom III. Komentarz. Art. 627–1088*, ed. Maciej Gutowski (Warsaw: C.H. Beck, 2022), art. 822, Nb 5 and 7, Legalis.

[14] Judgment of the Supreme Court of 19 October 2011, II CSK 86/11, OSNC 2012, no. 4, item 55.

[15] Małgorzata Serwach, "Komentarz do ustawy o ubezpieczeniach obowiązkowych, Ubezpieczeniowym Funduszu Gwarancyjnym i Polskim Biurze Ubezpieczycieli Komunikacyjnych," in *Prawo ubezpieczeń gospodarczych. Komentarz*, vol. 1, *Komentarz do przepisów prawnych o funkcjonowaniu rynku ubezpieczeń*, eds. Zdzisław Brodecki et al. (Warsaw: Wolters Kluwer Polska, 2010), Article 19, Nt 3.

in the Law on Compulsory Insurance is closer to that of the Motor Vehicles Directive. Article 18 of the Directive instructs Member States to ensure that a direct claim against the insurance company is available to "the victim of an accident caused by a vehicle."

In relation to the Civil Code, it has also been considered whether a "third party" within the meaning of this provision is only a person outside the insurance relationship, or whether this should also be understood as a person who is jointly covered by the same insurance. In more recent literature, the second view prevails.[16] The interpretation of the concept of "third party" has also been the subject of a number of court decisions, most of which have concerned compulsory insurance against civil liability in respect of the use of motor vehicles. Initially, although the right to compensation for personal injury caused by the driver of the vehicle was sometimes granted to any passenger, including a close relative who was a co-owner of the vehicle,[17] the Supreme Court generally held that the injured co-owner of the vehicle (including in particular the spouse and the partner of a civil partnership) could not be considered a third party, since his/her liability was also covered by the civil liability insurance contract. Consequently, the insurer was not liable to such a person either for damage to property or for personal injury.[18]

It was not until the 2008 resolution of the Supreme Court that a different interpretation of the provisions was included, resolving the discrepancy appearing in the case law,[19] and was significantly influenced by the content of the motor vehicles directives. The Supreme Court accepted that the insurer bears the guarantee liability under the contract of compulsory motor

16 Raczyński, in *Kodeks cywilny*, Article 822, Nb 2 and the literature cited therein.

17 Judgment of the Supreme Court of 26 July 2001, II CKN 72/99, "Izba Cywilna" 2002, no. 1, p. 53; Judgment of the Supreme Court of 5 September 2003, II CKN 454/01, "Izba Cywilna" 2004, no. 6, p. 41; Resolution of the Supreme Court of 19 January 2007, III CZP 146/06, OSNC 2007, no. 11, item 161.

18 Judgment of the Supreme Court of 10 January 1963, 3 CR 111/62, OSPiKA 1964, no. 3, item 39; Resolution of the Supreme Court of 29 November 1996, III CZP 118/96, OSNC 1997, no. 3, item 26; Judgment of the Supreme Court of 14 September 2000, V CKN 113/00, OSNC 2001, no. 6, item 85; Judgment of the Supreme Court of 15 April 2004, IV CK 232/03; Decision of the Supreme Court(7) of 12 January 2006, III CZP 81/05.

19 Resolution of the Supreme Court (7) of 7 February 2008, III CZP 115/07, OSNC 2008, no. 9, item 96.

insurance for personal injury caused by the driver of a vehicle, including a passenger who is a co-owner of the vehicle together with the driver.

In its argumentation, the Supreme Court referred to the regulation of Article 822 of the Civil Code and – above all – to the provisions of the Law on Compulsory Insurance, constituting *lex specialis* in relation to the Code, including in particular the principle that insurance against civil liability in respect of the use of motor vehicles covers civil liability of any person who, while driving a motor vehicle during the period of insurance liability, caused damage in connection with the movement of that vehicle (Article 35 of the Law), regardless of whether that person was also the holder or co-holder of the vehicle. An exception, constituting a limitation of this liability, is found in Article 38(1) of the Law, where damage caused by the driver to the holder or co-holder of the motor vehicle is expressly excluded, but only to the extent of damage consisting of damage to, destruction of or loss of property. There are, therefore, no grounds to extend this exception to personal injury. The Supreme Court also referred explicitly to the Second Directive 84/5[20] and Third Directive 90/232[21] of the Council of the European Union, recalling that Article 1 of the Third Directive prescribes the coverage of liability insurance for personal injuries to all passengers other than the driver, while Article 3 of the Second Directive, provides that family members of any person who is liable for damage covered by liability insurance relating to the use of motor vehicles may not be excluded from the benefit of the insurance. The Court of First Instance also emphasized that, as one of the objectives of that Directive, it was stated that the family of the insured person, the driver or any other person liable for damage arising out of the use of vehicles should be afforded protection comparable to that of other third parties, at least as regards personal injuries.[22]

The Directive and the case law of the Court of Justice of the European Union were also referred to by the Insurance Ombudsman (Rzecznik

[20] Directive 84/5/EEC of 30 December 1983 (OJ L8, 11 January 1984), item 17, as amended.

[21] Directive 90/232/EEC of 14 May 1990 (OJ L129, 19 May 1990), item 33, as amended.

[22] Reasons for the Supreme Court (7) Resolution of 7 February 2008, III CZP 115/07, OSNC 2008, no. 9, item 96.

Ubezpieczonych)[23] when applying to the Supreme Court for the adoption of the resolution in the case discussed above.[24] The Insurance Ombudsman pointed in particular to the ruling in Case C-348/98,[25] which states that Article 3 of the Second Council Directive requires compulsory insurance against civil liability in respect of the use of motor vehicles to cover personal injuries to passengers who are members of the family of the insured person, of the driver of the vehicle or of any other person who incurs civil liability for an accident and whose liability is covered by compulsory motor-vehicle insurance, where those passengers are carried free of charge, whether or not there is any fault on the part of the driver of the vehicle which caused the accident, only if the domestic law of the Member State concerned requires such cover in respect of personal injuries caused in the same conditions to other third-party passengers.

The Supreme Court, in issuing its resolution, noted that the Second and Third Directive extend the insurer's liability to the general rules of civil liability for personal injury,[26] sharing the position in the Insurance Ombudsman's proposal.

How the notions of third party and injured party in civil liability insurance are understood clearly affects the scope of persons entitled to *actio directa*. The position finally adopted in the jurisprudence of Polish courts is in line with the decisions of the Court of Justice of the European Union concerning the issue of whether the injured party may be at the same time the policyholder. In its case law, the ECJ has confirmed on several occasions that

> the insurance against civil liability in respect of the use of motor vehicles referred to in Article 3(1) of First Directive 72/166 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles must cover all the victims other than the driver

[23] A Polish body tasked with supporting insurers' customers, replaced by the Financial Ombudsman (Rzecznik Finansowy) from 2015.

[24] Proposal available at: https://rf.gov.pl/dla-klientow/wnioski-o-uchwale-sadu-najwyzszego/, accessed March 29, 2025.

[25] CJEU Judgment of 14 September 2000, Vitor Manuel Mendes Ferreira and Maria Clara Delgado Correia Ferreira v. Companhia de Seguros Mundial Confianca SA, Case C-348/98, ECLI:EU:C:2000:442.

[26] Ibid.

of the vehicle that caused the damage or injury, unless one of the exceptions expressly provided for by the First, Second or Third Directives applies.[27]

These exceptions include, in particular, the possibility of refusing to pay compensation to persons who voluntarily occupy a seat in the vehicle that caused the damage if the insurance company proves that they knew that the vehicle was stolen.[28]

Thus, the reference to the regulations of the Directives and the ECJ case law allowed the resolution of an issue that had remained controversial in Polish jurisprudence for years.

4. The Manner of Redress and the Extent of Damages That Can Be Claimed from the Insurer under a Direct Claim

Another issue that has been causing doubts in the practice of the application of motor vehicle liability insurance regulations in Poland for years is the way in which the damage caused to the injured party is compensated, with the compensation usually being paid directly by the insurer under the *actio directa* construction.

The main issue is the question of whether it is permissible to determine the compensation as equivalent to the hypothetical costs of restoring the vehicle to its previous condition in those situations where, even before the amount of compensation was determined, the vehicle was sold without being repaired, as well as when the victim made such repairs himself. This method of settling damages is referred to as monetary restitution. In this context, we refer to the cost method of determining the amount of damage.

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27 Vadim Mantrov, "Clarifying the Concept of Victim in the Motor Vehicle Drivers' Liability Insurance: the ECJ's Judgement in Case C-442/10," *European Journal of Risk Regulation* 3, no. 2 (2012): 257–60, http://www.jstor.org/stable/24323225; CJEU Judgment of 1 December 2011, Churchill Insurance Company Limited v. Benjamin Wilkinson and Tracy Evans v. Equity Claims Limited, Case C-442/10, ECLI:EU:C:2011:799; CJEU Judgment of 30 June 2005, Katja Candolin, Jari-Antero Viljaniemi and Veli-Matti Paananen v. Vahinkovakuutusosakeyhtiö Pohjola and Jarno Ruokoranta, Case C-537/03, ECLI:EU:C:2005:417; CJEU Judgment of 19 April 2007, Elaine Farrell v. Alan Whitty and Others, Case C-356/05, ECLI:EU:C:2007:229.

28 Article 2(1) of the Second Directive and Article 13(1) of Directive 2009/103/EC.

As a matter of principle, in the case of insurance against civil liability – including compulsory insurance for motor vehicle owners – the general provisions on liability for damages contained in the Polish Civil Code apply. These are, firstly, Article 361 of the Civil Code, indicating that a person obliged to pay damages shall only be liable for ordinary effects of an action or omission which the damage resulted from. Within the above-mentioned limits, in the absence of a different statutory or contractual provision, the redress of damage shall involve losses which the injured party has suffered as well as profits which it could have obtained, if no damage were inflicted. The regulation of the method of redress of damage is contained in Article 363 of the Civil Code, according to which the redress of damage shall come into being according to the injured party's choice either by the restoration of the former state or by the payment of an adequate sum of money. However, if the restoration of the former state was proved impossible or if it entailed excessive difficulties or expenses to the obliged party, a claim of the injured party shall be limited to pecuniary performance.

The latter provision is central to the issue under consideration. It should be noted that it does not provide for such a way of repairing the damage, which consists in paying an amount corresponding to the costs of restoring the previous state of affairs. However, Polish courts have for many years allowed such a method of repairing damage in the case of motor liability insurance. The line of jurisprudence allowing the cost method of determining damage and monetary restitution dates back to the 1960s and 1970s.[29] It was consolidated later in a number of Supreme Court decisions.[30] It is mainly based on the assumption that the damage arises at the moment of the traffic accident and also the obligation to compensate the damage by paying an appropriate monetary sum arises at the moment of the damage and does not depend on whether the injured party has repaired the vehicle

[29] Judgment of the Supreme Court of 1 September 1970, II CR 371/70, OSNC 1971, no. 5, item 93; Judgment of the Supreme Court of 27 June 1988, I CR 151/88.

[30] Judgment of the Supreme Court of 11 June 2001, V CKN 266/00; Resolution of the Supreme Court of 15 November 2001, III CZP 68/01, OSNC 2002, no. 6, item 74; Judgment of the Supreme Court of 8 March 2018, II CNP 32/17; Decision of the Supreme Court of 7 December 2018, III CZP 51/18, OSNC 2019, no. 9, item 94; Judgment of the Supreme Court of 3 April 2019, II CSK 100/18; Judgment of the Supreme Court of 20 October 2021, I NSNc 150/20; Judgment of the Supreme Court of 16 December 2021, I NSNc 451/21; Judgment of the Supreme Court of 30 March 2022, I NSNc 184/21.

and whether he intends to repair it at all. This is because the purpose of compensation is to make up for the pecuniary loss caused by the event causing the damage, existing from the moment the damage is caused until the time when the obligor pays the injured party a sum of money corresponding to the damage as established by law. With this understanding of the damage and the duty to compensate, it is irrelevant at what cost the injured party has actually repaired the item and whether he/she has done so at all or intends to do so.[31]

In recent years, however, a second line of jurisprudence has emerged in the jurisprudence of the Supreme Court, which has questioned the legality of determining compensation on the basis of hypothetical repair costs.[32] Doubts were also expressed about this point in the doctrine. The circumstances in which the Supreme Court's judgment of 2 June 1988 was given were pointed out – due to the economic crisis at the time, there was a serious shortage of supplies in Poland and spare parts were difficult to obtain. Therefore, the injured party could not always be expected to repair their vehicle. It was also pointed out that the Polish Civil Code does not provide for monetary restitution and that there are no grounds for compensation for damages of a hypothetical nature. An important argument put forward repeatedly by the opponents of monetary restitution is that setting compensation at the level of repair costs not incurred often leads to making money out of the damage, as the amount calculated in this way turns out to be higher than the compensation determined by the differential method.[33]

The existence of two conflicting lines of jurisprudence prompted the Financial Ombudsman ("Rzecznik Finansowy") to ask the Supreme Court to resolve this legal issue. In a Resolution of 11 September 2024, the Supreme Court stated that if it has become impossible for the injured party to repair the vehicle, in particular if the vehicle is sold or repaired, it is

31 Cf. Justification of the Resolution of the Supreme Court of 15 November 2001, III CZP 68/01, OSNC 2002, no. 6, item 74.

32 Cf. Decision of the Supreme Court of 17 July 2020, V CNP 43/19; Decision of the Supreme Court of 11 September 2020, IV CNP 26/19; Judgment of the Supreme Court of 10 June 2021, IV CNPP 1/21, OSNC 2022, no. 3, item 33; Judgment of the Supreme Court of 8 December 2022, II CSKP 726/22, OSNC 2023, no. 6, item 62; Judgment of the Supreme Court of 15 December 2022, II CNPP 7/22.

33 Sandra Hadrowicz and Piotr Ratusznik, "O tak zwanej restytucji pieniężnej – przyczynek do rozważań na temat zakresu ochrony poszkodowanego," *Przegląd Sądowy*, no. 7–8 (2022): 78–99.

not justified to determine the amount of compensation under motor vehicle liability insurance as the equivalent of the hypothetical repair costs.[34] In justifying its resolution, the Supreme Court referred to previous case law, which took into account the concept of the dynamic nature of damage, according to which from the moment the damage occurs until the moment it is repaired, the form and size of the damage suffered may change. Above all, however, the Court emphasized that the use of the cost method could lead to the unjust enrichment of the injured party, *inter alia*, if he or she were to receive compensation in an amount exceeding the value of the funds actually spent on repairing the vehicle. In its reasoning, the Court further referred to the case law of the Court of Justice of the European Union, which has ordered national courts to ensure that the protection of rights guaranteed by the legal order of the European Union does not lead to the unjust enrichment of entitled persons: judgment of the CJEU of 25 March 2021, C-501/18, *Bt v. Balgarska Narodna Banka*, and judgment of the CJEU of 21 March 2023, C-100/21, *Qb v. Mercedes-Benz Group Ag, Anciennement Daimler Ag*.[35]

The above-mentioned resolution of the Supreme Court met with the approval of some doctrine representatives. It was pointed out that the amount needed to repair the vehicle is compensation, i.e. a way of repairing damage. Damage, on the other hand, is the deterioration or destruction of the vehicle. The extent of the insurer's liability changes, as does the extent of the offender's obligation to repair the damage. In other words, the same damage can be compensated in different ways. If the injured party has repaired the vehicle, the compensation should correspond to the cost of the repair; if, on the other hand, he has sold the vehicle, his loss will correspond to the difference in the price obtained. In both cases, the amount of compensation may differ from compensation calculated either as the hypothetical cost of repairing the thing or as the difference between the thing's actual value and its hypothetical value if the damage had not occurred. It was submitted that the latter two methods should be applied until the damage is repaired.[36]

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34 Resolution of the Supreme Court of 11 September 2024, III CZP 65/23.

35 Cf. the grounds for Resolution III CZP 65/23.

36 Jędrzej M. Kondek, "Odszkodowanie za szkodę w pojeździe mechanicznym w przypadku uprzedniego naprawienia tego pojazdu lub jego zbycia w stanie uszkodzonym. Glosa do

However, it is difficult to consider that the resolution in question actually resolved the doubts concerning the admissibility of the cost method of determining damages, since in a later judgment the Supreme Court still considered that no provision explicitly resolved the question of the admissibility of damages calculated by the cost method, and there are two well-argued possible interpretative options in current case law.[37]

Moreover, the question of the permissibility of calculating compensation on the basis of hypothetical repair costs for a vehicle, irrespective of whether the owner has repaired or intends to repair that vehicle, was one of the elements of the question referred by the Polish District Court for the City of Warsaw (*Sąd Rejonowy dla miasta stołecznego Warszawy*). In asking its question, the court expressly pointed out that compensation which takes into account such hypothetical repair costs, which far exceed the amount of the damage suffered determined on the basis of the differential method, is granted even to injured parties who have already sold their damaged vehicle and who, therefore, do not use that compensation to have the vehicle repaired. According to the referring court, that practice results in the unjustified enrichment of those persons, to the detriment of all other policyholders, to whom insurance undertakings pass on the cost of that excessive compensation, by requiring them to pay ever higher premiums.[38]

In its judgment, the Court of Justice ruled that Article 3 and Article 18 of Directive 2009/103/EC must be interpreted as not precluding national legislation which, in the event of a direct action, by the person whose vehicle has suffered damage as a result of a road traffic accident, against the insurer of the person responsible for that accident, provides that the sole means of obtaining redress from that insurer is by way of monetary compensation. At the same time, the Court of Justice held that those provisions must be regarded as precluding rules for the calculation of that compensation and conditions relating to its payment, in so far as they would have the effect, in the context of a direct action brought under Article 18,

uchwały siedmiu sędziów Sądu Najwyższego z 11 września 2024 r., III CZP 65/23," *Prawo Asekuracyjne* 4, no. 121 (2024): 90–100.

37 Cf. Justification of the Judgment of the Supreme Court of 12 September 2024, II CNPP 26/22.

38 CJEU Judgment of 30 March 2023, AR and Others v. PK SA and Others, Case C-618/21, ECLI:EU:C:2023:278, para. 13.

of excluding or limiting the insurer's obligation, under Article 3, to cover all the compensation which the person responsible for the damage must provide to the injured party in respect of the damage suffered by that party.

In its reasoning, the Court of Justice also emphasized – for the first time so clearly – the importance of the direct claim described in Article 18 of the Directive. The Court noted that, in so far as, by exercising his or her direct right of action against the insurer of the civil liability of the person responsible for the damage, the injured party requires the provision, to him or her, of the insurer's benefit provided for in the insurance contract, the payment of that benefit could be made subject only to the conditions expressly laid down in that contract.[39] In addition, the Court emphasized that in order to avoid undermining the effectiveness of the direct right of action provided for in Article 18 of Directive 2009/103, the conditions for the calculation of such monetary compensation cannot have the effect of excluding or limiting the insurer's obligation, under Article 3 of that directive, to cover in full the compensation which the person responsible for the damage must provide to the injured party in respect of the damage suffered by the latter.[40]

The above-mentioned judgment in *AR and Others* is read as an important ruling confirming that the direct right of action against an insurer is of fundamental concern to the protective and correct application of the Directive 2009/103.[41] Although the Court of Justice did not indicate in its ruling that the cost method is admissible,[42] the judgment in case C 618/21 is interpreted as confirming the correctness of the line of case law of the courts that allow the recovery of damages determined by the cost method. The injured party is not obliged to repair the vehicle and subsequent

39 Ibid., para. 46.

40 Ibid., para. 47.

41 James Marson and Katy Ferris, "Extra-Contractual Rules and Third-Party Rights of Direct Action: The Court of Justice Defines Claimants' Rights and Insurers' Obligations in Motor Vehicle Agreements," *European Law Review* 48, no. 4 (2023): 480–9.

42 Bartosz Kucharski, "Gloss to a Judgement of CJEU of 30th of March 2023, C-618/21 AR and Others Versus PK S.A. and Others," *Wiadomości Ubezpieczeniowe*, no. 1 (2024): 67; Marcin Orlicki, "Glosa do wyroku Trybunału Sprawiedliwości Unii Europejskiej (piąta izba) z dnia 30 marca 2023 r. (C-618/21) dotyczącego zakresu kompetencji ustawodawców krajowych w zakresie zasad prawa odszkodowawczego oraz ubezpieczenia odpowiedzialności cywilnej posiadaczy pojazdów mechanicznych," *Prawo Asekuracyjne* 1, no. 114 (2023): 87–8.

events, after the partial damage, are irrelevant. For this reason, it is possible to claim compensation within the *actio directa* in the amount corresponding to the necessary and economically justified costs of restoring the vehicle to its previous state, also in the event that the vehicle is sold in its damaged state or is previously repaired.[43]

5. Relationship between National and EU Rules in Motor Vehicle Insurance

The possibility for persons entitled to compensation to claim directly from the insurance company is one of the elements of the insurance system emphasizing the protection of victims of damage caused by the driver of a motor vehicle (in addition to, *inter alia*, the compulsory nature of this civil liability insurance, and the coverage of damage caused by any person driving a vehicle).[44]

As elements of insurance law and civil law converge in *actio directa* in the case of motor vehicle liability insurance, the necessity of applying a strictly national regulation (principles of liability for damages) together with the regulation covered by the Directive and interpreted by the Court of Justice of the European Union (principles of compulsory motor vehicle liability insurance) becomes apparent with this institution.

The relationship between national civil liability rules and the motor vehicle directives has, of course, been the subject of numerous rulings by the Court of Justice of the European Union. The Court pointed out that the Member States remain free to determine the civil liability regime applicable to damages resulting from the use of motor vehicles, as the directives do not aim to harmonize civil liability regimes. Nonetheless, the Member States have obligations under the Directives to ensure that civil liability under their national law is covered by insurance which complies with the provisions of the Motor Vehicle Directives, and national rules governing

43 The Financial Ombudsman's Request of 12 December 2023 for a Resolution by the Supreme Court, p. 32, accessed March 29, 2025, https://rf.gov.pl/wp-content/uploads/2024/04/Wniosek-RF-do-Sadu-Najwyzszego-grudzien-2023.pdf; Aleksandra Partyk, "Niemożność żądania od ubezpieczalni naprawienia auta zgodna z prawem UE. Omówienie wyroku TS z dnia 30 marca 2023 r., C-618/21 (AR i in.)," LEX/el. (2023).

44 The Justification of the Supreme Court (7) Resolution of 7 February 2008, III CZP 115/07, OSNC 2008, no. 9, item 96.

the conditions of compensation for damage arising from the use of motor vehicles may not deprive the Directives of their effectiveness (*effet utile*).[45]

However, as countries have separate civil liability regimes, there are still differences in the practice of applying the liability regulations, which may affect the achievement of the fundamental objective of the EU Motor Insurance Directive,[46] which is that motor vehicle accident victims should be guaranteed comparable treatment irrespective of where in the Community accidents occur (recital 20 in the preamble) and ensure the free movement of vehicles normally based on EU territory and of persons travelling in those vehicles.[47] Another, separate, issue that may affect the achievement of the objectives of the Directive is also the problem of the implementation of the insurance obligation for motor insurance. No country manages to achieve full implementation of this obligation. Different European countries use different methods to deal with these problems.[48] At the same time, another objective of the directives is to protect that particularly vulnerable category of potential victims who are motor vehicle passengers by filling the gaps in the compulsory insurance cover of those passengers in certain Member States.[49]

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45 CJEU Judgment of 14 September 2000, Vitor Manuel Mendes Ferreira and Maria Clara Delgado Correia Ferreira v. Companhia de Seguros Mundial Confianca SA, Case C-348/98, ECLI:EU:C:2000:442; CJEU Judgment of 19 April 2007, Elaine Farrell v. Alan Whitty, Minister for the Environment, Ireland, Attorney General and Motor Insurers Bureau of Ireland (MIBI), Case C-356/05, ECLI:EU:C:2007:229; CJEU Judgment of 30 June 2005, Katja Candolin, Jari-Antero Viljaniemi and Veli-Matti Paananen v. Vahinkovakuutusosakeyhtiö Pohjola and Jarno Ruokoranta, Case C-537/03, ECLI:EU:C:2005:417.

46 Vadim Mantrov, "Is 142 Euro Equal to 350,000 Euro? The CJEU Interpretation of 'Personal Injury' and 'Injured Party' in EU Motor Insurance Law," *European Journal of Risk Regulation* 5, no. 3 (2014): 405–6, http://www.jstor.org/stable/24323470.

47 CJEU Judgment of 28 March 1996, Criminal proceedings against Rafael Ruiz Bernáldez, Case C-129/94, ECLI:EU:C:1996:143, para. 13; CJEU Judgment of 30 June 2005, Katja Candolin, Jari-Antero Viljaniemi and Veli-Matti Paananen v. Vahinkovakuutusosakeyhtiö Pohjola and Jarno Ruokoranta, Case C-537/03, ECLI:EU:C:2005:417, para. 17.

48 Jeff De Mot and Michael G. Faure, "Special Insurance Systems for Motor Vehicle Liability," *The Geneva Papers on Risk and Insurance – Issues and Practice* 39 (2014): 569–84, https://doi.org/10.1057/gpp.2014.23.

49 CJEU Judgment of 1 December 2011, Churchill Insurance Company Limited v. Benjamin Wilkinson and Tracy Evans v. Equity Claims Limited, Case C-442/10, ECLI:EU:C:2011:799; CJEU Judgment of 19 April 2007, Elaine Farrell v. Alan Whitty and Others, Case C-356/05, ECLI:EU:C:2007:229.

Sometimes the boundary between the provisions of a Directive and the interpretation of European Union law and the strictly national provisions and interpretation of national law governing liability for damages may be difficult to draw, as the example of the judgment in Case C-618/21 shows. Following the submission of the reference for a preliminary ruling, one of the parties, in its submissions, sought a refusal to give a preliminary ruling on the ground that the questions referred for a preliminary ruling in its view, in fact, concerned the undermining of the rules laid down in Polish law governing compensation for damage arising from the use of motor vehicles under civil liability insurance.[50]

The need for the simultaneous application of EU motor vehicle directives and national liability for damages rules may lead to special treatment for victims of motor vehicle accidents, different from victims who have been injured in other circumstances. In Poland, this is visible in the case of co-insured victims, who under the general regulation of the Civil Code would be unlikely to be recognized as third parties who can claim compensation for damage caused by another co-insured. Another example is the authorization of the use of the cost method of determining compensation and monetary restitution in motor insurance, which often leads to the determination of a higher compensation than the actual damage suffered. This constitutes a violation of the basic principles of civil law on liability for damages, from which it follows that compensation must not lead to the enrichment of the injured party. This different treatment was, however, already practiced before Poland's membership of the European Union, on the basis of specific national rules on compulsory insurance and the practice developed by the courts. Particularly in the latter case, it is indeed a matter of national law and not of European Union law.

[50] CJEU Judgment of 30 March 2023, AR and Others v. PK SA and Others, Case C-618/21, ECLI:EU:C:2023:278, para. 21.

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The Legal Character of Polish Disciplinary Proceedings for Advocates and Legal Advisers in Light of the Case Law of the Polish Constitutional Tribunal and the European Court of Human Rights

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Abstract: The article presents an analysis of the case law of the Polish Constitutional Court and the European Court of Human Rights regarding the nature of disciplinary proceedings for advocates and legal advisers in Poland. The analysis is based on a comparison of the standards outlined in the case law of both courts, demonstrating that disciplinary proceedings in legal professions in Poland have a repressive character, even though they are not formally criminal proceedings.

1. Introduction

Disciplinary liability, and consequently the proceedings concerning it, is one of the means ensuring that the bodies of self-governing professional associations exercise supervision over the lawful performance of professional duties by representatives of these professions (Article 17 of the Polish Constitution).[1] In general, it pertains to liability for conduct contrary to law, ethical principles, or the dignity of the profession, as well as for violations of professional

This text expands on the considerations contained in the author's doctoral dissertation titled "The Appropriate Application of the Code of Criminal Procedure in Disciplinary Proceedings of Lawyers and Legal Advisers," which has not been published yet.

[1] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws 1997 no. 78, item 483.

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duties or rules governing the exercise of a particular profession or office. Disciplinary liability applies to representatives of various professional groups, including legal professions such as advocates and legal advisers.

Since disciplinary liability does not fit neatly into the categories of criminal, civil, administrative, or other forms of liability, its precise nature requires examination. An analysis of jurisprudence leads to the conclusion that there is a divergence of views on this matter, and disciplinary proceedings are treated differently in constitutional and convention-based regulations. This prompts reflection on the essence of such proceedings and on which judicial perspective most accurately captures their legal character.

2. The Nature of Disciplinary Proceedings Based on the Jurisprudence of the Polish Constitutional Tribunal

Disciplinary proceedings are subject to several provisions of the Polish Constitution, which establish constitutional standards for such proceedings. The analysis of constitutional regulations and the jurisprudence of the Constitutional Tribunal allows for an assessment not only of the constitutionality of specific legal provisions regulating disciplinary liability and proceedings, but also leads to conclusions regarding the repressive nature of disciplinary processes as a specific type of proceedings. The analysis of the Constitutional Tribunal's case law indicates that disciplinary proceedings are treated as repressive proceedings, falling under the broad category of criminal proceedings (*sensu largo*).[2]

A key argument supporting this classification is the application of fundamental constitutional standards governing criminal proceedings in disciplinary cases: the presumption of innocence under Article 42(3) of the Polish Constitution, the right to defense under Article 42(2), and the principle of legality under Article 42(1). The Tribunal has expressed its stance on this issue primarily in its rulings concerning disciplinary or professional

[2] See: Paweł Czarnecki, "Stosowanie kodeksu karnego w postępowaniach dyscyplinarnych," *Państwo i Prawo* 72, no. 10 (2017): 101; see also: Katarzyna Gajda-Roszczynialska and Krystian Markiewicz, "Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland," *Hague Journal on the Rule of Law* 12 (2020): 451 et seq., https://doi.org/10.1007/s40803-020-00146-y; Karolina Kremens, "The Model of Disciplinary Proceedings against Prosecutors – Selected Issues," *Białostockie Studia Prawnicze* 22, no. 1 (2017): 33 et seq., https://doi.org/10.15290/bsp.2017.22.01.en.03.

liability proceedings for legal professionals, police officers, doctors, and academic teachers. The application of provisions that establish standards for criminal proceedings to disciplinary cases is a significant argument for recognizing their repressive nature.[3] Justifying the application of Article 42(3) of the Polish Constitution to non-criminal cases, the Tribunal referred to the necessity of ensuring participants in these proceedings certain procedural rights and safeguards.[4] It emphasized that the inclusion of provisions on the presumption of innocence among civil rights and freedoms in the Constitution may, in exceptional situations, extend the principle's applicability beyond the framework of criminal proceedings to other repressive proceedings. The primary role of this principle, along with other provisions defining the standards of repressive proceedings, is to provide the accused with specific procedural guarantees.

In its reasoning regarding disciplinary proceedings for academic teachers, the Tribunal cited the principle of a democratic state governed by law (Article 2 of the Polish Constitution) as the basis for extending the guarantees derived from Article 42 to proceedings other than criminal ones.[5] Similarly, in a case concerning administrative monetary penalties, the Tribunal pointed to the interdisciplinary nature of punitive mechanisms.[6]

A fundamental element allowing for the incorporation of the presumption of innocence into disciplinary proceedings is the concept of guilt. Therefore, the presumption of innocence does not affect the legal situation of participants in proceedings where guilt is not an issue, such as administrative

3 Polish Constitutional Tribunal, Judgment of 2 September 2008, Ref. No. K 35/06, OTK-A 2008, no. 7, item 120, reasoning point 3, referring to disciplinary proceedings of police officers; see also: Izabela Urbaniak-Mastalerz, "Application of the Provisions of the Code of Criminal Procedure in Disciplinary Proceedings Against Attorneys," *Białostockie Studia Prawnicze* 22, no. 1 (2017): 85 et seq., https://doi.org/10.15290/bsp.2017.22.01.en.07.

4 Polish Constitutional Tribunal, Judgment of 4 July 2002, Ref. No. P 12/01, OTK-A 2002, no. 4, item 50, reasoning point 3, referring to proceedings concerning liability under Article 172 of the Regulation of the President of the Republic of Poland of 24 October 1934 – Bankruptcy Law, consolidated text: Journal of Laws 1991 no. 118, item 512, as amended.

5 See: Polish Constitutional Tribunal, Judgment of 27 February 2001, Ref. No. K 22/00, OTK 2001, no. 3, item 48, reasoning point V.

6 See: Polish Constitutional Tribunal, Judgment of 5 October 2013, Ref. No. P 26/11, OTK-A 2013, no. 7, item 99, reasoning point 5.3.

cases.[7] Consequently, the application of this constitutional principle in disciplinary cases supports their classification as criminal proceedings *sensu largo*. The Constitutional Tribunal has extensively outlined a catalogue of criminal cases *sensu largo*, where the criterion of guilt determines the applicability of Article 42(3) of the Constitution. These include misdemeanor proceedings,[8] proceedings concerning the liability of collective entities,[9] and lustration proceedings.[10] Most importantly, the Tribunal explicitly stated that the presumption of innocence applies to disciplinary proceedings.[11] In its ruling on case K 22/00, the Tribunal emphasized the protective aspect of the presumption of innocence, which should be incorporated into disciplinary proceedings to fulfil the requirement of procedural guarantees. In disciplinary proceedings (as in criminal proceedings), the presumption of innocence defines the procedural position of the accused, requiring the adjudicating authority to adopt a "temporary truth" until the evidence presented in the proceedings demonstrates that the actual truth differs.[12]

Undoubtedly, Article 42(2) of the Polish Constitution, which guarantees the right to defense, also applies to disciplinary proceedings. This is evidenced, among other things, by the provisions of the professional laws governing attorneys and legal advisers – Article 94 of the Law on the Bar[13] and Article 68(4) of the Law on Legal Advisers.[14] However, the application of the

7 See: Piotr Karlik, Tomasz Sroka, and Paweł Wiliński, "Commentary on Article 42," in *Konstytucja Rzeczypospolitej Polskiej. Tom I. Komentarz*, eds. Marek Safian and Leszek Bosek (Warsaw 2016), nb. 248, Legalis.

8 See: Polish Constitutional Tribunal, Judgment of 8 July 2003, Ref. No. P 10/02, OTK-A 2003, no. 6, item 62, reasoning point 6.

9 See: Polish Constitutional Tribunal, Judgment of 11 September 2001, Ref. No. SK 17/00, OTK 2001, no. 6, item 165, reasoning point 2.

10 See: Polish Constitutional Tribunal, Judgment of 2 April 2015, Ref. No. P 31/12, OTK-A 2015, no. 4, item 44, reasoning point 3.2.

11 See, among others, Polish Constitutional Tribunal, Judgment of 27 February 2001, Ref. No. K 22/00, OTK 2001, no. 3, item 48, reasoning points V and VI.

12 See: Polish Constitutional Tribunal, Judgment of 27 February 2001, Ref. No. K 22/00, OTK 2001, no. 3, item 48, reasoning point VI; see also: Polish Supreme Court, Judgment of 18 January 1991, Ref. No. I KR 120/90, OSP 1991, no. 10, item 248; Polish Supreme Court, Judgment of 8 January 1988, Ref. No. IV KR 175/87, OSPiKA 1989, no. 1, item 12.

13 The Act of 26 May 1982, Law on the Bar, consolidated text: Journal of Laws 2024, item 1564.

14 The Act of 6 July 1982, Law on the Legal Advisors, consolidated text: Journal of Laws 2024, item 499.

principle of the right to defense also results from constitutional jurisprudence, where a well-established view holds that Article 42(2) of the Polish Constitution refers to repressive proceedings in general, which is a broader concept than criminal proceedings regulated by the Code of Criminal Procedure.[15] The application of the constitutional provision means that in disciplinary proceedings against attorneys and legal advisers, the accused not only has the right to legal representation, but also the right to actively defend against the charges. This right necessitates ensuring that the accused has the opportunity to actively influence the course of the proceedings, including the ability to actively participate, submit explanations, file evidence motions, participate in evidentiary proceedings, challenge decisions through legal means,[16] and take all actions aimed at improving their procedural position.

Among the constitutional provisions relevant to disciplinary proceedings, the principle of legalism enshrined in Article 42(1) of the Polish Constitution should also be mentioned. Legal scholarship emphasizes that the term "criminal liability" used in this provision has an autonomous meaning.[17] Accepting a different concept and interpreting this term strictly in accordance with statutory provisions would allow for circumventing constitutional guarantees applicable to all forms of punishment by formally classifying a given type of liability as something other than criminal.[18] Although the Polish Constitutional Tribunal has not explicitly defined the term "criminal liability" under Article 42(1) of the Constitution, it is

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15 See: Polish Constitutional Tribunal, Judgment of 26 November 2003, Ref. No. SK 22/02, OTK-A 2003, no. 9, item 97, justification point 4, relating to misdemeanor proceedings; Polish Constitutional Tribunal, Judgment of 3 November 2004, Ref. No. K 18/03, OTK-A 2004, no. 10, item 103, justification point 4, relating to proceedings concerning the liability of collective entities for acts prohibited under penalty; Polish Constitutional Tribunal, Judgment of 28 November 2007, Ref. No. K 39/07, OTK-A 2007, no. 10, item 129, justification points 2.2.2. and 11.2.1., relating to judicial immunity proceedings.

16 See: Monika Florczak-Wątor, in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. Piotr Tuleja (Warsaw: Wolters Kluwer, 2019), 150–4, LEX/el.

17 See, among others, Karlik, Sroka, and Wiliński, "Commentary on Article 42," no. 56; Bogusław Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (Warsaw: C.H. Beck, 2012), commentary on Article 42, no. 1; Marian Grzybowski, "Konstytucyjne ujęcie odpowiedzialności karnej (uwagi na marginesie wykładni art. 42 ust. 1 Konstytucji)," in *Państwo prawa i prawo karne. Księga Jubileuszowa profesora Andrzeja Zolla*, vol. 1, eds. Piotr Kardas, Tomasz Sroka, and Włodzimierz Wróbel (Warsaw: Wolters Kluwer Polska, 2012), 140.

18 See: Karlik, Sroka, and Wiliński, "Commentary on Article 42," no. 54.

indisputable from its jurisprudence that a key element of this liability is the imposition of penalties on individuals, subjecting them to some form of punishment or sanction.[19] This interpretation is primarily based on protective considerations and aims to ensure the broadest possible procedural protection for individuals. The Tribunal has ruled that the guarantees arising from Article 42(1) of the Polish Constitution also apply to disciplinary proceedings.[20]

The constitutional standard for assessing the fairness of disciplinary procedures should also be derived from Article 45(1) of the Polish Constitution, which establishes the right to a fair trial. This provision guarantees that everyone has the right to a fair and public hearing without undue delay by a competent, independent, impartial, and autonomous court.[21] In all types of proceedings, including repressive proceedings, the right to a court serves a crucial function in ensuring judicial oversight over the protection of civil rights and freedoms.[22] The Polish Constitutional Tribunal explicitly recognizes the existence of the right to a court in proceedings where "justice is not being administered" in the traditional sense, specifically citing disciplinary proceedings.[23] Furthermore, the repressive na-

19 See, among others, Polish Constitutional Tribunal, Judgment of 12 April 2011, Ref. No. P 90/08, OTK-A 2011, no. 3, item 21, justification point 4; Polish Constitutional Tribunal, Judgment of 20 May 2014, Ref. No. K 17/13, OTK-A 2014, no. 5, item 53, justification point 2; Polish Constitutional Tribunal, Judgment of 21 April 2015, Ref. No. P 40/13, OTK-A 2015, no. 4, item 4, justification point 3.

20 See: Polish Constitutional Tribunal, Judgment of 2 September 2008, Ref. No. K 35/06, OTK-A 2008, no. 7, item 120, justification point 6, relating to disciplinary proceedings for police officers; Polish Constitutional Tribunal, Judgment of 6 November 2012, Ref. No. K 21/11, OTK-A 2012, no. 10, item 119, justification point 2, relating to hunting disciplinary proceedings.

21 See: Cezary Kulesza, "Ewolucja wybranych procedur dyscyplinarnych w świetle konwencyjnego i konstytucyjnego standardu prawa do sądu," *Białostockie Studia Prawnicze* 22, no. 1 (2017): 11–22; Damian Gil, "Prawo do sądu karnego a inne postępowania represyjne (zagadnienia wybrane," in *Zbieg odpowiedzialności dyscyplinarnej z innego rodzaju odpowiedzialnością o charakterze represyjnym w służbach mundurowych*, eds. Bartłomiej Wróblewski, Piotr Jóźwiak, and Krzysztof Opaliński (Piła 2014), 35 et seq.

22 See: Polish Constitutional Tribunal, Judgment of 11 September 2001, Ref. No. SK 17/00, OTK 2001, no. 6, item 165, justification point 2.

23 See: Polish Constitutional Tribunal, Judgment of 6 November 2012, Ref. No. K 21/11, OTK-A 2012, no. 10, item 119, justification point 3.6, concerning hunting disciplinary proceedings.

ture of disciplinary proceedings and the existing standards for individual protection in such cases justify subjecting them to judicial review.[24] The Polish Constitution guarantees that judicial functions are exercised by an independent, impartial, and autonomous court. P. Sarnecki[25] may be correct in suggesting that the enumeration of these attributes constitutes a pleonasm, as they are inherently linked to the concept of a court. Nevertheless, their constitutional emphasis is necessary to ensure their realization within the judiciary and to safeguard its genuine independence from other branches of government. These three attributes – independence, impartiality, and autonomy – complement and reinforce one another, ensuring that courts can render decisions free from external pressures, based solely on objective criteria, and without favoring any party in the proceedings.

The right to a court as a guarantee of rights and freedoms cannot be separated from the right to a court understood as an individual subjective right.[26] Given that Article 45(1) of the Polish Constitution establishes a subjective right, participants in disciplinary proceedings are effectively protected under this provision, ensuring that their case is adjudicated in accordance with constitutional standards.[27] The constitutional principle of the right to a court serves as a safeguard for strengthening the procedural rights of individuals in disciplinary proceedings.[28] However, the direct realization of the right to a court, which administers justice, only occurs through the possibility of filing a cassation appeal with the Supreme Court. The procedural safeguards surrounding disciplinary proceedings before professional self-governing courts (e.g. corporate courts), which partially correspond to the requirements of Article 45(1) of the Polish Constitution,

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24 See: Norbert Gesek, "Glosa do wyroku Trybunału Konstytucyjnego z dnia 6 listopada 2012 r., K 21/11," *Przegląd Sejmowy*, no. 5 (2013): 161.

25 Paweł Sarnecki, "Commentary to Article 45," in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 2, eds. Leszek Garlicki and Marek Zubik, t. 10 (Warsaw: Wydawnictwo Sejmowe, 2016), LEX/el.

26 Ibid., t. 15.

27 "Article 45(1) and Article 77(2) of the Constitution of the Republic of Poland establish subjective rights that may be protected through a constitutional complaint" – Polish Constitutional Tribunal, Judgment of 3 October 2017, Ref. No. SK 31/15, LEX no. 2361199, justification point 5.2.

28 See: Sławomir Pilipiec, "Prawo do sądu w sprawach dyscyplinarnych radców prawnych," *Studia Iuridica Lublinensia* 25, no. 3 (2016): 762.

do not equate these bodies with courts in the constitutional sense. A court, in the constitutional meaning, is exclusively an entity representing the judiciary as defined in Article 10(2) of the Polish Constitution and responsible for the administration of justice. In this context, it is worth noting that Article 45(1) of the Polish Constitution was a control standard in case K 9/10.[29] This case concerned the right of the accused to a court in disciplinary proceedings. The constitutional issue at stake was the incomplete scope of judicial review over disciplinary proceedings for attorneys, legal advisers, notaries, and prosecutors. The Tribunal ruled that the model of cassation proceedings in these cases was consistent with Article 45(1) of the Polish Constitution. Consequently, restricting the possibility of filing a cassation appeal to the Supreme Court only against second-instance disciplinary court decisions that resulted in "gross violations of the law" or "gross disproportionality of disciplinary punishment" does not constitute a violation of the right to a court. From the perspective of the nature of disciplinary proceedings, this ruling provides an important interpretative guideline. The Tribunal unequivocally determined that the regulations governing cassation appeals in attorney and legal advisers disciplinary cases meet constitutional standards, as they sufficiently ensure access to a court within the meaning of Article 45(1) of the Polish Constitution.

3. The Nature of Disciplinary Proceedings as Derived from the Case Law of the ECtHR

In the case law of the European Court of Human Rights (ECtHR), starting with the case of *Engel and Others v. the Netherlands*,[30] which concerned the disciplinary responsibility of soldiers, criteria have been developed to classify a given case as a criminal case. These criteria include: the classification of the case under domestic law, the nature of the act in question, and the type and severity of the sanction provided for in domestic legislation.[31] However,

[29] Polish Constitutional Tribunal, Judgment of 25 June 2012, Ref. No. K 9/10, OTK-A 2012, no. 6, item 66.

[30] See: ECtHR Judgment of 23 November 1973, Engel and Others v. the Netherlands, application no. 5100/71, paras. 9–11.

[31] See more broadly: Małgorzata Wąsek-Wiaderek, "Postępowanie dyscyplinarne w orzecznictwie Europejskiego Trybunału Praw Człowieka," *Rejent – Special Issue* (2010): 75; Piotr Hofmański and Andrzej Wróbel, "Commentary on Article 6," in *Konwencja o Ochronie Praw*

not all of these criteria have equal influence on the final classification of a case. The first criterion – the classification under domestic law – is of supplementary importance and primarily serves as a starting point for further analysis.[32] This stems from the fact that the concept of "criminal charge" in Article 6(1) of the European Convention on Human Rights (ECHR) has an autonomous character, meaning that domestic classification is not decisive. It should also be noted that for a case to be considered "criminal," not all of the indicated criteria must be met simultaneously – fulfilling one of them is sufficient, though meeting two or all three is also possible.[33]

Within the criterion of the nature of the act, two key elements should be considered. The first is the subjective scope of the rule whose violation constitutes a prohibited act. To classify a case as criminal, the rule should be generally binding rather than applying only to specific individuals or groups. Secondly, for a case to be considered criminal under ECtHR jurisprudence, the rule must have a retributive purpose, encompassing both prevention and repression.[34] However, the most significant criterion is the type of sanction that may be imposed in the given proceedings. What matters here is the maximum possible penalty for committing the act in question, rather than the penalty actually imposed in the case.[35] Given inconsistencies in the Court's case law, S. Treschel rightly argued that the threat of imprisonment is not an absolute criterion for determining that

Człowieka i Podstawowych Wolności, vol. 1, *Komentarz do artykułów 1–18*, ed. Leszek Garlicki (Warsaw: C.H. Beck, 2010), no. 70 et seq., Legalis; Katarzyna Dudka, "Węzłowe problemy odpowiedzialności dyscyplinarnej żołnierzy na tle zbiegu odpowiedzialności dyscyplinarnej z innego rodzaju odpowiedzialnością represyjną," in *Zbieg odpowiedzialności dyscyplinarnej z innego rodzaju odpowiedzialnością o charakterze represyjnym w służbach mundurowych*, eds. Bartłomiej Wróbleski, Piotr Jóźwiak, and Krzysztof Opaliński (Piła, 2014), 31 et seq.

32 See: ECtHR Judgment of 10 June 1996, Benham v. the United Kingdom, application no. 19380/92, para. 55; ECtHR Judgment of 22 May 1990, Weber v. Switzerland, application no. 11034/84, para. 31.

33 See: ECtHR Judgment of 9 October 2003, Ezeh and Connors v. the United Kingdom, applications no. 39655/98 and 40086/98, para. 86; ECtHR Judgment of 16 January 2007, Bell v. the United Kingdom, application no. 41534/98, para. 36.

34 See: ECtHR Judgment of 28 September 1999, Öztürk v. Turkey, application no. 22479/93, para. 53; ECtHR Judgment of 2 September 1998, Lauko v. Slovakia, application no. 26138/95, para. 58.

35 See: ECtHR Judgment of 27 August 1991, Demicoli v. Malta, application no. 13057/87, para. 33.

a case is criminal, but creates a strong presumption in favor of such a classification.[36] The same applies to financial penalties (fines). When a fine is at stake, auxiliary criteria for classifying a case as criminal include the possibility of converting the fine into imprisonment[37] and the inclusion of the conviction in the relevant register.[38] Cases where the sanction involves a ban on practicing a profession or holding a particular function should be treated separately. While such sanctions can be highly burdensome, they do not constitute typical criminal penalties. In the Court's case law, cases involving such sanctions are classified as those determining civil rights and obligations.[39]

Considering these criteria, the Court has ruled on multiple occasions regarding the nature of disciplinary proceedings, determining whether they should be classified as "criminal charges" or as proceedings concerning "civil rights and obligations." In *Weber v. Switzerland*,[40] which concerned liability for breaching investigative secrecy, the Court attempted to define the concept of "disciplinary proceedings," stating that they occur particularly when they involve a breach of specific rules applicable to a given professional group. The prevailing stance in ECtHR case law is that disciplinary proceedings concern civil rights and obligations rather than constituting criminal cases.[41] In *Henning Sjöström v. Sweden*,[42] the Court

36 See: Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005), 23.

37 See: ECtHR Judgment of 23 March 1994, Revnsborg v. Sweden, application no. 14220/88, para. 35.

38 See: ECtHR Judgment of 28 September 1999, Öztürk v. Turkey, application no. 22479/93, para. 52.

39 See: ECtHR Judgment of 23 June 1981, Le Compte, Van Leuven, and De Meyere v. Belgium, applications no. 6878/75 and 7238/75, paras. 54–61.

40 See: ECtHR Judgment of 22 May 1990, Weber v. Switzerland, application no. 11034/84, para. 33.

41 See, for example, ECtHR Judgment of 20 May 1998, Gautrin and Others v. France, application no. 21260/93, para. 56; Adam Bodnar, "Postępowania dyscyplinarne w wolnych zawodach prawniczych w kontekście orzecznictwa ETPC," in *Postępowania dyscyplinarne w wolnych zawodach prawniczych. Model ustrojowy i praktyka*, eds. Adam Bodnar and Piotr Kubaszewski (Warsaw: Helsińska Fundacja Praw Człowieka, 2013), 22–5; also see: Cezary Kulesza, "Ewolucja zasad odpowiedzialności dyscyplinarnej lekarzy w kontekście gwarancji rzetelnego procesu," in *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla*, vol. 2, eds. Piotr Kardas, Tomasz Sroka, and Włodzimierz Wróbel (Warsaw: Lex a Wolters Kluwer business, 2012), 1676–92.

42 See: ECtHR Decision of 12 October 1992, Henning Sjöström v. Sweden, application no. 19853/92, paras. 1 and 2.

explicitly ruled out classifying disciplinary proceedings as criminal, stating that such proceedings – leading to the most severe disciplinary sanction of disbarment – could not be considered "criminal" under Article 6 of the Convention. Similarly, in *Linder v. Germany*,[43] the Court referred to its consistent classification of disciplinary proceedings against doctors as civil cases due to their focus on determining whether the individual could continue practicing (e.g. suspension or prohibition). The Court noted that similar criteria apply to disciplinary proceedings concerning legal professionals, provided that the disciplinary sanctions include suspension or removal from the relevant professional body.

It is important to note that classifying disciplinary cases as concerning civil rights and obligations has an autonomous significance from the perspective of the Convention.[44] This classification affects only the assessment of potential violations of the Convention and does not influence how disciplinary cases are classified within the legal systems of the Convention's signatory states. Furthermore, the Convention does not prohibit states from maintaining a distinction between criminal and disciplinary law or from setting the boundaries between them. However, this does not impact the interpretation of Convention provisions, but only affects national legal systems. The ECtHR has emphasized that

> if states were allowed by exercising their discretion and classifying an offence as disciplinary to exclude the application of fundamental guarantees under Articles 6 and 7, the applicability of these provisions would depend solely on their sovereign will. Such discretion would lead to results contrary to the object and purpose of the Convention.[45]

Despite classifying disciplinary cases as concerning civil rights and obligations, the fair trial standard derived from Article 6(1) ECHR still

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43 See: ECtHR Decision of 9 March 1999, Linder v. Germany, application no. 32813/96, point 2.a.

44 See: Astrid Sanders, "Does Article 6 of the European Convention on Human Rights Apply to Disciplinary Procedures in the Workplace?," *Oxford Journal of Legal Studies* 33, no. 4 (2013): 791–819, https://doi.org/10.1093/ojls/gqt030; Mario Chiavario, "Principles of Criminal Procedure and Their Application to Disciplinary Proceedings," *Revue internationale de droit pénal* 74, no. 3–4 (2003): 707–46.

45 See: ECtHR Judgment of 28 June 1984, Campbell and Fell v. the United Kingdom, application no. 7819/77, para. 68.

applies, albeit in a manner characteristic of such cases.[46] The procedural guarantees of this provision apply to all individuals subject to disciplinary proceedings, regardless of the final decision, i.e. whether or not they actually receive a disciplinary penalty affecting their ability to practice their profession. In disciplinary cases involving lawyers, the Court generally does not examine the applicability of Article 6(1) ECHR, considering the matter settled.[47] Although previous case law has focused primarily on disciplinary proceedings involving legal professionals in private practice, the established standards – classifying disciplinary cases as concerning civil rights and obligations and applying the guarantees of Article 6(1) ECHR – should also be extended to legal professionals holding public office, such as judges and prosecutors.[48]

An analysis of ECtHR jurisprudence reveals several specific procedural guarantees explicitly recognized as applicable to disciplinary proceedings.[49] A key consideration is whether a disciplinary court qualifies as a "court" under Article 6(1) ECHR. The concept of "court" in ECtHR case law has an autonomous meaning.[50] In the context of the status of disciplinary courts, an important position was expressed in *Le Compte, Van Leuven and De Meyere v. Belgium*.[51] The Court held that professional disciplinary bodies must generally meet the requirements of Article 6(1) ECHR and, if they do not, their decisions must be subject to review by

46 See: Chiavario, "Principles of Criminal Procedure," 719; Roland Miklau, "Austria, Principles of Criminal Procedure and Their Application in Disciplinary Proceedings," *Revue internationale de droit pénal* 74, no. 3 (2003): 799.

47 See, for example, ECtHR Judgment of 17 July 2008, Schmidt v. Austria, application no. 513/05.

48 The Court referred to a concept in which there is a rebuttable presumption of the application of Article 6(1) of the Convention in such cases, see: ECtHR Judgment of 19 April 2007, Vilho Eskelinen and Others v. Finland, application no. 63235/00, paras. 42–64.

49 See more broadly: Michał Indan-Pykno, "Postępowanie dyscyplinarne wobec adwokatów z perspektywy standardów Europejskiego Trybunału Praw Człowieka w Strasburgu," *Polski Rocznik Praw Człowieka i Prawa Humanitarnego* 5 (2014): 15–34; Kulesza, "Ewolucja wybranych procedur dyscyplinarnych," 11–22.

50 See: Marek A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka* (Warsaw: Wolters Kluwer Polska, 2017), 509–40; Wąsek-Wiaderek, "Postępowanie dyscyplinarne," 84–5.

51 See: ECtHR Judgment of 23 June 1981, Le Compte, Van Leuven and De Meyere v. Belgium, applications no. 6878/75 and 7238/75, paras. 54–61.

a judicial body. Based on this reasoning, two models of disciplinary courts satisfying ECtHR standards have emerged: either a professional body that is not a court in the strict sense, but fulfils all the guarantees under Article 6(1) ECHR, or a system in which decisions made by a body lacking such guarantees can be reviewed by an entity that unequivocally qualifies as a court under the Convention.

It should also be noted that the Court's interpretation of the term "court" is not strictly formalistic; it considers whether an entity exercises judicial functions.[52] Under this approach, the ECtHR has recognized, for example, a Belgian bar association body as a "court," despite its many administrative and advisory competencies, because it also adjudicated disciplinary cases.[53] Similarly, a Polish Regional Medical Court was classified as a "court" within the meaning of Article 6(1) ECHR.[54] In this Polish case, the Court held that assigning jurisdiction over disciplinary cases to professional disciplinary bodies does not, in itself, violate the Convention, even when Article 6(1) ECHR applies.

The principle of equality of arms also applies to disciplinary proceedings. It should be noted that this principle is not explicitly stated in Article 6(1) of the European Convention on Human Rights (ECHR), but it is unequivocally derived from the case law of the European Court of Human Rights (ECtHR).[55] An attempt to define this principle was made in the case of *Dombo Beheer B.V. v. the Netherlands*,[56] according to which each party to the proceedings must be provided with the same opportunity to present their case (including evidence) under conditions that do not place them at

52 See: ECtHR Judgment of 30 November 1987, H. v. Belgium, application no. 8950/80, para. 50; Wąsek-Wiaderek, "Postępowanie dyscyplinarne," 85.

53 See: ECtHR Judgment of 30 November 1987, H. v. Belgium, application no. 8950/80, paras. 49–55.

54 See: ECtHR Judgment of 16 December 2008, Frankowicz v. Poland, application no. 53025/99, para. 50.

55 See: ECtHR Judgment of 28 August 1991, Brandstetter v. Austria, applications no. 11170/84, 12876/87, and 13468/87, para. 66; ECtHR Judgment of 25 March 1998, Belziuk v. Poland, application no. 23103/93, para. 37; ECtHR Judgment of 18 March 2014, Beraru v. Romania, application no. 40107/04, para. 70; ECtHR Judgment of 13 September 2016, Ibrahim and Others v. the United Kingdom, applications no. 50541/08, 50571/08, 50573/08, and 40351/09, para. 251.

56 See: ECtHR Judgment of 27 October 1993, Dombo Beheer B.V. v. the Netherlands, application no. 14448/88, para. 33.

a disadvantage compared to their opponent.[57] In the case of *Olujić v. Croatia*, the ECtHR found a violation of the principle of equality of arms in disciplinary proceedings due to the unjustified dismissal of the defendant's evidentiary motions, thereby preventing them from presenting evidence in their defense, despite the prosecution's evidence being admitted and forming the basis of disciplinary liability.

A guarantee subject to protection in disciplinary proceedings is also the right to have the case heard within a reasonable time. In the case of *W.R. v. Austria*,[58] where the complaint was lodged in connection with disciplinary proceedings against a lawyer, the ECtHR ruled that the excessive length of the proceedings constituted a violation of Article 6(1) ECHR. It is, therefore, beyond dispute that disciplinary proceedings, regardless of their classification within a specific legal framework, should be conducted efficiently to fulfil the requirement of a reasonable timeframe for adjudication.

It is also worth noting that in its most recent case law, the Court has emphasized the application of safeguards such as the right to an independent and impartial tribunal within the framework of Polish disciplinary proceedings against advocates.[59]

It should not be overlooked that the ECtHR has refrained from explicitly determining whether serious disciplinary charges should be classified as civil or criminal for the purposes of Article 6 of the Convention.[60] In the case of Albert and Le Compte, the Court held that the civil and criminal aspects of Article 6 are not mutually exclusive and that the principles established in Article 6(2) and (3) ECHR apply *mutatis mutandis* to disciplinary proceedings covered by Article 6(1) in the same manner as they do to individuals accused of criminal offenses.[61]

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57 See: Trechsel, *Human Rights in Criminal Proceedings*, 96–7; Dražan Djukić, *The Right to Appeal in International Criminal Law* (Leiden: Brill, 2019), 53.

58 See: ECtHR Judgment of 21 December 1999, W.R. v. Austria, application no. 26602/95, paras. 25–31.

59 See: ECtHR Judgment of 22 July 2021, Reczkowicz v. Poland, application no. 43447/19.

60 Attention has been drawn in the literature, see: Hofmański and Ważny, "Commentary on Article 6," note 42; Marek A. Nowicki, *Komentarz do Konwekcji o ochronie praw człowieka i podstawowych wolności* (Warsaw: Wolters Kluwer Polska, 2021), 620.

61 See: ECtHR Judgment of 23 June 1981, Le Compte, Van Leuven and De Meyere v. Belgium, applications no. 6878/75 and 7238/75, paras. 30 and 39.

Despite the ECtHR generally recognizing disciplinary proceedings as adjudications on "civil rights and obligations," certain rights derived from Article 6(2) and (3) ECHR, such as the presumption of innocence[62] and the right to defense,[63] also apply in disciplinary proceedings. This is because these requirements constitute particular aspects of the right to a fair trial guaranteed by Article 6(1) of the Convention.[64] The specific guarantees established in Article 6(3) ECHR serve as an example of the notion of a fair trial concerning typical procedural situations that arise in punitive cases. However, their ultimate purpose is always to ensure or contribute to ensuring the fairness of criminal proceedings as a whole. The guarantees contained in Article 6(3) ECHR are, therefore, not an end in themselves and should be interpreted in light of their function concerning the overall proceedings.[65] Consequently, it should be concluded that Article 6(2) and (3) ECHR do not directly apply within the Strasbourg standard of disciplinary proceedings, as these provisions are explicitly dedicated to "criminal cases" under the Convention. Nevertheless, given the punitive nature of disciplinary proceedings, these guarantees should be understood as elements of the right to a fair trial under Article 6(1) ECHR.

4. Conclusions

Summarizing the foregoing considerations, it should be stated that disciplinary proceedings have a punitive character and constitute criminal proceedings in a broad sense (*sensu largo*).[66] This conclusion is supported by an analysis of Polish constitutional case law and the case law of the

62 See: ECtHR Judgment of 22 April 2010, Fatullayev v. Azerbaijan, application no. 40984/07, paras. 159–160; ECtHR Judgment of 15 July 2010, Šikić v. Croatia, application no. 9143/08, paras. 52–55.

63 See: ECtHR Judgment of 21 January 1984, Öztürk v. Germany, application no. 8544/79, para. 66.

64 See: ECtHR Judgment of 1 June 2010, Gäfgen v. Germany, application no. 22978/05, para. 168; ECtHR Judgment of 2 November 2010, Sakhnovskiy v. Russia, application no. 21272/03, paras. 94–98.

65 See: ECtHR Judgment of 13 September 2016, Ibrahim and Others v. the United Kingdom, applications no. 50541/08, 50571/08, 50573/08, and 40351/09, paras. 94–100; ECtHR Judgment of 12 June 1981, Can v. Austria, application no. 9300/81, paras. 52–56.

66 See similar statements: Marcin Wielec and Roland Szymczykiewicz, "Standardization of Disciplinary Responsibility in Legal Professions in the System of Polish Law – Conclusions de lege ferenda," *Prawo w Działaniu* 32 (2017): 35 et seq.

ECtHR. An examination of constitutional case law leads to the conclusion that disciplinary proceedings, including those concerning legal professionals, are classified as punitive proceedings. The key aspect is the incorporation of a minimum standard of criminal proceedings into these cases, as regulated in Articles 42(1)–(3) of the Polish Constitution. The Constitutional Tribunal explicitly states in the reasoning of its judgments that this standard should also apply to non-criminal cases, applying Articles 42(1)–(3) of the Polish Constitution appropriately, with modifications arising from the nature of the proceedings in which these provisions are applied. The realization of the right to a court as enshrined in Article 45(1) of the Polish Constitution is also significant.

The classification of disciplinary proceedings as punitive is not contradicted by the ECtHR's qualification of disciplinary cases as "determination of civil rights and obligations." The concepts contained therein and their interpretation have an autonomous character. The ECtHR itself, among the criteria for recognizing a case as criminal, indicates the possibility of treating a particular category of cases differently under national and Convention law. This occurs through the criterion that the classification of a given case within the domestic legal order is a factor in determining whether it constitutes a "criminal case." The decisive factor in the ECtHR's classification of disciplinary proceedings as civil is the possibility of imposing sanctions that limit or prevent the practice of a specific profession. However, the nature of the sanction does not negate other criteria derived from this case law, such as the severity of the disciplinary penalty or the application of a legal framework characteristic of criminal proceedings – in this case, through reference to the corresponding provisions of the Code of Criminal Procedure. The classification established in the ECtHR's case law does not negate the necessity of applying the standard of a fair trial to disciplinary proceedings. Moreover, the ECtHR explicitly indicates the need to apply the guarantees of Article 6(1) ECHR, and due to recognizing elements of repressiveness, it derives the minimum standard of criminal proceedings from Article 6(2) and (3) ECHR as general norms within Article 6(1) ECHR.

It is not erroneous if a single proceeding is classified differently in different legal systems. However, the essential nature of a given proceeding must have a core that aligns more closely with one of the fundamentally

distinct legal categories – in this case, criminal or civil proceedings, and in other situations, even administrative proceedings. In the context of disciplinary proceedings, what is crucial is that Polish constitutional case law explicitly classifies them as punitive proceedings, and ECtHR case law does not exclude such classification. While the ECtHR considers that, due to the criterion of the most severe sanction, i.e. loss of the right to practice a profession, disciplinary cases are more civil than criminal, it simultaneously partially equates the standard of fairness in such proceedings with that of criminal proceedings under Article 6(1) ECHR and also partially incorporates explicitly "criminal" rights under Article 6(2) and (3) ECHR.

In recognizing disciplinary proceedings as a form of broadly understood criminal liability, it is, of course, necessary to respect their distinctiveness. However, such respect for distinctiveness fits within the boundaries of the *sensu largo* criminal nature of this liability. The elements influencing the determination of this nature, as acknowledged in Strasbourg case law and granted in Polish constitutional case law – such as the preventive-retributive purpose of liability, ensuring access to a court within disciplinary proceedings, sanctions as the primary means of liability, and the necessity of fulfilling the culpability criterion – allow for the conclusion that, in essence, disciplinary proceedings are punitive and constitute criminal proceedings in a broad sense (*sensu largo*).

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The Effectiveness of North Macedonia's Legal and Institutional Framework for Combating Human Trafficking

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Abstract: Human trafficking is a global problem that fundamentally violates human freedoms and rights because a person is treated as an object exposed to various forms of exploitation, primarily sexual, forced labor, slavery, violation of bodily integrity, and other unlawful acts. The paper focuses on the normative and institutional framework of North Macedonia for combating human trafficking with an emphasis on effectiveness, i.e. the extent to which the established framework achieves its goal. The hypothesis of the research is that the creation of a national normative and institutional framework for combating human trafficking is not in itself a guarantee that it will be effective, i.e. that a substantive approach by the state is needed in the implementation of policies and the provision of the necessary resources for effectiveness. The research resulted in conclusions that point to several weaknesses in the framework for combating human trafficking in North Macedonia, including the lack of resources among competent institutions, inadequate sanctioning practices, weaknesses in coordination, and inadequate assistance and protection of victims. The paper contains several proposals for improving the effects of the fight against human trafficking, which are aimed at all segments of the social response through awareness-raising, education, prevention and repression. Several methods have been applied, namely, content analysis, historical and comparative methods. The paper also presents statistical data from several national and international institutions and organizations.

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1. Introduction

In today's circumstances, organized crime uses the benefits of technological development, as well as globalization, to commit crimes and obtain material benefits.[1] The most profitable illegal activities of organized crime groups are drug trafficking, arms trafficking, and human trafficking.

Human trafficking has existed since the time of ancient states such as Greece and Rome and was an integral part of their economic and legal systems. The state established rules regulating the slave trade, including markets for the sale of slaves and methods of taxation. Namely, after wars, members of the defeated side often became slaves of the victors. They were sold and exploited for sexual purposes, forced labor, conscription into the victor's army, or other forms of exploitation. Even after the past millennia, filled with the development of human society, great discoveries, and new technologies to make life easier, human trafficking as a modern form of slavery is still significantly present in today's society.[2]

Through human trafficking, criminals gain enormous profits, especially due to the fact that they add to this crime a series of other criminal activities, such as money laundering, drug trafficking, which bring them great financial power. Its execution involves a complex network of numerous actors, significant profits, corruption among officials, as well as difficulties in securing cooperation from the victim due to fear of retaliation by the traffickers, feelings of shame or guilt, distrust in institutions, and psychological trauma. All of this makes human trafficking difficult to detect, prove, prevent, and suppress.[3]

The Republic of North Macedonia (RNM) has formally and legally built a normative and institutional framework for combating human trafficking, but the question is about the essence, i.e., the effects in practice,

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1 Thanh-Dam Truong, "Human Trafficking and Organised Crime" (ISS Working Paper Series/General Series, Institute of Social Studies, The Hague, 2001), 5, accessed March 20, 2025, https://www.researchgate.net/publication/5130620_Human_trafficking_and_organised_crime.

2 Mihai Ștefănoaia, "Modern-Day Slavery – Human Trafficking in the 21st century," *International Conference Knowledge-Based Organization* 21, no. 2 (2015): 507, https://doi.org/10.1515/kbo-2015-0086.

3 Emilija Aleksovska, "Poverty in Modern Society – A Challenge for Modern Slavery and a Profitable 'Industry' of Human Trafficking in the Balkans," *Iustinianus Primus Law Review* 15, no. 2 (2024): 2, https://journals.ukim.mk/index.php/iplr/article/view/2691/2312.

i.e. the results. All relevant international evaluations and reports indicate that work should be done on better implementation of the regulation in practice. Namely, RNM, as a developing country, has gone through a long period of transition and is feeling all the negative effects of the process that resulted in increased corruption and challenges in application of the rule of law. In such a situation, opportunities have been created for the strengthening of organized crime and its activities, including human trafficking.

North Macedonia has an institutional framework for combating human trafficking involving several institutions led by the National Commission for the Prevention of Human Trafficking and Illegal Migration, the Basic Public Prosecutor's Office for the Prosecution of Organised Crime and Corruption, and the Department for Organised and Serious Crime within the Ministry of Interior. They are joined by other independent institutions whose aim is the prevention, detection, investigation, and prosecution of the crime of human trafficking, as well as the protection and assistance of victims.

However, the lack of resources, i.e. professional staff, material and technical resources is a real problem for achieving better results. Statistical data show a low number of documented cases of human trafficking on an annual basis, which raises concerns about the size of the dark figure and, consequently, the number of victims who remain without protection and assistance.

In RNM, most often, human trafficking occurs in the form of sexual exploitation,[4] forced labor, begging, as well as forced marriages where the victims are underage girls. There are numerous consequences of this form of crime, including economic and demographic destabilization, an increase in economic crime; but the greatest consequences are felt by the victim themselves, i.e. violation of dignity, honor, reputation, inability to resocialize, traumatization, and health problems that can result in the death of the victim.[5]

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4 Nada Doneva, "Forms of Internal Human Trafficking in the Republic of North Macedonia," *International Scientific Journal "Sui Generiss"* 3, no. 2 (2024): 94, https://doi.org/10.55843/SG243289d.

5 Alexis A. Aronowitz, *Human trafficking, Human Misery: The Global Trade in Human Beings* (Westport: Praeger Publishers, 2009), 47.

Hypothesis: the effectiveness of the fight against human trafficking depends not only on the existence of a normative and institutional framework, but also on the degree of its substantial implementation and the provision of necessary resources by the state, which influences the success of the policies.

Method: several research methods have been applied within the framework of the paper, namely, the content analysis method, the historical method, as well as the comparative method. Statistical data from several national and international institutions and organizations have also been presented.

2. Normative Framework

In a global perspective, the normative framework for preventing human trafficking has gained importance since the beginning of the 20th century. Among the first legal acts are the International Convention for the Suppression of the Traffic in Women and Children adopted in Geneva,[6] as well as the International Convention for the Suppression of the Traffic in Women of Full Age.[7] In this developmental path, the role of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others,[8] Convention on the Rights of the Child,[9] Convention on Action against Trafficking in Human Beings[10] are also significant.

However, the most important international legal act to combat human trafficking is the Protocol to Prevent, Suppress and Punish Trafficking

6 League of Nations, International Convention for the Suppression of the Traffic in Women and Children, 1921, accessed March 25, 2025, https://treaties.un.org/doc/Treaties/1921/09/19210930%2005-59%20AM/Ch_VII_3p.pdf.

7 League of Nations, International Convention for the Suppression of the Traffic in Women of Full Age, 1933, accessed March 25, 2025, https://treaties.un.org/doc/Treaties/1933/10/19331011%2006-00%20AM/Ch_VII_5p.pdf.

8 United Nations, Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, accessed March 25, 2025, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-suppression-traffic-persons-and-exploitation.

9 United Nations, Convention on the Rights of the Child, 1989, accessed March 24, 2025, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child.

10 Council of Europe, Convention on Action against Trafficking in Human Beings, 2005, accessed March 27, 2025, https://www.coe.int/en/web/anti-human-trafficking/anti-trafficking-convention.

in Persons, Especially Women and Children[11] to the Convention against Transnational Organised Crime. The Protocol emphasizes the danger of trafficking in persons as an extremely dangerous form of organized crime and contains its most comprehensive definition (mentioned above). In its essence, the following goals are set:

(1) prevention and combating trafficking in persons, with particular attention to women and children;
(2) protection and assistance to victims, with full respect for their fundamental rights;
(3) promotion of cooperation between states in the fight against trafficking in persons.

In Macedonian criminal legislation, the definition of human trafficking is in line with the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Convention).

Namely, the Criminal Code[12] contains three criminal offences that cover the matter of human trafficking, namely:

(1) human trafficking (Article 418-a),
(2) child trafficking (Article 418-d), and
(3) organizing a group and inciting the commission of the acts of human trafficking, child trafficking, and smuggling of migrants (Article 418-c).

The crime of human trafficking was introduced into the Macedonian criminal legislation in 2002. According to Article 418-a, the perpetrator commits the crime of human trafficking when, by use of force, serious threat, abduction, fraud, abuse of position, exploitation of another's

11 United Nations, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, accessed March 24, 2025, https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons.

12 Кривичен законик, Службен весник на Република Македонија [Criminal Code, Official Gazette of the Republic of Macedonia] no. 37/96, 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 142/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 41/14, 115/14, 132/14, 160/14, 199/14, 196/15, 226/15, 97/17, 248/18, and Службен весник на Република Северна Македонија [Official Gazette of the Republic of North Macedonia] no. 36/23, accessed March 27, 2025, https://www.slvesnik.com.mk/Issues/75a2a79bf50f4420a995d414a3bb73f1.pdf.

powerlessness to resist, or by purchase from a person who has control over the victim, he/she carries out any of the following actions: recruits, transports, transfers, buys, sells, harbors or receives persons. For the basic offence, a minimum prison sentence of four years is prescribed.

The purpose of the above is for the victim to be exploited through prostitution or other forms of sexual exploitation, pornography, forced labor or servitude, slavery, forced marriage, forced fertilization, illegal adoption, or unauthorized transplantation of human body parts. It is especially sanctioned if the perpetrator of the crime takes away or destroys the victim's ID card, passport or other identification document for the purpose of committing the crime of human trafficking. A prison sentence of at least four years is prescribed for such an act.

In the Criminal Code, in accordance with the provisions of the Protocol, the consent of the victim to the occurrence of harmful consequences is irrelevant to the existence of the crime and will not be taken into account when making the deciding in the potential proceeding.

When it comes to the crime of child trafficking (introduced into the criminal legislation in 2008), provided for and punishable under Article 418-d of the Criminal Code, the object of protection is any minor, i.e. person under the age of 18. The existence of a separate criminal offence for the protection of children, alongside the principal offence of human trafficking, indicates the significance of the protected legal interest.

The act of committing a crime can take various forms, including: recruiting, transporting, transferring, buying, selling, procuring, harboring or receiving a child for the purpose of exploitation. This is a broad range of acts that encompass all significant segments in the commission of crime, from a criminal perspective. For the basic offence, a prison sentence of at least eight years is prescribed. The penal is higher if the crime is committed by use of force, threat, fraud, kidnapping, abuse of public authority or by taking advantage of the physical or mental incapacity of another, and especially if the child is under 14 years of age. For this offence, a prison sentence of at least 10 years is prescribed.

According to the law, the child is protected from various forms of exploitation, namely, sexual exploitation, forced labor, begging, slavery, forced marriages, forced fertilization, illegal adoption, as well as trafficking in human organs. The seizure or destruction of a child's identification

document, as well as its execution by an official in the performance of work duties, is additionally penalized.

Based on the fact that the most common forms of organized crime are illicit drug trafficking, illicit arms trafficking, human trafficking and migrant smuggling, the Macedonian Criminal Code contains a criminal offence of organizing a group and inciting the commission of the acts of human trafficking, child trafficking and migrant smuggling, provided for and punishable under Article 418-c (introduced into the criminal legislation in 2004).

The essence of the crime of human trafficking is the participation of multiple persons in its implementation, i.e. they act as a group of at least three persons who jointly contribute to the achievement of the criminal goal. The law penalizes the creation of a group to commit the above-mentioned acts, i.e. penalizes preparatory actions which create conditions for the activity that has not yet begun. The high level of danger to the protected goods as well as their importance imposes the need for such an approach and placing the penalization at the earliest stage of danger or endangerment of the protected goods. For this criminal offence, a prison sentence of at least eight years is prescribed.

Starting from the difficulties and complexity of detecting organized groups or gangs, the legislator provided for mandatory exemption from punishment for its member if they disclose the group or gang before committing a crime within its composition or for the group.

In addition to the Criminal Code, other legal acts also have their place in the fight against human trafficking. Thus, the Law on Child Protection[13] protects children from all types of exploitation, commercial exploitation, and abuse. The Law on Family[14] is extremely important from the aspect of

[13] Закон за заштита на децата, Службен весник на Република Македонија [Law on Child Protection, Official Gazette of the Republic of Macedonia] no. 23/2013, 12/2014, 44/2014, 144/2014, 10/2015, 25/2015, 150/2015, 192/2015, 27/2016, 163/2017, 21/2018, 198/2018, Службен весник на Република Северна Македонија [Official Gazette of the Republic of North Macedonia] no. 104/2019, 146/2019, 275/2019, 311/2020, 294/2021, 150/2022, 236/2022, accessed March 25, 2025, https://natlex.ilo.org/dyn/natlex2/natlex2/files/download/97562/MKD-97562.pdf.

[14] Закон за семејство, Службен весник на Република Македонија [Law on Family, Official Gazette of the Republic of Macedonia] no. 80/92, 9/96, 38/2004, 33/2006, 84/2008, 67/10, 156/10, 39/12, 44/12, 38/14, 115/14, 104/15, 150/15, 120/18, Службен весник на

protecting child victims of trafficking, with a special chapter that refers to the guardianship for child victims of human trafficking. The Law on Social Protection[15] improves protection by providing a service for temporary residence for victims of human trafficking and child victims, while licensing of this service is carried out by the Ministry of Labour and Social Policy (Commission for Licensing of Social Service Providers), which check the fulfilment of standards for functioning of the Centre for Victims of Human Trafficking. The legal regulation has been improved with the adoption of the Law on Prevention and Protection from Violence against Women and Domestic Violence,[16] which recognizes human trafficking as gender-based violence and requires due diligence from all relevant institutions involved. A more recent act is the Law on Payment of Financial Compensation to Victims of Violent Crimes,[17] which includes the crimes related to human trafficking, as assistance from the state for their suffering, in accordance with the principle of social solidarity.

In the normative framework, the National Strategy for Combating Human Trafficking and Illegal Migration in the Republic of North Macedonia 2021–2025[18] has an important place as a document that determines the

Република Северна Македонија [Official Gazette of the Republic of North Macedonia] no. 53/21, 199/23, accessed March 25, 2025, https://www.mtsp.gov.mk/wbstorage/files/zakon_semejstvo_osnoven.pdf.

15 Закон за социјална заштита, Службен весник на Република Северна Македонија [Law on Social Protection, Official Gazette of the Republic of North Macedonia] no. 104/19, accessed March 26, 2025, https://www.slvesnik.com.mk/Issues/e19ef6763a-344beeaddf059157344512.pdf.

16 Законот за спречување и заштита од насилство врз жените и семејното насилство, Службен весник на Република Северна Македонија [Law on Prevention and Protection from Violence against Women and Domestic Violence, Official Gazette of the Republic of North Macedonia] no. 24/21, accessed March 26, 2025, https://www.slvesnik.com.mk/Issues/e47c4174574c4dcda6d7e05e713038d6.pdf.

17 Законот за исплата на паричен надоместок на жртви од кривични дела со насилство, Службен весник на Република Северна Македонија [Law on Payment of Financial Compensation to Victims of Violent Crimes, Official Gazette of the Republic of North Macedonia] no. 247/22, accessed March 26, 2025, https://www.slvesnik.com.mk/Issues/d0f88bf42e134b978d599eadcfafac20.pdf.

18 Влада на Република Северна Македонија, Националната Стратегија за борба против трговија со луѓе и илегална миграција во Република Северна Македонија 2021–2025 (2021), accessed March 28, 2025, https://mvr.gov.mk/upload/editor_upload/nacionalna-strategija-mkd-alb-ang-25_10_2021.pdf.

strategic priorities for combating human trafficking and child trafficking, the specific tasks of the competent institutions. The Strategy has a comprehensive, multi-disciplinary and coordinated approach that seeks to assist and protect victims of human trafficking. Namely, the National Strategy sets the postulates of policies for dealing with human trafficking and child trafficking.

3. Institutional Framework

The institutional framework of RNM for combating human trafficking, in accordance with international standards, began to be built after 2000 with the signing of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. This protocol was signed on December 12, 2000, followed by its ratification, while it entered into force in Macedonian legislation on January 12, 2005.[19]

A key institution is the National Commission for Combating Human Trafficking and Illegal Migration (Commission), established in 2001 with the aim of achieving a higher level of efficiency and joint action of all institutions involved in the fight against human trafficking. Its tasks are to monitor and analyze the situation with human trafficking and illegal migration, to coordinate the activities of the competent institutions and to cooperate with international organizations and citizen associations involved in supporting victims.

The Commission has an inter-institutional composition, i.e. its work includes members from the following institutions: Ministry of Internal Affairs, Ministry of Social Policy, Demography and Youth, Ministry of Education and Science, Ministry of Health, Ministry of Foreign Affairs and Trade, Ministry of Justice, State Labour Inspectorate, Employment Agency, Basic Public Prosecutor's Office for Prosecution of Organised Crime and Corruption and Basic Criminal Court Skopje. The National Commission is headed by a national coordinator appointed by the Government.

The Commission undertakes measures aimed at improving the identification of victims of human trafficking, providing them with assistance

[19] Министерство за правда, Ратификувани меѓународни правни инструменти за борба против корупцијата и организираниот криминал, 2010.

and protection, as well as more effectively detecting perpetrators of human trafficking and bringing them to justice.

Since 2003, the Commission has also established a Subgroup for Combating Child Trafficking. The activities of this body are aimed at preventing child trafficking and improving the protection of child victims and the exercise of their rights, as well as strengthening cooperation.

In order to fulfil the recommendations of the Council of Europe's Group of Experts on Action against Trafficking in Human Beings – GRETA, at the initiative of the Commission, in 2019 the National Rapporteur on Human Trafficking and Illegal Migration was appointed within the Office of the Ombudsman, with the aim of independently monitoring and assessing the situation with human trafficking in the RNM.

The National Referral Mechanism (NRM) for victims of trafficking was first established in 2005 and institutionalized in 2009 through the establishment of the NRM Office within the Sector for equal opportunities of the Ministry of Labour and Social Policy (Ministry of Social Policy, Demography and Youth from 2024). The Office coordinates the referral of identified victims to assistance, accommodation, protection, reintegration and social inclusion.

In order to strengthen national capacities and improve coordination and cooperation between the police and the public prosecution in combating organized forms of migrant smuggling and human trafficking, a National Unit for Combating Migrant Smuggling and Human Trafficking was established in 2018. The National Unit is headed by a public prosecutor from the Basic Public Prosecutor's Office for Prosecution of Organised Crime and Corruption, who is responsible for managing and directing the activities of the National Unit for detecting organized forms of migrant smuggling and human trafficking.

In order to improve the capacities for identifying victims and potential victims of human trafficking, mobile teams for the identification of vulnerable categories, including victims of human trafficking, were established in 2018. This is a tripartite cooperation between the Ministry of Internal Affairs, the Ministry of Labour and Social Policy, and the civil sector (namely, the mobile teams include a representative of the Centre for Social Affairs, a police officer (from the National Unit) and a representative of a citizens' association). The aim of the mobile teams is to improve

identification through proactive action in the detection and prevention of human trafficking. The mobile teams work with vulnerable categories of citizens, including victims of human trafficking. They assess potential victims, determine their identity, conduct an early risk assessment, provide information on the possibility of including the victim in an assistance and support program, etc.

The Centre for Victims of Human Trafficking and Sexual Violence was established in 2005 and institutionalized within the Ministry of Labour and Social Policy in 2011. It accommodates victims of human trafficking, as well as victims of sexual violence, citizens, as well as foreigners who have been granted temporary residence in RNM.

The contribution of the Basic Public Prosecutor's Office for Prosecution of Organised Crime and Corruption, as well as the Department for Suppression of Organised and Serious Crime within the Ministry of Interior, is essential in the institutional framework for combating human trafficking. These are operational and specialized structures that are the leaders in the fight against organized crime, including human trafficking, in the Republic of North Macedonia.

The Commission for Monetary Compensation of Victims of a Violent Crime was established in 2024 with the aim of ensuring better protection of human rights for victims of violent crimes, including human trafficking. The legal basis for its establishment is the Law on payment of monetary compensation to victims of violent crimes, which harmonizes Macedonian legislation with Directive 2004/80/EC of the Council of the European Union.

Civil society organizations involved in prevention, assistance, support and integration of victims, i.e. organizations that have partnership relations with the above-mentioned institutions, also appear as active entities in the fight against human trafficking.

4. Characteristics of Human Trafficking in North Macedonia

Based on its location, the level of rule of law, the functioning of institutions, and the level of corruption, RNM is involved in the three segments of human trafficking – country of origin, transit, and destination.

As a country of origin, it occurs in cases of recruitment of domestic victims for internal trafficking or in other countries, most often in the European Union. It is a country of transit due to its specific location – a central

position in the Balkans, i.e., part of the Balkan route for the transfer of victims of human trafficking. It is a destination in cases of foreign nationals – victims of human trafficking, who are exploited in RNM, most often from Albania, Kosovo, Bulgaria, Serbia, Moldova, and Ukraine.

According to official data,[20] in the period 2001–2011 the victims were mostly foreign nationals, women and girls (aged 16–35), victims of sexual and labor exploitation in catering facilities in the northern and northwestern parts of the country. Starting from 2012, the majority of the victims are children (around 70%) aged 9 to 17, domestic citizens, mostly female, victims of sexual and labor exploitation, but also an increased incidence of forced marriages. The average age of victims of trafficking is around 24 years, while for children it is around 15 years.

The perpetrators of this crime most often take advantage of the difficult financial situation of the victims and, through fraud, false promises for work or arranging marriage with a person living in the EU, succeed in their intention. In recruitment, the perpetrators use mediation by close people of the victim or third parties who know the victim, and who receive material compensation for the service. The transport of foreign victims to the destination of exploitation is most often legal, with forged travel documents, or illegal through illegal crossings of the state border, most often near border crossings.

In terms of the types of exploitation of victims, most of them are sexual exploitation, which is most often carried out in catering facilities and nightclubs. Labor exploitation is carried out through forced labor in catering facilities, combined with sexual exploitation, labor exploitation for agricultural needs, as well as through forced begging. Forced marriages as a form of human trafficking are combined with sexual and labor exploitation. In the period 2017–2023, according to data from the Ministry of Interior, 31 criminal charges were filed for the crime of child trafficking, against 67 perpetrators of the crime, with 18 child victims of sexual and labor exploitation, as well as forced marriages.[21] But these are data on detected cases; if

[20] Националната Комисија за борба против трговија со луѓе и илегална миграција, 20 години – Факти и бројки за трговијата со луѓе во Р.С. Македонија, 2024, accessed March 28, 2025, https://nacionalnakomisija.gov.mk/mk/за-нас/.

[21] Министерство за внатрешни работи, Годишен Извештај 2023 година, 2024, 54, accessed March 28, 2025, https://mvr.gov.mk/Upload/Editor_Upload/Godisen izvestaj/Годишен извештај 2023.pdf.

we take into account the fact that the dark figure (unreported or undetected crime) is several times larger, then the conclusion will be that the situation is complex with the presence of human trafficking in all its manifestations.

The above data also create the profile of the victim of the crime of human trafficking, i.e. they are most often female children, people from vulnerable categories, who, due to a series of economic and social factors, such as: poverty, gender discrimination, domestic violence and similar circumstances, fall into the hands of the perpetrators of the crime of human trafficking. In the case of forced marriages and forced begging, the contribution of the parents or close people of the victim to her victimization is significant.

In sexual exploitation, the perpetrator of a crime is most often a male person, the owner of a catering facility, or members of the close family involved in the operation of the catering facility. In labor exploitation, the perpetrator is most often a male person who owns agricultural land or a construction company. In forced begging of children, the perpetrators are most often male persons who are close to the victim's family, as well as the parents themselves. In cases of forced marriages, the recruiter is most often located in the country of destination (EU) and through his intermediaries in RNM, mainly of Roma origin, identifies a potential bride, most often aged 14 to 16, contacts the family and makes an offer of marriage to a person living in an EU member state.

5. Between Reality and Laws, How to Overcome Challenges and Weak Points

The above shows that RNM has built a good normative framework for combating human trafficking, with the ratification of the most important international instruments. In addition, over a period of two decades, a solid institutional framework has been created with the involvement of multiple authorities, cooperation with the civil society sector, as well as networking in international initiatives to combat human trafficking.

However, each created instrument needs to be periodically evaluated in order to determine the extent to which it achieves its goal. In this regard, the evaluation of the normative and institutional framework is carried out through practical implementation, through the results in practice, thus assessing the effectiveness of the complete framework.

In the Report of the third round of evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings, the Group of Experts on Action against Trafficking in Human Beings (GRETA) emphasizes that the number of detected victims of the crime of human trafficking in RNM is relatively small, taking into account the geographical location and the level of rule of law (the problem of corruption). It is emphasized that despite the existence of legal provisions on legal assistance to victims of human trafficking, they are still not clear enough and that there are gaps in their application in practice (lack of clear procedures and criteria, limited access to legal assistance, and lack of a clear basis for providing legal assistance). Then, it is emphasized that despite the existence of special state programs for the reintegration of victims of human trafficking, they do not function effectively due to the lack of financial resources and insufficient involvement of municipalities in their implementation. With regard to penalization, it is stated that in reality the sentences imposed on perpetrators of crimes related to human trafficking are below the legal minimum. From a procedural perspective, it is emphasized that special measures for procedural protection of victims, such as testimony via video-conferencing and the exclusion of the public from the courtroom, are rarely applied to adult victims of trafficking and are inconsistently applied to child victims. GRETA points out that the labor inspectorate needs to have a clear mandate and adequate human and financial resources to conduct inspections in order to prevent and detect cases of human trafficking for labor exploitation. The problem of the continued absence of safe accommodation for male victims of human trafficking, as well as the lack of adequate accommodation for children who are victims or potential victims of human trafficking, is underlined.[22]

The annual Trafficking in Persons Report[23] highlights that RNM does not fully meet the minimum standards for eliminating human trafficking

[22] Совет на Европа (ГРЕТА), Извештај за трет круг евалуација на Северна Македонија, Пристап до правда и ефективни правни лекови за жртвите на трговија со луѓе, 2023, accessed March 29, 2025, https://rm.coe.int/iii-greta-report-for-north-macedonia-mk-d/1680ac0368.

[23] United States Department of State, "Trafficking in Persons Report: North Macedonia," 2024, accessed March 29, 2025, https://www.state.gov/reports/2024-trafficking-in-persons-report/north-macedonia/.

and classifies it as Tier 2. It points out that in certain cases there is a lack of coordination between institutions, insufficient resources for the Basic Public Prosecutor's Office for prosecuting organized crime and corruption, as well as the problem of corruption. The report highlights that mobile teams have good results in their work, but lack adequate financial support. Also, in certain cases victims are exposed to intimidation by perpetrators, i.e., adequate protection measures are not taken, and journalists publish data about victims in favor of sensationalism, which in itself represents revictimization, but also exposes the victim to new risks and dangers.

The need to strengthen the capacities of law enforcement agencies in the area of human trafficking, with the aim of more proactive investigations is emphasized by the EU, but it also has remarks to the normative part, i.e. the need to harmonize Macedonian criminal legislation with EU law in the area of penalties for crimes related to human trafficking.[24]

The above evaluations/reports detect weak points in the normative and institutional framework for combating human trafficking in RNM.

The adoption of laws, strategies or similar acts is the easier part of the process, taking into account comparative experiences, as well as international instruments. On the other hand, normative harmonization is also an obligation for RNM in the process of full membership in the EU. The real challenge is building the effective institutional framework. Creating an institution means providing professional staff and material resources for the smooth and full implementation of competencies.

Right here we have one of the weak points of RNM in the fight against human trafficking, i.e. lack of resources. Namely, it is necessary to strengthen the human, financial and technical capacities of law enforcement agencies so that they can proactively investigate human trafficking crimes, using all possible evidence, including evidence collected through special investigative measures, financial and digital evidence.

As already mentioned, the sentences for perpetrators of crimes related to human trafficking are low. According to the law, the basic offence of

[24] European Commission, North Macedonia 2024 Report, 2024, 41, accessed March 29, 2025, https://enlargement.ec.europa.eu/document/download/5f0c9185-ce46-46fc-bf44-82318ab47e88_en?filename=North%20Macedonia%20Report%202024.pdf.

human trafficking is prescribed with a prison sentence of four years, but if the victim is a child, the sentence is a minimum of eight years. According to the data from the State Statistical Office,[25] in the period 2020–2023, nine perpetrators of human trafficking were convicted, with most receiving sentences ranging from three to five years in prison, while the legal minimum is four years. The need for change is necessary, because the sentence, among other characteristics, should create intimidation for the perpetrator, to deter him from committing crimes. Therefore, courts, guided by the objectives of criminal policy, should not impose minimal sentences for such criminal offences, especially when public officials are involved in the commission of the crime in a corrupt manner.

Providing sufficient financial resources for victim protection should be a priority, first of all for shelters where victims are temporarily accommodated, then for mobile teams tasked with proactively identifying victims of human trafficking, especially among vulnerable categories. Providing financial resources is also essential for the efficiency of the police and prosecution, the bearers of the fight against human trafficking. This also raises the issue of the specialization of police and prosecution personnel for the fight against human trafficking. Namely, law enforcement agencies are faced with criminal groups that are well organized, have large financial resources and have easy access to new technologies, since human trafficking is one of the "most profitable" activities of organized crime groups. This imposes the need for law enforcement agencies to be constantly upgraded with sufficient resources and strong international cooperation, in order to succeed in opposing criminal groups.

Specialized training is also needed for courts, focusing on segments such as determining the consequences for the victim, compensation for damage, determining the responsibility of the perpetrator, and imposing a sanction in accordance with the law that will achieve justice and prevention. The state's strategic approach to strengthening the effectiveness in

[25] Државен завод за статистика, Осудени полнолетни лица според видот на кривичното дело и изречените главни казни – затвор и парична казна, по години [State Statistical Office, Convicted adults by type of criminal offense and main sentences imposed – imprisonment and fine, by years], accessed March 29, 2025, https://makstat.stat.gov.mk/PXWeb/pxweb/mk/MakStat/MakStat__Sudstvo__ObvinetiOsudeniStoriteli/300_SK2_Mk_T14_ml.px/table/tableViewLayout2/.

the fight against human trafficking should include measures and activities according to the following roadmap: awareness raising – education – prevention – repression.

The awareness of citizens about the significance of human trafficking, the risks and dangers, the method of protection, as well as the consequences for the victim and the state should be strengthened through a series of campaigns implemented via the media, schools and other public institutions. Education should be implemented in parallel with the campaigns to raise public awareness and the focus should be placed on vulnerable population categories. The previous two activities have a preventive character, and prevention should be widely applied because the point of all policies is to prevent the harmful consequences, i.e. taking measures and activities to protect the victim. Repression should represent the state reaction against the perpetrators of crimes related to human trafficking, that is, the reaction of the police, the public prosecutor's office, the court and the penitentiary institutions. Repression should achieve the rehabilitation of the convict, his correction in accordance with the purpose of punishment, which includes justice and prevention (special and general).

The above goes towards confirming the hypothesis of this research, i.e. that the creation of a national normative and institutional framework to combat human trafficking is not in itself a guarantee that it will be effective, i.e. that a substantive approach by the state is needed in the implementation of policies and the provision of the necessary resources for effectiveness.

6. Conclusion

Human trafficking is a global problem faced by all countries and it causes numerous harmful consequences, primarily for the victim of the crime. Starting from the location (Western Balkan Route), problems with corruption and implementation of the rule of law, RNM has numerous challenges in the fight against human trafficking.

RNM has built a normative and institutional framework for combating human trafficking since 2001. It includes laws, strategies, action plans, as well as several institutions that have competences in this area. But the key question is the level of implementation of the regulation in practice, how the institutions function, to what extent they realize their competences, whether they have sufficient resources.

The lack of human, technical and material resources is a problem for RNM. This directly affects the fulfilment of the competencies of the institutions responsible for combating human trafficking – without sufficient resources they cannot realize their legal competencies. This raises the question of the normative structure – if the law is not applied it is the same as if it does not exist.

To realize their competencies, institutions working in this area should have a higher degree of coordination. Personnel should be specialized and have adequate resources to achieve their competencies. By strengthening the capacities of institutions and providing adequate resources, preconditions are created for better implementation of mechanisms for protection and support of victims, and thus for reducing human trafficking.

North Macedonia's fight against human trafficking should include measures and activities aimed at raising awareness among citizens, education, prevention and repression. The comprehensive approach would enable the achievement of the defined goals, if the institutions would effectively realize their competencies.

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Commercial Agent as a Self-Employed Intermediary: A Gloss to the Judgment of the CJEU of 21 November 2018 in Case 452/17, Zako SPRL v. Sanidel SA

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Abstract: According to Article 1(2) of Directive 86/653, only a self-employed intermediary can be considered a commercial agent. The first and only judgment of the CJEU that deals with the interpretation of the condition of self-employment is the judgment of November 21, 2018, in Case 452/17, *Zako SPRL v. Sanidel SA*. In this judgment, the CJEU pointed to some general guidelines on how to assess self-employment (independence) and assumed that the premise of self-employment (independence) also applies to intermediaries who are legal persons. The gloss positively assessed the CJEU's indication that the assessment of self-employment (independence) should be made taking into account all the circumstances of the case, which seems to confirm that, in the CJEU's opinion, the typological method should be applied in this respect. There is also no doubt about the specific criteria indicated by the CJEU, such as the extent to which the intermediary is subject to the principal's instructions, the degree of freedom in organizing his activities, the degree of economic risk, and the method of calculating the remuneration. It can be assumed that the CJEU correctly took the view that it is the personal independence of the intermediary that matters, not economic independence. What raises the most doubts is the assumption that the condition of self-employment (independence) also applies to intermediaries that are legal persons. The meaning of the term "self-employed" and

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systemic argumentation (referring to the TFEU provisions on the freedom of establishment) justify the view that, according to the legislator's intention, the self-employment (independence) requirement was to apply only to natural persons. The position of the CJEU that this requirement also applies to legal persons has no functional justification (legal persons cannot be employees). In addition, it unnecessarily hinders the application of the regulations on agency agreements.

1. Introduction

The Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (86/653/EEC)[1] defines the term "commercial agent." According to Article 1(2) of Directive 86/653, a commercial agent is

> a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the 'principal', or to negotiate and conclude such transactions on behalf of and in the name of that principal.

This provision is crucial for determining the scope of Directive 86/653.

The term "self-employed" used in the English version of Article 1(2) of Directive 86/653 also appears in some other language versions of this provision, e.g. in the Croatian (*samozaposleni pośrednik*), Latvian (*pašnodarbinātu starpnieku*) or Slovenian (*samozaposleni pośrednik*) version. In most other language versions, the term "independent intermediary" is used, e.g. in the French (*intermédiaire indépendant*), Spanish (*intermediario independiente*), Czech (*nezávislý zprostředkovatel*), Danish (*selvstaendig mellemmand*), Italian (*intermediario indipendente*), Swedish (*självständig agent*) or Portuguese (*intermediário independente*). In the German version, in addition to indicating the independence of the intermediary, there is a requirement that he be engaged in an economic activity (*selbständiger Gewerbetreibender*). In turn, in the Polish version, the legislator used the phrase "intermediary working on his own account" (*pośrednik pracujący na własny rachunek*).

[1] OJ L382/18, 31 December 1986.

The first – and so far only – judgment in which the CJEU ruled on the interpretation of the condition of self-employment (independence) of the intermediary is the judgment of November 21, 2018, *Zako SPRL v. Sanidel SA*, Case C-452/17[2].

2. The Dispute before the Commercial Court, Liege (Belgium) and Questions for a Preliminary Ruling

The commented CJEU judgment was issued in response to questions for a preliminary ruling referred by the Belgian Commercial Court of Liège (*Tribunal de commerce de Liège*). The background to the questions were the following facts.[3] In 2007, Zako SPRL (hereinafter: Zako) entered into an agreement with Sanidel SA (hereinafter: Sanidel). The agreement was not concluded in writing. Under this agreement, Zako was obliged to negotiate and conclude contracts for the sale and implementation of fitted kitchens on behalf of Sanidel. However, the scope of Zako's responsibilities was broader. It included the following activities performed on behalf of Sanidel: selection of products and suppliers, determination of commercial strategy, meeting clients, drafting kitchen plans, calculating quotes, negotiating prices, signing for orders, taking measurements off-site, settling disputes, managing staff in the department (secretary, salespeople and fitters), creating and managing of website for online sales, developing sales to distributors, real estate developers and contractors, negotiating and finalizing subcontracts on behalf of Sanidel. The agreement was implemented in such a way that André Ghaye, a representative of Zako, worked directly at Sanidel's premises, where he had access to a telephone line and e-mail. As a result, Zako negotiated and concluded contracts at Sanidel's premises. However, A. Ghaye performed his tasks independently.

In October 2012, Sanidel informed Zako that it was terminating the agreement without notice. Termination of the agreement resulted in two lawsuits. In the first lawsuit, A. Ghaye claimed, among other things, compensation from Sanidel, on the grounds that he had an employment

[2] CJEU Judgment of 21 November 2018, Zako SPRL v. Sanidel SA, Case C-452/17, EU:C:2018:935.

[3] Facts based on: Opinion of Advocate General Szpunar delivered on 25 July 2018, Zako SPRL v. Sanidel SA, Case C-452/17, ECLI:EU:C:2018:625, paras. 7–15; CJEU Judgment of 21 November 2018, Zako SPRL v. Sanidel SA, Case C-452/17, ECLI:EU:C:2018:935, paras. 9–17.

contract with Sanidel. The court of first instance (*Tribunal du travail de Marche-en-Famenne*) dismissed the action with its decision of February 21, 2014, stating that there was no employment relationship between A. Ghaye and Sanidel. This decision was upheld by the court of appeal (*Cour du travail de Liège*) with its decision of September 9, 2015.

After the first proceedings, Zako sued Sanidel (probably for damages) before the Commercial Court of Liège. The court had doubts about the legal nature of the agreement, i.e. whether it was an agency agreement or a specific-task contract (contract for work). This fact was important from the perspective of the statute of limitations. Claims arising from an agency agreement under Belgian law become time-barred one year after the termination of the agreement (Article 26 of the Belgian Commercial Agents Act of 1995). Zako's lawsuit was filed after this deadline, which Sanidel raised during the trial.

The Commercial Court of Liège, therefore, decided to refer three questions to the CJEU for a preliminary ruling:

> (1) Must Article 1(2) of [Directive 86/653] be interpreted as requiring the commercial agent to seek and visit customers or suppliers outside of the business premises of the principal?
>
> (2) Must Article 1(2) of [Directive 86/653] be interpreted as requiring the commercial agent to carry out no tasks other than those relating to the negotiation of the sale or purchase of goods on behalf of the principal or to the negotiation and conclusion of such transactions on behalf of and in the name of the principal?
>
> (3) If the second question is answered in the negative, must Article 1(2) of [Directive 86/653] be interpreted as requiring the commercial agent to carry out tasks other than those relating to the negotiation of the sale or purchase of goods on behalf of the principal, or to the negotiation and conclusion of such transactions on behalf of and in the name of the principal, only secondarily?[4]

3. Judgment of the CJEU

The CJEU recognized that the essence of the questions referred by the Commercial Court of Liège boils down to two issues: (1) whether the

[4] Ibid., para. 17.

performance of activities by an intermediary from the principal's business premises prevents the intermediary from being classified as a commercial agent within the meaning of Article 1(2) of Directive 86/653[5]; (2) whether the fact that the intermediary carries out not only the activities indicated in Article 1(2) of Directive 86/653, but also, on behalf of the same person, activities of a different nature, which are not secondary to activities indicated in Article 1(2) of Directive 86/653, prevents the intermediary from being classified as a commercial agent within the meaning of this provision.[6]

The CJEU gave the same answer to both questions, i.e. it recognized that the above-mentioned circumstances do not *per se* exclude the possibility of classifying an intermediary as a commercial agent. In both cases, the CJEU provided similar reasoning.

Firstly, the CJEU pointed out that Article 1(2) of Directive 86/653 provides three conditions that are necessary and sufficient for a person to be considered a commercial agent: (1) the person must be a self-employed intermediary; (2) the contractual relationship between the intermediary and the principal must be of a continuing character; (3) the intermediary must conduct activities involving either negotiating the sale or purchase of goods for the principal, or negotiating and concluding these transactions on behalf and in the name of the principal.[7] There is no express requirement under Article 1(2) of Directive 86/653, or under any other provision of this Directive, for an intermediary to carry out its activities outside the principal's business premises.[8] Similarly, it does not follow from the wording of Article 1(2) of Directive 86/653 that an intermediary who performs additional tasks not mentioned in this provision, cannot be regarded as a commercial agent.[9] With regard to intermediaries performing additional tasks, the CJEU also referred to Article 2(2) of Directive 86/653, according to which: "Each of the Member States shall have the right to provide that the Directive shall not apply to those persons whose activities as commercial agents are considered secondary by the law of that Member State."[10]

5 Ibid., para. 20.
6 Ibid., para. 37.
7 Ibid., para. 23.
8 Ibid., para. 22.
9 Ibid., para. 38.
10 OJ L382/18, 31 December 1986.

It seems that the CJEU considered this provision as an indirect confirmation that the agent's activities indicated in Article 1(2) of Directive 86/653 may be combined with other activities.[11]

Secondly, the CJEU referred to the objectives of Directive 86/653, indicating that one of these objectives is the protection of commercial agents in their relations with principals.[12] In the context of intermediaries performing activities from the principal's business premises, the CJEU argued that making the application of Directive 86/653 dependent on conditions not expressed in Article 1(2) of the Directive, concerning the place or manner in which the intermediary conducts business, would limit the scope of protection granted by the Directive and would jeopardize the achievement of the objective pursued by the Directive.[13] With regard to intermediaries who perform an additional task, the CJEU also stated that an interpretation of Article 1(2) of Directive 86/653, according to which this provision excludes such intermediaries, would be contrary to the objectives of this Directive.[14] In particular, such interpretation would allow the principal to circumvent the mandatory provisions of Directive 86/653 by providing in the agreement for tasks other than those related to the activities of commercial agents.[15]

However, the CJEU recognized that the fact that an intermediary carries out activities in the principal's premises or performs additional tasks may affect the independence of the intermediary. This independence may be undermined both by subordination to the principal's instructions and by the way in which the intermediary performs his duties.[16] Elaborating on this idea, the CJEU first pointed out that the presence of an intermediary in the principal's premises and the resulting proximity to the principal may

11 CJEU Judgment of 21 November 2018, Zako SPRL v. Sanidel SA, Case C-452/17, ECLI:EU:C:2018:935, paras. 41–43. In this regard, the CJEU referred, among other things, to paragraph 49 of the Opinion of Advocate General Szpunar delivered on 25 July 2018, Zako SPRL v. Sanidel SA, Case C-452/17, ECLI:EU:C:2018:625, where such position was stated more clearly.

12 CJEU Judgment of 21 November 2018, Zako SPRL v. Sanidel SA, Case C-452/17, ECLI:EU:C:2018:935, para. 26.

13 Ibid., para. 27.

14 Ibid., para. 44.

15 Ibid., para. 45.

16 Ibid., para. 32.

make the intermediary subject to the principal's instructions.[17] In addition, the material benefits associated with the presence in the principal's premises, such as the provision of a workplace or access to the organizational facilities of the principal's premises, may make it difficult for the intermediary to pursue his activity independently, either from the point of view of the organization of this activity or the associated economic risk. In particular, this can lead to a reduction in the agent's operating costs and, thus, to a reduction in his economic risk if the reduction in costs is not reflected in the level of commissions paid to the agent.[18] In the context of performing additional tasks by the intermediary, the CJEU pointed out that the referring court should examine whether performance of such tasks has the effect, taking account of all of the circumstances of the case, such as the nature of the tasks performed, the manner in which they are carried out, the proportion those tasks represent with regard to the overall activities of the intermediary, the method of calculating the remuneration, or the reality of the financial risk incurred, of preventing the intermediary from performing the activities indicated in Article 1(2) of Directive 86/653 in an independent manner.[19]

With all this in mind, the CJEU decided to give the following answers to the questions referred for a preliminary ruling:

> (1) Article 1(2) of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents must be interpreted as meaning that the fact that a person who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, or to negotiate and conclude such transactions on behalf of and in the name of that person, performs his activities from the latter's business premises does not prevent him from being classified as a "commercial agent" within the meaning of that provision, provided that that fact does not prevent that person from performing his activities in an independent manner, which is for the referring court to ascertain.
>
> (2) Article 1(2) of Directive 86/653 must be interpreted as meaning that the fact that a person not only performs activities consisting in the negotiation of

17 Ibid., para. 33.
18 Ibid.
19 Ibid., para. 50.

the sale or purchase of goods for another person, or the negotiation and conclusion of those transactions on behalf of and in the name of that other person, but also performs, for the same person, activities of another kind, without those other activities being subsidiary to the first kind of activities, does not preclude that person from being classified as a "commercial agent" within the meaning of that provision, provided that that fact does not prevent the former activities from being performed in an independent manner, which it is for the referring court to ascertain.[20]

4. Commentary

The CJEU judgment leads to several conclusions concerning the requirement under Article 1(2) of Directive 86/653 for an intermediary to be self-employed (independent). However, their assessment varies.

4.1. A Method of Assessment of the Agent's Independence

The CJEU expressed the correct view that the assessment of the agent's independence should be made taking into account all the circumstances of the case.[21] It seems that in this way the CJEU indirectly confirmed that such an assessment should be made using the typological method. This method is used in Member States such as Germany,[22] Austria[23] or Poland[24] to distinguish between an agency agreement and an employment agreement. In general, according to this method, the determination of whether an intermediary is independent is made on the basis of the entire content of the agreement and its actual performance. A number of specific criteria are

20 Ibid., para. 52.

21 Ibid, para. 50.

22 Raimond Emde, "Commentary to § 84," in *Staub Handelsgesetzbuch. Großkommentar*, eds. Stefan Grundmann, Mathias Habersack, and Carsten Schäfer (Berlin: De Gruyter, 2021), 493–8; Dariusz Bucior, "Handlowy charakter umowy agencyjnej," *Kwartalnik Prawa Prywatnego* 20, no. 1 (2011): 184–6.

23 Michael Nocker, *HVertrG. Handelsvertretergesetz 1993. Mit ausführlichen Berechnungsbeispielen zum Ausgleichsanspruch* (Vienna: Verlag Österreich, 2015), 66; Alexander Petsche and Simone Petsche-Demmel, *Handelsvertretergesetz. Praxiskommentar* (Vienna: LexisNexis, 2015), 6–7; Peter Jabornegg, *Handelsvertreterrecht und Maklerrecht* (Vienna: Manzsche Verlags- und Universitätsbuchhandlung, 1987), 47–8.

24 Kazimierz Jaśkowski, "Komentarz do art. 22," in *Komentarz aktualizowany do Kodeksu pracy*, eds. Kazimierz Jaśkowski and Eliza Maniewska (LEX/el., 2025); Bucior, "Handlowy charakter," 204–5.

taken into account, which can speak for or against the independence of the intermediary. Their weight and intensity in the specific case are examined and, taking into account all the criteria, an assessment is made of where the emphasis lies. If the elements typical of an independent intermediary prevail, an agency agreement is assumed to exist. If, on the other hand, the characteristics of an employee prevail, then it is an employment agreement.[25]

When applying the typological method, it is crucial to first determine what features characterize a typical (ideal) independent intermediary and what features characterize a typical (ideal) employee. Certain guidelines can be derived from the commented judgment in this regard. The CJEU pointed to a number of criteria that should be taken into account when assessing independence of an intermediary, namely: the extent to which the intermediary is subject to the principal's instructions, the degree of freedom in organizing their activities, the degree of economic risk, the method of calculating the remuneration, the nature of additional tasks entrusted to the intermediary, the manner in which such tasks are performed and the proportion of the intermediary's activities represented by such tasks.[26] On this basis, it is possible to formulate a (very general) conclusion that the characteristics of a typical (ideal) independent intermediary include: not being subject to the instructions of the principal (subject to the obligation arising from Article 3(2)(c) of Directive 86/653), freedom to organize his activities, bearing the economic risk associated with his activities and – as it seems – receiving remuneration in the form of commission.[27] In contrast, a typical (ideal) employee is characterized by: subordination to the employer's instructions, lack of freedom in organizing his activities, lack of bearing economic risk, and receiving a fixed salary. Due to the brevity of the CJEU's statement, it is difficult to draw any concrete conclusions as to the significance of the other criteria mentioned (the nature of the additional

[25] Bucior, "Handlowy charakter," 184–5 (the author provides a summarized description of the method used in Germany).

[26] CJEU Judgment of 21 November 2018, Zako SPRL v. Sanidel SA, Case C-452/17, ECLI:EU:C:2018:935, paras. 32, 33, 50.

[27] The CJEU did not specify how the method of calculating remuneration affects the assessment of independence. It can, therefore, only be assumed that the CJEU meant a link between the method of remuneration and the economic risk of the intermediary. Commission-based remuneration is related to such risk, as it depends on the performance of the intermediary.

tasks entrusted to the intermediary, the manner in which these tasks are performed, and the proportion these tasks represent in the intermediary's overall activities).

At a general level – corresponding to the general nature of the CJEU's statement – the independence criteria presented regarding: subordination to instructions, freedom to organize activities, economic risk and method of remuneration, do not raise significant doubts. From the perspective of Member States applying the typological method presented above, they are not a novelty anyway.[28]

4.2. Agent's Personal Independence vs Economic Independence

Legal literature correctly points out that the independence referred to in Article 1(2) of Directive 86/653 means personal independence, not economic independence. If it were to be assumed that an intermediary must be economically independent in order to be considered a commercial agent, the protective provisions of Directive 86/653 would lose their justification. After all, they were adopted in view of the economic advantage of the principal over the agent, which is typical for agency agreements.[29] The commercial agent is perceived as the weaker party to the agreement requiring protection.[30]

The fact that the CJEU indicated in the commented judgment the criterion of subordination to the principal's instructions allows us to assume that the CJEU perceives the condition of independence as personal independence.

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[28] For example, in Germany, circumstances indicating the independence of an intermediary include, among others: independence from the instructions of the principal, owning one's own enterprise, performing activities in one's own premises, bearing the economic risk, including that related to receiving remuneration in the form of a commission; Michael Stöber, "Commentary to § 84," in *Heymann Handelsgesetzbuch. Kommentar. Erster Band. Einleitung, §§ 1 bis 104a*, eds. Norbert Horn et al. (Berlin: De Gruyter, 2019), 779–82.

[29] Till Fock, *Die europäische Handelsvertreter-Richtlinie. Kompetenzgrundlage, Systematik, Angleichungserfolg* (Baden-Baden: Nomos Verlagsgesellschaft, 2001), 103; Bucior, "Handlowy charakter," 201.

[30] Ewa Rott-Pietrzyk and Mateusz Grochowski, "Ochrona pośredników handlowych jako słabszej strony umowy (o wspólnych założeniach i mechanizmach ochrony agenta i konsumenta)," in *Wyzwania dla prawa konsumenckiego w wymiarze globalnym, regionalnym i lokalnym*, eds. Monika Namysłowska, Krzysztof Podgórski, and Elżbieta Sługocka-Krupa (Warsaw: C.H. Beck, 2022), 279.

4.3. Self-Employment (Independence) of Legal Persons

However, what raises the most doubts is the assumption that underlies the commented judgment. Namely, the CJEU assumed that the condition of self-employment (independence) also applies to intermediaries that are legal persons. The dispute pending before the Commercial Court of Liège concerned an agreement in which Zako, a Belgian limited liability company, acted as an intermediary. The CJEU found it expedient to consider its status from the perspective of the condition of independence and indicated that this issue should be examined by the referring court.[31]

The CJEU did not provide any justification for the assumption that the condition of independence applies to legal persons acting as intermediaries. The CJEU did not even raise this issue as an interpretative problem. However, it is in fact a significant interpretative problem that requires clarification. Several arguments can be made in favor of the thesis that the self-employment (independence) requirement was designed with intermediaries that are natural persons in mind.

Firstly, the term "self-employed" used in Article 1(2) of Directive 86/653 in English and several other language versions refers to natural persons, to indicate the opposite of being in an employment relationship. It means: "not working for an employer but finding work for yourself or having your own business"[32] or "earning income directly from one's own business, trade, or profession rather than as a specified salary or wages from an employer."[33]

Secondly, the terminology of Article 1(2) of Directive 86/653 in this respect is similar to the terminology used by the legislator in the provisions of the Treaty on the Functioning of the European Union concerning freedom of establishment.[34] This is not surprising, as the preamble to Directive 86/653 cites Article 57(2) of the Treaty establishing the European Economic Community, which deals with the freedom of establishment, as one of the legal bases of the Directive. The term "self-employed person" appears

31 CJEU Judgment of 21 November 2018, Zako SPRL v. Sanidel SA, Case C-452/17, ECLI:EU:C:2018:935, paras. 35, 50.

32 *Cambridge Dictionary*, s.v. "self-employed," accessed June 9, 2025, https://dictionary.cambridge.org/dictionary/english/self-employed.

33 *Merriam-Webster*, s.v. "self-employed," accessed 9 June 2025, https://www.merriam-webster.com/dictionary/self-employed.

34 Treaty on the Functioning of the European Union (OJ C202, 7 June 2016).

primarily in Article 49(2) TFEU, according to which "Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms (...)." "Self-employed persons"[35] should be understood to mean only natural persons. This is confirmed by the combination of Article 49(2) and Article 54 TFEU. The latter provision requires companies and other legal persons to be treated as natural persons for the purposes of the application of the provisions on the freedom of establishment. If legal persons were included in the concept of a "self-employed person," Article 54 TFEU would be superfluous.

In the case law of the CJEU concerning the freedom of establishment and the freedom of movement of workers, the concept of a self-employed person is explained as follows: it refers to natural persons who perform activities outside of an employment relationship. Therefore, any person who does not have a relationship of subordination is considered self-employed within the meaning of the regulations on the freedom of establishment.[36] The premise of self-employment (independence), therefore, serves to distinguish the employment relationship from other legal relationships, the implementation of which is an element of the economic activity of natural persons.

All this justifies the view that the requirement in Article 1(2) of Directive 86/653 that the intermediary be self-employed (independent) was intended by the legislator to apply only to natural persons – as a criterion for distinguishing commercial agents from employees.

The inclusion in the definition of a commercial agent of the requirement of self-employment – intended to apply only to natural persons – should be seen as an example of a flawed legislative technique. It may suggest that

35 The German version of Article 49(2) TFEU refers to the pursuit of independent gainful activities (*selbstständiger Erwerbstätigkeiten*), the French version refers to non-salaried persons (*non salariées*), and the Polish version refers to the pursuit of an activity on one's own account (*działalność prowadzona na własny rachunek*).

36 CJEU Judgment of 27 June 1996, Asscher v. Staatssecretaris van Financiën, Case C-107/94, ECLI: EU:C:1996:251, paras. 25, 26; CJEU Judgment of 20 November 2001, Jany and Others v. Staatssecretaris van Justitie, Case C-268/99, ECLI:EU:C:2001:616, para. 34; CJEU Judgment of 26 February 2019, Wächtler v. Finanzamt Konstanz, Case C-581/17, ECLI:EU:C:2019:138, paras. 45, 46.

Directive 86/653 shall apply only to intermediaries who are natural persons.[37] However, this suggestion should be rejected. The legislator's intention was to include legal persons in the scope of Directive 86/653. First of all, this is evidenced by the content of Article 2(1), third indent of the Directive, which states that the Directive does not apply to the body known as the Crown Agents for Overseas Governments and Administrations, as set up under the Crown Agents Act 1979 in the United Kingdom, or its subsidiaries. This provision would be superfluous if the legislator's intention was to exclude all entities that are not natural persons from the scope of Directive 86/653. Secondly, this is evidenced by the first proposal of the directive from 1976.[38] Although the definition of a commercial agent included the requirement of self-employment, Article 33(1) of the proposal also included a provision directly referring to agents who are companies or legal persons, which confirmed that the proposed directive was intended to apply to them. Thirdly, exempting intermediaries that are legal persons from the scope of Directive 86/653 would seriously limit the harmonizing effect of the Directive, which is one of the main objectives of the Directive.

In the case law of the CJEU, the thesis that Directive 86/653 also applies to intermediaries that are legal persons has never been questioned. In a number of judgments, the CJEU has answered questions referred for a preliminary ruling in cases where the intermediary was a legal person.[39] The CJEU treated such situations as covered by Directive 86/653, i.e. it did

[37] Such doubts arose under the British Commercial Agents (Council Directive) Regulations 1993. The provision of Article 2(1) of this regulation contains a definition of a commercial agent corresponding almost literally to Article 1(2) of Directive 86/653. However, the argument that the condition of self-employment excludes legal persons from the scope of the regulation has been rejected in British case law, see: Séverine Saintier and Jeremy Scholes, *Commercial Agents and the Law* (London: LLP, 2005), 29, and the rulings cited there.

[38] Proposal for a Council Directive to coordinate the laws of the Member States relating to (self-employed) commercial agents (Submitted by the Commission to the Council on 17 December 1976) (OJ C13/2, 18 January 1977).

[39] For example: CJEU Judgment of 13 October 2022, Rigall Arteria Management sp. z o.o. sp.k. v. Bank Handlowy w Warszawie S.A., Case C-64/21, ECLI:EU:C:2022:783; CJEU Judgment of 4 June 2020, Trendsetteuse SARL v. DCA SARL, Case C-828/18, ECLI:EU:C:2020:438; CJEU Judgment of 16 February 2017, Agro Foreign Trade & Agency Ltd v. Petersime NV, Case C-507/15, ECLI:EU:C:2017:129.

not justify its jurisdiction as it usually does when a case falls outside the scope of the Directive.[40]

The use of a flawed legislative technique[41] in Article 1(2) of Directive 86/653, when defining a commercial agent, raises the question of how this definition should be applied to intermediaries that are legal persons. Two solutions are possible here.

The first solution is to apply the premise of self-employment (*mutatis mutandis?*) also to legal persons. This was the position taken by the CJEU in the commented judgment. However, it is difficult to indicate what the purpose of applying the self-employment premise in relation to legal persons would be. In the case of natural persons, this premise has a clear role. It serves to separate commercial agents from employees. At the same time, it serves to separate the protective regime of the agency agreement regulations from the protective regulation of labor law. In the case of legal persons, the self-employment premise is not able to fulfil such a function, because legal persons cannot have the status of employees.

Moreover, the thesis that the self-employment premise applies to legal persons unnecessarily complicates the application of the laws on the agency agreement. The assessment of the self-employment of an intermediary must be made using the typological method. The application of this method is not an easy task. It requires an assessment of all the circumstances of a given case. Like any typological method, it does not provide certain results, primarily due to the lack of precise methods for measuring individual features.[42] On the one hand, it may lead to disputes between the parties to the agreement and, on the other hand, it may make it difficult for the court to assess the legal nature of the concluded agreement. However, the effort put in by the court to determine the legal nature of the agreement would

[40] For example, the CJEU specifically justifies its jurisdiction in cases where the agency agreement concerns the provision of services. Such agreements are not subject to Directive 86/653. See, e.g.: CJEU Judgment of 13 October 2022, Rigall Arteria Management sp. z o.o. sp.k. v. Bank Handlowy w Warszawie S.A., Case C-64/21, ECLI:EU:C:2022:783, paras. 24–27.

[41] The correct solution would be as follows: (a) the definition of commercial agent in Article 1(2) of Directive 86/653 does not indicate a requirement of self-employment, (b) Article 2(1) of the Directive indicates that it does not apply to intermediaries in an employment relationship.

[42] Zbigniew Radwański, *Teoria umów* (Warsaw: Państwowe Wydawnictwo Naukowe, 1977), 213.

only serve to possibly not apply the provisions on the agency agreement due to the possible lack of independence of the intermediary.

It is, therefore, regrettable that the CJEU did not consider a second possible solution, which could be inspired by German and Austrian experiences with the interpretation of the regulations defining a commercial agent. Both in § 84(1) of the German Commercial Code[43] and in § 1(1) of the Austrian Independent Commercial Agents Act 1993,[44] the legislator introduced the premise of the agent's independence. It is assumed that this premise should be examined only in the case of natural persons – as a criterion for distinguishing a commercial agent from an employee. Intermediaries who are entities other than natural persons (e.g. companies) are always considered independent by virtue of their legal form, as they cannot be employees.[45] This interpretation has been affirmed in the jurisprudence of the German Federal Court (*Bundesgerichtshof*).[46]

Adopting a similar solution with regard to Article 1(2) of Directive 86/653 would mean that the Directive would apply to any intermediary that is a legal person, regardless of whether it is independent of the principal. On the one hand, it would ensure that the protective provisions of Directive 86/653 would be applied to a wider range of entities. On the other hand, it would be a simpler solution free from complications arising from the typological method. Therefore, it is reasonable to expect that the CJEU will revise its position at the earliest opportunity and depart from the interpretation adopted in the commented judgment.

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43 Commercial Code (*Handelsgesetzbuch*) of 10 May 1897, a consolidated text available at: www.gesetze-im-internet.de/hgb.

44 Independent Commercial Agents Act 1993 – Bundesgesetz über die Rechtsverhältnisse der selbständigen Handelsvertreter (Handelsvertretergesetz – HVertrG 1993), a consolidated text available at: www.ris.bka.gv.at.

45 Emde, "Commentary to § 84," 503; Stöber, "Commentary to § 84," 778; Joachim N. Stolterfoht, *Die Selbständigkeit des Handelsvertreters: ein Beitr. z. Abgrenzung nach Handels-, Arbeits-, Steuer- u. Sozialversicherungsrecht* (Düsseldorf: Verlag Handelsblatt, 1973), 260; Nocker, *HVertrG*, 71; Wendelin Moritz, "Der Handelsvertreter," in Wendelin Moritz and Thomas Schneider, *Praxishandbuch Vertriebsrecht. Handelsvertreter – Franchising – Vertragshändler* (Vienna: Linde, 2024), 4.

46 German Federal Court, Judgment of 12 March 2015, Ref. No. VII ZR 336/13, available at: www.bundesgerichtshof.de.

It should be emphasized that it is not necessary for Member States – especially those such as Germany or Austria – to adapt their understanding of the premise of independence to the interpretation adopted by the CJEU in the commented judgment in reference to legal persons. The scope of entities covered by national regulations concerning agency agreements may be broader in relation to the Directive 86/653 – this does not constitute a violation of the Directive. Existing German and Austrian practice can be maintained.

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